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The President in His Labyrinth: Checks and Balances in the New Pan-American Presidentialism

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The President in His Labyrinth:
Checks and Balances in the New Pan-American Presidentialism

A Dissertation
Presented to the Faculty of the Graduate School
of
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in Candidacy for the Degree of
Doctor of Philosophy

by

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Abstract

The President in His Labyrinth: Checks and Balances in the New Pan-American Presidentialism

Andrea Scoseria Katz

2016

This is a sketch of a pan-American presidential constitutionalism. In the U.S. it is still common to pontificate on American exceptionalism and the superiority of its institutions, but this perspective misses structural similarities in presidential systems across the region, and increasing convergence in their practices. One driver of this convergence is the role played in these systems by the President. This is the result of a fundamental fact of the modern presidency: the limited constitutional powers of the office are at odds with the imperial expectations foisted upon the President himself. To fulfill these expectations, the President will reliably seek to expand his effective power by convincing others to support his agenda; in other words, the President's formal authority is supplemented through the power of persuasion. The major sites of these appeals are *political party*, the *administrative state*, and the *people*, respectively.

My argument is that the best way to understand, and ultimately preserve, an accountable and effectively balanced government is not by looking to formal inter-branch separations or the checking powers of the three branches, but rather, by paying attention to the sites and techniques where the President exercises leadership in practice. A more realistic separation of powers theory identifies these "sub-constitutional" actors as sites where meaningful presidential aggrandizement takes place, and hence as the real constitutional checks in a system where presidential power is a product of persuasion, and in turn, the "engine" of government policy today.

The techniques by which presidential leadership exploits these sites fall into three regular categories. First, there is *plebiscitary leadership,* where the President turns the force of popular majorities against laws and institutions that bind. Second is *executive law-making*, the exercise of legislative powers through party leadership or by unilateral administrative

administration. Finally, there is *emergency* management, whereby the President's faculties of speed and decisiveness are deployed to produce wholesale delegation of power and semi-permanent institutional expansion.

In three case studies from Latin America, I illustrate these techniques and the ways in which constitution-builders and political actors have responded and adapted to them. I chose, not uniform success stories, but rather examples of radical institutional tinkering that offer evocative lessons for problems common to the U.S. First, on plebiscitarianism, I discuss Venezuelan direct democracy under Hugo Chávez, a proliferation of grassroots organizations that created a dual "parastate" that dangerously attempted to discredit and circumvent, rather than reshape, the extant bureaucratic state. Second, I give a critical assessment of Brazil's spin on "cabinet government," in which party balance in the assembly translates directly to the makeup of the President's Cabinet, thereby drawing a direct link between representative democracy and administrative policy. Finally, I describe Colombia's efforts to "judicialize" the emergency via its Constitution, which provides for three different types of legal emergencies and diverse processes for managing these, now subject to judicial review by the Constitutional Court, created in 1991 with a mandate to curb a historical legacy of presidential excess.

In the final three chapters, I discuss how the problems of plebiscitarianism, unaccountable administration, and abuse of war-making and crisis play out in the American system, and how checking and balancing actors (the opposition party, civil society, and courts) can apply some of the lessons derived from Latin American cases. I argue that plebiscitary institutional reform has value in legitimizing modern-day democracies, which can skew toward elitism and unrepresentativeness, but that the outer limits of institutional politicization lie at the point at which old institutions are, not reformed, but delegitimized as no longer representative of the nation. Second, centralized presidential control of the bureaucracy and executive-legislative co-operation in governance is essentially unavoidable, but it must be accompanied by increased mechanisms for public participation, likely the best way to ensure responsiveness to a complex

constellation of values including representativeness, bipartisanship, and expertise. Finally, I argue that the exploitation of presidential war power needs to be strictly policed, by civil society at the margins, but most effectively by courts, which ought to discard the venerable legitimating fiction of a "nonpolitical" judiciary evading "political questions," and exercise stricter review of commander-in-chief power.

Because of the distortions wrought (and continually wreaked) by the President on formalist separations, the preservation of constitutional structure requires precisely the opposite of rigidity and fixity as the classic separation of powers had it: the pragmatic adaption of institutions and structures that were once considered outside the constitutional system, as well as a new theory of constitutionalism that can adequately theorize their roles. Taken holistically as a source for commendation and critique, these practices point the way toward a new normativity in our institutions.

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Introduction

> "The government of the United States was constructed upon the Whig theory of political dynamics, which was a sort of unconscious copy of the Newtonian theory of the universe. . . . Every sun, every planet, every free body in the spaces of the heavens, the world itself, is kept in its place and reined to its course by the attraction of bodies that swing with equal order and precision about it, themselves governed by the nice poise and balance of forces which give the whole system of the universe its symmetry and perfect adjustment. . . . [A]s Montesquieu had pointed out to them in his lucid way, [the American Whigs] had sought to balance executive, legislative and judiciary off against one another by a series of checks and counterpoises, which Newton might readily have recognized as suggestive of the mechanism of the heavens."
> Woodrow Wilson, *Constitutional Government* (1907)

> "[C]an [the] gratification [of man's ruling passion] be found in supporting and maintaining an edifice that has been erected by others? Most certainly it cannot."
> Abraham Lincoln, *Lyceum Address* (1838)

In 1932, Carl Schmitt published *Legality and Legitimacy,* his withering critique of the Weimar Constitution and the flailing regime it created. Parliamentary democracy, Schmitt claimed, was weak, corrupted, and unable to resist the onslaught of "three extraordinary lawgivers" that had been smuggled into the Weimar Constitution itself. There was *ratione supremitatis,* the appeal to the legitimacy of the popular will over that of the statute. Then there was *ratione necessitatis,* the replacement of the statute by the administrative measure. Finally, there was *ratione materiae,* higher substantive law protected from legislative amendment.

To all three "rivals," parliamentary democracy was vulnerable, argued Schmitt. Parliament, a coterie of elites bartering interests for influence, could no longer command loyalty through its deliberative or procedural legitimacy; better, said Schmitt, to let the President represent the people as a "whole" in an acclamatory plebiscitary union. In the modern welfare state, Schmitt claimed, statutes targeting particular groups for special treatment had become as particular as any executive measure, and therefore there was nothing to keep the decree from swallowing up the law. Substantive "higher" legal norms such as the protection of minorities contradicted the orthodox view that law is simply that

which is generated by the legislative process, the "negation" of the very idea of democracy itself.

An ocean, a world war, the better part of a century and a world of difference in culture and constitutional design fortunately separate our political context from Schmitt's. But Schmitt had a way of asking questions that still "prove awkward for liberals, constitutionalists, and even democrats who understand themselves to be committed to the rule of law."[1] An unrepentant foe of liberalism, he had no qualms about exposing tensions that work at the margins of constitutional orders, tugging at their very foundations. These three "rivals" of liberal democracy—call them the populist temptation, executive lawmaking, and countermajoritarian judicial review—still haunt our politics today, should we care to see them. In Schmitt's age, his theory was a body blow to democracy, though he claimed not to have intended it as such.[2] For us, it should be a challenge and a call to action.

This dissertation turns to the American continent to present a sketch of the "real" separation of powers as lived and experienced by its various presidential democracies. Out of important commonalities among the practices of these countries, it unearths what we might call a Pan-American presidential constitutionalism, characterized by pragmatic, improvisational accommodations to the problem of presidential leadership. In light of the ways in which these practices depart from traditional separation-of-powers theory (still the dominant framework in which the American constitutional system is understood[3]), it

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[1] John McCormick, "Identifying or Exploiting the Paradoxes of Constitutional Democracy? An Introduction to Carl Schmitt's *Legality and Legitimacy,*" in Carl Schmitt, *Legality and Legitimacy* (Durham: Duke University Press, 2004), xiii-xliii, xv.

[2] Ibid, xxiii.

[3] See, e.g., Hugh Heclo, "What Has Happened to the Separation of Powers?," in Bradford P. Wilson and Peter W. Schramm (eds.), *Separation of Powers and Good Government* (Lanham, MD: Rowman and Littlefield, 1994), 131-164, 134 ("[T]he framework of 1787 has proven durable

proposes a new normativity based upon these shared solutions. In this regard, it proposes that since meaningful constitutional checks are now to be found at the sub-constitutional level of politics, preservation of constitutional structure demands fighting fire with fire, through the *politicization* of institutions like courts and the administrative state, once intended to stay out of the political fray.

North of the Border it is still common—if less and less so—to pontificate on the exceptionalism of American institutions, but the similarities of political practices across the continent are gradually coming into focus. This argument submits that, across various countries, it is the President that has been the driver for this convergence. An office quintessentially at odds with the legal frame into which it is crammed, the President has a voracious potential for self-aggrandizement. Among political actors, the president is the bull in the china shop, uniquely hemmed in by institutions and chronically given to breaking them whenever he acts. Presidents must act to legitimate their turns in office, but to take action is to disrupt the existing order.

The estimable Framers of the American Constitution came to the problem of designing a constitution with very different priors. The Framers designed the Constitution in the Newtonian mold, a self-equilibrating "machine that would go of itself," provided it was sufficiently well-designed.[4] The famed solution of checks and balances envisioned a structure each of whose parts would, "by their mutual relations, be the means of keeping

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because the dynamics set up in its allocations of power have usually operated more or less as intended."); Arthur M. Schlesinger, Jr., "The Constitution and Presidential Leadership," *Maryland Law Review,* Vol. 47 (1987): 54-74, 65 ("The separation of powers is the vital means of self-correction in our system. . . . It is the ultimate guarantee of the system of accountability.").

[4] The phrase, taken from an 1888 essay by James Russell Lowell, is quoted in Michael Kammen, *A Machine That Would Go of Itself* (New Brunswick, NJ: Transaction Publishers, 2009).

each other in their proper places."[5] Aware that men were not angels, the Framers anticipated the danger of the Constitution's pristine architecture being "crushed by the disproportionate weight of other parts,"[6] and having witnessed just such dysfunction in the Articles of Confederation, they believed that the likely culprit would be the legislature "everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."[7] The "popular branch" was divided into two to help check its tendency to produce rash, ill thought-out laws, while the natural "weakness of the executive" would be "fortified" by arming him with the legislative veto, and with "unity", "duration", financial independence, and "competent powers."[8]

Today, it seems that the Framers' fears were misdirected, and their choice of metaphor erroneous. In the late 19th century, under the sway of a new scientific philosophy, that of Charles Darwin, the U.S. Constitution was drastically reconceived. Proclaimed Woodrow Wilson, with all the élan of the age, "[G]overnment is not a machine, but a living thing." The Framers had sought to tamp down on the vitality, ambitions, and passions of those who would inhabit the government by locking them in a rigid system. But this vitality could not be caged for long, insisted Wilson. Like any living thing, the government would evolve with time, shaped by its environment, impulses, and functional needs. "The government of the United States," said Wilson, "has had a vital and normal organic growth and proved itself eminently adapted to express the changing temper and purposes of the American people from age to age."[9]

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[5] Alexander Hamilton, John Jay, and James Madison, The Federalist (ed. Jacob E. Cooke) (Middletown: Wesleyan University Press, 1961), no. 51, 347.

[6] Ibid, no. 47, 323.

[7] Ibid, nos. 47 and 48, 323 and 332.

[8] Ibid, nos. 51 and 70, 347 and 471.

[9] Woodrow Wilson, *Constitutional Government* (New York: Columbia Univ. Press, 1907), 55-57.

And evolve it has, in time proving that the "most dangerous branch" is *not* the legislature, but the president. Below the surface of the (mostly) unchanged text, tectonic changes to political practices and the institutional landscape over the centuries have worked to funnel power towards the Executive Branch. These changes have been chronicled by scholars working in the important tradition of American political development: massive movement-based political parties,[10] industrialization and urbanization,[11] new uses of the presidential veto,[12] the growth of the bureaucracy,[13] the filibuster,[14] primary elections,[15] among others. Other accounts emphasize the role played by external developments in this evolution: the United States' emergence as a global power,[16] the New Deal and the

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[10] Sydney Milkis, *The President and the Parties: The Transformation of the American Party System Since the New Deal* (New York: Oxford University Press, 1993); Jeffrey Tulis, *The Rhetorical Presidency* (Princeton: Princeton University Press, 1987); Peri E. Arnold, *Remaking the Presidency: Roosevelt, Taft, and Wilson, 1901-1916* (Lawrence, KS: University of Kansas Press, 2009).

[11] Richard F. Bensel, *The Political Economy of American Industrialization, 1877-1900* (New York: Cambridge University Press, 2000).

[12] Robert J. Spitzer, *Presidential Veto: Touchstone of the American Presidency* (Albany: State University of New York Press, 1988); Charles M. Cameron, *Veto Bargaining: Presidents and the Politics of Negative Power* (New York: Cambridge University Press, 2000).

[13] Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920* (New York: Cambridge University Press, 1982); Peri E. Arnold, *Making the Managerial Presidency: Comprehensive Reorganization Planning, 1905-1996* (2nd. ed.) (Lawrence, KS: University of Kansas Press, 1998); James P. Pfiffner, *The Managerial Presidency* (2nd. ed.) (College Station: Texas A&M University Press, 1999).

[14] Gregory Koger, *Filibustering: A Political History of Obstruction in the House and Senate* (Chicago: University of Chicago Press, 2010); (Lobel, May 1989), *Filibuster: Obstruction and Lawmaking in the U.S. Senate* (Princeton: Princeton University Press, 2007).

[15] James Ceasar, *Presidential Selection: Theory and Development* (Princeton: Princeton University Press, 1979).

[16] Clinton Rossiter, *Constitutional Dictatorship* (Princeton: Princeton University Press, 1948); Arthur Schlesinger, *The Imperial Presidency* (New York: Houghton Mifflin, 1973).

corporatization of the economy,[17] the mass media,[18] the "acceleration" of politics that technological developments have spurred,[19] and crisis and war.[20] Still others describe an evolution in theories of political leadership, particularly in the sense of building popular and party leadership into accounts of presidential power.[21] Almost without exception, scholars seem to agree that the summed effects of these changes have been to funnel power toward the President.

These accounts are important and provide much explanatory power in accounting for the present state of our politics. But this project hopes to add one more factor to the mix by exploring the nature of presidentialism itself. *Iargue that, independent of its historical circumstance or occupant, the presidency always harbors the potential for aggrandizement.* What is remarkable is not that the office fits awkwardly within the structure of the present-day U.S. Constitution—or indeed, the Venezuelan, Brazilian, or Colombian constitution—, but rather that it fits within the structure of any written constitution at all.

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[17] Theodore Lowi, *The Personal President: Power Invested, Promise Unfulfilled* (Ithaca: Cornell University Press, 1986); Wiliam E. Leuchtenberg, *Franklin D. Roosevelt and the New Deal: 1932-1940* (New York: Harper Perennial, 2009); Matthew Dickinson, *Bitter Harvest: FDR, Presidential Power, and the Growth of the Presidential Branch* (New York: Cambridge University Press, 1996).

[18] Samuel Kernell, *Going Public: New Strategies of Presidential Leadership* (4th ed.) (Washington, D.C.: Congressional Quarterly Press, 2006); Ceasar, *Presidential Selection.*

[19] William Scheuerman, *Liberal Democracy and the Social Acceleration of Time* (Baltimore: Johns Hopkins University, 2004).

[20] Louis Fisher, *Military Tribunals and Presidential Power: American Revolution to the War on Terrorism* (Lawrence, KS: University of Kansas Press, 2005); Michael A. Genovese, *Presidential Leadership in an Age of Change* (New Brunswick, NJ: 2016); Garry Wills, *Bomb Power: The Modern Presidency and the National Security State* (New York: Penguin, 2010); Jules Lobel, "Emergency Power and the Decline of Liberalism," *Yale Law Journal,* Vol. 98, No. 7 (May 1989): 1385-1433.

[21] Bruce Ackerman, *We The People, Vol. 1: Foundations* (Cambridge, Belknap Press, 1991); Stephen Skowronek, "The Conservative Insurgency and Presidential Power," *Harvard Law Review,* Vol. 122, No. 8 (October 2009): 2070-2103; Peter Shane, *Madison's Nightmare: How Executive Power Threatens American Democracy* (Chicago: University of Chicago Press, 2009).

Two features of presidentialism are central in this connection: the great *rigidity* of the system, and the *dual legitimacy* of the elected branches.[22] Juan Linz defined presidentialism as a system in which

> an executive with considerable constitutional powers—generally including full control of the composition of the cabinet and administration—is ***directly elected*** by the people for a ***fixed term*** and is ***independent of parliamentary votes*** of confidence. He is not only the holder of executive power but also the symbolic head of state and can be removed between elections only by the drastic step of impeachment.[23]

Linz was thinking as a comparativist, juxtaposing parliamentary democracy alongside presidentialism to highlight the rigidity of the latter. Fixed term lengths break political processes into discrete cycles, foreclosing the possibility of readjustment that contingent events often demand.[24] Unpopular or ineffective presidents cannot easily be replaced, as in parliamentary systems, by votes of no confidence, and in the event of presidential incapacitation, impeachment, or death, the forced regularity of elections can result in succession crises or at least the selection of patently inadequate replacements.[25] Rigidly enforced separations between powers may also contribute to poor functioning, lead to waste and

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[22] A note about scope: Parliamentary systems *do* experience the destabilizing effects of executives—Weimar Germany being a salient and tragic example—, but, for reasons clearly formulated by Juan Linz, in an attenuated way.

[23] Juan J. Linz, "The Perils of Presidentialism," *Journal of Democracy,* Vol. 1, No. 1 (Winter 1990), 51-69, 52 (emphasis added). See also Juan Linz, "Excursus on Presidential and Parliamentary Democracies," in Juan J. Linz and Alfred Stepan, eds., *The Breakdown of Democratic Regimes: Crisis, Breakdown and Reequilibration* (Baltimore: Johns Hopkins, 1978), 71-74, and Juan J. Linz, "Democracy, Presidential or Parliamentary: Does It Make a Difference?" in Juan J. Linz and Arturo Valenzuela, eds., *The Failure of Presidential Democracy: The Case of Latin America* (Baltimore: Johns Hopkins, 1994), 3-87.

[24] This feature of the American Constitution was much criticized by Walter Bagehot in *The English Constitution.*

[25] There is no shortage of examples. Take the disappointing Andrew Johnson, Lincoln's vice-president and successor; the fraught last months of the Woodrow Wilson presidency, during which time the First Lady concealed her stroke-ridden husband's condition and unofficially acted as president; the hopeless illegitimacy of Argentina's Isabel Martínez de Perón in taking up her fallen husband's presidential mantle; or the thankless task of Hugo Chávez's former Vice President, Nicolás Maduro, thrust into an office far too large for him.

duplication, and breed unnecessary hostility. Woodrow Wilson urged, "You cannot compound a successful government from antagonisms,"[26] and indeed, there have been numerous attempts in the U.S. at revising the constitution to bring the President's Cabinet more in line with congressional policy, including having them take on an advisory role in legislation.[27]

A second complicating feature of presidentialism is the *dual legitimacy* of its two democratically elected branches. That the executive and the legislature are both chosen by and primarily accountable to the people writ large gives each branch license to offer competing claims of "democratic legitimacy."[28] That each branch is chosen by different electoral constituencies leads to divergent policy interests, too, particularly because while the President has a national constituency, legislative electoral interests may be mired in localism.[29] On top of that, the frequent malapportionment of legislative seats can leave national assemblies with an agrarian, rural bias. Staggered elections and personalized campaigns heighten the likelihood of divided government, in which the legislative and executive branches are controlled by different parties, and the allure of inter-branch bargaining and dialogue diminishes.

One result has been for presidents to "go public," appealing to the public for support in promoting their desired policies against recalcitrant, unsympathetic legislatures.[30] Most empirical accounts of presidential public leadership suggest that American presidents

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[26] Wilson, *Constitutional Government,* 60.

[27] John R. Vile, *Encyclopedia of Constitutional Amendments, Proposed Amendments, and Amending Issues, 1789-2015* (4th ed.) (Santa Barbara: ABC-CLIO, 2015).

[28] Linz, "The Perils of Presidentialism," 63.

[29] Terry Moe and Scott A. Wilson, "Presidents and the Politics of Structure," *Law and Contemporary Problems,* Vol. 57, No. 2 (Spring 1994), 1-44, 11.

[30] Kernell, *Going Public,* 2.

largely fail to "move" public opinion,[31] but this does not stop them from trying. Jeffrey Tulis has suggested that this is largely the handiwork of Wilson tempting the modern president into a plebiscitary role; wrote Wilson in 1907, if the President "lead[s] the nation, his party can hardly resist him. His office is anything he has the sagacity and force to make it."[32] It is no coincidence that the Progressives saw the presidency as the "only organ sufficient for the exercise of [the people's] sovereignty,"[33] for as Skowronek tells us, a pervasive conceit in the field of American politics is "that the presidency is inherently disposed to ally itself with movements for reform and liberation."[34] To wit, consider President Obama's "We Can't Wait" program, intended to force an immobile Congress's hand on policies including immigration, solar energy development, criminal justice reform, and others.

Another response to rigidity and dual legitimacy has been the development of the "managerial presidency," according to which the President presses the tools available to him—executive discretion over foreign affairs, war-making, or routine administration—to their full advantage in order to shape the meaning of the law.[35]

The president's slow creep into a leadership role has spawned the development of devices to clip this power (advice-and-consent powers over appointments, oversight

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[31] George C. Edwards III, *The Strategic President: Persuasion and Opportunity in Presidential Leadership* (Princeton: Princeton University Press, 2009); George C. Edwards III, *On Deaf Ears: The Limits of the Bully Pulpit* (New Haven: Yale University Press, 2003); Brandice Canes-Wrone, *Who Leads Whom?: Presidents, Policy, and the Public* (Chicago: University of Chicago Press, 2005).

[32] Wilson, *Constitutional Government,* 69.

[33] Henry Jones Ford, *The Rise and Growth of American Politics: A Sketch of Constitutional Politics* (New York: Macmillan, 1900), 56.

[34] Stephen Skowronek and Matthew Glassman, eds., *Formative Acts: American Politics in the Making* (Philadelphia: University of Pennsylvania Press, 2007)*,* 7.

[35] Peri E. Arnold, *Making the Managerial Presidency*; James P. Pfiffner, *The Managerial Presidency*; Peri E. Arnold, *Remaking the Presidency.*

mechanisms like independent counsels, comptrollers, ombudsmen, impeachment procedures and so forth), but their clunky, not to mention presumptively *undemocratic* nature often exacerbates the problem by heightening the legislature's democratic deficit with the public, so to speak, and by giving the president incentives to view such institutions, not only as undue checks upon his authority, but as the cause of inefficient, gridlocked government.[36]

Cumulatively, these features introduce into presidential systems "a dimension of conflict that cannot be explained wholly by socioeconomic, political, or ideological circumstances."[37] Built into the core of presidentialism is a "fundamental contradiction,"[38] as Linz says, between the dynamic processes unleashed by executives and the laws intended to ground these officers in fixed, stable systems. The presidency is an odd hybrid of an office in this sense. The mission of every president is to "make something" of the office, although to do so entails an almost-Oedipal struggle to set oneself apart from one's predecessors through sweeping, redemptive changes which naturally do violence to the contours of the office. Because, as Stephen Skowronek points out, leadership outcomes "turn less directly on the powers or institutional resources of the presidency than on the incumbent's *contingent political authority* or *warrants for changing things*,"[39] the President finds himself in an "unavoidable institutional situation," saddled with limited constitutional powers and exaggerated expectations for leadership, responsibility, reform and redemption. The

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[36] Take the War Powers Resolution of 1973 (50 U.S.C. §§ 1541-1548). Criticized by Nixon as an unconstitutional intrusion onto presidential powers, it *still* has managed to be ineffective and unpopular. Louis Fisher, *Presidential War Power* (3rd ed. 2013), at 144-153, 297-311 (on the history of the War Powers Act and other statutes aimed at reining in the President).

[37] Linz, "The Perils of Presidentialism," 55.

[38] Ibid, 54 and 55.

[39] Stephen Skowronek, *The Politics Presidents Make: Leadership from John Adams to Bill Clinton* (Revised Edition) (Cambridge: Harvard University Press, 1997), xii (italics mine).

president, called upon to tend to his historical legacy but *also* to "preserve, protect, and defend" the constitution, is thus a simultaneously an "order-shattering" and "order-affirming" figure.

It is no wonder, then, that the presidency has become "a repository of high expectations, myth, legend, and hagiography,"[40] an office with "all the disadvantages of monarchy with none of the advantages."[41] No wonder, either, that Woodrow Wilson famously exhorted its inhabitant to be "as big a man as he can."[42] The mismatch between powers and expectations forces upon presidents a tragic choice: to languish lawfully within the legal contours of the office, or to turn their powers of popular persuasion against the limitations imposed upon the office, or government itself.[43] With heightened responsibilities for governing, presidents are prone "to view their office as tantamount to the state," and to view "barriers and obstructions to their activities as tantamount to disloyalty."[44]

The result has been the emergence of the presidential hybrid, an office taking on functions belonging to others. Faced with a losing hand, the President presses his advantage, and does so by drawing upon one (or, indeed, all) of the three rival sources of normative authority, mentioned above. There is *plebiscitarianism,* where the President

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[40] Dennis M. Simon, "Public Expectations of the President," in George C. Edwards III and William G. Howell, *The Oxford Handbook of the American Presidency* (New York: Oxford University Press, 2009), 135-160, 139.

[41] Theodore J. Lowi, *The Personal President,* 174. Terry Moe and Scott Wilson echo the point: "Unlike legislators, presidents are held responsible by the public for virtually every aspect of national performance. When the economy declines, an agency falters, or a social problem goes unaddressed, it is the president who gets the blame, and whose popularity and historical legacy are on the line. All presidents are aware of this, and they respond by trying to build an institutional capacity for effective governance." Moe and Wilson, "Presidents and the Politics of Structure," 11.

[42] Wilson, *Constitutional Goverment,* 70.

[43] This point was famously, if a little less contentiously, made by Richard Neustadt in his classic *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan* (New York: Free Press, 1991).

[44] Lowi, *The Personal President,* 174.

turns the force of popular majorities against laws and institutions that bind. There is *executive law-making*, taking on powers to legislate through either inserting himself into the legislative process or by use of administrative channels. And there is use of the *emergency,* whereby the President's typical crisis-time discretion is deployed for semi-permanent norm creation.

Presidential power, not in the formal constitutional sense but in the sense of what Skowronek calls "authority" for transformative action,[45] combines these three faces in its full exercise. Because, as Skowronek tells us, the president's formal powers are unequal to the task of legitimating the office, the President's greatest powers are still largely persuasive[46] in nature—appealing to other institutional actors and the public at large to support his program. If he is to fulfill the high expectations that more and more come with the office, he must expand his effective power to one or more of these three sites: the *people,* the *parties,* and the *courts,* respectively.

From the point of the view of the separation of powers, this leaves us in a brave new world. The Framers' constitution was never one of truly *separate* powers, but it did take the three branches as the constituent blocks of a regime of checking and balancing. By contrast, the realization that the greatest strain on the constitutional structure comes from

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[45] "Power and authority have a common source in the prerogatives granted to presidents in the Constitution and the laws, but they reach beyond these formalities in different directions. Power, as I will use the term here, refers to the resources, formal and informal, that presidents in a given period have at their disposal to get things done. Presidents exercise power by husbanding their resources and deploying them strategically to effect change. Authority, on the other hand, reaches to the expectations that surround the exercise of power at a particular moment, to perceptions of what is appropriate for a given president to do. A president's authority hinges on the warrants that can be drawn for a given president to do. A president's authority hinges on the warrants that can be drawn from the moment at hand to justify action and secure the legitimacy of the changes effected." Skowronek, *The Politics Presidents Make,* 18.

[46] Although the term "persuasive" is indebted to Richard Neustadt, I intend it in a broader sense than Neustadt did. I mean it to include mobilization of popular forces in the electorate, coalition-building in Congress, and appeals to necessity in the emergency. In brief, I use "persuasion" in a sense analogous to Skowronek's "warrant for authority."

sub-constitutional, political factors confronts us with a serious mismatch between the blueprint of presidentialism and the reality. Our Newtonian separated powers constitution *is* indeed a rather rigid machine, but as Wilson saw in 1907, not so rigid that it has managed to keep the presidency from growing and evolving under its wake. Constitutional practice has outrun theory, and our 18th century republican constitution, designed to slow down the production of laws and keep the legislature in check, no longer can be said to function as intended. The old separation of powers lives, still, but only at the rarified level of theory; on the ground, our system is cooperative, pragmatic, and president-centric.

The persistence of formalisms obscures the way our system actually functions and keeps us from formulating new ideals in response to changing functional needs. From the classical vantage point, *too* much efficiency in law-making represents a violation of the terms of the contract—take the presidency of "King Andrew" Jackson, who, with a mastery of both his party and the office's formal powers, certainly knew how to press the strengths of the presidency to their fullest, and was met with innumerous accusations of being a tyrant. Conversely, in the old paradigm, gridlock is a necessary evil in the interest of winnowing out bad laws. Through today's lens, particularly in light of present levels of polarization, it seems more an index of self-interest, shortsightedness, and dysfunction.

The project is organized as follows. Three theoretical chapters sketch out the system-shifting dynamics of presidential power and propose new conceptual language to describe the practices we see. Each corresponds to one of three founts of extra-constitutional (which is not to say illegal) authority by which the president recasts the office into an alternate law-giver to the legislature. First is the temptation to *populism*, by which the President appeals to the People as a source of normative legitimacy above and eventually, opposite to that of ordinary law. Next is the phenomenon of *executive law-making,* in which the President himself is inserted into the legislative process, by influencing either the inputs

of the process or, as a chief administrator, their outputs. Finally is the normalization of the extra-legal *emergency,* in which the blurring of the boundaries between emergency and normalcy transforms the temporary defensive measure into a new legal baseline.

Each theoretical chapter is followed by a companion chapter set in the Latin American context. These chapters each describe a particular manifestation of one of the three problems of presidentialism and conceive of a new mode of responding to it. Why Latin America? With the U.S., the region shares a common history of revolutions,[47] constitution-writing,[48] and presidentialism.[49] The course of presidential democracy in Latin America has, to put it gently, run less than smooth, but from the perspective of institutions, past turmoil may be a source of strength today. Truly, the modes of system dysfunction and breakdown that Latin America *hasn't* faced makes for a short list—consider coups of the presidential, military, and legislative variety, spells of brutal dictatorship, one-party autocracy, civil war and internal violence, rival governments, populism, and terror. Experience with crisis need not always result in learning, but countries like Mexico, Colombia, Brazil, Chile, and others have designed today's institutions with yesterday's struggles in mind, and with seeming success. Of a more recent vintage, Latin America's constitutions better reflect

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[47] Jeremy Adelman, "An Age of Imperial Revolutions," *American Historical Review,* Vol. 113, No. 2 (April 2008): 319-40; Joshua D. Simon, "The Ideology of Creole Revolution: Ideas of American Independence in Comparative Perspective," Ph.D. Dissertation (Yale University, Department of Political Science, 2012).

[48] Roberto Gargarella points out that "the overwhelming majority of the Latin American constitutions which traversed the 20th century appeared . . . 'cast in the mold' of a particular model: the Constitution of the United States." Roberto Gargarella, "Latin American Constitutionalism Then and Now: Promises and Questions." Paper presented at the Comparative Politics Workshop, Yale University (Feb. 23, 2010); Roberto Gargarella, *Latin American Constitutionalism, 1810-2010: The Engine Room of the Constitution* (New York: Oxford University Press, 2013).

[49] Matthew Soberg Shugart and John Carey, *Presidents and Assemblies: Constitutional Design and Electoral Dynamics* (New York: Cambridge University Press, 1992); Arend Lijphart, *Parliamentary Versus Presidential Government* (New York: Oxford University Press, 1992). Outside the U.S. and Latin America, full-fledged presidential systems exist only in Ghana, Nigeria, Uganda, South Korea, and the Philippines.

past failures, new trends in institutional design, and the realities of modern social and economic life. Some of its projects seem quixotic—the right to play sports, enshrined in the Brazilian Constitution of 1988, is a favorite whipping boy—, but they are audacious, innovative, and may have lessons to impart.

Each case study explores a regime of checking and balancing that repurposes extant institutions in new, hitherto unexplored ways, and suggests new notions of what it could mean for a presidential system to "work well" in context. First, in Hugo Chávez's Venezuela, I explore the absence of such checks in the proliferation of grassroots organizations that directly linked the President and the people in a plebiscitarian "parastate," a dual set of institutions that attempted to circumvent, in some cases literally to duplicate, the extant bodies of public administration. The fall of Chavismo on a tidal wave of waste, mismanagement and hyper-politicized institutions suggests that president-led social movements must avoid the temptation to work outside the system, staking their success or failure on "unconventional adaptation" of extant institutions.

Next, I turn to the Brazilian spin on "cabinet government,"[50] whereby the President, in a role reminiscent of that of a prime minister,[51] must cultivate and maintain a governing coalition of political parties in Congress (as well as attend to citizen actors outside it), bartering policy perks for legislative outcomes. The system has been harshly—and rightly—criticized for fomenting corruption and inter-branch collusion, but it also suggests an extremely effective method of overseeing the administrative state. Through coalitional government, legislative and social actors are drawn inside the administrative state, so to

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[50] Woodrow Wilson, *Congressional Government* ("Cabinet government is a device for bringing the executive and legislative branches into harmony and cooperation without uniting or confusing their functions."), 118.

[51] Luis Afonso Arinos, quoted in Marcus André Melo and Carlos Pereira, *Making Brazil Work: Checking the President in a Multiparty System* (New York: Palgrave Macmillan, 2013), 4.

speak, endowing them with discretion and accountability over, not only legislative outcomes but also administrative policy. Contra both the Hamiltonian thesis that a single executive is most accountable, and the Progressive thesis as to the necessary separation of politics and administration, the "politicization" of the administrative process proves a meaningful mechanism for checking executive and administrative power.

Finally, I examine Colombia's efforts to tame the extra-legal "emergency" by means of judicial review by its Constitutional Court, created in 1991 with a mandate to curb a century-and-a-half long legacy of presidential abuse of the state of exception. Armed with the power to review presidential decisions declaring and exercising power during the emergency, Colombia's highest court has staged a daring revolt against the venerable legitimating fictions of a "nonpolitical" judiciary evading "political questions" and seized a leading role in dictating rights in the emergency. This is a move that American courts, even at their most activist, have not yet dared to make, though examples of executive overreach related to the emergency or wartime situations abound.

I present three methods of presidential control that do not depend on zealous patrolling of the rigid separation of powers, but rather, on subconstitutional, political factors. There is control through the *people,* at times not unlike the fox guarding the henhouse, but whose power to "make" presidential greatness cannot be ignored. The people, claims the cynic, are in thrall to politicians. But they also put demands on them and shape the institutional environment in which they work. Control through *parties* has gained much attention in the United States of late in the worrying sense that divided government resembles dysfunctional government, but the coalitional form of government embodies a different logic. Why leave administrative policy to be carved up between so many veto players when these can be transformed into bargaining partners? Finally, there is substantive judicial review of executive action in the emergency. The idea flies in the face of the

cherished ideal of a "depoliticized" judiciary, but when rights are in the bargain, as increasingly undeniably, they are, who but courts are most suited to step into the breach?

This project does not aim to make a claim about the excellence of Latin American democracy. It *does* aim to explore how to make presidentialism workable, yielding an efficient government that limits power, but is not at war with itself. It mines Latin America for examples of practices that can help us find an answer to American constitutional problems. As Stephen Breyer has put it, exhorting American courts to pay attention to the practices of foreign jurisdictions, other democracies "have led the way in developing solutions to the problem[s] we face, and [we] may learn something from examining their practices rather than considering our own in a vacuum."[52] Although Latin American democracies seem very different from the American, we share important commonalities in *practices*, which hints at the possibility of convergence in practical solutions to problems of presidentialism, solutions arrived at by adaptation as opposed to the dictates of constitutional text.

The American Constitution: Newtonian machine or Wilsonian living organism? The answer matters to constitutional theorists, no doubt, but it may matter most in that our constitutional system requires sensible animating ideals in order to provide evaluative standards for how the system is operating. The new separation of powers recognizes that, in light of modern demands and conditions, the "fundamental contradiction"[53] at the heart of presidentialism is heightened, and the distortions wrought by the President on the old formalist frame grow ever more grotesque. Television and social media have heightened the plebiscitary face of the office; administrative power has ballooned in our massive industrial complex; emergency powers become more relevant with the "social acceleration

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[52] Stephen Breyer, *The Court and the World* (New York: Alfred A. Knopf, 2015), 83.

[53] Linz, "The Perils of Presidentialism," 54 and 55.

of time."[54] The old structure has changed, and with it comes a need for new legitimating ideals. I hope to draw the attention of constitutional theory to the joints in the system where the real power of checking and balancing lie. I argue that, under changed conditions, the preservation of constitutional structure requires precisely the opposite of what the classic separation of powers intended: the politicization of institutions and structures that were once designed to stand above the political fray. Taken holistically, as a source for commendation and critique, these practices point the way toward a new normativity guiding our presidential system in the twenty-first century and beyond.

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[54] Scheuerman, *Liberal Democracy and the Social Acceleration of Time*.

1: Populism in Power: Direct Democracy and Dual Legitimacy in Venezuela's "Bolivarian Revolution"

I came upon Bolivar, one long morning,
in Madrid, at the entrance to the Fifth Regiment.
Father, I said to him, are you, or are you not, or who are you?
And, looking at the Mountain Barracks, he said:
"I awake every hundred years when the people awake."
-Pablo Neruda, *A Song For Bolívar*

Introduction

"Give me a balcony and I'll become the next president," said José Maria Velasco, a five-time president of Ecuador, early in the last century. Out of the mouth of a Latin American president, the observation is at once audacious and trite. The "populist seduction" is, according to Ecuadorian sociologist Carlos de la Torre, a deeply ingrained feature of Latin American democracy. Historically speaking, Latin American democracy has had, to paraphrase Winston Churchill, much to be modest about, but it is not the only system predisposed to such temptations.

As we have seen, populism's "two faces," the direct democratic and the personalist-authoritarian, arise from its construction of a single popular will embodied in a mythic union between leader and People. Populism has two strong affinities with the presidential system: first because channeling the "democratic wish" for political unity, order, and transcendence is an important resource allowing presidents to bridge the gap between their (comparatively scanty) constitutional powers and the expectations and demands placed upon them.[1] Second, in that populism's attack on elite institutions and values—structures,

[1] Because, as I have argued before, this "mismatch" is particularly acute in presidential systems, I limit my focus to these systems. The argument potentially could be broadened beyond this scope, however, deploying the concept of executive populism to recast the collapse of the semi-presidential Weimar Republic, for example.

laws, rules, norms, conventions, even the idea of deliberative rationality holding consensual structures together—targets the systems that keep presidential energy hemmed in.

Populism can play an important role in injecting vitality and movement into ossified political systems. But when do beneficent upswells of democracy degenerate into lawless mob rule? Our efforts to sketch out a new normativity for presidential systems point to the importance of institutional fealty—albeit not *too* much—and of *sub*-constitutional, political checks in keeping executive activity within sustainable limits.

I locate the key pressure points in the new normative constitutional system at the sites where the president's desire for activity bumps up against functional veto players, so to speak.[2] The President's plebiscitarian power cannot be exercised by fiat; it requires persuasion, not only in courting the popular will, but also in channeling said will against the old institutions of the state.

The *way* in which presidential populism targets old institutions, I argue, is the crux of the normative argument distinguishing populism in the good, revitalizing sense from the bad, destructive one. To deny or suppress democracy's reformist impulse would be both normatively illegitimate and disastrous in consequence, so my theory insists, as an evaluative measure, on the channeling of popular energies *through* extant institutions ("unconventional adaptation"[3]) as opposed to the *anti-institutionalist* impulse to work *outside* the system, which leaves only a vacuum in its wake. The spectacle of an unruly mob targeting old institutions, gaining control of and reappropriating them may be a terrifying prospect. Yet, I argue, such institutions have a built-in defense mechanism, absorbing, slowing

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[2] George Tsebelis, *Veto Players: How Political Institutions Work* (Princeton: Princeton University Press, 2001).

[3] Bruce Ackerman, *We The People, Vol. 2: Transformations* (Cambridge: Belknap Press, 1998), 382-420.

down, and deadening the reformist zeal as it passes through them. In working through institutions, populism loses its soul—and this is a good thing, for government cannot abide by a logic of constant revolution.

In this spirit I turn to the case of Venezuela under Hugo Chávez (1998-2013), one of the most literal attempts ever to establish a populist grassroots democracy. Chavismo began as a social movement, evolved into an electoral vehicle, and later became its own governing philosophy. But it never solved the typical quandary of populist movements that reach power: how to institutionalize the revolution without losing its spirit in the process? Chávez's attempted solution was to implement a thickly populated version of grassroots democracy in which local representative and administrative bodies were set up that *directly bypassed* existing local, state and federal institutions.

Chávez's vision for direct democracy often takes a backseat in scholarly works to dismayed or derisive sketches of his larger-than-life charismatic persona, but it is a crucial aspect of the regime, not merely because it speaks directly to the heart of the presidential-populist contradiction, but also because of its curious institutional approach. Instead of taking over old institutions, the regime literally circumvented or duplicated them, building up a series of vehicles for local democracy including the Bolivarian Circles, the communal councils, and the municipal assemblies. In the Chávez's grassroots parastate, opposition politicians were often cut out of governing and excluded from state benefits entirely. As a result, Chavista institutions became irremediably politicized, practically guaranteeing the movement's ultimate failure and the terrible crisis in which Venezuelan democracy would later find itself, almost as if the nation had been left with two rival governments.

The Chávez dual state shows that while it is possible to envision alternate versions of separated powers and still save democracy, the values of political alternation and party competition remain a *sine qua non* of the regime. It also illustrates that the only way to

achieve enduring institutional stability is through old institutions' being repurposed and redeployed, trapping revolutionary force and thereby containing it, in part.[4]

A. From Movement to Regime: Venezuela under Hugo Chávez (1998-2013)

Hugo Chávez Frías (1954-2013) was a perplexing and, above all, a polarizing figure. His rhetoric was pompous, histrionic, and obnoxious, and for it, he was loved by millions. Chávez was by turns pragmatic and doctrinaire, running several brilliant electoral campaigns and lifting millions of Venezuelans out of poverty, yet he squandered the nation's prodigious oil wealth on quixotic programs like "petrodiplomacy" that filled his allies' pockets with sharply discounted petroleum and drove the state oil company, PDVSA, into the ground. He demonized America—famously referring to George W. Bush as "the Devil himself," and calling Barack Obama a "clown" and an "ignoramus"—while leaving commercial relations between the two untouched (the U.S. remains Venezuela's #1 customer for oil). Chávez stirred up hatred against the wealthy elite—"Being rich is bad," he was known to sermonize—even as a new generation of "Boligarchs" arose from oil profits under his rule.

Chávez gave the lower classes, especially the indigenous and the rural poor, a new voice in politics while waging a bitter war against Venezuela's opposition media and on free speech in general. He made the political system more deeply democratic than ever before: the 1999 Constitution created two new citizen branches to oversee elections and the other branches in the name of the people. It established the popular recall of the president, as well as four different types of referendums, turned the legislature into a unicameral body, and created a popular right to resistance against those seeking to abolish the

[4] Potential for unorthodox deployment of routinized institutions is not, as in the Ackermanian vision, a way to create progress, but rather a way to *contain* (in 2 senses) the inherent affinity of presidentialism and populism and thus stave off collapse.

constitutional order.[5] Yet Chávez continually centralized presidential power, never let go of the reins of power willingly, and, having cemented his own personal imprint on Venezuela's institutions, made following up on his legacy an impossible task. On his first official visit to Cuba in 1999, just after winning his first election, Fidel Castro reportedly instructed Chávez's handlers: "Look after this man for me, because without this man this revolution will be over immediately."[6]

Many believe that populism arises precisely *because* old orders are tarnished and discredited, when a good "house cleaning" is in order.[7] This was the case with Venezuela's sclerotic twentieth-century democracy. The political scientist Howard Wiarda once described Latin American democracy as "top-down, organic, elitist, centralized, statist, non-participatory, patrimonialist [and] executive-centered,"[8] and Venezuela pre-Chávez certainly lived up to the assessment. The Pact of Punto Fijo, signed in 1954 between Venezuela's main parties, the COPEI (Christian Democrats), AD (Democratic Action) and the URD (Democratic Republic Union), was a gentleman's agreement whereby the parties agreed to put a stop to the violence and coup-mongering that had plagued the country by sharing power and split the perquisites of governance. Many view Punto Fijo as having

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[5] Article 333 specifies a popular "obligation to reestablish the validity of the constitution" and Article 350 provides that "people of Venezuela shall … disavow any regime, legislation, or authority that contradicts the values, principles, and democratic guarantees or impairment of human rights." There are notable similarities to the "right to resistance" found in Article 20(4) of the German Basic Law: "All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available."

[6] Jon L. Anderson, "The Revolutionary: The President of Venezuela has a vision, and Washington has a headache," *The New Yorker* (September 2001).

[7] Paul Taggart, "Populism and the Pathology of Representative Politics," in Yves Mény and Yves Surel, eds., *Democracies and the Populist Challenge* (Chippenham, UK: Antony Rowe Ltd., 2002), 69-80; on populism arising as a protest against the old order, see Margaret Canovan, *Populism* (New York: Harcourt, 1981); Ghita Ionescu and Ernest Gellner, *Populism: Its Meaning and Characteristics* (London: Weidenfield and Nicolson, 1969).

[8] Howard Wiarda, *The Soul of Latin America* (New Haven: Yale University Press, 2001), 334.

stabilized Venezuelan democracy and saved it from the instability, "golpismo" (coup-mongering) and authoritarianism that plagued its neighbors in the '70s and '80s.[9] But the pact also produced a shallow farce of a democracy, a "partyarchy"[10] too corrupt, inflexible, exclusive, and unresponsive to the common man to take adequate action when the boom years of oil wealth ended.[11] During the late '60s and '70s, Venezuela had enjoyed decades of prosperity financed by a stream of oil wealth and massive state spending, but by the early '80s, a decade of declining oil prices with few corresponding cuts had left the state with a public debt of $24 billion and on the verge of crisis.[12] Although the IMF urged Venezuela to implement structural reforms, politicians calculated that passing the buck would be a safer solution, electorally speaking, than austerity. The result was that certain sectors like sanitation, water provision, telecommunications, and policing would be "bled dry" by the shortages. Public employees could no longer afford a car on their diminished salaries. Soldiers were faced with an inadequate supply of boots and uniforms.[13]

In early 1989, President Carlos Andrés Pérez (who, during a previous presidential term in 1974-79, had practically patented the strategy of massive petrodollar spending)

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[9] David Levine, *Conflict and Change in Venezuela* (Princeton: Princeton University Press, 1973) (crediting Venezuela's strong party system for preserving democracy in the nation, for which decentralized power centers and elites' propensity toward moderation are in part responsible); Carlos Sabino, "El sistema político venezolano: estabilidad, crisis e incertidumbre", *Contribuciones,* No. 1 (Centro Interdisciplinario de Estudios Sobre el Desarrollo Latinoamericano, 1995): 1-14, 73; Rickard Lalander, "The Impeachment of Carlos Andrés Pérez and the Collapse of Venezuelan Partyarchy," in Mariana Llanos and Leiv Marsteintredet, *Presidential Breakdowns in Latin America: Causes and Outcomes of Executive Instability in Developing Democracies* (London: Palgrave Macmillan, 2010), 129-145.

[10] Michael Coppedge, *Strong Parties and Lame Ducks: Presidential Partyarchy and Factionalism in Venezuela* (Stanford: Stanford University Press, 1994); Jennifer McCoy, "Chavez and the End of 'Partyarchy' in Venezuela," *Journal of Democracy,* Vol. 10, No. 3 (July 1999): 64-77.

[11] Carlos Romero, *La Miseria del Populismo: Mitos y Realidades de la Democracia en Venezuela* (Caracas: Centauro, 1987).

[12] Ryan Brading, *Populism in Venezuela* (New York: Routledge, 2012), 46.

[13] Ibid.

took a series of drastic austerity measures which fell heavily upon the urban poor of Caracas. Domestic oil prices shot up by 100 percent, followed by steep hikes to public transportation fares. A wave of protests, vandalism and looting was unleashed, particularly in urban slums, to which Pérez responded with a swift military crackdown in which hundreds or more Venezuelans were killed.[14] Teodoro Petkoff, eventual leader of Chávez's electoral vehicle, the *Movimiento al Socialismo,* describes the revolts as "the roar of a wounded animal."

Known as the "Caracazo," the crackdown provoked widespread hatred towards the government, not least among soldiers sent to "pacify" the population. On Feburary 4, 1992, an organization of disgruntled young soldiers, the Revolutionary Bolivarian Movement (MBR-200), at the head of which stood the young lieutenant Hugo Chávez Frías, launched a coup attempt against President Pérez, sending five battalions of tanks to locations that included the Presidential Palace in Miraflores, Caracas. The plan had been leaked, however, and the coup plotters were swiftly neutralized and arrested by government troops. Chávez was jailed, but he was given the opportunity to call off his forces on national television—an ill-fated decision, some say—, famously saying that although the coup-plotters had failed to meet their objectives "for now," his supporters were encouraged to "keep fighting." Chávez emerged from the ordeal a hero for many Venezuelans.

By the early '90s, the Caracazo, coup attempts, continued economic woes, and the impeachment of Carlos Andrés Pérez on corruption charges in May 1993 would combine to deal the old parties a mortal blow. Although there would be no new outsiders in the 1993 presidential elections—it was the octogenarian Rafael Caldera (another presidential

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[14] Official statistics record 300 deaths in the Caracazo, but many believe that the real death toll reached 3,000.

holdover from Venezuela's oil-rich heydays) who emerged the victor in the presidential election—by that time the façade of "business as usual" had worn thin: Caldera had shocked his old party, COPEI, by breaking off to lead a coalition of 17 leftist parties, the "National Convergence," to victory, and the old guard parties would never contest a presidential election again.

After being pardoned two years later, he slowly transformed the MBR-200 from a fledging military organization into a massive nationwide grassroots operation under the banner of "Simón Bolívar the Liberator," setting out once more to conquer the nation's highest office, this time through the ballot.[15] The MBR-200 was renamed the MVR (*Movimiento Quinta República*) after the Electoral Council refused to register it in 1997—no official political party could use the name "Bolívar"—and began to campaign on a platform demanding constitutional reform, an end to corruption and the Punto Fijo system, improvements in social services, and a direct democratic mode of organization, which they referred to as "Bolivarian Government."[16] Within the movement, so-called "Bolivarian committees" were formed, in which members expressed ideas for a new constitutional assembly. A year and a half before the election, Chávez was polling only 7 percent of the vote nationwide, far behind the front-runner, Irene Sáez, Venezuela's 1981 Miss Universe.[17] In the lead-up to the December 1998 elections, however, the MVR was joined by two parties delivering the labor and socialist vote, respectively. Chávez would win the presidency with a whopping 56.20 percent of the vote. The collapse of the party system

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[15] Initially, Chávez's MBR was opposed to political contestation through elections. It was only after a political confidant of Chávez, Luis Miquilena, convinced the former that people would vote for him that the movement agreed to adapt its strategy.

[16] Jennifer McCoy (2006), "From Representative to Participatory Democracy?," in Jennifer McCoy and David Myers, eds, *The Unraveling of Representative Democracy in Venezuela* (Baltimore: Johns Hopkins University Press, 2006), 263-296, 276.

[17] Brading, *Populism,* 55.

presaged a long period in which Venezuelan parties would be in perpetual flux, from which the nation has still not emerged as of this writing.

Chávez had pledged to change things in his country forever, "from top to bottom,[18]" and a bare two months after he took the oath of office in February 1999, voters approved the convocation of a new constitutional assembly by referendum by a margin of 88%, if official statistics are to be believed. In July, elections were held for the delegates, and while reportedly over 900 of 1,1711 candidates were Chávez opponents, candidates of diverse pro-Chavista parties forming the "Polo Patriótico" (Patriotic Axis) managed to take 95% of the total seats. After just 60 days, a new constitution was produced. It was submitted to another popular referendum in December 1999 and approved by 71.78% of the popular vote, as reported and audited by the National Electoral Council, a new national auditing body staffed, it must be said, with Chávez supporters.

From start to finish, the constitution-writing process was emblematic of the regime as a whole: Chávez's theatrical call to arms, the giddy pace of reform that irked more sedate democrats, the language of almost touching optimism and hyperbole.[19] Backed by the undeniable visual evidence of massive waves of Venezuelans turning out to vote, it was hard to doubt the new Constitution's democratic bona fides, yet the whole process was rife with irregularities,[20] and, having been almost totally shut out of the drafting process, it

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[18] Jon L. Anderson, "Writing About Chávez," *The New Yorker* (April 2013).

[19] For example, the Preamble's stated aim of "reshaping the Republic to establish a democratic, participatory and self-reliant, multiethnic and multicultural society in a just, federal and decentralized State that embodies the values of freedom, independence, peace, solidarity, the common good, the nation's territorial integrity, comity and the rule of law for this and future generations; guarantees the right to life, work, learning, education, social justice and equality, without discrimination or subordination of any kind."

[20] See note 63, below.

was understandable that the opposition would feel that the new Constitution had been foisted upon them by force.

Scholars divide the Chávez Presidency into three or four separate phases, roughly speaking: the early years (1998-2000) during which Chávez's policies were much more moderate than his rhetoric suggested; the sharpening of his anti-neoliberal and anti-opposition rhetoric and policies (2001-2004) after a coup attempt in 2002 and the attempted shutdown of the oil industry; a period of new economic experimentation (2004-2007) involving the launch of the "missions" to provide social, economic, and cultural resources to rural communities; and a final, more radical stage (2007-13) involving calls for a turn to true socialism, increased expropriation and crackdowns on industry, and persecution of the opposition.[21]

It is difficult to say whether Chávez's increasing radicalism over the course of his administration owed more to ideology or personal vindictiveness, but certainly, the events of 2001-04, in which Chávez weathered a lock-out strike, followed by an attempted coup d'état in April 2002, a two-month strike at the national oil company organized by his opponents in the entrepreneurial sector, and a recall election in 2004, represented a turning point. Speaking to supporters after the second strike, Chávez gloated, "We have dealt a might blow to the conspirators, to those who tried to stop the heart of the Venezuelan

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[21] Steve Ellner, *El fenómeno Chávez: sus orígenes y su impacto* (Caracas: Fondo Editorial Tropykos/Fundación Centro Nacional de Historia, 2011). Ryan Brading describes 3 periods of Chavismo, a first between 2001-03, when Chávez passed the 49 "New Enabling Revolutionary Laws," a second between 2003-07, in which the social, economic, educational, and cultural *misiones* were created, and a third starting in 2007 with the construction of "socialism" in Venezuela. Brading, *Populism,* 87-88. On the radicalization of Chávez regime after 2002, see, Rory Carroll, *Comandante* (New York: Penguin, 2013); Thomas Ponniah and Jonathan Eastwood, *The Revolution in Venezuela* (Cambridge: David Rockefeller Center for Latin America Democracy, 2011). Hawkins and Brading agree that as the contest between Chávez and the liberal democrats unfolded, the president shifted to more overtly Marxist appeals. Kirk A. Hawkins, *Venezuela's Chavismo and Populism in Comparative Perspective* (New York: Cambridge University Press, 2014); Brading, *Populism in Venezuela.*

economy. It was truly a deadly conspiracy, they tried to destroy the Venezuelan oil industry, the heart of the Venezuelan economy, the fundamental source of the nation's income." After the coup, the opposition fractured while Chávez strengthened his hand, purging the leadership of the Armed Forces, increasing his control over the military generally, over state media organs and over the police, and beginning to construct new organizational forms such as the Bolivarian Circles, the Urban Lands Committees, and so on. (I return to these forms below.)

After winning reelection on December 5, 2006 with an unprecedented 63% of the vote—in an election with an apparent 75% turnout—Chávez promised a more radical turn, pledging to nominate a new presidential commission to evaluate constitutional reforms that might push Venezuela forward on "the path to socialism."[22] On December 15, he announced that his support coalition would unite into a single party, the United Socialist Party of Venezuela (PSUV), declaring that the old parties must "forget their own structures, party colors and slogans, because they are not the most important thing for the fatherland."[23] At the same time, Chávez warned that parties on the left who did not join the party would have to leave the government.

In 2007, Chávez narrowly lost a referendum on a proposal to eliminate term limits for elected officials, extend public control over international reserves, eliminate the authority of the Central Bank and increase the state's expropriation powers.[24] A visibly disappointed Chávez gave a press conference the next day praising the defeat as proof of Venezuela's democratic credentials. "Now Venezuelans should have trust in their institutions,"

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[22] "Chávez lanza una nueva reforma constitucional: Afirman que incluirá la cláusula de reelección indefinida," *La Nación* (Argentina) (December 6, 2006).

[23] Barry Cannon, *Hugo Chávez and the Bolivarian Revolution: Populism and Democracy* (Manchester: Manchester University Press, 2009), 59.

[24] "Chávez: reelección indefinida" *BBC Mundo* (August 16, 2007).

he said.[25] It had been a slim victory for the opposition, however, and in February 2009, Chávez held a popular vote on the indefinite reelection and won with 54.3% of the vote.[26] As before, the president cast the victory in terms of long-term ideological goals. "With this victory," said the exultant Chávez, "we begin the third cycle of the Bolivarian revolution."

But Chávez's health would not allow him to see it through. On October 7th, 2012, Chávez was reelected for a third six-year term by a margin of 54 to 45% over the challenger Henrique Capriles, amidst myriad charges by the opposition that he had having unfairly used state funds to bolster his support among the lower class. It was revealed soon after that Chávez, who had been diagnosed with cancer in 2011, would not be able to appear for the January inauguration ceremony as he was undergoing medical treatment at the time in Cuba. The legislature proposed to postpone the inauguration until the Supreme Court decided that, as Chávez was the sitting president, the formality could be bypassed. By this time, Chávez was no longer appearing in public, with acting executive officials making policy on the basis of orders of government allegedly signed by Chávez himself, which opposition members suspected of forgery. By March 5, 2013, Chávez was dead.

As mandated by the constitution, a successor was to be elected within thirty days of Chávez's death. On April 14th, 2013, Vice President Nicolás Maduro defeated Capriles by a margin of approximately 235,000 votes (1.5% of the vote). Notwithstanding pervasive complaints of fraud, the Supreme Tribunal refused a recount.[27] Maduro, who had campaigned on the slogan "We are all Chávez," began his tenure with a palpable legitimacy deficit, and there is no sign that things are getting better. Chávez's outlays on

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[25] Simon Romero, "Venezuela Vote Sets Roadblocks on Chávez's Path," *The New York Times* (December 4, 2007).

[26] Carroll, *Comandante,* 2; Cannon, *Hugo Chávez*, 65.

[27] Marie Metz, "Venezuela – Voting Tricks and *Trampas,*" *Spanglish Observer* (April 2013).

“petrodiplomacy” and domestic programs left the country running continual shortages, and with the price of oil, which has accounted for about 95 percent of Venezuela’s export economy over the last decade, at its lowest since 2002,[28] Venezuela finds itself beset by cash shortages, hyperinflation (180%), scarcities in basic commodities like shampoo, aspirin and toilet paper, and spiking crime. Under Maduro, the regime grew increasingly repressive, isolated, and dependent upon emergency measures, as the economy teeters on the brink of collapse. Perhaps it is too soon to say for sure, but it looks increasingly unlikely that the Bolivarian Revolution will long outlast its prophet.

B. Populist Democracy and the Bolivarian Shadow State

Populist movements, as if by rule, appear at times when the existing order comes to seem sclerotic, unresponsive, or corrupted. “Latin America’s elite,” wrote *Time* magazine in a finger-wagging eulogy for Carlos Andrés Pérez, “has never understood that its kleptocratic abuses, embodied by leaders like Pérez, almost always give rise, via ballots or bullets, to radical populists like Venezuela’s current President, Hugo Chávez (who tried bullets first, then ballots).”[29] Invariably, populists claim that wholesale institutional change—“revolution” or “liberation”—is required in order to restore the will of the people.[30] This was the case with Chávez’s assault on the party system, the constitution, and the old state apparatus. But while Chávez was able to profit from the collapse of parties, and to entirely rewrite the constitution in a process dominated by allies, the regime never

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[28] As of this writing, in February 2016, the price of crude oil was $32.78 per barrel, well below its peak of $144.78 in June 2008. Source: U.S. Energy Information Administration, Bureau of Labor Statistics.

[29] Tim Padgett, “Why Chávez Happened: Carlos Andrés Pérez’s Legacy,” *Time* (Dec. 29, 2010).

[30] Hawkins, *Venezuela’s Chavismo and Populism in Comparative Perspective,* 5.

fully gained command of institutions at the state, local, and federal level. Accordingly, the regime set upon the unique strategy of *circumventing* and *replacing* them, a strategy which would ultimately have disastrous consequences.

Under Chávez, Venezuela would become a worldwide leader in terms of its extensive use of citizen initiatives, popular consultations, and referendums. Local group mobilization had first taken form in Venezuela in the late 1980s as a protest movement, with local neighborhood assemblies banding together under the slogan, "We don't want to be a government, we want to govern."[31] For Chavistas, tapping into this organic bottom-up potential for mobilization was a point of pride, and defenders still insist that Bolivarian democracy be considered as a viable alternative to representative democracy.[32] Martha Harnecker, a Chilean sociologist and advisor to Chávez, describes the movement as "a transitional process attempting to transform [Venezuela's] inherited bureaucratic governance structure into a *participatory socialist democracy*."[33] The Constitution of 1999 defines the Bolivarian Republic as "democratic, participatory, elective, decentralized, alternative [e.g., parties in power], responsible and pluralist," establishes the municipality as "the primary political unit" of the nation, and emphasizes that decentralization of state powers "must add depth to democracy, [and] bring power closer to the people."[34] Article 70 specifies the

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[31] Dario Azzellini, "The Communal State: Communal Councils, Communes, and Workplace Democracy." *NACLA*, 46(2), 25-30 (2013).

[32] In critiquing the Chávez parastate, we do not deny that direct democracy constitutes a meaningful alternative to traditional representative democracy, or that new forms of institutionalized direct democracy have emerged in Latin America, with meaningful consequences for public participation and governing outcomes. See, e.g., Maxwell A. Cameron, Eric Hershberg, & Kenneth E. Sharpe, "Voice and Consequence: Direct Participation and Democracy in Latin America," in Maxwell A. Cameron, Eric Hershberg, & Kenneth E. Sharpe, eds., *New Institutions for Participatory Democracy in Latin America: Voice and Consequence* (New York: Palgrave Macmillan, 2012), 1-20.

[33] Marta Harnecker, "Venezuela: A Sui Generis Revolution," *Venezuela Analysis* (January 24, 2003), emphasis added.

[34] Articles 6 and 158.

forms that citizen participation in governing can take: voting, referendums, public consultations, recall elections, citizen initiatives, open forums and meetings "the decisions of which shall be binding," citizen service organs, self-management, co-management, and "cooperatives in all forms," as well as other forms of association guided by the values of mutual cooperation and solidarity.

It is fair to say that the reality of Bolivarian democracy never lived up to the ideal, except in terms of the sheer proliferation of diverse participatory bodies. Over the nearly two decades that spanned his life as a politician, Chávez whipped up into existence a plethora of mobilized groups of the rank-and-file. He cut his teeth in the late '80s and early '90s with the soldier-led Movimiento Bolivariano Revolucionario 200. The triumph of his catchall electoral vehicle, the MVR, was grounded at bottom in the effectiveness of local democratic circles at mobilizing and spurring turnout in the electorate.[35] Then there were the "Bolivarian Circles" which evolved out of the campaign into citizen groups asked to, as Chávez put it, "make the Constitution known [and take] on concrete tasks: solve some problem in the neighborhood, create a cooperative, get a loan from the bank, etc."[36] The Circles languished after 2002, but they reappeared en masse in 2003 to mobilize Chávez supporters in a recall election led by the opposition, which he won handily, 58% to 42%. There were the local planning councils (CLPPs), defined by a 2002 law as the heart of Venezuela's "protagonistic" democracy, and tasked with matters of local administration, budgeting, and governance.[37] There were the *misiones* of *Barrio Adentro*, Robinson, Sucre, Mercal, Ribas, and more which provided the poor with cut-rate commodities and

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[35] Marta Harnecker, "Venezuela: A Sui Generis Revolution."

[36] Ibid.

[37] Art. 2, Law of the Local Councils of Public Planning, No. 37463 (June 12, 2002), Official Gazette of the Bolivarian Republic of Venezuela.

services like health care and schooling; citizen assemblies in which policies were debated; the Health and Urban Land Commmittees, to help devise policy at the municipal level; and the communal councils, through which ordinary citizens were to "share" governing functions with municipal governments that were in the main less friendly to Chávez.

But as the dizzying proliferation itself suggests, these groups had mixed results. The year 2001 saw the birth of two new popular forms. One was the rural communes, formed back in November 2001, when Chávez, armed by the Assembly with emergency legislative powers, passed a package of 49 laws which, among other things, redistributed "idle" lands on large estates to thousands of poor sharecroppers. (According to sociologist Gregory Wilpert, Chavista land reform has directly benefited about 180,000 families.[38]) Many communes have apparently succeeded at ensuring food self-sufficiency for small farmers and survive today. One of the largest ones, El Maizal, which occupies land expropriated from a British factory, now houses 22 communal councils and about 3,500 families. It imports gas for farming vehicles and exports agricultural products including corn, sunflower oil, milk, and coffee, using the profits to provide for communal schools, infrastructure repair, and health care.[39] Politically speaking, the communes have been divisive: many trace the seeds of Venezuela's present hyper-polarization back to early expropriations, after which the first complaints could be heard from an alarmed middle class of the growing "Cubanization" of the republic. But to the thousands who remember being

[38] Gregory Wilpert, "Chávez's Legacy of Land Reform for Venezuela," *Review of Agrarian Studies,* Vol. 3, No. 2 (2014).

[39] *Hoy Venezuela,* "En la Comuna El Maizal se produce un rico maíz para preparar arepa," (September 6, 2015).

"treated like slaves" as former sharecroppers, Chávez remains a hero for providing them with land, houses, roads, doctors, and schools.[40]

The other new form was the CLPPs, or local public planning councils, established by Article 182 of the Constitution. The CLPPs were supposed to allow elected community members to work side-by-side with elected officials on local budgetary and administrative matters.[41] Poorly conceived, the CLPPs failed to get off the ground, however. There were several problems. One was that elected officials managed to condition council membership on party affiliation, shutting out opposing voices and turning the local councils into rubber stamps for the municipal council. Apportionment was flawed, with some municipalities including over 1 million people, making genuine representation difficult, and fomenting public apathy.[42] In other cases, the old municipal bodies simply manipulated council elections, or bypassed the local bodies altogether.[43]

For Chávez, economic self-sufficiency and political self-determination were intimately related, just as the socialist economy and the participatory form of democracy were to go hand-in-hand. Speaking in rural Tacagua in 2005, Chávez insisted, "If we want to put an end to poverty, we have to give power to the poor." Land reform was just one part of Chávez's bigger plan for "endogenous development" of a "people's economy" and a popular democracy that could replace the current "bureaucratic state." A new ministerial structure was to promote these priorities, which included the Ministry for the People's

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[40] Grace Livingstone, "Venezuela's farmers: 'Planting for the Revolution'." *BBC News*. (February 25, 2016).

[41] According to Article 178, the municipality was authorized to govern and administrate its own affairs.

[42] Federico Fuentes, "Power to the People: Communal Councils in Venezuela," *Venezuela Analysis* (April 26, 2006).

[43] Sarah Wagner, "Citizen Power and Venezuela's Local Public Planning Councils," *Venezuela Analysis* (November 12, 2004).

Economy, created in 2004, and the Ministry of Social Participation and Protection in 2005. Chávez insisted that the people in their cooperatives, communes, urban land committees or other grassroots organizations, would have to become part of the structure of these new ministries and help to run them: "This is society, the people, taking power over the state. Power for the people. . . . The people's time has come."[44]

By 2006, Chávez moved to deepen the institutionalization of Bolivarian democracy, turning to the "communal state" as the preferred mode of organization. Communal councils had emerged organically, as the government liked to allege, around 2005 in a handful of rural towns working in a spirit of self-help. A 2006 law formalized the arrangement. Communal councils would represent a self-defined political unit of families—the number varied from 20 in rural areas to 200 to 400 families in urban areas—and would be responsible for initiating and overseeing policies towards community development. Councilmembers would be elected by majority vote in citizens' assemblies in which at least 30 percent of the adult population over age 15 was present. The federal government would keep a list of registered community councils and would fund them directly, a fact which would hopefully increase their autonomy as compared to the CLPPs. Councils were required to provide for their own financial oversight bodies, which were to be report directly to the national popular branch to ensure council ethics.

Funding would remain a headache for the councils, however. Managed by communal banks with little oversight, the process became bogged down with waste and corruption. With the councils mushrooming into the tens of thousands, in 2010, the Community Council Law established a national body to process councils' funding requests: each

[44] Iain Bruce, *The Real Venezuela: Making Socialism in the 21st Century* (London: Pluto Press, 2015), 8.

council was now required to provide a "diagnosis" of community needs, draw up a community development plan and a budget, including a method for collective oversight to assure the fulfillment of the plan and ensure ethical functioning.[45] Communes would also have their own banks and could even receive foreign currency through the Venezuelan Corporation for Foreign Trade.[46] The law also gave citizens new weapons to check councilmembers who fell out of line, including revoking their mandates.[47] According to one source, through 2013, something like 44,000 councils had been registered throughout the country, with tens of billions of dollars distributed to support their efforts.[48]

Perhaps the greatest controversy surrounding the councils was how they would relate to other institutions in an already overcrowded landscape. Government officials hastened to assure Chavistas that the councils would not replace existing citizens' groups: "[W]e already have land committees, health committees, Bolivarian circles, UBEs [units of electoral battle], even party militants inside the communities, but each of us carried out our work on our own, even in some cases [duplicating] the same work," explained one leader in Petare, a huge slum of Caracas. Councils would coordinate and streamline such work as the "maximum instance of planning, of organization of the community."[49] Yet

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[45] Organic Law of Communal Councils, National Assembly of the Bolivarian Republic of Venezuela (November 26, 2010), Article 45.

[46] "Venezuelan government strengthens communal economic model," *El Universal* (October 4, 2014).

[47] In 2010, a number of laws towards popular democracy were passed, including the Law on People's Participation and Power, the Law on Citizen-Initiated Audits of State Institutions, the Social Ownership Law, the Public Planning Law, the reform of the People's Economy Law and the Law for Communes.

[48] Dario Azzellini, "Overcoming marginalization through self-administration: A case study of the Venezuelan Consejos Comunales," Presented at RC21 Conference "Resourceful Cities," ISA Conference, Humboldt-University Berlin (August 2013).

[49] Iruma Sánchez, head of the Casa Bolivariana in the state of Petare, quoted in Federico Fuentes, "Power to the People."(2006).

insofar as the 2006 law also mandated the communal council to "promote the birth of new organizations" where necessary "in defense of [councils'] collective interests and the integral development of the communities," it seemed councils were also required to help contribute to the confusion.

Even worse was councils' relationship to the Venezuelan state. State and local institutions like municipal councils, police departments, and especially governorships could be staffed with anti-Chavistas, and conflicts would arise when such institutions were perceived to be slow in responding to demands made by the councils, or even attempting to interfere in their affairs. At a more fundamental level, though, the councils' very mission was to transcend the organs they were nominally supposed to cooperate with. Yet curiously Chavistas routinely denied that they a "parallel structure" of government had been created, although Chávez's vision, as his rhetoric made clear, was that the councils would draw power away from the state and into the hands of the people.

Or would they? Would national institutions give up power as easily as municipal ones had been asked to do? Where in the Chávez state did real political power lie? Chávez and other movement leaders always maintained a strict rhetorical commitment to the ideal of popular power. Chávez referred to the people as "El Soberano"—*the sovereign*—and he described himself as its "subject." In 2012, he explained:

> Power is the pueblo, the majority of the Venezuelan pueblo has given me part of their power, because the pueblo is the owner of political power . . . . That is democracy. And I am here to exercise that power, in the name of the pueblo, but obeying the pueblo. It is what Enrique Dussel calls "gobernar obedeciendo" [to govern obeying]. This is very important.[50]

Theorists of the movement proudly vaunted the movement's distinctiveness and difference from traditional Leninist or social movement approaches in that social transformation

[50] Quoted in Frederick B. Mills, "Chavista Theory of Transition Towards the Communal State," *Venezuela Analysis* (August 8, 2015).

took place both "from above" and "from below."[51] Chavismo's bona fides as a grassroots alternative to representative democracy were a source of pride for the left.[52] And no doubt, Chávez did hold regular elections and increase political participation for many Venezuelans.

But, as the opposition always pointed out, these bodies never threatened or posed a challenge to Chávez's authority.[53] With local organizations dominated by Chávez supporters—to join the commune, say, was in some measure to buy in to the Bolivarian movement itself—, there was some truth to claims that these, as one observer put it, were little more than "tribalistic arms" of the Chávez state,[54] the entire regime held together by "a kind of vertical dependence around the cult figure of Chávez" that substituted democracy with "institutionalized charity."[55]

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[51] Dario Azzelini, "Overcoming Marginalization."

[52] A number of studies have focused on the participatory budgeting process of the city of Porto Alegre as a model for participatory experiments elsewhere. Thamy Pogrebinschi, "Participation as Representation: Democratic Policymaking in Brazil", in Maxwell A. Cameron, Eric Hershberg, and Kenneth E. Sharpe, eds., *New Institutions for Participatory Democracy in Latin America* (New York: Routledge, 2012), 53-74; Thamy Pogrebinschi, "The Impact of Participatory Democracy: Evidence from Brazil's National Public Policy Conferences," *Comparative Politics*, Vol. 46, No. 3 (April 2014): 313-332; Paolo Spada, "Political Competition in Deliberative and Participatory Institutions," Ph.D. (Myers, 2008) (Yale University, Department of Political Science, 2012).

[53] Steven Levitsky and James Loxton, "Populism and Competitive Authoritarianism in the Andes," *Democratization,* Vol. 20 (2013): 108-125 (arguing that Venezuela is a competitive authoritarian regime where "formal democratic institutions are viewed as the primary means of gaining power, but in which incumbent abuse skews the playing field to such an extent that the opposition's ability to compete is seriously compromised," 107); Michael Coppedge, "Venezuela: Popular Sovereignty vs. Liberal Democracy," in Jorge I. Dominguez and Miguel Shifter, eds., *Constructing Democratic Governance in Latin America* (2nd ed.) (Baltimore: Johns Hopkins University Press, 2003), 165-192 (arguing that Chávez eliminated "horizontal accountability" and interbranch checks); David J. Myers, "Venezuela: Delegative Democracy or Electoral Autocracy," in Jorge I. Dominguez and Miguel Shifter, eds., *Constructing Democratic Governance in Latin America* (3rd ed.) (Baltimore: Johns Hopkins University Press, 2008), 285-322; Human Rights Watch, *A Decade Under Chávez* (2008); "Letter to Board of Directors of Human Rights Watch," (December 16, 2008) (full text available at http://venezuelanalysis.com/analysis/4051)

[54] Hawkins, *Venezuelan's Chavismo,* 152.

[55] Nikolas Kozloff, *Revolution!: South America and the Rise of the New Left* (London: St. Martin's Griffin, 2009), 152; Nikolas Kozloff, "In Conversation: Hugo Chávez and Latin American

To the extent that the ideal of self-sufficiency was part of the Bolivarian vision all along,[56] and to the extent that many communes have gotten off the ground, "institutionalized charity" is unfair. On the other hand, under Chavismo, the productive sector collapsed, and poor urban areas did grow dependent on Chávez's largesse. Poor economic management, in particular, intervention in the petrosector and the subsequent fall in production, exports, and long-term investment have choked the Venezuelan economy. Increasingly pervasive economic distortions and regulations have done nothing to counter this trend, as the worsening shortages in food, commodities, and basic services following the crash in oil prices attest. The recent fall in oil prices has worsened an already dire scenario. In this sense, Bolivarian democracy has done little to improve on the mistakes of the old Venezuelan "petrostate."

As for "vertical dependence," with the exception of the 2007 referendum that Chávez lost, the popular power never trenched upon presidential power, nor kept Chávez from pursuing projects of his own design.[57] The Law of the Community Councils, for example, was dictated and approved with no input from the grassroots.[58] The councils, to be sure, did develop their own constituency interests and demonstrated "a marked tendency toward independence,"[59] but they had no way as such to censure the president; the recall

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Populism, by Nikolas Kozloff and Steve Stein," *Brooklyn Rail* (December 8, 2006). Rory Carroll echoes this view, Carroll, *Comandante*.

[56] In 1996, Chávez published a campaign manifesto called "The Alternative Bolivarian Agenda," which described in detail the need to transform the productive apparatus of the state, including by local communes.

[57] Some of the prongs of the 2007 referendum were promulgated in 2010 by statute. Moreover, the 2009 referendum, which he won, permitted the president reelection.

[58] Rafael Uzcategui, *Venezuela: Revolution as Spectacle* (Tucson, AZ: See Sharp Press, 2011), 179.

[59] Julia Buxton, "Foreword: Venezuela's Bolivarian Democracy," in David Smilde and Daniel Hellinger, eds., *Venezuela's Bolivarian Democracy* (Durham, NC: Duke University Press, 2011), j-xxii, xviii.

and referendum had been written for a mass democracy of voters, not a "communal state." The chain of influence seemed to go in one direction, only.

The "horizontal" separation of powers presented Chávez with little resistance, either. In 1998 and 1999, he parlayed his great support among the public into three consequential electoral victories in the presidential election, the referendum on a constitutional convention, and elections for delegates to the convention, three victories which enabled him significant leverage over the Presidency, the legislature, and the courts. Between August 9, when the Assembly was convoked and December 15, 1999, when the Constitution was approved by referendum, the Constituent Assembly, acting through a series of "transitory decrees" in the exercise of what it considered its plenary "constituent powers," purged the old "constituted powers," the Supreme Court and the legislature, limiting their powers, reorganizing their structure, firing individual members, right to veto their decisions, and fire individual members. The Assembly chose a new national ombudsman and chief prosecutor, placed mayors and municipals under supervision, and set up commissions to remove judges and labor union leadership throughout the country. Although the courts objected to this high-handed exercise of power, the Assembly justified its acts on the theory that it was sovereign since the people, as embodied in the March referendum and elections to the constituent assembly, had risen up against and overthrown the old regime. Eventually the courts were forced to back down.[60] After the smoke cleared, it became apparent that Chávez had managed to establish near-total control over national

[60] On the debatable legality of the referendum, the constituent process, and the normative acts of the Constituent Assembly, see Joshua Braver, "Hannah Arendt in Venezuela: The Supreme Court Battles Hugo Chávez over the Creation of the 1999 Constitution," paper prepared for Weimar Jurisprudence Conference, Humboldt University-Berlin (Oct. 15-17, 2015), 14-19; David Landau, "Constitution-Making Gone Wrong," *Alabama Law Review,* Vol. 64, No. 5 (2012): 923-980; and Joel I. Colón-Ríos, "Carl Schmitt and Constituent Power in Latin American Courts: The Cases of Venezuela and Colombia," *Constellations,* Vol. 18, No. 3 (2011): 365-388.

institutions. Not once during his time in office would he lose a majority in the National Assembly.[61]

But where the constraints of federalism, old structures and personnel, or civil society loomed, cutting through the thicket proved too much of an onus. The President's own contempt for parties and bureaucracies was well known,[62] and hardly unjustified in the Venezuelan political context. Since democratization in 1958, parties had been less concerned with using "the state against each other than [with using] each other to gain access to the state."[63] Routinized, rigid and inclusive, Venezuelan parties exercised a "pathological kind of political control"[64] over the political system that dampened participation, voice, vision, and movement formation—particularly on the left. Meanwhile, all possibility of real political contestation was extinguished by the "utilitarian, non-normative political culture" that oil had helped to create in Venezuela.[65] The bureaucracy itself became Venezuela's own golden goose, the physical locus of greed and corruption, as it doled out access and wealth in Venezuela's rentier economy.[66]

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[61] Certainly gerrymandering didn't hurt Chávez in this venture. The September 2010 elections for the National Assembly gave the PSUV almost 60 percent of the seats even though the party received only 1 percent more of the popular vote than candidates of the opposition. Eugenio G. Martínez, " 'Gerrymandering': 10 datos sobre cómo pueden manipularse circuitos electorales," *Prodavinci* (March 3, 2015).

[62] Charles de Gaulle shared this contempt for parties. Not that this is surprising, for this is a common trope of populism.

[63] Fernando Coronil, *The Magical State* (Chicago: Chicago University Press, 1988), 70.

[64] Michael Coppedge, *Strong Parties and Lame Ducks,* 2.

[65] Aníbal Romero, "Rearranging the Deck Chairs on the Titanic: The Agony of Democracy in Venezuela," paper presented at the meeting of the Latin American Studies Association in Washington, D.C (September 28-30, 1995), 2; Juan Carlos Rey, *El futuro de la democracia en Venezuela* (Caracas: Instituto de Estudios Avanzados, 1989); Steve Ellner, "A Tolerance Worn Thin: Corruption in the Age of Austerity," *NACLA Report on the Americas*, Vol. 27, No. 3 (1993): 13-16, 14.

[66] Coronil, *The Magic State*; J.C. Rey, *El futuro de la democracia en Venezuela*; Romero, *La Miseria del Populismo*; Terry Karl, *The Paradox of Plenty: Oil Booms and Petro-States* (Berkeley: University of California Press, 1997); Thad Dunning, *Crude Democracy* (New York: Cambridge University Press, 2008).

Although the collapse of the party system left Chávez with a clean slate on which to build his Movimiento Quinta Republica and in 2006 his broad socialist party, the PSUV, even supporters recognized that the bureaucracy presented an immovable obstacle. Regime advisor Marta Harnecker admitted in 2003 that "little has been done with the bureaucratic institutions inherited by the government." Chavistas had been "unable to eradicate the procedures and the vices of public officers, the majority of whom were incorporated in exchange for favors by the AD and COPEI parties, and there are still no laws to eliminate corrupt, incompetent and sabotaging officers."[67]

Instead of retooling the bureaucracy, the Chávez regime settled on what seemed the next-best solution, to ignore it. In 1999, Chávez had inherited a resource-starved public sector, most of whose employees had been appointed by AD and COPEI governments. Few supported the president. "Thus when the possibility to allocate resources increased, the president ignored the traditional bureaucracies and instead created new institutions staffed by individuals loyal to him."[68] The sixteen Misiones Bolivarianas that had been set up by 2006 to provide public schooling, health care, subsidized food, housing, and redistributed land did double duty for Chávez by cutting the "oligarchic bureaucracy" out of the equation. For some time, "[t]he misiones thrived and traditional bureaucracy atrophied."[69]

State and local bodies in the federal system presented the same problems of control, elected as they were by their own constituencies as the Constitution required, and they received similar treatment. Chavistas tried to target these seats through electoral

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[67] Harnecker, "A Sui Generis Revolution," 2003.

[68] David J. Myers, "Liberal Democracy, Populism, and Beyond: Elite Circulation in Bolivarian Venezuela," *Latin American Research Review,* Vol. 49, No. 3 (2014), 231-245, 236.

[69] Ibid.

mobilization, mostly to great success,[70] but this was not always enough. On one occasion in 2009, Chávez was able to eliminate the Caracas mayor's office after an opposition candidate won the seat, replacing it with a federal overseer.[71] But for the most part, as with the public sector, the idea was simply to deny opposition mayors and governors funding and to divert their work to regime sympathizers.[72] Here, too, the strategy of institutional duplication was crucial. Urban planning councils, the CLPPs, sketched out in the Constitution of 1999 and established by law in 2002, were intended to take over the functions of official municipal governments. When it was realized early on that these were being coopted by those institutions, the regime replaced them with the stronger communal councils. Gradually local bodies were given more and more autonomy from municipal governments, with new constitutional provisions spelling out procedures for transferring responsibilities from local governments to the communes and community councils.[73]

The consequences of parallel building have been disastrous. First, by circumventing established bureaucracies, Chavismo repudiated expertise that could have helped to manage and sustain massive public projects. Some proposals were poorly conceived from the start. In one, Minister of Planning Jorge Giordani and Chávez sent the Army into the undeveloped center of the country to begin building "self-sustaining agro-industrial

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[70] The PSUV won 77 percent of governorships and 80 percent of mayoralties in the regional elections of November 2008.

[71] Padgett, "Why Chávez Happened."

[72] For instance, the 2013 budget earmarked $2 billion for councils and communes, 69% more than mayors received, and 25% more than governors' offices. Mayela Armas, "Venezuelan communes to get more funds than mayor's offices," *El Universal* (December 19, 2012). In Petare, a crime-ridden slum in Caracas, the opposition mayor has claimed that the federal government withdrew funds from the local police force. Irene Caselli, "Fighting crime in Petare, Venezuela's toughest slum, *BBC News* (July 5, 2013).

[73] Myers, "Liberal Democracy."

communities," or SARAOs, which they believed would grow into small cities.[74] Other projects were driven into the ground by mismanagement, as Chávez loyalists were put at the helm of projects they lacked the expertise to run, with predictable poor outcomes. This was a common criticism of Chávez's handling of PDVSA, Venezuela's enormous state-owned oil company. Other projects stagnated as a result of Chávez's erratic "ad-hoc" style of governance.[75] For example, many of the thirty-four missions established between 2003 and 2009 were announced on the spur of the moment and managed out of the President's office. Barrio Adentro, which had set up thousands of public health stations across the country staffed by Cuban doctors supplied by Chávez's good friends, the Castros, was allowed to stagnate "when [Chávez] turned his attention elsewhere."[76] By 2016, 80% of the hospital "modules" set up under the Barrio Adentro mission lay abandoned, and thousands of Cuban doctors defected.[77] Observed the *New Yorker*, "Nearly everything in Venezuela's Bolivarian revolution, it seems, depends upon Hugo Chávez's personal attention. The result is haphazard, anarchic."[78]

Beyond poor performance, which has certainly been injurious to the legitimacy of the regime, Chávez's parastate has wrought lasting damage to Venezuela's political institutions. The strategy of building up new political bodies around immobile or unsympathetic institutions led Chávez to overextend his mandate, resulted in weak institutionalization,

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[74] Jon L. Anderson, "Slumlord: What has Hugo Chávez wrought in Venezuela?," *The New Yorker* (January 28, 2013).

[75] Myers, "Liberal Democracy," 244.

[76] Ibid,.

[77] Nadeska Noriega Avila, "Sin médicos ni servicios opera sistema de salud de Vargas," *El Universal* (February 19, 2010); Marlene Castellanos, "80% de los módulos de Barrio Adentro del país está cerrado," *Notitarde* (March 1, 2016).

[78] Jon L. Anderson, "The Revolutionary."

and, by establishing rival sites of state authority, has brought about polarization and ultimately a legitimation crisis.

Chávez did not so much press the limits of his popular "warrant for authority" as president, to use Skowronek's phrase, as simply to skirt them. One result was overreach. By minimizing the depth of the conflict at work between the old state and the new local bodies, Chavismo could pretend that an economic and institutional "revolution" could be achieved without a thorough and costly demolition of the old state. For example, Article 184 of the Constitution spoke of "open and flexible mechanisms" to be created by law that would "cause the States and Municipalities to decentralize and transfer to communities and organized neighborhood groups" the services they managed. But what force would "cause" municipal and state governments to give up their power?

Similarly, the failed attempt, in 2007, at passing an enormous package of constitutional amendments is important both for the content of the reforms and for what happened after they were narrowly rejected. The reforms, had they passed, would have brought about the near-apotheosis of Chavista democracy. The President would be eligible for indefinite reelection (mayors and governors would not). He would now control the Central Bank and its funds. The Council of State would be brought directly under the President's control, and whereas it had once included a state Governor, now there would be none. The President would have the power to create, for any number of reasons of "necessity," special regions with their own authorities, directly responsible to the President. It was a near-certainty that these regional authorities would have come into conflict with elected local or regional officials. Replacing municipalities as the "primary political unit" of the nation would be "the city, . . . including areas or geographic extensions known as communes." Missions would be incorporated into the public administration as "special or experimental systems." The Popular or Citizens Branch would now be made up of

"communities," the "spatial nucleus of the Socialist state," and would incorporate social movements and electoral organizations.[79]

It was apparent that the system, thus conceived, had little to do with a "decentralized" republic, as the Constitution provided.[80] Chávez could lawfully create regions autonomous of extant state institutions and provide them with resources from a fund he controlled. Against the mayors and governors would be regional arms of the Citizens' branch; instead of the municipality was the commune. The doubling is too obvious to ignore.

The Chávez parastate might have been merely wasteful had it not been for the fact that it created a rival source of authority. Chávez insisted that the communal councils are "not about, as some are trying to say, a parallel power, rather it is the same power of revolutionary democracy," and maintained that the councils would work hand in hand with regional and local authorities.[81] But fundamental questions remained. If a rural farmer wanted to take out a loan to buy a tractor, would he visit the municipal authorities or the bank of the local commune? How would property disputes be resolved if a commune seized land belonging to old public authorities? Would courts have jurisdiction over the communes and "special regions" at all? There were no legal answers to these questions;

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[79] Luis E. Lander and Margarita López Maya, "Referendo sobre la propuesta de reforma constitucional: ¿Punto de Inflexión en el proceso bolivariano?" *Revista Venezolana de Economía y Ciencias Sociales*, Vol. 14, No. 2, 197-218 (2014).

[80] Allan Brewer-Carías, a longtime critic of the regime, describes the process of "recentralization," how eventually, municipalities were stripped of their status as primary units of the republic, to be replaced by communes, which were designated as a new "vertical level of power" and the "basic nucleus of the Venezuelan socialist state." Inside of the communes, communal cities could be established by popular referendum where authorized by the president. In 2015, a National Presidential Commission for the People's Power was established to take over financing of the councils. It was designed to have branches at the state and municipal level, and to work alongside a special commission in the National Assembly. With its national fund established to fund the councils, it seemed these would be cut loose, once and for all, from obstreperous municipal governments. Unsurprisingly, the transfer of powers to communes has moved slowly, held up by PSUV governors and mayors unsympathetic to the new arrangements. *Dismantling Democracy in Venezuela: The Chávez Authoritarian Experiment* (Cambridge University: New York, 2010), 209.

[81] Fuentes, "Power to the People" (2006).

only political. Because benefits and access in the Chávez parastate were conditioned upon loyalty, the entire system was essentially a party machine. (Because council membership signified support for the movement, it was easy for Chavistas to identify and funnel funds to their supporters. One opposition mayor claimed that councils from neighborhoods not loyal to Chávez's PSUV party were banned by national bodies from registering for official status.[82]) As such, the Chávez parastate could never have legitimacy in a free state of contestation.

Perhaps we cannot have it both ways: either the Chávez state failed to institutionalize, or it drastically deformed the political landscape, but not both! But these two are not contradictory. Chávez has been survived by the Manichean logic that Margaret Canovan and Ernesto Laclau see as so central to populism: Venezuela versus the imperialists; the People versus the oligarchs; the economic forms of 21st century socialism versus neoliberalism's privatizing pretensions. And the Chavista mode of organization survives in rural communities, cooperatives, plenty of sites where the poor seek to preserve the gains they made under Chavismo.

After the 2007 referendum failed to pass, Chávez adopted an attitude of resignation, congratulated his adversaries, and vowed to respect the results. But within the week, he was promising a new "offensive." After winning decisively in the regional elections, Chávez announced plans to seek another constitutional amendment to allow him to stand for reelection. In 2009, voters approved his proposal on the single issue of reelection, the "Yes" vote winning 55% of the votes of the electorate. Says one pollster, the election carried "an explicit threat" in the president's message to the electorate: "without Chávez

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[82] Dalyla Dennery, "'A communal State exercises more control and hinders participation,'" *El Universal* (November 24, 2012).

there will be war."[83] In 2010, a package of "Laws of Popular Power" gave Chávez nearly everything he had sought as regards the "transfer" of public functions to grassroots organizations. One article of the law spoke of a relationship of "shared governance" between organs of the "Popular Power" (e.g. the Chávez state) and the "Public Power" (the old state). Yet, tellingly, another contradicted it, providing that all organs "of Public Power will guide their actions by the principle of governing obediently in relation to the mandates of the citizens and organizations of Popular Power, within the parameters of the Constitution of the Republic and the law."[84] The contest between the old and the new states was resolved, on paper at least, in favor of the latter. Under President Maduro, "decentralization"—or "recentralization," depending on perspective—has continued, with the formation, in May 2014, of a Presidential Council of Popular Government for the Communes, which has held cabinet-level meetings with commune spokespeople nationwide, as well as numerous state-level conventions across the country.[85]

One final, fittingly literal image of institutional duplication and the rhetoric of crisis which Chávez has left behind was the creation of a "communal parliament" in December 2015 by the outgoing legislators of the PSUV, which had lost its majority for the first time since 1999. Invoking the powers granted themselves with the 2010 Law of Communes, PSUV legislators created an "adjunct body" to the country's National Assembly. Assembly leader Diosdado Cabello warned, "Now that we have a parliament at the service of the bourgeoisie, we will hear nothing about attending to the needs of the people."[86] The

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[83] "Chávez for ever?," *The Economist* (February 19, 2009).

[84] *Ley Orgánica del Poder Popular*. *Gaceta Oficial*, No. 6.011, 21 Dic. 2010.

[85] Mills, "Chavista Theory of Transition" (2015).

[86] Article no. 58 of the Law of the Communes provides the legislative basis for different branches of government to create internal "additional Communal systems" with the purpose of advancing "self-government" from within the Venezuelan state.

opposition predictably blasted the move as an illegitimate attempt to create a "parallel" institution to the National Assembly.[87] In the months that followed, the Chavista-controlled Supreme Court has unseated several legislators and voided several decisions; the Assembly, meanwhile, decries the "judicial coup" and is attempting to unseat several justices. In the long shadow cast by Chávez, the conflict between Venezuela's dual regimes is escalating into full-blown institutional crisis.

Conclusion

Like that misheard observation of Chinese Premier Zhou Enlai when asked about the impact of the French Revolution, it may be "too soon to say" what will be the fate of Venezuela's experiment in Bolivarian democracy.[88] For the time being, though, it looks to be an unhappy one. It is difficult to overstate the depth of feeling and loyalty that Chávez inspired in the Venezuelan poor, but his Bolivarian revolution became simply unsustainable in light of economic reality and, as we have discussed here, its failure to become more than a tool of party politics.

All social movements are grounded in, and make conspicuous appeals to the idea of "returning back" to the people. But most populist movements flare out soon after they appear, before they branch out past the local level. In rare cases, they succeed in shaping mass politics to some degree—the nineteenth-century Granger movement was instrumental in the passage of several agricultural bills and in the landmark *Munn v. Illinois,* an early

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[87] Rachael Boothroyd Rojas, "Outgoing National Assembly Creates 'National Communal Parliament,'" *Venezuela Analysis* (December 16, 2015).

[88] According to Chas Freeman, a retired U.S. foreign service officer present at the famous exchange in 1971 between Zhou and U.S. Secretary of State Henry Kissinger, Zhou had been confused, thinking that the question referred to the 1968 students' riots in France just three years earlier. Richard McGregor, "Zhou's cryptic caution lost in translation," *Financial Times – China* (June 10, 2011). Nevertheless, the quote is too good to pass up.

Supreme Court case on railroad regulation. But even where leaders of a populist persuasion *do* succeed in taking power, say in the case of Nixon, debatably a populist president, eventually the buffer of institutions, the routine demands of ordinary, everyday governance absorb and blunt the thrust of these movements.

It is for this reason that Hugo Chávez's Bolivarian movement is so interesting and important, the rare case of a populist movement not only seizing power, but also, refusing to be coopted by the demands of routinization and continuing undaunted in its efforts to translate populist energies into actual institutions. Chávez gave us the indelible image of what a "populist state" might look like. It was a chaotic vision, with its panoply of clustered, squabbling political bodies, its daily ministrations of crude, tawdry spectacle, its unabashed cult of veneration for the President. (No wonder populism can be such an embarrassment for "civilized" societies; recall Benjamin Arditi's astute description of the "drunk dinner guest" of democracy.)

As we saw before, populism's greatest strategic dilemma is that, as an ideology, it rejects the kind of structures that make everyday politics possible. Professional party apparatuses—permanent campaign offices, elite-led caucuses, professional administrators—allow for the sort of regular behavior that signals a healthy democracy—regular alternation in power, stability in the rules of competition, durable parties with clear ideological positions. Populism rejects these very institutions, and the people who occupy them, as illegitimate and undemocratic. "We are a contradiction," insisted Chávez in one of his speeches. "We are representatives, but we have sworn to give life to a democracy that is not representative, but participatory, and even more, protagonistic."[89] This was not a matter strictly

[89] Quoted in Mills, "Chavista Theory of Transition," 2015.

of principle, as we have seen, the side benefits being the marginalization of Chávez's own political adversaries.

Arriving in the wake of Venezuela's discredited, moribund party system, Chávez certainly had a mandate for change—but how much, and of what sort? He used his sweeping electoral victory to swiftly dismantle opposition in the national branches of government, and began to put out feelers toward the construction of local bodies staffed with Bolivarian supporters. But Chávez bumped up against the limits of his popular mandate in the entrenched resistance of municipal and state governments. Eventually, he gradually settled upon a course of triangulation and circumvention. "Either we invent or we err," goes the saying of Simón Rodríguez, Bolívar's mentor, much quoted in Venezuela today.

As we have seen, the parastate was a failure, not merely because of the duplication and waste it generated, but because it produced a crisis of legitimacy. It allowed Chávez to ignore opposition voices and overestimate his own mandate. It painted legitimate disagreement as treason, and, in excluding consideration of cost and feasibility as "bureaucratic," it excluded important technical questions of performance that might have minimized policy overreach and poor outcomes. And it undermined the possibilities for democratic alternation-in-power, shunting dissent outside the boundaries of its institutions. To be within the Chávez state was to be *of* it, necessarily, and therefore, the Chávez state *could not* replace the old state, because it could never claim the allegiance of all Venezuelans. It was, in fact, not a political system at all, but a denial of the legitimacy of politics altogether.

Building up a "parallel state" in the mode of a plebiscitarian democracy is an extreme in every sense, but the temptation to bypass existing sites of opposition and obstruction is one *common to all presidential systems*, which build in such impediments as part of the system of routine governance. Consider, for example, the president-people connection

forged, to the exclusion of Congress, by the widespread phenomenon of "going public."[90] As in the populist movement, the President is the focal point of energy and reform, destabilization, charisma, redemption, and morality. Yet the President is also the center of the governing order. A constant abiding tension exists between stability and disruption, two different but indispensable facets of presidential power.

In this connection, the spectacle of the Chávez shadow state teaches us that the President's reformist/destructive impulses must be channeled *through* existing institutions, and conversely, that institutions must be flexible enough to channel and absorb those energies. Where, as in the Venezuelan partyarchy of Punto Fijo, institutions are so closed off as to be impenetrable, their imperviousness comes at a fatal cost to their legitimacy. As the Chávez dual state shows, where institutions cannot be reformed, they will be destroyed—or, unique to this case, made redundant by duplication. Flexibility becomes crucial: can institutions absorb, capture, and contain populist appeals against the system? The old order must bend enough to mollify its populist critics, yet it must be firm enough to reconcile and incorporate these demands into the constitutional order.

This thesis goes farther down the populist path than many would be comfortable with. It allows that the President *may* steamroll the legislature, if he has their overwhelming support. It accepts court packing where done by statutory means. A bureaucracy can be brought to heel, even where civil service protections shield personnel, as Venezuela's did, so long, again, as changes are brought about by statutes ratified by the legislature. In Chávez's case, this stipulation might seemingly have made no difference, for with his solid control of the National Assembly, the bureaucracy would not have long held holding off

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[90] Samuel Kernell, *Going Public: New Strategies of Presidential Leadership* (Washington, D.C.: Congressional Quarterly Press, 2006).

his assault. Right? Not so, for from the perspective of long-term institutional stability, to politicize the bureaucracy in such a way that a future opposition movement could have later reappropriated the apparatus would have been a far lesser evil than to sidestep it altogether.

One lesson from the perspective of constitutional theory is that, merely by remaining standing, institutions *do* check and balance even when they are entirely taken over and politicized. First, their sheer complexity slows, deadens and diffuses the populist impulse, the routinization of charisma that Weber so lamented, but which proves crucial for regime stability. Chávez's circumvention of the bureaucracy is an implicit acknowledgment of the point. Secondly, they remain visible as an object of capture for future movements, a certain sort of machine able to be reprogrammed now and again.

A related point is that a good deal of the actual work of checking and balancing must be shouldered by *sub*-constitutional mechanisms. Richard Pildes and Daryl Levinson have made this point in the American context, pointing out that *parties,* not powers, are the real brake on executive power, although this "check" waxes and wanes in unpredictable ways.[91] The same is true of the relationship between people and President that we have explored here. It is useless to pretend that the people will always serve as a check on their leaders; the relationship between the people and their crusader/commissarial dictator/servant-in-chief is more fluid than that. But understanding the relationship as one of symbiosis—the president serving an important renovating function for democracy; the people granting him the authority with which to do so—, as one liable to change—even the Chavistas appear to have now lost their warrant for authority—, and as one best governed

[91] Daryl J. Levinson and Richard H. Pildes, "Separation of Parties, Not Powers," *Harvard Law Review* , Vol. 119, No. 8 (2006): 2311-2386

by laws and procedures, even where these are altered in the process is crucial for minimizing presidentialism's tendency to rigidity, and thus its conflict with the popular will.

Other solutions can and have been proposed. One is to keep unwanted demands out of the political arena as much as possible. This, for example, is the central intuition behind militant democracy.[92] Another is to erect substantive limits on the constituent power of the people. Eternity clauses and participation thresholds are a way of doing so.[93] Another is to introduce substantive values into process, by discouraging irrationalism and charisma and encouraging deliberation in defining constitutional outcomes. Civic education that encourages critical thinking, deconstruction of propaganda, and public deliberation is perhaps recommended in this regard.[94] Still another are laws that attempt to defuse the thrust of populist mobilizations—factions, as the Federalist Papers call them. Presidentialism itself, with its fixed structure of separated powers, is such a device. Within it are federalism, staggered or indirect elections, and term limits.

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[92] Giovanni Capoccia, "Militant Democracy: The Institutional Bases of Democratic Self-Preservation," *Annual Review of Law and Social Science*, (2013): 207-226. Karl Loewenstein, "Militant Democracy and Fundamental Rights, I," *The American Political Science Review*, Vol. 31, No. 3(1937): 417-432; Karl Loewenstein, "Militant Democracy and Fundamental Rights, II," *The American Political Science Review*, Vol. 31, No. 4, (1937): 638-658.

[93] Consider Article 79.2 of the Basic Law of Germany, which establishes that, among others, human dignity rights can never be violated or abridged by Parliament. Other constitutions that contain "eternity clauses" include those of Brazil, the Czech Republic, and, debatably, India and Colombia, among others.

[94] Jamie Bartlett and Carl Miller, "The Power of Unreason: Conspiracy Theories, Extremism and Counter-Terrorism," *Demos* (August 2010): 1-54. Scholarship advancing creative institutional proposals for putting deliberative democracy into practice includes Kevin O'Leary, *Saving Democracy: A Plan for Real Representation in America* (Stanford: Stanford University Press, 2006); James S. Fishkin, *When the People Speak: Deliberative Democracy and Public Consultation* (New York: Oxford University Press, 2011), Bruce Ackerman and James Fishkin, *Deliberation Day* (New Haven: Yale University Press, 2004); John Dryzek, *Foundations and Frontiers of Deliberative Governance* (New York: Oxford University Press, 2010), and Ethan Leib, *Deliberative Democracy in America: A Proposal for a Popular Branch of Government* (University Park: Pennsylvania State University Press, 2005).

All of the above tactics may be justified in certain contexts, but their effectiveness depends on the continued health of the regime in which they are embedded. As the rocky course of Venezuelan democracy over the last two-and-a-half decades shows, once a political order loses its legitimacy, substantive limits on popular power come to seem like unjustified fetters upon popular will imposed by the "dead hand of the past." In such cases, to deny the legitimacy of populism's house-cleaning impulse of populism becomes, as the Federalists put it, a remedy worse than the disease.

These mechanisms are not incompatible with the claim of this chapter, which is that the end of institutional protection is well served by letting institutions do their work, channeling movement demands, and necessarily refining them and slowing them down. To insist that renegade movements obey legal process is already somewhat quixotic, although even in Venezuela, the opposition won the 2007 referendum, as far as we can tell, on a rule-of-law campaign. Moreover, to allow that institutional transformation can take place via legal channels is one way to build trust in alternation in power, so that incoming parties need not feel that the rules are stacked against them, and that they must bypass the system altogether.

One final point about the "spirit" of the law. The process of routinization and institution-building that James Morone describes as the extinguishing of the "democratic wish" is disappointing, tedious, and ultimately necessary. Weber, Arendt, and Schmitt were "anti-moderns" in their dismay at the politics produced by rational, bureaucratic society, and sought, in different ways, to return to charismatic politics of some sort. This account suggests that, if on the one hand, populism *is* the animating spirit of democracy, if it is to govern, it must betray itself. And this is a good thing. Populism's messianic, charismatic energy cannot be eliminated from democratic politics, but it cannot animate routine governance, either.

This account points to new solutions to old problems by repurposing old institutions in new, hitherto unorthodox ways. Against the plebiscitarian temptation, the people have to resist the anti-institutionalist impulse to work outside and tear down the system, lest the populist swell leave nothing in its wake. Populist energies must be channeled and constrained through the "unconventional adaptation" of extant institutions. Accordingly, we must understand the periodic political capture of our state institutions as a natural stage of democracy, and should require our institutions to be porous enough to be captured by, and thus to capture in turn, the forces of popular majorities. Perhaps perversely, we see stability coming to the tune of periodic revolution, possible only when extant institutions can be periodically used in completely unorthodox ways.[95]

What can the experience of Venezuela, with its authoritarian past, corrupt petrostate, and current bout with revolutionary socialism, possibly have to say to the United States? Notwithstanding its much-vaunted and much-studied federalist structure, the U.S. has not been entirely immune from the populist temptation: the Granger agrarian movement of the late 19th century and its relative, the Populist Party of the 1890s; the rise of Louisiana's "tinpot dictator" Huey Long; the charismatic anti-New Dealer Father Coughlin, a Catholic priest known for his heady social justice-tinged and anti-Semitic radio orations served up to an audience reaching thirty million Americans; the "Red Scare" of Senator Joseph McCarthy; the race-baiting of George Wallace; the "Southern Strategy" of the Nixon Republican party; the 2011 appearance of the Tea Party; the staying power of the unsinkable Donald Trump. The present moment is one of particular susceptibility: with

[95] I am using the term intentionally to refer to Ackerman's "unorthodox adaptation," which on his theory, is a way to create progress. Here I suggest that unorthodox deployment of routinized institutions may also be a way to *contain* the inherent affinity of presidentialism and populism and thus to stave off collapse.

income inequality looming large in the public consciousness, a growing number of political figures are decrying the U.S.'s tendency to "oligarchy." Even the fundamental viability of American political institutions are being called into question as a result of obstructionism and scorched-earth tactics in Congress, as well as the manipulation of state electoral institutions through gerrymandering, voter enfranchisement, and so forth. As the conservative Robert Kagan wrote in early 2016, surveying the state of the Republican Party and political institutions generally, "Was it not the [G.O.P.] party's wild obstructionism—the repeated threats to shut down the government over policy and legislative disagreements, the persistent calls for nullification of Supreme Court decisions, the insistence that compromise was betrayal, the internal coups against party leaders who refused to join the general demolition—that taught Republican voters that government, institutions, political traditions, party leadership and even parties themselves were things to be overthrown, evaded, ignored, insulted, laughed at?"[96] In March 2016, Venezuela's *El Universal,* commenting on Trump's popularity with the electorate, proclaimed, "We now have proof, once again, that no society is immune to the virus of populism."[97]

This story of sharp pendular swings between closed elite technocracy and populist chaos may be particularly Latin American, but of late, American representative democracy is showing signs of Schmitt called "the power of real life [to] break[] through the crust of a mechanism that has become torpid by repetition.[98]" With deep popular resentment at the opacity, exclusivity, and elite capture of the state, and in particular a growing sense that what we are witnessing is the playing out of, not democracy, but American oligarchy, it is

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[96] Robert Kagan, "Trump is the GOP's Frankenstein monster. Now he's strong enough to destroy the party," *The Washington Post – Opinions* (February 25, 2016).

[97] Roberto Giusti, "Chávez y Trump," *El Universal* (March 1, 2016).

[98] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Chicago: Chicago University Press, 2006).

not unthinkable that America might be barrelling towards its own shock treatment of "populist seduction," warts and all.[99]

[99] Bernie Sanders recently stated that the U.S. is "moving rapidly away from our democratic heritage into an oligarchic form of society." On dysfunction in U.S. institutions, see, e.g., Thomas E. Mann and Norman Ornstein, *It's Even Worse Than it Looks: How the American Constitutional System Collided with the New Politics of Extremism* (New York: Basic Books, 2012); Jack M. Balkin, "The Last Days of Disco: Why the American Political System Is Dysfunctional," *Boston University Law Review*, Vol. 94 (2014): 1159-1199; Mark A. Graber, "Belling the Partisan Cats: Preliminary Thoughts on Identifying and Mending a Dysfunctional Constitutional Order," *Boston University Law Review*, Vol. 94 (2014): 611-657. Relatedly, the perception that elections are bought and sold has gained in purchase of late, and the cost of buying an election has never been higher. Not unrelatedly, 2014 was the first year that, for the first time in history, both houses of Congress housed a majority of millionaires. With congressional districts larger than ever, and turnout for legislative elections at their lowest levels since the 1940s, the distance between the People and their representatives grows dangerously wide. And at a mass level, there has been no notion of a unified American public since the end of the Progressive Era, when the quest for the "people" was replaced by the skepticism and diminished ambitions of pluralist democracy. Political scientists Robert Putnam and Theda Skocpol lament the present-day alienation and political apathy, particularly among the poor, and wonder at the fact that the closest thing in the recent American political landscape to grassroots mobilization and participatory democracy has been the Tea Party. See, e.g., Putnam, *Better Together* (New York: Simon & Schuster, 2004); Theda Skocpol and Vanessa Williamson, *The Tea Party and the Remaking of American Conservatism* (New York: Oxford University Press, 2013).

2: The President, the People, and the Parties: Controls on the Administrative State in Brazil

"Form is the sworn enemy of arbitrariness, the twin sister of liberty."
Rudolf von Jhering

"It is therefore fair to suppose that an irksome law of which the majority did not see the immediate utility either would not be passed or would not be obeyed."
Alexis de Tocqueville, *Democracy in America*

Introduction

One critical manifestation of the President's inherent capacity to shake up existing policy settlements, coalitions, old agendas, and even written rules is the "legislative presidency." Presidents now take on increased responsibility in shaping the content of law, both *before* its passage—drafting bills and conscripting legislators to sponsor them, mediating congressional disputes and brokering settlements, "going public" to force the legislature's hand—as well as *after*—prioritizing certain facets of law enforcement over others, appointing administrative allies to carry these out, issuing guidelines for implementation.

As a descriptive matter, the fluid reality of policymaking may be captured by, not a separation of *powers*, but a "separation of parties."[1] What determines, then, whether the Legislative and Executive branches compete or cooperate is whether party control of the House, Senate, and Presidency is divided or unified, particularly so where, as today, political parties are polarized and ideologically distinct. Party control of government thus rivals, or even outstrips, the constitutional distinction between the branches in predicting and explaining inter-branch political dynamics. This much seems true, although it does not fully

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[1] See Daryl J. Levinson and Richard H. Pildes, "Separation of Parties, Not Powers," *Harvard Law Review*, Vol. 119, No. 8 (2006): 2311-2386; Peter Strauss, "The Place of Agencies in Government: Separation of Powers and the Fourth Branch," *Columbia Law Review,* Vol. 84, No. 3 (1984): 573-669; M. Elizabeth Magill, "The Real Separation in Separation of Powers Law," *Virginia Law Review,* Vol. 86, No. 6 (Sep. 2000): 1127-1198. Arguing that presidential preeminence in policymaking is a natural, and desirable outcome, see, e.g., William G. Howell and Terry M. Moe, *Relic: How Our Constitution Undermines Effective Government—and Why We Need a More Powerful Presidency* (New York: Basic Books, 2016), and Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (New York: Oxford University Press, 2013).

account for the totality of the President's "legislative" power, for even during periods of divided government, the bureaucracy is still more or less his to command.

Commentary of late on the American political system has emphasized the dysfunctional effects that can result from the combination of divided government and a party system increasingly prone to polarization and intemperance.[2] One recent symptom has been the ideological affray over alleged unilateral policymaking by the President through recess appointments, deferred deportations for certain immigrants, executive orders on gun control and the environment. Whether or not President Obama is making particularly audacious use of these tools, one common line of public criticism understands that his doing so is presumptively illegitimate because he cannot "control his Congress." Unspoken, it seems, is the assumption that administrative policymaking is illegitimate when it is unsupported by the consent of the legislature, and legitimate when supported by it, whether or not such action defies the formalistic tripartite separation of functions. In a "separated system"[3] of powers, this is indeed a strange assumption. Yet it voices a commonsensical, even plausible longing for a political responsiveness in American public administration that the system, as currently understood, cannot provide.

In this spirit I turn to Brazil, a political system in which the checks upon presidential unilateralism are hardly visible at first glance. The Brazilian President is an exceptionally strong one, boasting the power to propose legislation and to govern by decree in a

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[2] See, e.g., Nathaniel Persily, ed., *Solutions to Political Polarization in America.* (New York: Cambridge University Press, 2015); Thomas E. Mann and Norm J. Ornstein, *It's Even Worse Than It Looks: How the American Constitutional System Collided with the New Politics of Extremism.* New York. (New York: Basic Books, 2012); Jane Mansbridge and Cathie Jo Martin, eds., Final Report: "Negotiating Agreement in Politics: Report of the Task Force on Negotiating Agreement in Politics, *American Political Science Association* (Washington, D.C., 2013).

[3] Charles O. Jones, *The Presidency in a Separated System* (Washington, D.C.: Brookings Institution, 1994).

number of policy arenas.[4] And unlike in the American context, Brazil's public bureaucracy is, on paper, a unitary apparatus, with all final administrative authority resting in the President.[5] Yet in practice, the system works quite differently. Despite its "unitary" appearance, Brazil's system of public administration is governed by two models of control still undertheorized in the American context, which I call the *partisan balance* and the *social control* models.[6]

The partisan balance model is not a policy codified in statutory or constitutional law, but rather a norm of Brazil's unique version of presidentialism. Yet it is no less important for all that. Because the Brazilian President is an important legislative actor—the "principal legislator," say Fernando Limongi and Argelina Figueiredo—the need to ensure positive legislative outcomes is all important, and doing so in Brazil's system of pork-hungry and fluid political parties requires constant attention to and maintenance of a coalition of allies in Congress.[7] This legislative coalition in turn conditions the President's command of the administrative state: key posts are handed out to coalition partners, and the latter's continued support depends on continued harmony between the President and the coalition in the legislative arena. The Brazilian President must be a legislator first, an administrator second, almost as if Richard Neustadt's "power to persuade" had swallowed up the

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[4] Matthew Soberg Shugart & John M. Carey, *Presidents and Assemblies: Constitutional Design and Electoral Dynamics*. (New York: Cambridge University Press, 1992).

[5] Mariana Mota Prado and Carlos Pereira, "Presidential Dominance from a Comparative Perspective: The Relationship between the Executive Branch and Regulatory Agencies in Brazil", in Susan Rose-Ackerman & Peter L. Lindseth, eds., *Comparative Administrative Law* (Cheltenham, UK: Edward Elgar, 2010), 225-242, 226.

[6] Susan Rose-Ackerman discusses the partisan balance model in "Policymaking accountability: parliamentary versus presidential systems," although in her analysis this form is typically represented by multi-member agencies in which partisan balance is required by law. In David Levi-Faur, ed., *Handbook on the Politics of Regulation* (Cheltenham, UK: Edward Elgar, 2011), 171-184, at 175.

[7] Argelina Figueiredo and Fernando Limongi, "Mudança Constitucional, Desempenho do Legislativo e Consolidação Institucional." *Revista Brasileira de Ciencias Socias*, Vol. 29 (1995): 175-200, 176.

"managerial Presidency" entirely.[8] Yet, instead of compounding presidential power into tyrannical proportions, the imperatives of the one condition the other.

Second is the concept of "social control" of administration, of increasing importance in Brazil's post-dictatorship constitutional landscape. The 1988 Constitution, written shortly after Brazil's return to democracy, inaugurated several new devices for citizens' protection against the government. These included new social and collective rights; new procedures to increase public participation in policymaking and in the administrative process (for example, participatory budgeting and national policy conferences); and expanded recourse to the courts, with agencies like the Public Prosecutor taking on new duties of guiding citizen suits against the government. While "independent" oversight agencies have proven paper tigers in Brazil's recent past, unexpectedly, the federal and state Public Prosecutors have grown extremely powerful in the new constitutional system, largely on the strength of the popular support they enjoy.

In this chapter, I will examine two representative and unique features of the Brazilian system of public administration:

> 1) *The Appointment Power.* As "chief legislator" in a system of fluid, opportunistic parties, the President must produce a slate of Cabinet appointees that mirrors the composition of the governing coalition. Accordingly, the President will assign choice Ministry posts to coalition "allies," albeit ones whose continued support is never guaranteed, but must be continually won;
>
> 2) *The Public Class Action.* Formally separate from the Executive Branch, the Brazilian Attorney General, or Public Prosecutor, functions as a real check on administrative discretion through weapons *political* in nature, in particular the public class action (*ação popular civil*). This device allows the Public Prosecutor to bring suit against a private entity or public agency in the name of the "public interest." Hardly less effectively, the Public Prosecutor may also *threaten* such a suit in order to leverage a negotiated settlement (*termo de ajustamento de conduta*), a legally binding agreement according to which the offending party agrees to modify its behavior.

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[8] Richard Neustadt, *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan* (New York: Free Press, 1991).

Through a closer look at how these two features work in practice, we can see how a pragmatic, party-oriented settlement gives new meaning to rigid constitutional arrangements.

I do not claim that the President's conditioned appointment power and accountability to the public via the class action gives Brazilian administration a greater democratic basis than that of the United States. These features *may* do so; perhaps where the "political layer"[9] of the bureaucracy more closely reflects the composition of the legislature, the troubling gap between the law and its application closes somewhat. Or perhaps the public class action may heighten the popular component and democratic validation of administrative output. But neither of these conclusions is required for the argument. Nor do I seek to elevate Brazil as an example of how to "solve" the problem of bureaucratic accountability—if such a thing exists. Not only would it be exceptionally poor timing to claim as much as Brazil reels from the largest scandal in its history, involving sums of $3 billion siphoned away from state-run petroleum producer Petrobras, and which in its wake has led to the arrests of over a hundred politicians, lobbyists, and industry leaders, and to a wave of calls for President Dilma Rousseff's impeachment. More deeply, though, in designing a public bureaucracy there are a plurality of values to be weighed and traded off—expertise vs. democracy, accountability vs. insulation, speed vs. accountability—to which no one static arrangement can ever fully do justice.

Our point in selecting the Brazilian administrative system for study is to illustrate how, when animated by politics, legal devices that superficially seem to empower instead can *limit* presidential power and *legitimize* otherwise unilateral bureaucratic activity. Concretely, the appointment power *checks* executive legislative action by conditioning it upon

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[9] Hugh Heclo, *A Government of Strangers: Executive Politics in Washington* (Washington, D.C: Brookings Institution, 1977), 70-79.

the production of negotiated consensus; it *legitimates* such action because it closes the possible gap between it and congressional will. Analogously, social control mechanisms *limit* by subjecting executive authority to the independent power of popular forces, channeled through a forceful, focused medium; they *legitimate* by connecting action to the consent of the People in a literal, tangible way. Through the vital force of politics, the President's constitutional power to command comes to resemble the plural, far more tenuous *power to persuade.*

These examples will suggest, I hope, one conclusion from the point of view of theories of public administration—namely, that it is possible to conceive of a democratically accountable public administration in which "the buck *doesn't* stop" with the President, as the Hamiltonian-unitary executive tradition would have us believe.[10] The fact of plural controls of administrative action need not result in unaccountability and chaos. Moreover, arrangements that check in a meaningful sense can come in guises more *political* than *constitutional*, and consequently they may pay dividends in terms of regulatory flexibility and strength. Thus, with some qualifications, such checks could be beneficial in the American context.

A. The Fundamentals of Brazilian Public Administration

Brazil's rather mixed experience with modern public administration began in the early decades of the twentieth century. Industrialization and mounting economic

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[10] See, e.g., Steven G. Calabresi and Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush*. New Haven (New Haven: Yale University Press, 2008); Christopher S. Yoo, Steven G. Calabresi, and Anthony J. Colangelo, "The Unitary Executive in the Modern Era, 1945-2004," *Iowa Law Review*, Vol. 90, No. 2 (2004): 601-731; Steven G. Calabresi, "Some Normative Arguments for the Unitary Executive," *Arkansas Law Review*, Vol. 48 (1995): 23-104; Lawrence Lessig & Cass Sunstein, "The President and the Administration," *Columbia Law Review*, Vol. 94, No. 1 (1994): 1-123; John Yoo, *Crisis and Command: A History of Executive Power from George Washington to George W. Bush*. (New York: Kaplan Publishing, 2010).

inequality, societal stratification and labor specialization, waves of immigration and mass democracy began to expose the inadequacies of the patrimonial state left by the Portuguese monarchy, prompting an expansion of the reach of the state. Under statist president-slash-dictator Getúlio Vargas (1930-1945, 1951-1954), Brazil embarked on a wrenching quest after national ideals of unity, prosperity, and above all, "order and progress." Bureaucracy, as Max Weber saw, risks imprisoning human freedom in an "iron cage," even in the most democratic of systems. In preindustrial Brazil, where many ruling elites considered the people too benighted to govern themselves—illiteracy ran to 65% in 1920, for example—the tension between progress and democracy was usually resolved by forsaking the latter for rapid development, bureaucratization, and industrialization. Progressive values of science and progress would take on a particularly sinister cast with the abuses of the military dictatorships of the '60s and '70s, and if the legacy of "bureaucratic authoritarianism[11]" has been tamed today by successive "waves of democratization,"[12] bureaucracy's antidemocratic features still loom large in the popular imagination, a fact that goes some way to explaining the strongly participatory features of Brazil's modern regime of public administration.

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[11] The term was coined by Guillermo O'Donnell in *Modernization and Bureaucratic Authoritarianism* (Berkeley, CA: University of California Press, 1970) to refer to the combination of military force and right-wing economic orthodoxy that characterized the dictatorships of the Southern Cone in Chile, Brazil, Argentina and Uruguay.

[12] Samuel P. Huntington, *The Third Wave: Democratization in the Late 20th Century* (Norman, OK: University of Oklahoma Press, 1993). See also Frances Hagopian and Scott P. Mainwaring, *The Third Wave of Democratization in Latin America: Advances and Setbacks* (New York: Cambridge University Press, 2005), 14-62, 90-120; Larry Diamond, Marc F. Plattner, Yun-han Chu, and Hung-mao Tien, *Consolidating the Third Wave Democracies* (Baltimore: Johns Hopkins University Press, 1997), 14-34 and 40-66; Juan J. Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe.* (Baltimore: Johns Hopkins University Press, 1996),166-189.

Brazil's current system of public administration is grounded in the 1988 Constitution, as well as in two framework statutes.[13] The Constitution it today considered a progressive text, yet it was drafted by a somewhat suspect "assembly" made up of ordinary legislators holding office at the time that incumbent president José Sarney called for the convocation of the assembly. (This had apparently been a condition imposed by the military government before the democratic transition, and it significantly dragged out the drafting process by forcing assembly members to do double duty drafting constitutional text in the morning and statutes in the afternoons.) Yet surprisingly, the process resulted in a text "more transformative than conservative."[14] Internal disputes among conservative parties, combined with the forceful leadership of progressive delegates like Ulysses Guimarães and Mário Covas, resulted in the victory of a surprising number of progressive initiatives: procedurally, in the soliciting of popular input on ballot initiatives, numbering over 22 in the end, and drawing well over 12 million signatures; and also in outcomes like the inclusion of such direct democratic mechanisms as the referendum and plebiscite, as well as new social and collective rights. Ultimately, however, the Assembly's progressive trajectory was hijacked at the compiling stages by the "Centrão," a center-right coalition loyal to the incumbent President José Sarney, which managed to engineer an eleventh hour

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[13] Two framework statutes, the Administrative Procedure Act of 1999 and the Transparency Act of 2011, also establish fundamentals of public administration, including defining "basic individual rights" of process relative to administrative adjudication, minimum procedural thresholds for agency rulemaking, such as a public hearing, and the mandated disclosure of documents, something like the Freedom of Information Act. Further, every statute that creates an independent agency regulates its rulemaking and adjudication processes in some capacity, usually ensuring "minimum rights" like previous notification – private if adjudication, or public if rulemaking. (Lei No. 9.784, Jan. 29, 1999 and Lei No. 12.527, Nov. 18, 2011)

[14] Adriano Pilatti, *A Constituinte de 1987-1988: progressistas, conservadores, ordem econômica e regras do jogo* (Rio de Janeiro: Lúmen Júris, 2008), 5.

volte-face over the preservation of Brazil's presidential system, which many progressives had hoped would go the way of the military dictatorships of the continent.[15]

Yet survive it did, and from a transnational vantage point, one of the most salient features of Brazil's system of public administration is how clearly it conforms to a *presidentially dominated model.*[16] The President is defined as the chief of the executive branch, with all agencies explicitly under his authority. (Art. 84, II). The President has sole supervisory power over the organization, operation, and "higher management" of the federal administration, and may issue decrees and regulations for the "true enforcement" of laws. (Art. 84, I) He can fill and abolish vacant federal government positions (Art. 84, XXV),

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[15] Institutional choice in post-dictatorship Brazil responded not just to the excesses of military government, but also to lessons learned from the collapse of democratic Brazil in 1964, which most interpretations considered to be the result of decision-making paralysis. Lucio Rennó, "Críticas ao Presidencialismo de Coalizão no Brasil: Procesos Institucionalmente Constritos ou Individualmente Dirigidos?", in Leonardo Avritzer and Fátima Anastasia, eds., *Reforma Política no Brasil* (Belo Horizonte: Editora UFMG, 2007). On the history of the Convention, in addition to Pilatti, *A Constituinte de 1987-1988*, see Keith S. Rosenn, "Conflict Resolution and Constitutionalism: The Making of the Brazilian Constitution of 1988," in Laurel E. Miller, ed., *Framing the State in Times of Transition: Case Studies in Constitution Making* (Washington, D.C: U.S. Institute of Peace, 2010); Scott Mainwaring and Aníbal Perez Liñán, "Party Discipline in the Brazilian Constitutional Congress," *Legislative Studies Quarterly*, Vol. 22, No. 4 (1997): 453-483; Paulo Bonavides and Paes de Andrade, *História Constitucional do Brasil* (Brasília: Senado Federal, 1989); Câmara dos Deputados, *Diários da Assembléia Nacional Constituinte* (Brasília: Câmara dos Deputados, Coordenação de Publicações, 1987); João Gilberto Coelho and Antonio Carlos Nantes de Oliveira, *A nova constituição: Avaliação do texto e perfil dos constituintes*. (Rio de Janeiro: Revan, 1989); Márcia Texeira Souza, "O processo decisório na Constituição de 1988: práticas institucionais," *Lua Nova - Revista de Cultura Política*, Vol. 58 (2003): 38-59; Leonardo Augusto de Andrade Barbosa, *História Constitucional Brasileira: Mudança constitucional, autoritarismo e democracia no Brasil pós-1964*. (Brasília: Edições Câmara dos Deputados, 2012).

[16] This is so even considering that the 1988 Constitution expands some of the prerogatives of Congress in the wake of the extreme centralization of executive authority during military rule. These include, as we will see, auditing the federal budget and the right to be consulted on executive appointments. Executive decrees were replaced by "provisional measures," which are valid for 60 days, after which Congress may pass, reject, or allow the provisional law to expire. See, e.g., Argelina Figueiredo and Fernando Limongi, *Executivo e Legislativo na nova ordem constitucional* (2nd ed.) (Rio de Janeiro: Editora FGV, 2001); Gustavo Binenbojm, *Uma Teoria do Direito Administrativo* (3rd ed.) (Rio de Janeiro: Editora Renovar, 2014); Timothy Power, "The pen is mightier than the Congress: Presidential decree power in Brazil," in John M. Carey and Matthew Soberg Shugart, eds., *Executive Decree Authority* (New York: Cambridge University Press, 1994), 197-230; Mota Prado and Pereira, "Presidential Dominance from a Comparative Perspective,"; Lee J. Alston and Bernardo Mueller, "Pork for Policy: Executive and Legislative Exchange in Brazil," *The Journal of Law, Economics, and Organization*, Vol. 22, No. 1 (2005): 87-114, 87-88.

and, with the consent of the Senate, can appoint Ministers of State, federal court judges, state Governors, public prosecutors including the Attorney General, the head of the Central Bank and numerous others (Art. 84, XV), a staggering 48,000 appointments in total.

The Brazilian president also possesses significant power to *initiate legislation*, a power with little parallel in the American presidency.[17] He has *exclusive* authority to introduce legislation concerning the creation and abolition of public offices, Ministries and Government bodies; administrative or judicial organization; tax and budgetary matters; public services and administrative personnel; the tenure of civil service officers; the organization of the federal Public Defender's Offices; and the military.[18] It is no stretch to call him the "principal legislator" of Brazil; 85.6% of laws approved since Brazil's return to democracy were initiated in the executive branch, and 71% of all bills submitted to Congress by the various presidents were approved within their mandate.[19]

Whereas the U.S. Constitution specifies no actor primarily responsible for review of administrative acts, the Brazilian hedges its bets, assigning several to the task. Article 74 of the Constitution requires the three branches maintain an "integrated system" of internal

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[17] Shugart and Carey, *Presidents and Assemblies*, Timothy Power, "The pen is mightier than the Congress: Presidential decree power in Brazil", in John M. Carey and Matthew Soberg Shugart, eds., *Executive Decree Authority* (New York: Cambridge University Press, 1994), 197-230; Gary Reich, "Executive Decree Authority in Brazil: How Reactive Legislators Influence Policy." *Legislative Studies Quarterly*, Vol. XXVII, No.1 (2002): 5-31; Alston and Mueller, "Pork for Policy," 88; Pereira, Power, and Rennó, "Under What Conditions Do Presidents Resort to Decree Power?"

[18] Although Article 68 lists spheres not liable to regulation, as part of "the exclusive competence of the national congress," (and specific situations in which administration can act directly by rulemaking or adjudication) the line between statutory law and regulation is can indeed be a thin one, and scholars of administrative law are wont to criticize the tendency toward "*deslegalização*" or deformalization that occurs when realms of law come to be governed by regulation via delegation. Binenbojm, *Uma Teoria do Direito Administrativo,* 293, 295, 303. Although the effort to sift policy realms directly regulable by rule from those that require statutory regulation may seem quixotic to an American reader, we point out that unitary theorists who argue that the President is granted sole authority over foreign affairs and war-making are not far from making this sort of a claim.

[19] Fernando Limongi, "Presidencialismo e Governo de Coalizão", in Leonardo Avritzer & Fátima Anastasia, eds., *Reforma política no Brasil* (Rio de Janeiro: Editora UFMG, 2007), 237-268, 256.

review of budgetary integrity, the lawfulness and efficiency of agency action, and the use of public funds by private legal entities. Review of administrative acts is primarily the responsibility of a special agency known as the Court of Auditors (*Tribunal de Contas da União,* or TCU)[20], considered an appendage of the Congress, which oversees public finances and investigates and punishes instances of corruption. The largely autonomous TCU, whose members have life tenure, can exercise both adjudicatory and injunctive powers in conducting review.[21] The Comptroller General, located within the federal government, is an organ of "internal" review empowering to conduct audits and investigations, among others, in the name of promoting transparency. Meanwhile, Brazil's has two offices that could be referred to in English as "Attorneys General," the Prosecutor-General (*Procurador-Geral da República*), or federal public prosecutor, who heads the Public Prosecutor's Office (*Ministério Público Federal*) and the Solicitor General (*Advogado-Geral da República*), who heads the *Advocacia Geral da União,* analogous to the Department of Justice. While the Solicitor General fulfills much the same tasks as the American Attorney General, the federal public prosecutor is an independent organ that exercises vast powers of oversight, to which we return presently.[22]

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[20] A sort of counterpart to the Government Accounting Office, although possessing broader powers, the TCU is tasked with preventing, investigating, and punishing corruption or misuse of public funds. It is ordered to perform a yearly review of the President's accounts; to review accounts of other administrators and any "supranational" company in which the government has a direct interest; to evaluate the lawfulness of all actions taken by civil servants; to carry out investigations, inspections and audits; and to sanction violations, which includes issuing a stay of action. Where the offending party refuses to comply, the dispute proceeds to a court. (Articles 70, 71). Marcus André Melo, Carlos Pereira and Carlos Mauricio Figueiredo, "Political and Institutional Checks on Corruption: Explaining the Performance of Brazilian Audit Institutions," *Comparative Political Studies*, Vol. 42, No. 9 (2009): 1217-1244.

[21] Maria Rita Garcia Loureiro, *Coordenação do Sistema de Controle da Administração Pública Federal* (São Paulo: Escola de Administração de Empresas de São Paulo, 2011), 32.

[22] Ibid.

Judicial review of administrative action represents a controversial question today. Traditionally, Brazil's inheritance from its continental forefathers entailed a practice of weak judicial review *à la française*, in which courts resolved disputes, but could not review the constitutionality of statutes.[23] This tradition plus the existence of the TCU can be interpreted to suggest that administrative review by courts was intended to play but a marginal role in the battery of checks and balances on agencies. If so, he reality has proven different. The 1988 Constitution took a major step away from the continental tradition when it granted courts the power to review executive and legislative acts, and in the ensuing years, the role of the judge has been dramatically recast by the global spread of the institution of

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[23] The Brazilian system of judicial review combines features from both abstract and concrete review systems. Courts can assess the constitutionality of governmental acts already enacted on the occasion of a concrete "case or controversy" between individuals and a state actor. The courts' simultaneous exercise the faculty of abstract review, emulating European legal systems, allowing the Brazilian Supreme Tribunal to hear independent actions concerning the constitutionality of a law before it is passed. In both abstract and concrete review, new procedural instruments have been placed at the courts' disposal by the 1988 Constitution and thereafter. These include: habeas corpus, habeas data, writ of mandamus, the injunctive writ, the public class action (*açao civil pública*) and the individual citizen action (*ação popular*). Gilmar Mendes, *Jurisdição Constitucional: o controle abstrato de normas no Brasil e na Alemanha* (5th ed.) (São Paulo: Editora Saraiva, 2005). In the sphere of abstract review are such as direct unconstitutionality suits, declaratory actions of constitutionality, direct unconstitutionality suits due to omission (ADO) and claims for non-compliance of a fundamental precept. Increasingly, says Daniel Binenbojm, Brazil has witnessed the "judicialization of administrative law," in the sense that courts are increasingly attuned to the requirement that administrative acts be not only closely grounded in constitutional or statutory norms (see Art. 37 of the Constitution), but also procedurally valid in the sense of being subject to democratic checks. Binenbojm, *Uma Teoria de Direito,* 253-54. According to current judicial practice, the level of deference given to administrative acts will depend on five factors: first, the more objective the act, the stricter the review; second, the more technical the issue, the weaker the review; third, the more political, the weaker the review; fourth, the greater the level of social participation in the process of deliberation that produced the measure, the weaker the review; and fifth, the more rights-restrictive is the measure, the greater the level of review. The task incumbent upon the reviewing judge is to carefully weigh and balance these imperatives, and to be explicit in her reasons for doing so. Floriano de Azevedo Marques Neto, "Discricionariedade Administrativa e Controle Judicial da Administração." *Fórum Administrativo*, Vol. 2, No. 14 (2002): 1-6.

judicial review,[24] by the expansion of the welfare state,[25] and by Latin America's "new constitutionalism" of participatory democracy and collective rights.[26] The Brazilian court system in particular has been recast as an "institutional voice for the poor," a mechanism for participatory justice, and a tool of administrative oversight[27]. In this context, the Constitution's demands that the "*law may not exclude from review by the Judiciary any violation of or threat to a right*" (Art. V, XXXV) and that "*any citizen, political party, association or labour union shall have standing* [before the TCU] *to denounce irregularities or illegalities*" (Article 74) have been read to mean that statutes limiting judicial review or court access are presumptively unconstitutional.[28] In the United States, such carte blanche power to challenge administrative action by individual action has been whittled down by the standing doctrine and case law, statutes, or norms fashioned by Congress and the

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[24] Alec Stone Sweet, *Governing with Judges*. (New York: Oxford University Press, 2000); Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004).

[25] Tercio Sampáio Ferraz Junior, " (Sampáio Ferraz Junior, 1994)" *Revista USP*, No. 21 (1994): 12-21.

[26] On Latin America's new constitutionalism, see infra. n. 37.

[27] José Reinaldo de Lima Lopes, "Brazilian Courts and Social Rights: A Case Study Revisited," in Roberto Gargarella, Pilar Domingo, & Theunis Roux, eds., Courts and Social Transformations in New Democracies: An Institutional Voice for the Poor? (Surrey, UK: Ashgate Publishing, 2006), 185-212; Rogério B. Arantes and Cláudio G. Couto, "Constitutionalizing Policy: The Brazilian Constitution of 1988 and its Impact on Governance," in Detlef Nolte and Almut Schilling-Vacaflor, eds., *New Constitutionalism in Latin America* (Surrey, UK: Ashgate Publishing, 2012). (Arantes, 2012)

[28] In fact, a great deal of controversy was stirred in Brazil about the constitutionality of arbitration in view of its potential to deny individual access to court. In January 2002, the Brazil Supreme Court nonetheless upheld, 7-4, the constitutionality of the 1996 law establishing a framework for arbitration.

courts.[29] But in Brazil, some say that judicial review has created a litigious monster, "excessive judicial review" increasingly an annoyance and an imposition.[30]

The "pluricentric," catch-as-catch-can tendency of the system of administrative review continued to grow with the *entrée en scène* of independent regulatory agencies (IRAs) exercising powers of administrative review.[31] In the 1990s, Latin American countries began to delegate regulatory powers to private or semi-private bodies in hopes of reducing the risks of expropriation, manipulation, corruption, and waste that had plagued nationalist authoritarian governments of yore. Brazilian IRAs were explicitly modeled on New Deal-era agencies, although, as touchstones of the Washington Consensus's deregulatory program, they served almost antithetical functions.[32] IRAs represented an effort by the government at "self-binding" and countering the "super-accumulation" of power in the Executive.[33] Under liberalizing reformer Fernando Henrique Cardoso, the government parceled off regulatory power over electricity, telecommunications, oil, gas, and other infrastructure sectors as part of an ambitious program of privatization. IRAs were armed with functional guarantees of independence including fixed, staggered terms of office for commissioners, congressional approval of presidential nominations, and endowed with their own independent sources of funds. However, concludes Mariana Mota Prado, while

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[29] See, e.g., Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441 (1915), Crowell v. Benson, 285 U.S. 22 (1932), Allen v. Wright, 468 U.S. 737 (1984) and Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

[30] Ricardo Perlingeiro, "A justiça administrativa brasileira comparada," *Revista CEJ*, Vol. XVI, No. 57 (2012): 6-18; Ricardo Perlingeiro, "Administrative Justice in Brazil: A Judicial, Non Judicial or Hybrid Jurisdiction?" *Revista de Processo*, Vol. 233 (2014): 285-292.

[31] Binenbojm, *Uma Teoria do Direito Administrativo,* 244.

[32] Ibid.

[33] Mariana Mota Prado, "The Challenges and Risks of Creating Independent Regulatory Agencies: A Cautionary Tale from Brazil," *Vanderbilt Journal of Transnational Law,* Vol. 41, No. 2 (2008): 435-503.

Brazil's IRAs *do* exercise great regulatory power in the telecommunications, electricity, oil, securities sectors, and others, from the point of view of checking political—especially executive—discretion, the IRAs have proven a failure, their structural guarantees of independence failing to insulate them from presidential meddling.[34]

The reasons explaining the IRAs' functional lack of independence are several. Certain features of their design transplanted from the U.S. proved ineffective in the Brazilian system. Staggered terms resulted merely in delayed appointments. Financial autonomy proved feeble against the President's control of the appropriations process. The senatorial veto of nominations was rarely used. Denying the President explicit removal authority did little to protect agency commissioners from being "convinced" to resign by allies of the President.[35] Perhaps most importantly, the IRAs became increasingly unpopular, particularly among the rural poor, whom were ill served by privatization of utilities.[36] As president, former labor activist Luis Inácio Lula da Silva would take aim at the autonomy of IRAs, proposing a slew of tools for increasing political control of agencies' mandates, budgets, and accountability before Congress. A 2006 decree, for instance, granted Cabinet ministers authority to review agency decisions, which up to that point had been final.

Another important feature in the landscape of administrative review are mechanisms of so-called "social control" of administration. Various accounts describe the sweep

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[34] Mota Prado, "Independent Regulatory Agencies"; Rodrigo A. Lopes de Vasconcellos, "Brazilian Regulatory Agencies: Future Perspectives and the Challenges of Balancing Autonomy and Control," Ph.D. Dissertation (George Washington University, School of Business and Public Management, 2009); Mariana Mota Prado and Carlos Pereira, "Presidential Dominance from a Comparative Perspective."

[35] Mota Prado, "Independent Regulatory Agencies," 496-498.

[36] Susan C. Stokes, *Mandates and Democracy: Neoliberalism by Surprise* (New York: Cambridge University Press, 2001); Alberto Chong and Florencio Lopez de Silanes, *Privatization in Latin America* (Washington, D.C: The World Bank, 2005); Antonio Estache, "Utilities Privatization and the Poor: Lessons and Evidence from Latin America," *World Development*, Vol. 29, Iss. 7 (July 2001): 1179–1198.

over the Latin American continent of a wave of "new constitutionalism"[37] which scoops up, variously, threads of human rights cosmopolitan, positive demands upon the state, new mechanisms of participatory democracy, and popular constitutionalism. Brazil has witnessed corresponding changes to many of its institutions, but a different manifestation has been the alleged onset of a "crisis of administrative law paradigms."[38] On this account, the classical separation between administrators and administered appears increasingly inadequate, with civil society demanding greater involvement in administrative decision-making in addition to greater responsiveness.[39] In the face of such demands, new forms of accords governing public provision have appeared, leading not just to the blurring of the traditional division between state and society, but also to the erosion of classical paradigms of the finality and authoritativeness of administrative action.

B. The Appointment Power and Coalitional Presidentialism

It was at one time fashionable to cite Brazil's "hybrid" brand of presidentialism, which mixes party pluralism and proportional representation with strong presidential powers, as a shining example of how *not* to design a political system.[40] The Constitution having parceled out the legislative power across two branches, it was supposed that

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[37] See, e.g., Miguel Carbonell, *Teorías del neoconstitucionalismo: Ensayos escogidos.* (Madrid and Mexico City: Trotta and UNAM, 2007); Pedro Salazar Ugarte, *Derecho y Poder: Derechos y garantías* (Mexico City: Fontamara, 2013); Detlef Nolte and Almut Schilling-Vacaflor, *New Constitutionalism in Latin America: Promises and Practices* (Surrey, UK: Ashgate Publishing, 2012); Roberto Viciano Pastor and Rubén Martínez, *Estudios sobre el nuevo constitucionalismo latinoamericano* (Valencia: Editorial Tirant lo Blanch, 2012).

[38] Binenbojm, *Uma Teoria do Direito, passim.*

[39] Vitor Rhein Schirato and Juliana Bonacorsi de Palma, "Consenso e Legalidade: Vinculação da Atividade Administrativa Consensual ao Direito," *Direto Revista Electrônica sobre a Reforma do Estado,* Vol. 24 (2011): 1-26, 2.

[40] See, e.g., Scott Mainwaring, "Presidentialism, Multipartism, and Democracy: The Difficult Combination," *Comparative Political Studies*, Vol. 26, No. 2 (1993): 198-228; Barry Ames, *The Deadlock of Democracy in Brazil* (Ann Arbor, MI: University of Michigan Press, 2002).

forward motion in the policymaking arena would require mutual consent by two branches with little to bind them. Worse, with Brazil's legacy of weak, personalistic, pork-loving political parties,[41] and with no electoral threshold for congressional representation, marked party pluralization in both houses of the Brazilian government (as of this writing, 15 parties have some representation in the Senate, 28 parties in the Chamber of Deputies), presidents would be practically assured of lacking legislative majorities, and, driven by necessity, would resort to governing by administrative decree, leading to inter-branch conflict and system paralysis. Such, at least, was the gloomy prognosis of Juan Linz.[42] And if Linz's broadsided attack on presidentialism has given way to more nuanced analyses of how presidential regimes differ among themselves (see, e.g., Shugart and Carey 1992), many institutionalists continue to view presidentialism and multi-party political systems, such as we find in Brazil, as a "difficult combination," not to say a recipe for failure.[43]

These pessimistic accounts relied too much on the blueprint of the text, and would in time be confounded by empirical accounts showing the performance of the post-1988 Brazilian regime to be completely at odds with the outcomes predicted on the basis of this

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[41] Barry Ames, "Electoral Rules, Constituency Pressures, and Pork Barrel: Bases of Voting in the Brazilian Congress," *The Journal of Politics*, Vol. 57, No. 2 (1995): 324-343; Barry Ames, *The Deadlock of Democracy in Brazil*; Scott Mainwaring, "Politicians, Parties, and Electoral Systems: Brazil in Comparative Perspective," *Comparative Politics*, Vol. 24, No. 1 (1991): 21-43; Scott Mainwaring, "Party Systems in the Third Wave," *Journal of Democracy*, Vol. 9 (1998): 67-81; Scott Mainwaring, *Rethinking Party Systems in the Third Wave of Democratization: The Case of Brazil* (Stanford: Stanford University Press, 1999); David J. Samuels, "Sources of Mass Partisanship in Brazil," *Latin American Politics and Society*, Vol. 48, No. 2 (2006): 1-27; Kenneth Roberts, *Changing Course in Latin America: Party Systems in the Neoliberal Era* (New York: Cambridge University Press, 2014); Scott Desposato, "Parties for Rent? Ambition, Ideology, and Party Switching in Brazil's Chamber of Deputies," *American Journal of Political Science*, Vol. 50, No. 1 (2006): 62-80.

[42] Juan J. Linz, "The Perils of Presidentialism." *Journal of Democracy*, Vol. 1, No. 1 (1990): 51-69.

[43] Maurice Duverger, "A new political-system model: semi-presidential government," *European Journal of Political Research*, Vol. 8, No. 2 (1980): 165-87; Scott Mainwaring and Timothy Scully, *Building Democratic Institutions: Party Systems in Latin America* (Stanford: Stanford University Press, 1995); Mainwaring, "Presidentialism, Multipartism, and Democracy."

institutional analysis. Since 1988, Brazilian presidents have had great success enacting their legislative agenda, the National Congress proving neither an obstacle nor a rubber stamp, but actually a formidable partner.[44] And far from turning the President and Legislature into warring autarchies, Brazil's undisciplined party system has actually forced Presidents to craft broad but disciplined governing coalitions out of the multi-party sprawl, defying predictions of party indiscipline and inaction.[45] Social scientists once considered presidential coalitions empirical rarities,[46] yet coalition governments in Brazil date back to 1946 under President Gaspar Dutra,[47] and huge party coalitions have been a feature of every administration since the new constitution was implemented, particularly under recent presidents Fernando Henrique Cardoso and Lula.

The appointment power illustrates well this dynamic of mutual pressure by the President and Congress in the maintenance of governing coalitions. Although the President

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[44] Leany B. Lemos and Timothy J. Power, "Determinantes do controle horizontal em parlamentos reativos: o caso do Brasil (1988-2005)," *Dados*, Vol. 56 (2013): 383-412; Leslie Elliott Armijo, Philippe Faucher and Magdalena Dembinska, "Compared to What?: Assessing Brazil's Political Institutions," *Comparative Political Studies*, Vol. 39, No. 6 (2006): 759-786; Octávio Amorim Neto and Fabiano G.M. Santos, "The Executive Connection: Explaining the Puzzles of Party Cohesion in Brazil," *Party Politics* Vol. 7, No. 2 (2002): 213-234; Cox and Morganstern, "Latin America's Reactive Assemblies and Proactive Presidents"; Gary Reich, "Executive Decree Authority in Brazil"; Argelina Figueiredo, "Resenha de estudos sobre o Executivo," *Revista do Serviço Público*, Vol. 55. Nos. 1-2 (2014): 5-48. Bolivar Lamounier discusses the prolificness of the Cardoso administration, although he considers it "paradoxical" given the system's "manifest dysfunctionality." Bolívar Lamounier, "Brazil: An Assessment of the Cardoso Administration," in Jorge I. Domínguez and Miguel Shifter, eds., *Constructing Democratic Governance in Latin America* (2nd ed.) (Baltimore: Johns Hopkins University Press, 2003), 269-291, 289.

[45] Argelina Cheibub Figueiredo and Fernando Limongi, "Presidential Power, Legislative Organization, and Party Behavior in Brazil," *Comparative Politics*, Vol. 32, No. 2 (2000): 151-170; Figueiredo and Limongi, "Mudança Constitucional"; (1995); Figueiredo and Limongi, *Executivo e Legislativo na nova ordem constitucional* (2001); Fernando Limongi, "Institutions, Presidents, and Agencies," *Revista Direito FGV,* Vol. Especial 1 (2005): 21-54.

[46] Linz, "Perils of Presidentialism"; Lijpardt, *Parliamentary vs. Presidential Government*: Mainwaring, "Presidentialism, Multipartism, and Democracy"; Juan J. Linz and Arturo Valenzuela, *The Failure of Presidential Democracy: Comparative Perspectives, Vol. 1* (1st ed.). (Baltimore: Johns Hopkins University Press, 1994), esp. Ch. 1; Giovanni Sartori, *Comparative Constitutional Engineering* (2nd ed.) (New York: NYU Press, 1997).

[47] Figueiredo and Limongi, *Executivo e Legislativo*.

is authorized to fill over 20,000 positions by appointment (a figure horrifying to northern observers[48]), this power is limited in practice by programmatic and personalistic demands arising from powerful state governors and federal legislators, and by the imperative to maintain a governing coalition. If the Brazilian Congress plays a largely "reactive role" in policymaking, the power it wields over the President can still be formidable.[49] In its exercise of "horizontal accountability," Congress has several tools at its disposal: public hearings, summoning ministers, information requests, and investigative commissions, among others.[50] Most important, however, is its ability to condition votes on policy consensus with the President.[51] Congress's highly centralized nature affords party leaders great influence over their caucuses (*bancadas*) when it comes to decisions including roll-call votes, cloture and, most importantly, the designation of a bill as urgent for purposes of debate. Party leaders thus have prime control over the content, timing and ultimately the fate of bills on the floor of the National Congress, serving as the main brokers in the bargaining between the executive and the legislature, bargaining for offices in exchange for delivering votes for presidential initiatives.[52]

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[48] A typical example is a February 2015 article in *Time* magazine entitled "5 Reasons Brazil is Getting Close to the Brink" easily links the number of political appointments with a propensity for corruption: "More than 20,000 government jobs are by appointment—compared to 5,500 in the United States—providing politicians with ammunition to reward allies or business partners." Ian Bremmer, *Time* (Feb. 20, 2015).

[49] Cox and Morganstern, "Latin America's Reactive Assemblies and Proactive Presidents"; Scott Morganstern, Juan Javier Negri, and Aníbal Pérez-Liñán, "Parliamentary Opposition in Non-Parliamentary Regimes: Latin America," *The Journal of Legislative Studies*, Vol. 14, Nos. 1-2 (2008): 160-189.

[50] Lemos and Power, "Determinantes do controle horizontal em parlamentos reativos."

[51] Rafael Freitas dos Santos, "Poder de agenda e participação legislativa no presidencialismo de coalizão brasileiro," Master's Dissertation (São Paulo: Universidade de São Paulo, 2010).

[52] Argelina Cheibub Figueiredo, "Instituições e Política no Controle do Executivo," *Dados,* Vol. 44, No. 4 (2001): 689-727; Cheibub Figueiredo and Limongi, "Presidential Power, Legislative Organization, and Party Behavior," (2000); Figueiredo and Limongi, *Executivo e Legislativo* (2001).

Surprisingly, these coalitions are fairly stable across presidential administrations. The agenda powers and resources of patronage held by the president allow him to manage his coalition, neutralizing to some degree personalism in congressional voting and securing disciplined party support.[53] Patronage also helps stabilize the coalition, providing party leaders with the means to discipline and punish backbenchers.[54] Bargaining need not even take place on a case-by-case basis: once the government is formed and benefits distributed among coalition members, the president may exact support for his entire legislative platform much like a prime minister.[55]

The ability to maintain vast coalitions may be the most important factor in predicting the president's true policymaking authority, and the need to offer benefits to legislative allies imposes an external requirement of proportionality on the appointments the president can make. Accordingly, top positions in ministries, governmental agencies and public enterprises are divvied among parties according to the distribution of cabinet posts, which in turn reflect the composition of coalitions. A strong relationship has been found between cabinet proportionality and legislative success of the president's agenda.[56] As the logic

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[53] Mainwaring and Shugart, *Presidentialism in Latin America;* Figueiredo and Limongi, "Presidential Power, Legislative Organization, and Party Behavior," (2000).

[54] An interesting fact: Scott Desposato, "Parties for Rent?" has found that Brazilian legislators who switched parties voted with their new party 75% of the time after (versus 60% with their old party).

[55] The distribution of ministries and high-ranking positions also follows a federalist logic, as the government must cater to factions at different state levels. Fernando Limongi, "Institutions, Presidents, and Agencies," (2005)

[56] Octavio Amorim Neto, *Presidencialismo e Governabilidade nas Américas.* (Rio de Janeiro: Editora FGV, 2006); Octavio Amorim Neto, "Presidential cabinets, electoral cycles, and coalition discipline in Brazil," in Scott Morganstern and Benito Nacif, eds., *Legislatures and Democracy in Latin America* (New York: Cambridge University Press, 2002), 48-78; Amorim Neto and Santos, "The Executive Connection." But see Jose Antonio Cheibub and Fernando Limongi, "Modes of government formation and the survival of democratic regimes: presidentialism and parliamentarism reconsidered," *Annual Review of Political Science*, No. 5 (2002): 151-179 (finding no connection between cabinet proportionality and legislative success of the presidential agenda).

goes, when a proportional cabinet is formed, the president's legislative coalition is more disciplined, and therefore the president is likely to accomplish relatively more of her legislative agenda. Further, Cabinet proportionality may also bear an inverse relation to the number of decrees issued by Brazilian presidents, suggesting that the propensity to govern unilaterally (by "prerogatives") is tempered by a productive relationship with Congress.[57]

Contrast the two cases of Fernando Collor de Melo (1990-1992) and Fernando Henrique Cardoso (1994-2003). The first popularly elected president in Brazil after the fall of the military dictatorship, the charismatic young Collor enjoyed strong popular backing early in his tenure, but his radical plan of neoliberal reforms was supported, as one journalist puts it, "only by his arrogance and by the advice of a group of technocrats."[58] Collor's initial governing coalition consisted of only three political parties, with 245 seats, or about 49 percent of the Chamber of Deputies; 60 percent of the posts in his first cabinet went to nonpartisan ministers.[59] The Collor administration would be crippled by a perpetually bleak economic forecast, including massive hyperinflation, and it proved impossible to weather a series of corruption scandals and massive popular protests around the country without real alliances or strong backing in Congress. In 1992, Collor was impeached from office, largely, it was felt, as a result of extreme policy preferences, and his hubristic unilateral strategy and supra-party stance.

Collor's successor, Fernando Henrique Cardoso, or FHC, as he was popularly known, was never tempted to repeat this experiment in unilateralism. His party, the PSDB,

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[57] Octavio Amorim Neto and Paulo Tafner, "Governos de coalizão e mecanismos de alarme de incêndio no controle legislativo das medidas provisórias," *Dados*, Vol. 45, No. 1 (2002): 5-38.

[58] José Natanson, *La nueva izquierda: Triunfos y derrotas de los gobiernos de Argentina, Brasil, Bolivia, Venezuela, Chile, Uruguay y Ecuador* (Buenos Aires: Penguin Random House Group Editorial Argentina, 2008), 56.

[59] Carlos Pereira, "Brazil's Executive-Legislative Relations under the Dilma Coalition Government," *Brookings Institution*, (Nov. 10, 2010).

having won a scant 14% of seats in Congress in 1994 and 17.5% in 1998, Cardoso was aware that it would be impossible to get preferred legislation passed without reaching out to other parties and forming governing alliances: "[T]he worst mistake presidents can commit," Cardoso wrote in 2010, "is to imagine that they have a mandate to govern alone. In order to fulfill their promises to the electorate, they need Congress. And to obtain a majority in Congress they need to build alliances. . . . Without alliances presidents do not govern." Cardoso did just this, stitching together a sprawling legislative coalition consisting of four parties in his first term, and adding on two more to bring the total up to six, representing 72.8% of seats in the Chamber of Deputies.[60] Although sprawling, the FHC cabinet and coalition was blessed with remarkable "coalescence"[61] and consensus with regard to the president's reform agenda. Accordingly, Cardoso was able to sustain his majority coalition for almost eight years at a comparatively low cost, enjoying great programmatic success as he pursued his vision of the "necessary state," universalizing welfare coverage even as he decentralized and streamlined the state by expanding municipal responsibilities and decentralizing fiscal resources. Four conditional cash transfer programs were created under his watch that would target the poor while circumventing the bureaucracy and stemming clientilism.[62] The FHC administration also established formulae for calculating totals to be administered to state governments for grant-in-aid programs, thereby further reducing pork barrel exchanges between bureaucrats, legislators and

[60] Fernando Limongi and Argelina Figueiredo, "Processo orçamentário e comportamento legislativo: emendas individuais, apoio ao Executivo e programas de governo," *Dados*, Vol. 48 (2005): 737-776; Pereira, "Brazil's Executive-Legislative Relations," 2.

[61] Octavio Amorim Neto, *Presidencialismo e Governabilidade*.

[62] These four programs were: Bolsa Escola (credits for schooling), Agente Jovem/Erradicação do Trabalho Infantil (support for families with children), Bolsa Alimentação (distribution of foodstuffs), and Auxilio-gás (cash transfers for gas). They were joined by the Program for Family Health, the Support Program for Family Agriculture, and Project Alvorada ("Sunrise"), which targeted municipalities with particularly high rates of residents below the poverty line.

constituents. Cardoso even managed to reform the Constitution to dismantle state monopolies, allow immediate presidential reelection, and restructure the bureaucracy by decentralizing hiring and salary decisions.[63]

On the other hand, Cardoso's attempts to reform civil service employee pensions and the tax system were thwarted by fierce opposition from without—unions and the PT (Lula's Workers' Party), as well as from within—Cardoso's "crusading" Minister of Administration and State Reform, Luis Bresser Pereira, was stonewalled by several in the president's inner circle, including Chief of Staff Clovis Carvalho, Secretary of the Presidency Eduardo Jorge, Minister of Planning José Serra, and Minister of Education Paulo Renato de Souza.[64] Social security reform was finally implemented after a debate that stretched the duration of Cardoso's first term, but lost much of its bite in the implementation stage as corporatist interests managed to rearticulate themselves in Congress and society at large to bar new changes. Cardoso would note with frustration the "concessions that presidents [must] make to their allies and to their own party," grumbling in 2001, "How can you cut spending with this Constitution? [I have] a [legislative] majority, but for what?"

Recent evidence suggests, first, that notwithstanding its reputation for "passivity" and disorganization, the Brazilian Congress is making increased use of oversight

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[63] Each of the reforms required the approval of three-fifths of all members in both the Chamber of Deputies and the Senate in two rounds of voting, and because regulations in the lower chamber allowed that any party call for separate votes on individual parts of a proposition, the qualifying quorum of three-fifths had to be achieved on *hundreds of different votes*. Strict quorum requirements, combined with a system in which logrolling and patronage routinely greases the wheels of legislative voting, rendered the process of constitutional reform a demanding one.

[64] Francisco Gaetani and Blanca Heredia, "The Political Economy of Civil Service Reform in Brazil: The Cardoso Years," Paper prepared for the Conference "Red de Gestión y Transparencia" Inter-American Bank, Regional Political Dialogue (October 2002): 1-41; Akiko Koyasu, "Social Security Reform by the Cardoso Government of Brazil: Challenges and Limitations of Reform Ten Years After 'Democratization,'" *The Developing Economies*, Vol. XLII, No. 2 (June 2004): 241-261, 242.

mechanisms in recent years, and secondly, that such oversight is in fact mediated by measures of presidential popularity and the size of the pro-presidential faction in Congress.[65] If true, this suggests that what we might think of as constitutional mechanisms of oversight in fact respond to a purely political logic of coalitional politics, driven by the shifting context of the executive-legislative relationship in this system.

Such patterns of checking may provide an explanation for why, unlike in the United States, the Brazilian President cannot simply hunker down in the administrative state and govern unilaterally: first, because supposed "allies" studded throughout the bureaucracy may withhold their support from a President whose congressional leadership disappoints; and secondly, because the President's failure to impose discipline upon congressional parties can expose her to threats debilitating her very tenure in office

The present woes of the incumbent Dilma Rousseff (2010-) make clear the vital relationship between coalition maintenance and congressional checking and balancing. Although Dilma, as she is popularly known, had the support of 64 and 61 percent of seats in the Senate and Chamber of Deputies respectively at the start of her two terms, respectively, the Petrobras scandal that broke in late 2014 would thoroughly shake her nine-party coalition. In July 2015, the center-right PMDB, the second-largest party in Congress, temporarily withdrew its support from Dilma when its head, Eduardo Cunha, came under criminal investigation for involvement in the Petrobras scandal. Calling for Dilma's impeachment, Cunha threatened, "I cannot accept that the government uses its machinery to seek the political persecution of those who turn against it." In October, Dilma would manage at once to patch together the coalition and slow the tide of the impeachment movement, by increasing the pivotal PMDB's share of her cabinet in return for quashing the

[65] Lemos and Power, "Determinantes do controle horizontal em parlamentos reativos."

opposition's efforts to oust her. So far, the appeasement tactic appears to have worked, although heads are still rolling within the upper echelons of the political and economic spheres.

Ultimately, there is disagreement among scholars about whether Brazil's coalitional presidentialism is a good or a bad thing. E. E. Schattschneider's observation that "modern democracy is unthinkable save in terms of political parties," is a commonplace, and for many, the opportunism and prodigious appetite for pork of Brazilian "politicians without parties" are fomented by the "weakness" of the party system, with a resultant proclivity to horse-trading that engenders in many spectators a profound cynicism.[66]

Yet, from the point of view of presidentialism and administrative control thereof, there are reasons to rethink the longstanding normative bias of party-systems theory in favor of Weberian "institutionalization" of the system and its component parts.[67] As we have seen, the volatility of the Brazilian political party system has led to the formation of wide legislative coalitions, which may have two beneficial effects: first, they impose moderation and consensus on the executive policy agenda,[68] neutralizing radical sharp turns in

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[66] On the opportunism and appetite for pork of Brazil's politicians, see, e.g., Marcelo Cavarozzi, & Esperanza Casullo, "Los partidos politicos en América Latina hoy: consolidación o crisis?", in Marcelo Cavarozzi and Juan Abal Medina, eds., *El asedio a la política: los partidos latinoamericanos en la era neoliberal* (Rosario: Editorial Homo Sapiens, 2002), 9-33; Alston and Mueller, "Pork for Policy," Ames, *The Deadlock of Democracy in Brazil;* Ames, "Electoral Rules, Constituency Pressures, and Pork Barrel"; Amorim Neto and Santos, "The Executive Connection"; Perry Anderson, "The Cardoso Legacy," *London Review of Books*, Vol. 24, No. 24 (2002): 18-22; Cox and Morganstern, "Latin America's Reactive Assemblies and Proactive Presidents"; Kurt Weyland, "The Brazilian state in the new democracy: How did the transition affect the state?" *Journal of Interamerican Studies and World Affairs*, Vol. 39 (2005): 63-94.

[67] See, for example, Mainwaring, *Building Democratic Institutions*; Herbert Kitschelt, Kirk A. Hawkins, Juan Pablo Luna, Guillermo Rosas, & Elizabeth J. Zechmeister, *Latin American Party Systems* (New York: Cambridge University Press, 2010).

[68] Observed former president Cardoso in an interview in 2012, "[T]here is a kind of non-explicit agreement [for consensus in our system]. When Lula became president the world believed he would destroy everything that I had done. And he didn't . . . When I lived in Chile [during Brazil's period of military dictatorship] the Christian Democrats and Socialists were opponents, the Socialists far to the left and the Christian Democrats much more conservative. Then they merged to create a united

policymaking and imposing a kind of discipline on presidential unilateralism. The impeachment of Collor, and the increased representativeness of Lula's second-term cabinet attest to these dynamics. Secondly, inasmuch as the practice entails a kind of "fusion" of the executive and legislative branches,[69] the narrowing of the divide between statutory law and administrative policy may redound to the legitimacy of the system, as high-handed unilateralism cannot long endure.

C. The Public Class Action and the Negotiated Settlement

The Attorney General of Brazil, the highest public prosecutor of the nation, exercises a function entirely unlike that of the attorney general in the American system.[70] Although it is the President, with the consent of the Senate, who appoints and fires the Attorney General (*Procurador Geral*), the office, unlike in the U.S., officially belongs to none of the three branches but is instead considered a sort of vital accessory to the functions of justice.[71] The Attorney General sits at the head of the Public Prosecutor's Office (*Ministério*

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force, the Concertación. We didn't do that. But in practice we are doing the same[.]" Interview with Fernando Henrique Cardoso, "More personal security, less inequality." *The Economist* (January 19, 2012). Sartori's study of comparative constitutional design focused on the political conditions that can engender "consensus democracy" by balancing the need for strong parliamentary control and efficient government with safeguards against both parliamentary obstructionism and government by decree. Sartori, *Comparative Constitutional Engineering.*

[69] Cox and Morganstern, "Latin America's Reactive Assemblies and Proactive Presidents," Figueiredo and Limongi, *Executivo e Legislativo;* Limongi, "Presidencialismo e Governo de Coalizão" (2007).

[70] The *Advogado Geral* is another constitutional office which might also be translated as "Attorney General" ("Advocate General" is also found), and who resembles much more closely the American Attorney General. The Advocate General, who is "freely appointed" by the President, is responsible for representing the Republic in and out of court, and provides the President with legal advice. (Constitution of Brazil, Art. 131, Art. 131 §1)

[71] The Attorney General serves a fixed term of two years and is appointed by the president, out of a roster of career civil servants over thirty-five years of age, with the approval of a majority of the Senate and after a public hearing. The General Attorney may be reappointed to the post. Constitution of Brazil, Chapter IV, "Of the Essential Functions of Justice," Article 128, § 1, and Article 52, III, e).

Público), a institution derived from European models and in particular the *ministère publique* of French medieval law, which eventually passed to Portugal and then to its Brazilian colony in the fifteenth and seventeenth centuries.[72] Historically responsible for exercising "the state's monopoly on accusing and prosecuting criminals," such prosecutorial entities "have also historically held the power to intervene in and, in some cases, initiate civil litigation that involves the interests of the general public."[73]

The two main functions of the Public Prosecutor's Office are to defend the democratic order, ensuring due respect for the Constitution by the branches of government, and to defend the individual and social rights therein contained.[74] In addition to the power to launch public investigations,[75] the Attorney General and public prosecutors of the states and municipalities are endowed by statute with two crucial tools unknown in the U.S. context, the ability to file public class action suits (the *ação civil pública*, hereafter ACP) against private actors or public authorities, as well as to simply threaten such a suit in order to leverage a negotiated settlement (*termo de ajustamento de conduta*, TAC), in the

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[72] John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition* (Stanford: Stanford University Press, 2006), 104-5.

[73] Colin Crawford, "Defending Public Prosecutors and Defining Brazil's Environmental 'Public Interest': A Review of Lesley McAllister's *Making Law Matter: Environmental Law and Protections in Brazil*," *George Washington International Law Review*, Vol. 40, No. 3 (2008): 619-647, 620.

[74] Constitution of Brazil, Arts. 127-130.

[75] In this regard, the Brazilian Attorney General is not unlike the now-defunct independent counsel, or special prosecutor in the United States. Created by the Ethics in Government Act in 1978, the independent counsel's main function was to investigate allegations of misconduct in the executive branch. The office's potential for intrusiveness began to attract heavy criticism after the controversial *Morrison v. Olson* case (1988) and especially after the blowback surrounding the Kenneth Starr investigation of President Clinton, and the office's authorizing statute was allowed to expire in 1999. Today, the office has been folded into the Department of Justice Office of Special Counsel, under the formal command of the Executive, while "special counsels" are to be appointed by the Attorney General. For scholarship critical of the independent prosecutor, see, Herbert J. Miller, Jr. and John P. Elwood, "The Independent Counsel Statute: An Idea Whose Time Has Passed," *Law and Contemporary Problems,* Vol. 62, No. 1 (Winter 1999): 111-129; Stephen L. Carter, "Comment, The Independent Counsel Mess," *Harvard Law Review* Vol. 102, No. 75 (1988): 105-141; Julie O'Sullivan, "The Independent Counsel Statute: Bad Law, Bad Policy," *American Criminal Law Review,* Vol. 33 (1996): 463-509.

name of protecting public property, cultural inheritance, the environment, and other diffuse and collective interests. The two latter devices are a source of great power against presidential dominance.

The public class action can be brought against any individual or entity, private and public, that harms diffuse, collective, or individual rights.[76] Class actions have been brought against firms, banks, private schools, credit card companies, and health insurance plans. They have been used to oversee public processes: public bidding for contracts, collective bargaining, and in order to vindicate mass wrongs such as damage to the environment or cultural heritage. They are also considered a tool for consumer protection, targeting misleading advertising, defective products, inadequate information, or abusive adhesion contracts. Public civil actions are most commonly brought in cases concerning the environment (35.4%), consumer rights (34.9%), rights of children and adolescents (12.9%), public policy (7.5%), public administration (5.9%) and the rights of the disabled (1%).[77] There is evidence that this pattern is changing: in the '90s, the ACP was criticized for being primarily sensitive to "middle class" issues and targeting mostly private actors, and today, an increasing number of suits are being sought by poor people demanding access to services in the public sector.[78] The ACP can be brought by a select number of legal actors,

[76] Diffuse rights are those that pertain to individuals as a collective, but in their individual capacity, such as the right to breath clean air. Collective rights are those belonging to a group of persons related to one another by some legal interest, for example the collective bargaining rights of unions. Finally, homogenous individual rights, as they are known in Brazilian law, refer to those rights which arise among persons as a result of a particular event, for example in a common tort claim. They are now often vindicated by the class actions.

[77] Luis Werneck Vianna and Marcelo Baumann Burgos, "Entre Princípios e Regras: Cinco Estudos de Caso de Ação Civil Pública," *Dados,* Vol. 48, No. 4 (2005): 777-843, 786.

[78] Lima Lopes, "Brazilian Courts and Social Rights," 185.

although in actuality, the Public Prosecutor has a functional monopoly on the public class action, filing over 97.6% of these actions, according to a 2002 report.[79]

The negotiated settlement of adjusted conduct (TAC) is another "extrajudicial" device by which public prosecutors can solicit compliance from actors who harm constitutional rights of the individual, collective or diffuse variety.[80] In lieu of litigation, actors sign a legally binding agreement to modify their conduct and thereby remove the harm.[81] In cases involving a "public interest of the Union," the written agreement must specify the obligations assumed, the deadline and manner of their fulfillment, the method for overseeing compliance, their basis in law and fact, and the fine or penalty to be assessed in case of noncompliance.[82] The TAC is used daily in thousands of districts in the country, in similar contexts to the public class action; in practice, they might be analogized to the plea bargain, a sort of threat tactic used to forestall litigation (i.e. via the public class action suit).

In terms of regulation, the ACP and the TAC are powerful weapons. Next to litigation, the TAC, operating in the shadow of the ACP, has the advantages of speed,

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[79] Werneck Vianna and Burgos, "Entre Princípios e Regras," 786. By law, the public class action can be brought by federal, regional, or state-level Public Prosecutors; federal, regional, or state Public Defenders; Brazilian state, municipal, or federal governments; public corporations; and certain other groups with particular legal status, including the Brazilian attorneys' bar. Law 7.347, Art. 5, and Consumer Protection Code, Art 82.

[80] The adjusted conduct settlement was originally introduced in 1990 as part of the Consumer Defense Code (Law No. 8.078/90, Art. 113) and the Law of the Child and the Adolescent (8.069/90, Art. 211). It is also incorporated into the Public Class Action statute (7.347/85, as amended by Law no. 8.078/90, Art. 5, §6). Hugo Nigro Mazzilli, *O inquérito civil, investigações do Ministério Público, compromissos de ajustamento e audiências públicas* (2nd ed.) (São Paulo: Editora Saraiva, 2000); Geísa de Assis Rodrigues, *Ação civil pública e termo de ajustamento de conduta* (Rio de Janeiro: Editora Forense, 2002); Leonel Carlos da Costa, "Termo de ajustamento de conduta (TAC) e a algumas observações sobre o seus limites," *Revista Jus Navigandi,* ano 19, n. 4140 (Nov. 2014).

[81] Note that the Law of Administrative Improbity (8429/92, Art. 17, §1) prohibits these sorts of settlements, by a public prosecutor or any other authorized party, in cases involving ethical violations on the part of a civil servant.

[82] Art. 4ª, Law 9.469/97, as amended by Law 12.249/10.

flexibility, cost-effectiveness, and consensualism[83] (particularly in Brazil's overloaded court system). Whereas suits can take several years to reach a definitive resolution, the TAC can be completed in weeks or months, thus allowing it to target harms in need of swift redress, lest they became irreparable. The TAC has also been an important tool to appease a population now wary of privatizations. Accordingly, public-private contracting may be a preferred option to pure privatization,[84] and the TAC has gone some way to facilitating these partnerships. In the private sector, the TAC allows for government-industry cooperation in achieving outcomes, advantageous in preserving industry productivity and competitiveness while bolstering labor standards, workers' rights, and social and environmental protections.[85] Important examples include TACs signed by the Brazilian Federation of Banks pledging to update its accommodations for the disabled (2008); by Spanish mass fashion retailer Zara after one of its São Paulo factories was found to be using undocumented Bolivian slave labor (2011); and by Chevron Brazil, in which the oil company agreed to damages and to undertake measures to secure compliance with environmental standards and prevent future spills (2011).

The ACP and the TAC, introduced by legislation in 1985 and 1990, respectively, must be understood as part of a larger sociopolitical context of post-authoritarian Brazilian democracy, with its exuberant return to democracy—"Diretas já!" ("Direct elections

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[83] Da Costa, "Termo de ajustamento de conduta"; "Atuação Extrajudicial do Ministério Público" Report prepared by the Public Prosecutor's Office of the state of Rio Grande do Sul (2002).

[84] But on the dangers of cooptation of NGOs administering public programs, particularly where civil society and legislative oversights are weak, see, Susan Rose-Ackerman, "Public administration and institutions in the LAC region," in Bjørn Lomborg, ed., *Latin American Development Priorities: Costs and Benefits* (New York: Cambridge University Press, 2009), 515-590, 562.

[85] Roberto Pires, "Promoting Sustainable Compliance: Styles of Labour Inspection and Compliance Outcomes in Brazil," *International Labour Review*, Vol. 147, No. 2-3 (Jan. 2008): 199-229; Salo V. Coslovsky and Richard Locke, "Parallel Paths to Enforcement: Private Compliance, Public Regulation, and Labor Standards in the Brazilian Sugar Sector," *Politics & Society*, Vol. 41, No. 4 (Dec. 2013), 497-526.

now!") was the motto of millions of street protestors demanding free elections in the early-to-mid-'80s—and embrace of new social and collective rights. The Brazilian Constitution, now considered a vanguard in Latin America's wave of "new constitutionalism," encompasses various ideological threads: popular constitutionalism, a broadening of legitimate positive demands upon the state, new forms of citizen participation in governance and policymaking, and a cosmopolitan and group-oriented attitude toward human rights.[86] Constitutions written in this mode today feature litanies of new collective and social rights covering everything from the protection of clean water to indigenous interests to the right to practice a sport,[87] as well as novel participatory institutions which, some speculate, carry the tense coexistence of representative and direct democracy to the breaking point.[88] (The Ecuadorian Constitution of 2008, for example, enacts a thoroughgoing repudiation of Montesquieu's tripartite separation of powers with an indigenous justice branch, a

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[86] How "new" a constitutionalism we mean could be debated, and we do some violence to the literature by lumping together the multiple "waves" of post-authoritarian constitution writing witnessed by the continent since the 1980s. Nonetheless, Brazil has proven an important early example of later threads of participatory democracy and collective rights protection, on which we focus here. On Latin America's new constitutionalism, see, e.g., Roberto Gargarella and Christian Courtis, "El nuevo constitucionalismo latinoamericano: promesas e interrogantes." *CEPAL Serie Políticas Sociales*, No. 153 (2009): 1-45; Roberto Gargarella, "El nuevo constitucionalismo latinoamericano. Algunas reflexiones preliminares." *Crítica y Emancipación*, No. 3 (2010): 169-188; Viciano Pastor and Martínez Dalmau, *Estudios sobre el nuevo Constitucionalismo Latinoamericano*; Carbonell, *Teorías del neoconstitucionalismo*; Nolte and Schilling-Vacaflor, *New Constitutionalism in Latin America*.

[87] e.g., Constitution of Brazil, Article 217: "It is the duty of the State to foster the practice of formal and informal sports, as each individual's right, with due regard for: (I) the autonomy of controlling sports entities and associations as to their organization and operation; (II) the allocation of public funds in order to promote, on a priority basis, educational sports and, in specific cases, high-income sports; (III) differentiated treatment for professional and non-professional sports; (IV) the protection and encouragement of national sports events."

[88] Gargarella, for example, juxtaposes the 19th c. understanding of the separation of powers with the reformist versions of the doctrine in modern-day Latin American constitutions. Gargarella and Coutis, "El nuevo constitucionalismo latinoamericano; Gargarella, "El nuevo constitucionalismo latinoamericano: Algunas reflexiones preliminares."

transparency and social control branch, and an electoral branch to add to the legislature, executive, and the judiciary.)

Some say that a "crisis of representative democracy" has swept Latin America, its no longer being possible today, to use the expression of Pierre Rosanvallon, to limit the representative function to the narrow dimension of voting.[89] Although, Brazil's evolution towards participatory democracy has been subtler, it has edged toward its own "crisis of administrative law paradigms,[90]" with the strict separation of administrators and administered come to seem inadequate in a mature society desirous to *participate* in running the public machinery.[91] A new "pro consensus" movement demands greater responsiveness in public goods provision, increased cooperative action in the public services provision, and most importantly, greater participation in administrative decision-making.[92]

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[89] Thamy Pogrebinschi has extensively studied the "crisis of representation" in Latin America, concluding that in the Brazilian case, the symptoms of crisis (including low electoral turnout, rising political apathy, distrust in political institutions and actors, decrease of party membership and mobilization, proportionality deficits of electoral systems, etc.) may be present, Brazil's new participatory institutions bolster, rather than undermine representative democracy as "concurrent models of governance." ———, "Participation as Representation: Democratic Policymaking in Brazil", in Maxwell A. Cameron, Eric Hershberg, & Kenneth E. Sharpe, eds., *New Institutions for Participatory Democracy in Latin America* (2012), 53-74; ———, "The Pragmatic Turn of Democracy in Latin America," *Friedrich Ebert-Stiftung: Latin America and the Caribbean.* (2013), 3-20; ———, Thamy Pogrebinschi, "The squared circle of participatory democracy: scaling up deliberation to the national level," *Critical Policy Studies*, Vol. 7, No. 3 (2013): 219-241;———, "The Impact of Participatory Democracy: Evidence from Brazil's National Public Policy Conferences," *Comparative Politics*, Vol. 46, No. 3 (2014): 313-332.

[90] Binenbojm, *Uma Teoria do Direito Adminstrativo,* 310.

[91] Rhein Schirato and Bonacorsi de Palma, "Consenso e Legalidade," 2.

[92] Gustavo Binenbojm deals at length with the import and effects of so-called mechanisms of "social control," or greater citizen participation in agency control, a "more daring form of suppressing problem of democratic legitimacy deficit of independent agencies." *Uma Teoria do Direito Administrativo,* 310. Such direct citizen participation is provided for by the Brazilian Constitution and by the organic statutes of most regulatory agencies, such as ANATEL, the Brazilian agency of Telecommunications, or ANP, the National Agency of Petroleum. There are three basic mechanisms of social control. First, public hearings; second, public consultations, by which legislators are required to canvass public opinion, usually by letter or email, with regard to the content of rules to be promulgated by the agency; and third and finally, consultative councils. These are composed of individuals representing affected interests, federal legislators, the regulating agency and the Executive branch more broadly, public utility providers, consumer groups, and other groups representing

Particularly under Lula and the PT, reforms have allowed greater citizen participation in control of public administration. Increasingly, says a former minister of Lula, "social participation has been adopted as a democratic method of public administration."[93] Brazil has pioneered with some success such non-traditional forms of public participation in policymaking as participatory budgeting committees, national public policy conferences, national policy councils, public hearings, local administration councils, audit offices, and discussion and negotiation roundtables. National policy conferences skyrocketed during Lula's presidency, with 74 national conferences held between 2003 and 2010 on matters ranging from health reform to environmental protection and social assistance. The average conference brought together 3,000 delegates, and since 2003, over 5 million citizens have participated in total, according to government statistics.[94] Between 1988 and 2009, 19.8 percent of all regular bills proposed by the Congress (and 7.2 of those approved) were substantively consistent with national conferences' policy recommendations, and 48.5 percent of proposed constitutional amendments (15.8 of those approved). The point of these initiatives, says Pogrebinschi, is to allow citizens to become more directly involved in the administration of all things public, particularly in a way that is not directly mediated by political parties and professional politicians.[95]

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society at large. They may provide consultative and oversight functions to the agency, offering opinions on proposals and reviewing agency reports, particularly during the rulemaking stages. (316) Overall, though, these developments may be more sound and fury than major adaptation. The first two, public hearings and public consultations, are not very different from what is found in the U.S. in the typical "notice and comment" process, while the third is apparently of marginal effect in practice.

[93] Pogrebinschi, "Participation as Representation," 57.

[94] Ibid, 63.

[95] Ibid, 53-54. For a contrary view, see Brian Wampler, "A Guide to Participatory Budgeting," in Anwar Shah, ed., *Participatory Budgeting* (Washington, D.C: The World Bank, 2000), 21-54.

The public class action suit and the negotiated settlement are both cause and consequence of this larger trend in Brazilian administrative law toward increased "social control" of administrative processes. Two decades of economic modernization, argue Werneck Viana and Baumann Burgos, wrenched apart traditional societal structures, driving millions of rural inhabitants into the cities, destroying forms of associative civic life like political parties, and prompting the emergence of a new "mass" of alienated individuals. In the absence of true social solidarity, new rights claims and accordingly, new legal institutions like the ACP and the individual constitutional complaint sprang up, vindicating a more robust, participatory vision of democracy to replace the "minimalism"[96] with which many Latin American democracies were so disillusioned. The ACP and TAC would, it was hoped, encourage such solidarity by leveling societal and legal inequalities, giving voice to claims otherwise impossible to bring before a court in the more individualist model of the old Brazilian Code of Civil Procedure.[97] Bundling a multitude of individual complaints into a single case, moreover, would streamline the work of the bench; help to overcome cultural or psychological hurdles to litigation; and partly neutralize the advantages of the stronger litigant.[98] Only a few select entities have standing to file an ACP, it is true, but it is now common practice for social groups to go to a prosecutor and request such action.

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[96] Werneck Vianna and Burgos, "Entre Princípios e Regras," 778-79. For a statement of minimalist democracy, see Adam Przeworski, "Minimalist conception of democracy: a defense," in Ian Shapiro and Casiano Hacker-Cordón, eds., *Democracy's Values* (New Haven: Yale University Press, 1999), 23-55. On the "populist" features of the class action suit in the American context, see William Halton and Michael McCann, *Distorting the Law: Politics, Media, and the Litigation Crisis* (Chicago: University of Chicago Press, 2004).

[97] Vanessa de Queiroz Neves and Daniel Ferreira de Lira, "A ação civil pública inibitória e o ministério público na defesa do consumidor em juízo," *Ambito Jurídico.com.br* (2013); Manuel Reale, "Visão Geral do Novo Código Civil (Proceedings from Anais do "EMERJ Debate o Novo Código Civil")," *Revista EMERJ* (June 11, 2002).

[98] Luiz Guilherme Marinoni, *Questões do Novo Direito Processual Civil Brasileiro* (Curitiba: Editora Juruá, 1999), 87; José Carlos Barbosa Moreira, *O Novo processo civil brasileiro* (Rio de Janeiro: Editora Forense, 1991).

With the growing social importance of the TAC and the ACP, the Judiciary Branch has come to represent, writes one political scientist, a modern "wailing wall,"[99] working changes to the "physiognomy" of courts, in particular the public prosecutor, which cannot be overstated.[100] Narrow private litigated interests have been substituted by the "public interest" writ large as the proper object of prosecutorial tutelage (of course, in such a fractured, unequal society as Brazil, the intelligibility of the phrase cannot be taken for granted[101]), adding vast new responsibilities, but above all, *social meaning,* to an old institution. "How to compare," asks one report on the office's new "extra-judicial" functions, "the social ramifications of the prosecutor intervening in civil proceedings as a referee defending the decision of a judge or court in individual conflict resolutions, with those surrounding the role of initiator of a public class action, an author representing the interest of many people?"[102] Edis Milaré, one of the sponsors of the 1985 Public Class Action Act,

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[99] Werneck Vianna and Burgos, "Entre Princípios e Regras," 781.

[100] The idea for the Brazilian class action reportedly came from a group of Italian civil procedure scholars who pioneered the idea in the 1970, though it failed to gain traction in its local setting. In Brazil, the first champions of the class action, in the late '70s and early '80s, were renowned legal scholars José Carlos Barbosa Moreira, Ada Pellegrini Grinover and Waldemar Mariz Oliveira Júnior. With the National Environmental Policy Act of 1981 came the first recognition of the "diffuse interests," while the Public Civil Action Act (7.347/1985) was the first Brazilian statute to provide for the public civil action for protection of environment, consumer rights, and artistic, touristic, and aesthetic values. Soon after, the 1988 Constitution created the "mandado de segurança coletivo," a kind of collective civil habeas corpus, and in 1989 and 1990, statutes mandating the protection of the disabled, stock market investors, and children were passed, which empowered the Public Prosecutor to bring this action in their defense. In 1990, the Consumer Code followed, granting the same protection to consumers. These were followed by the 1997 Clean Water Act (Lei das Águas), a 1998 law on private health plans, the Senior Citizens Act of 2003, the City Act (Estatuto da Cidade) of 2001, which created a new legal order based on the civil law concept of "usucaption," akin to adverse possession, extending rights to land access in large cities, especially among favela residents. Antonio Gidi, "Class actions in Brazil: A Model for Civil Law Countries." *The American Journal of Comparative Law*, Vol. 51, No. 2 (2003): 311-408, 324-28; Werneck Vianna and Burgos, "Entre Princípios e Regras," 782-84.

[101] Colin Crawford, "Defending Public Prosecutors," 627.

[102] The current Code of Civil Procedure in Brazil (CPC), which dates to 1973—a new one will come into force in March 2016—envisions a much narrow role for the Public Prosecutor's Office as *custos legis*, or legal guardian of "social interests" (Arts. 82, 83, 84 and 85) than does the 1988 Constitution.

writes—not a little hyperbolically, but with some reason—that the Law "expanded the contours of civil society," "opened new avenues for the protection of inalienable sociocultural values before the law," and "bought about new levels of participation in [public] debates."[103]

But like most powerful weapons, the PAC and TAC have a way of turning against their masters. Not for nothing has the current Vice President referred to the Public Prosecutor as a "fourth branch," with all the sense of irritation that the term usually conveys in the mouth of a politician. The President and his agencies may often find themselves defendants in Brazilian class action suits, in which case the public prosecutor starts to seem more than a mere irritant. It is worth emphasizing the magnitude of the Public Prosecutor's Office in holding government accountable to law: "Try to imagine," writes Colin Crawford, "an arm of the U.S. Department of Justice suing the U.S. president and the administrator of the U.S. Environmental Protection Agency for failing to enforce the environmental laws, and one begins to appreciate the potential scope of the *Ministério Público*'s authority. For most of us, the scenario is unimaginable in the United States[.]"[104] ACPs have recently been filed against Adasa, the agency that regulates water provision[105] and against ANEEL, the electricity regulator, over rate hikes. Another was launched against the oil and environmental agencies, ANP and IBAMA, seeking to annul a public bid granting rights to explore gas and oil reserves in the Amazon.[106] A federal prosecutor opened an ACP against the Ministry of Social Security for unreasonable delays in performing medical

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[103] Quoted in de Queiroz Neves and Daniel Ferreira de Lira, "A ação civil pública inibitória."

[104] Colin Crawford, "Defending the Public Prosecutor," 621.

[105] Nicole Ongaratto, "Proteste entra na Justiça contra reajuste na conta de água do DF," *Investimentos e Noticias* (August 13, 2015).

[106] "Licitação para exploração de petróleo e gás no Acre pode ser anulada," *O Globo – Acre* (October 26, 2015).

exams in several rural states.[107] There has even been a recent ACP filed against Dilma Rousseff herself, the opposition PSDB accusing the President of illicitly using public funds to defend herself from impeachment.[108]

In view of the obvious importance of the ACP, the question of its scope is a high-stakes one. Roughly speaking, from its passage in 1985 until 1997, the trend was constant expansion of its jurisdiction; after that, continued cuts. The 1990 Consumer Code, which also established the TAC, expanded the ACP to cover damages to "any other diffuse or collective interest" while rationalizing pre-filing procedures. A 1994 reform tacked on "moral and patrimonial harms" and "infractions of an economic nature." The year 1997 saw the first cuts to the ACP's scope, its *erga omnes* effect whittled down to cover only the geographic territory in which it was filed. In 2001, President Cardoso issued a provisional measure prohibiting the use of the ACP to challenge taxation-related decisions and forbidding future suits with the same cause of action. The number of actors authorized to bring an ACP was limited by law in 2007; broad language about harms to the "popular economy" was cut in 2011; and in 2012 a reform proposed by the legal community to streamline ACP procedure across subject matters and expand the public prosecutor's discretion to bring and investigate ACPs was shelved. The only increase to the ACP's scope since 1994 has been to codify the protection of racial, ethnic and religious honor and dignity in 2014.[109]

Nonetheless, the wrangling over the jurisdiction of the public class action shows plainly that control of the Prosecutor's office is a high stakes affair. And Brazil's

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[107] "Tempo de espera para perícia do INSS é alvo de ação do MPF em Caruaru (PE)," *Notícias – Ministério Público Federal, Procuradoria Geral da República* (July 20, 2015).

[108] Iolando Lourenço, "PSDB entra na Justiça contra Dilma por uso de bem público em sua defesa," *EBC – Agência Brasil* (December 11, 2015).

[109] Lei No. 12.966 (April 24, 2014).

contrasting experiences with "independent" institutions make it clear that formal structural barriers are no guarantee of true functional independence. The powerful IRAs have fallen, to a greater or lesser degree, under executive control, notwithstanding their structural protections. Meanwhile, the Prosecutor remains structurally the same as it was after 1946, yet it is only in light of its new "social" instruments that it has gained its present stature. And of course, the unprecedented power and scope of Operation Lava Jato ("Car Wash"), which has so far ensnared over 100 political and economic heavyweights accused of corruption, paralyzing national institutions and several industries in the process, has only been made possible by the deep indignation and disgust of a broader Brazilian public. Indeed, Lava Jato has cast the judiciary in a new, heroic light: its lead prosecutor, Deltan Dallagnol, accosted in the street by Brazilians shedding tears of gratitude, while tenacious federal judge Sérgio Moro has been honored in a carnival parade with a twenty-foot-doll in his likeness. Claims by critics (including the accused) that the investigation has become a populist vendetta undermining the authority of elected officials and riding roughshod over the law only confirm the threat posed by a Public Prosecutor's Office newly aware of the power of tapping into, or mobilizing, popular energies.

Conclusion: Power and Persuasion, or Transcending "Parchment Barriers"

Public administration is shot through with the enduring tension between the efficiency of "command and control" and the ideal of legitimacy that democratic approbation is supposed to provide. Yet a more sober appraisal of reality—of the vast apparatuses, complicated processes, confused instructions, and interconnected chains of multiple actors that go by the misleading singular subject "bureaucracy"—reveals both ideals to be unattainable. The size and complexity of the modern administrative state is a powerful

argument to show that ideals of bureaucratic legitimacy that depend on a singular executive are nonsensical.

This short tour of Brazilian mechanisms of controlling presidential discretion over administrative policy has illustrated two models of bureaucratic accountability as of yet underexplored in the American context: the *partisan balance model* (the appointment power), and the *social control model* (the public class action suit). The two models suggest, first, that bureaucratic accountability may not only overcome the reality of institutional plurality, but in fact require it; and secondly, that constitutional checks on executive power are *most powerful when bolstered by political pressures*—coalitional and popular, and that hence, a model of administrative power that takes its cues from forces external to institutions is not merely a truer reflection of presidential power in practice, but also a *desirable ideal.*

The appointment power and the public class action illustrate two separate pathways through which control of public administration in Brazil is opened up to public forces beyond the unitary executive. A seeming prerogative of the "unitary executive," the appointment power is radically recast in the Brazilian political context. Coupled with the imperative of building a legislative coalition for policy achievement, the appointment power becomes a tool requiring the legislator's skill at bargaining and persuasion in order to be made effective. Many will argue that splitting the legislative power between the President and the legislature will only give freer rein to the "encroaching spirit of power." But instead, it may contain its advances by redrawing boundaries in a way more reflective of where actual, contingent political power lies, and therefore more effectively carried out. This may be the unitarists' nightmare, but a productive modus vivendi can be the result—and consider, by contrast, the frustrating spectacle of President Obama's relationship with his uncooperative Congresses from 2010-2016. Meanwhile, the channeling of social

control mechanisms through the public prosecutor has, by most accounts, been effective in providing functional independence and democratic bona fides to an institution that otherwise would be just another plaything of the President.

Today, it is plain that executives are held responsible for policy leadership to a capacity more or less—but in actuality, rather less—matched by their actual powers. That this functional fusion of legislative and executive powers should be found in the U.S., a system so unlike Brazil's idiosyncratic coalitional presidentialism, suggests that the pattern transcends particular national context. But more than just an argument about accepting coalitionalism as a true mirror of presidentialism, I echo those who, like Juan Linz, commend such consensual features, as in parliamentary systems, in terms of governance and accountability outcomes.

In light of these calculations, the partisan balance/social control model of administration could be desirable in the United States for three reasons. First, in systematizing the President's already-involved role in legislation, it equips the President for the tasks already demanded of him, particularly beneficially in preventing the lamentable tendency of presidents to supplement their policy arsenal by assertion.[110] Accordingly, the gap between constitutional text and reality might be somewhat narrowed. At times, the legislative process betrays Brazil-style coalitional features; in 1981 Kenneth Shepsle and Barry Weingast explained why "oversized coalitions" held together by pork barrel exchanges could often be observed in policy formation.[111] Broadening the coalitional norm to periods of divided government could help to smooth over interbranch relations, too, contributing to

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[110] Steven G. Calabresi and Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* (Yale University Press, New Haven: 2008).

[111] Kenneth A. Shepsle and Barry R. Weingast, "Political Preferences for the Pork Barrel: A Generalization," *American Journal of Political Science*, Vol. 25, No. 1 (Feb., 1981): 96-111.

smoother governance in a system compounded of antagonisms, to paraphrase Woodrow Wilson's *Constitutional Government*. Second, in light of the obvious reality that the legitimacy of the administrative state cannot be justified solely, or even primarily, on technical grounds, the model can account for the "thick layer" of so-called in-and-outers that so distressed Hugh Heclo as a *feature*, not a bug.[112] Political "hacks" at the upper rungs of agencies provide "responsive competence," as Terry Moe saw, no doubt, and if the bureaucracy is bound to be politicized, should its political components not be more closely bound to the representative features we find in the lawmaking body? Third and finally, on this vision, administrative power requires a continual "popular mandate"; it becomes a faculty of persuasion, not command. Popular access to state resources—whether courts or, via such access, social services—brings citizens "into" the inner workings of government, animating the checks they provide with a closeness and immediacy that makes them all the more compelling. For the President-as-legislator, in order to wield the machinery of the state, "power without persuasion" is simply not enough.

This is not to suggest that the partisan balance/social control model is without its problems and risks. At least five come to mind (more can, of course, be found): corruption, policy incoherence, instability, unaccountable power in the "checking" institutions and not enough in the President, not to mention the inaptitude of these models to the United States context. I do not attempt to refute these here, but instead offer some thoughts by way of counterpoint.

As to corruption, Brazilian political culture, history, and traditions may be a more significant determinant than coalitional presidentialism. That the party machine and spoils

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[112] Hugh Heclo, *A Government of Strangers: Executive Politics in Washington* (Washington, D.C: Brookings Institution, 1977).

system played such a constitutive role in American democracy in the Jackson era and the Gilded Age attests to the fact that coalitional presidentialism is no necessary condition for pork-barreling, patronage, and hardball politics.[113] Both Brazilian coalitional presidentialism and American public administration (in its actual practice, which differs less than we might think from unitary executive theory, which remains so controversial as scholarship[114]) reject the antipolitical values of discretion and neutral expertise that we associate with the Pendleton Act and Progressive Era civil service reforms in its heyday. If, in practice, we are back to a pre-Pendleton practice, Brazilian coalitionalism substitutes the unthinking party crony for a coalition partner with independent political leverage, capable of principled opposition. More radically, then, it may be time to rethink the meaning of bureaucratic patronage—a dirty word for World Bank types and scholars like Barbara Geddes, Stephen Haggard, and the like. It may not need stand for not getting things done, but instead, the realistic suggestion that, as has long been true of legislative debate, achieving policy goals and tending to a coalition may be the same thing.

Policy incoherence is a real risk of coalitional presidentialism and social control of administration, and Brazil has been often criticized for its fractured, unprincipled democracy. Competent implementation of the law is a requirement for any country, and the risk of the coalition model is that, with party slots to fill, petty tit-for-tat squabbling will

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[113] On spoils and corruption in the political systems of the Jacksonian era and the Gilded Age, see, e.g., Marvin Meyers, *The Jacksonian Persuasion: Politics and Belief* (Stanford: Stanford University, 1960); Michael McGerr, *A Fierce Discontent: The Rise and Fall of the Progressive Movement in America, 1870-1920* (New York: Oxford University Press, 2005); Claudia Goldin and Edward Glaeser, *Corruption and Reform: Lessons from America's Economic History* (Chicago: University of Chicago Press, 2008).

[114] Works critical of the unitary executive thesis include Louis Fisher, *Constitutional Conflicts Between Congress and the President* (6th ed.) (Lawrence: University of Kansas Press, 2014); Louis Fisher, *Presidential War Power* (3rd ed.) (Lawrence: University of Kansas Press, 2014); and Bruce Ackerman, *The Decline and Fall of the American Republic* (Cambridge: Belknap Press 2010); and Nick Sagos, *Democracy, Emergency, and Arbitrary Coercion: A Liberal Republican View* (Leiden, Netherlands: Koninklijke Brill NV, 2015).

compromise good governance, or that on the social control model, incessant suits will grind bureaucratic activity to a halt. Another partial response is that observers of post-1988 Brazilian parliamentary dynamics find that the regime's performance is at odds with predictions of party indiscipline and inaction.[115] Brazilian presidents like Cardoso and Lula enjoyed great success enacting their agendas with coalitions whose breadth belied their discipline. Cardoso managed major reforms to streamline and professionalize the bureaucracy, although truthfully, Lula and Dilma's administrative performance has been more memorable as scandal-ridden than truly progressive. That said, coalitional presidentialism may have a salubrious tendency toward moderation, as all three administrations demonstrate—Lula's evolution in particular, from chain-smoking, Che Guevara T-shirt-wearing labor activist to centrist reformer has been severally remarked. Assembling and preserving a coalition requires spinning consensus out of fragmented economic, federal, and institutional interests,[116] the logic goes, and further, it may stimulate internal deliberation within the administration—heterogeneous coalitions presumably requiring more internal back-and-forth than homogenous agglomerations of party "yes men"—; and force upon the President a degree of pragmatism regarding achievable outcomes. This in turn may encourage better policy and prevent the wild policy swings of which parliamentary and semi-presidential systems are sometimes accused.[117]

Accusations of the model's predisposition to instability ring true, too. Brazilian political scientists have recognized how very like parliamentarism or semi-presidentialism is

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[115] As Limongi points out, presidents introduced 86% of the bills enacted since 1988 and the rate of approval of the bills introduced by the executive was 78%. Limongi, "Institutions, Presidents, and Agencies," (2005). But see Koyasu, "Social Security Reform in the Cardoso Government," for a contrasting account in which coalition leaders in administrative positions could not deliver votes from their own party members in Congress.

[116] Melo and Pereira, *Making Brazil Work*.

[117] Ibid, Neto, *Presidencialismo e Governabilidade nas Américas*.

their coalitional presidential system—twentieth century jurist Afonso Arinos claimed that Brazil's institutions were "perhaps unique in the world," with a chief executive "closer to those of European parliamentarism than to the president of the United States"[118]—and the facility with which such regimes collapse has been studied at length since the fall of Weimar.[119] The imagined, unflattering, parallel between the two systems is a pattern whereby loss of coalitional support translates to a loss of confidence in a president's leadership and the termination of her tenure. Something like this is the current predicament of Dilma, reminiscent of the 1992 impeachment of Collor. (Incidentally, the *mensalão* scandal that exploded under Lula's watch in 2006 broke soon after the PT failed to "make room" for the PMDB in its governing coalition.[120] Lula made sure, during his second term in office, to broaden the makeup of his Cabinet.) More boldly, we might consider whether impeachment need reflect institutional crisis; Figueiredo claims that Collor's impeachment reflected

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[118] Afonso Arinos, quoted in Melo and Pereira, *Making Brazil Work,* 4. Note that other Latin American systems have parliamentary features, too, for example Argentina, where the Constitution envisions a Chief of the Cabinet who looks much like a Chancellor. Constitution of the Argentine Nation, Ch. IV, Sections 100-107.

[119] Maurice Duverger, "A new political-system model"; Matthew S. Shugart, "Semi-Presidential Systems: Dual Executive And Mixed Authority Patterns," *French Politics*, Vol. 3, No. 3 (2005): 323-351; Cindy Skach, *Borrowing Constitutional Designs: Constitutional Law in Weimar Germany and the French Fifth Republic* (Princeton: Princeton University Press, 2005); Robert Elgie, "The Perils of Semi-Presidentialism. Are They Exaggerated?" *Democratization*, Vol. 15, No. 1 (2008): 49-66. These accounts agree that "divided minority government" is the most dangerous form of semi-presidentialism, although this thesis cannot satisfactorily account for the durability of Brazil's coalitions. David J. Samuels and Matthew S. Shugart, *Presidents, Parties, and Prime Ministers: How the Separation of Powers Affects Party Organization and Behavior* (New York: Cambridge University Press, 2010), 255-57; Martin Carrier, *Executive Politics in Semi-Presidential Regimes: Power Distribution and Conflicts between Presidents and Prime Ministers* (Lanham, MD: Lexington Books, 2015).

[120] Pereira, "Brazil's Executive-Legislative Relations under the Dilma Coalition Government,"**;** Carlos Pereira, Timothy Power, and Eric D. Raile, "Coalitional Presidentialism and Side Payments: Explaining the Mensalão Scandal in Brazil," Unpublished manuscript (2008).

properly functioning mechanisms of accountability activating to rid the system of a corrupt president, "as it should be under a democratic regime."[121]

Bureaucratic unaccountability too becomes a problem on the unitarian's view, which is of course the Hamiltonian view, that a single executive is more democratically accountable because more readily visible to absorb blame. Might not the plethora of checks since thrust upon the institution—courts, IRAs (effective or not), citizen-led "social control," and of course, the public prosecutor—threaten to turn administrative review into an all-out tug of war? Brazilian federal and state public prosecutors are indeed seen by some as increasingly high-handed, intrusive, and overweening.[122] The TACs, even when they are not arbitrary or unfounded—and some are—can be a great hindrance to regular bureaucratic operations. They risk interfering with personal economic, religious, or other freedoms,[123] perhaps a cost worth paying, *if* social control of public administration endows the latter with greater legitimacy. To know whether it does is daunting, especially because Brazil does not keep statistics on the ACP and the TAC. Still, one lesson seems clear: the supposed greater pluralism of Brazilian public administration does little to blunt accountability. Coalitional government has failed to shield President Rousseff from harsh criticism over economic mismanagement. Besides, if the Brazilian prosecutor *does* enjoy political discretion as an actor independent of the President in a way worrisome to the unitarians,

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[121] Argelina Cheibub Figueiredo, "The Collor Impeachment and Presidential Government in Brazil," in Mariana Llanos and Leiv Marstreintredet, eds., *Presidential Breakdowns in Latin America: Causes and Outcomes of Executive Instability in Developing Democracies* (New York: Palgrave Macmillan, 2010), 111-129, 124).

[122] Sundfeld and Câmara, "Controle Judicial dos Atos Administrativos"; da Costa, "Termo de ajustamento de conduta"; Geisa de Assis Rodrigues, "Princípios da celebração do compromisso de ajustamento de conduta em matéria ambiental," *Revista do Centro de Estudos de Direito do Ordenamento, do Urbanismo e do Ambiente (CEDOUA)*, No. 13, Ano VII (2004), 87; Colin Crawford, "Defending the Public Prosecutor."

[123] da Costa, "Termo de ajustamento de conduta."

we should recall the independent regulatory agencies as proof that said discretion requires more than clever constitutional design. For the Attorney General, factual independence is conditioned, it seems, on the institution's being a conduit of public influence and acclaim. We know all the same that the TAC is not the perfect solution: it may be misused; it is no substitute for broader regulation (environmental degradation is easier to prevent than to remedy by court order); and, lacking adequate modes of publicity, its reach not broad enough, thus frustrating the ideal of participation of affected interests that supposedly justifies it. Still, to insist on the "branch of government" as the only node of power at which to situate accountability is blatantly in contradiction with the fact of technology and the new chances for scrutiny it offers, not to mention current practice. Public administration is "accountable" and "visible" at various levels of structure today,[124] and, with such massive structures operating "under" the President, this should be a welcome fact.[125]

A final objection is that these models have little to say to the United States. The American presidential system is hardly ripe for multiparty coalitional government today, with its serried Republican and Democratic camps. Then again, rote institutional transplantation is not at issue here, and coalitional features can adhere in the U.S. at the level of norms. Not long ago, the *Times* ran a proposal for strengthening cabinet government in

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[124] Jack Goldsmith makes precisely this point in *Power and Constraint: The Accountable Presidency After 9/11* (New York: W.W. Norton & Co, 2012). On bureaucratic accountability in particular depending on what Peter Shane calls "the availability of multiple pressure points within the bureaucracy," in "Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking," *Arkansas Law Review,* Vol. 48 (1995): 161-214, 174, Cynthia R. Farina, "The Consent of the Governed: Against Simple Rules for a Complex World," *Chicago Kent Law Review,* Vol. 72 (1997), 993-1007 ("we must necessarily look to a plurality of institutions and practices as contributors to an ongoing process of legitimizing the regulatory state,"), 989.

[125] Peter Shane, "Presidents, Pardons, and Prosecutors: Legal Accountability and the Separation of Powers," *Yale Law & Policy Review*, Vol. 11, Iss. 2 (1993): 361-406 (arguing that checks and balances do a better job than "categorical separation" at promoting the rule of law, lending support to proposals to enhance features of the office resembling a "prime minister" by affording the President a substantial and constitutionally vested policymaking role beyond Congress's capacity to regulate).

the United States,[126] and American presidents *have,* where possible, exploited their role as coalition-builders. Woodrow Wilson was such a president, "Brazilian" in his having bartered votes with his Democratic party for choice jobs in the administration. If we concede that direct congressional input gives administrative policy critical responsiveness and democratic legitimacy, then this sort of president-led cabinet government is actually beneficial.[127]

With much of the American academy presently occupied by the problem of party polarization, another lesson concerns the party system and the checking function. American party theory is still in thrall to the classic 1950 thesis of the *American Political Science*

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[126] "Over the past half-century, . . . the expansion of the White House staff has centralized deliberation and decision making increasingly within the confines of 1600 Pennsylvania Avenue NW. This reliance on professional staffers, political advisers and media spinmeisters within a constrictive White House "security bubble" deprives presidents not only of the deep substantive policy expertise of top civil servants but also of the political judgment of cabinet members who are often successful politicians. A strengthened cabinet could promote frank and creative deliberation, help coordinate policy across government and make sure all members are delivering the same political message. All of this could go far in staving off the inertia and drift so common in presidential second terms." Raymond A. Smith, "Make the Cabinet More Effective," *The New York Times* (Jan. 10, 2013). Smith makes four concrete proposals: (1) Employ the cabinet as a deliberative body, (2) Strengthen links between cabinet members and Congress; (3) Deploy cabinet members as individual proxies; (4) Use the Cabinet as a cradle for the next generation of political leaders.

[127] But see Stephen Skowronek, *Building a New American State.* (New York: Cambridge University Press, 1982) (arguing that, in the late Progressive Era, President Wilson's attempts to solidify his control over party by bartering away control over bureaucratic policy produced incoherence and fracture in the civil service). As Martin Fausold and Alan Shank write, "The three principal limits to domestic policy—interest groups, the intergovernmental system, and Congress—can be overcome by a vigorous Hamiltonian-type president. This has occurred on at least two occasions since 1945: Johnson's initiatives on civil rights, voting rights, and the Great Society antipoverty and aid to education program in 1964-65; and Reagan's $35 billion budget cuts, $225 billion tax cuts, and huge increases in defense spending in 1981. The ingredients for their achievements were clear: enormous landslide election victories, partisan support in Congress, quick response by Congress in the early months of the new administration, public support for the new president resulting from assassination—in the case of Johnson, sympathy for Kennedy; for Reagan, an unsuccessful assassination attempt—favorable media publicity and enough interest group support to overcome strong opposition. Both presidents benefited from a combination of effective leadership and a perceived need for change which mobilized huge voting support in Congress early in their presidencies. Without these ingredients, most presidents faced their normal obstacle course on domestic policy." Martin L. Fausold and Alan Shank, "Introduction," in Martin L. Fausold and Alan Shank, eds., *The Constitution and the Presidency* (Albany: State University of New York Press, 1991), xx.

Review that stronger parties make for strong democracy.[128] But political scientist Argelina Figueiredo argues that precisely the instability of Brazilian parties is what protects the stability of the system: "James Madison's fear of 'stable divisions of political conflict,'" she writes, "has proven to be correct. When political parties become the main basis of government, incentives to check the executive diminish."[129] Party discipline forces legislators to "stand by their man," producing rigid camps of supporters and opponents; the executive-legislative fusion for which Brazil has become known may, by contrast, stimulate negotiation and deliberation between coalition partners *during* policy formation rather than checks and vetoes after the fact.

Unitary executive theory also looks different in this light. The risk of untrammeled executive power and bureaucratic despotism comes not from the unitary executive per se, but from the unitary executive conjoined with two homogenous parties (plus an acclaiming public). An American president in the 1960s might have had a Dixiecrat in charge of Agriculture, a Rockefeller Republican in charge of Housing, and a New Dealer in charge of Labor. But where political parties are rigid camps, it is only the election where administrative personnel reflects the public; the "winner takes all" character of majoritarian presidentialism becomes hubris and groupthink.

Two final points. First, coalitional presidentialism and social controls will not be constant checks on the President. They represent relationships that vary in time according to, among other things, the President's ability to lead her party and the public. This variability is a crucial fact, for to actually understand the political-technocratic balance that

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[128] American Political Science Association, "A Report of the Committee on Political Parties: Toward a More Responsible Two-Party System," *American Political Science Review,* Vol. 44.3, Part 2 (September 1950).

[129] Argelina Figueiredo, "The Collor Impeachment and Presidential Government in Brazil," 125.

governs administration in fact, we must look outside the bureaucracy itself and to the political system writ large. Secondly, the arrangements of Brazilian administration pose a challenge to leading theories of the democratic legitimacy of administration, which depend more on post hoc mechanisms of oversight than on consensual mechanisms of policy formation,[130] and are conducted by congressional actors rather than popular ones.[131] Consensualism may help rid bureaucratic policymaking of its high-handed, unilateral, and—to some—despotic character. Participatory forms of bureaucratic accountability may introduce a new form of legitimacy to an institution that ails from a democratic deficit.

Brazil may be suffering from a national lack of institutional confidence, but this does not mean that its own system cannot offer an illuminating comparison with our own. The monstrous rationality and depoliticization feared by Weber becomes "politicized" in the Arendtian sense: command and control are not political, but speech and action, the tools of persuasion, are among man's noblest pursuits.[132]

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[130] Mathew D. McCubbins and Thomas Schwartz, " (McCubbins, Feb. 1984)," *American Journal of Political Science*, Vol. 28, No. 1 (Feb. 1984): 165-179.

[131] Note that this proposal does not purport to eliminate judicial review of administrative action. Indeed, insofar as courts scrutinize such action for reasonableness and procedural integrity, the coalitional and social control mechanisms may be compatible with such review. See, e.g., Eduardo Jordão, & Susan Rose-Ackerman, "Judicial Review of Executive Policymaking in Advanced Democracies: Beyond Rights Review," *Administrative Law Review*, Vol. 66, No. 1 (2014): 1-72.

[132] Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1998 [1958]).

3: Taming the Prince: The Colombian Constitutional Court and the Possibility of Rights Review of Executive Emergency Powers

> It has long been a grave question whether any government, not too strong for the liberties of its people, can be strong enough to maintain its own existence in great emergencies.
> -*Abraham Lincoln, Speech on the Results of the Presidential Election, 1864*

> *Quare siletis juristae in munere vestro?* [Why are you jurists silent about that which concerns you?]
> -Quoted in Giorgio Agamben, *State of Exception*

Introduction

As Louis Fisher puts it, "Nothing is more destructive to the rule of law than allowing presidents to claim that the commander-in-chief clause empowers them to initiate war. With that single step, all other rights, freedoms, and procedural safeguards are diminished and sometimes extinguished."[1] In the Latin American context, the truth of this proposition has been amply demonstrated. Although many early Latin American constitutions emulated the limited government and liberty protections of the U.S. Constitution, most of these early charters foundered, their republics torn apart by civil war and infighting, and they were replaced by "centralist" documents that left power squarely in the hands of the executive branch.[2] But what seemed a remedy for the sake of stability proved worse than the disease: these institutions seized control of political systems, rendering them de facto autocracies. Some countries, like Argentina, Mexico, Chile, and Colombia, are emerging only recently from the spell.

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[1] Louis Fisher, "Presidential Power in National Security: A Guide to the President-Elect," *The White House Transition Project: Reports* (The White House Transition Project, 2007): 1-16, 6.

[2] Roberto Gargarella, *Latin American Constitutionalism, 1810-2010: The Engine Room of the Constitution* (New York: Oxford University Press, 2013); José Aguilar Rivera, *En pos de la quimera: Reflexiones sobre el experimento constitucional atlántico* (Ciudad de México: Centro de Investigación y Docencia Económicas, 2000).

Even with more solid institutions, presidents have not missed the fact that war, that "true nurse of executive aggrandizement,"[3] provides a readily exploitable supply of momentum, urgency, and authority for initiatives. The concept of "war," or its close cousin, "crisis," has been stretched throughout Latin America history, and continues to be. Indeed, until his recent death, Hugo Chávez made a cottage industry warning of an ever-ready, imperialist America threatening to crush Venezuela. Less literally, but hardly less potent are the "economic emergencies" invoked by presidents from Peru's high-handed populist Alberto Fujimori to current Colombian head of state Juan Manuel Santos, examples which suggest that today, even "crises" of an economic nature may serve to expand the emergency powers of executives.[4] But as I have suggested, the U.S. may not be far behind. Across the hemisphere, as the temporal and spatial limits of emergencies seem to evaporate before our eyes—note, for example, the "borderless" war on terror, the "contagion" effects of the recent financial crisis, or the increasing discord in the European Union over "stateless" refugees and migrants—we enter a state in which crises become routine, emergencies attain a status of seeming normality, and consequently, executive power can no longer even be said to "transcend" the law, because in fact, it is effectively *constructing a new legal order* with every action.

For five decades or more, Colombia has been the most violent country in the Western Hemisphere. By way of comparison, under Argentina's military regime of 1976-1983, perhaps the bloodiest of the 20th century Latin American dictatorships, as many as 30,000 people were killed; by comparison, at least 220,000 Colombians have been killed in the

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[3] James Madison, in Ralph Ketcham (ed.), *Selected Writings of James Madison* (Indianapolis: Hackett Publishing, 2006), 235.

[4] See Gabriel L. Negretto, *El problema de la emergencia en el sistema constitucional* (Buenos Aires: Editorial Ábaco de Rodolfo Depalma, 1994).

internal conflict since 1958, and over 5.7 million persons displaced from their homes by the fighting. At the apogee of paramilitarism in the late '90s, one Colombian was kidnapped every eight hours, and one per day lost their life to landmines. Violence has distorted the face of politics, too, with countless political careers funded by drug money. Paramilitary groups associated with the government have also been responsible for unimaginable atrocities, including political murders and the "social cleansing" of so-called undesirables like drug addicts, street children, and prostitutes.[5]

In a continent notorious for its authoritarian excesses, the perpetual bloodshed could have seemed a gateway to another sure collapse of democracy. Crisis has long been known to funnel power toward the executive branch, a dangerous trend in a state unable to maintain a monopoly on violence, a sure sign of weak institutions. Throughout Colombia's history, it has been difficult to tell whether the most serious threat to its institutions came from actors outside the state, or within it. Time and again, Colombian presidents in the late twentieth century exploited, in a war-weary country with weak democratic foundations, the urgent need for "order" and "authority" to turn Colombia into a high-security regime of emergency decrees and mass arrests, just a few steps shy, in terms of the severity of its measures, of the right-wing dictatorships of Argentina, Chile, and Brazil.[6]

Recent president Alvaro Uribe has been among Colombia's most popular leaders, but at one point, it seemed as though, at his instance, presidential term limits would become a new casualty of the infighting. In 2002, Uribe managed to parlay a "law and

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[5] Julie Hristov, "Legalizing the illegal: Paramilitarism in Colombia's 'post-paramilitary' era," *NACLA Report on the Americas*, Vol. 42, No. 4 (2009): 12-19.

[6] Rodrigo Uprimny reports that many of the decrees upheld in '70s-era Colombia were homologous to ones passed in Argentina under the Dirty War. Rodrigo Uprimny, "The Constitutional Court and Control of Presidential Extraordinary Powers in Colombia," *Democratization*, Vol. 10, No. 4 (2003): 46-69.

order" campaign against FARC and right-wing militias into electoral victory, and in 2006, he was reelected to "finish the job." Consecutive terms required no less than an amendment of the Constitution, which at the time explicitly forbade presidential reelection. After his sweeping 2006 reelection, Uribe continued to make moves to strengthen the office of the presidency, proposing a series of constitutional reforms to augment presidential powers and permit indefinite presidential reelection. In 2009, just before the Uribe's second term expired, Act 1354-2009, a call for a popular referendum to reform the Constitution on these terms, made it through both houses of the Colombian Congress.

Against all odds, however, the proposed referendum never took place. Early in 2010, the Constitutional Court of Colombia stepped in, ruling Act 1354-2009 "unconstitutional in its entirety."[7] The Court claimed that while an amendment could *revise* the Constitution, it could not *substitute* it, and that this proposed amendment proposed so great a change to the presidential system as to constitute a substitution.[8]

The ruling suddenly and sharply halted the rise of Colombian presidentialism in its tracks. For those familiar with the Court, it was perhaps not surprising: the Court had been making enemies all over the political branches since its inception in 1992. In one of its earliest decisions, it infuriated President Ernesto Samper and the Colombian Congress by ruling that laws criminalizing the personal use of drugs, including cocaine, were an unconstitutional infringement of the private rights of the individual.[9] And in 1993, the Court asserted the power to review the *substantive* basis of, that is the adequacy of the reasoning

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[7] Press Release No. 9 (February 26, 2010) (por medio de la cual se decide sobre la Constitucionalidad de la Ley 1354 de 2009, de Convocatoria a un Referendo Constitucional).

[8] Manuel Cepeda Espinosa, *Polémicas Constitucionales* (Bogotá: Legis Editores, S.A., 2007).

[9] Decision C-221/1994 of the Constitutional Court of Colombia. Available at: http://www.corteconstitucional.gov.co/RELATORIA/1994/C-221-94.htm. A brief abstract of the decision (in English) is available at: http://english.corteconstitucional.gov.co/sentences/C-221-1994.pdf.

behind executive orders declaring a state of emergency.[10] After each of these and other "alarming" decisions,[11] a flurry of countermeasures were proposed by infuriated politicians threatening to clip the Court's wings. In the main, though, these came to naught.

Somehow, the Colombian Constitutional Court has bucked a continent-wide trend of strong presidents and subservient courts to become a "success stor[y] of judicial activism and autonomy in Latin America."[12] In light of the continuing violence, the popularity of recent executives, and Colombia's long struggles with internal warfare and presidential power, the new constraints put upon presidential extraordinary powers have been a major accomplishment.

This chapter asks how, in such a seemingly barren environment for democracy and strong courts and rights enforcement, has the Colombian Court managed to "get away with" such exacting review and meaningfully place checks on executive emergency orders? The question is intended in both an institutional capacity sense, as well as the theoretical conditions required to permit the legal system to grant courts said powers of review. The answer combines constitutional text, a public and political system weary of discretionary power and its potential for abuse, and finally, the underlying weakness of the party system. The 1991 Constitution created the Constitutional Court with the express ambition of

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[10] As we see below, this power is not entirely without precedent in Colombia, the old Supreme Court of Colombia nominally empowered to do so in the early 20th century, but historically it amounted to very little, the Court having been effectively dominated by the executive branch.

[11] "Rechazo general a la despenalización," *El Tiempo* Archivo (May 7, 1994).

[12] For example, in 2000, the Peruvian Constitutional Tribunal tried to do the same thing, ruling against Fujimori's bid for a third term in 2000. However, unlike Uribe, Fujimori simply refused to comply with the decision. Juan Carlos Rodríguez-Raga, "Strategic Prudence in the Colombian Constitutional Court, 1992-2006," Ph.D. Dissertation (Pittsburgh, PA: University of Pittsburgh, 2011), 80. On the strength of the Colombian Constitutional Court, see Alec Stone Sweet, "Constitutional Courts," in Michel Rosenfeld and András Sajó, eds., *The Oxford Handbook of Comparative Constitutional Law* (New York: Oxford University Press, 2012), 816-830, 826. On the weakness of Latin American courts in general, see, e.g., Gretchen Helmke and Julio Ríos-Figueroa, eds., *Courts in Latin America* (Cambridge: Cambridge University Press, 2011).

replacing weak judicial bodies of the past and equipped it with new powers and functional guarantees of independence. Secondly, the Court has secured wide acclaim as an institutional voice for the poor and marginalized, allowing it greater scope for audacity and activism in the face of assertions of executive prerogative. Finally, there is the backdrop of institutional and party fragmentation that has long, for better and worse, characterized the political system of Colombia, a check on presidential leadership less in the sense of a principled opposition than a perpetual headache.

In the conclusion of the chapter, I sketch out a lesson that the Colombian experience may offer American political institutions, in particular, courts review of emergency legislation or directives. The moral of the story will seem hard to swallow in light of two dearly-held beliefs in American constitutional theory, namely, that judicial review of *process* (as opposed to substance), assigns, as John Ely tells us, "judges a role they are conspicuously well-situated to fill,"[13] and secondly, that fettering the war powers of the President by statutory or judicial methods is futile, counterproductive, or even illegal.[14] In light of the two, American courts have largely confined their review of emergency-time executive action to the narrow procedural question asked by the Court in *Youngstown Sheet & Tube Co. v Sawyer* (1952): has such action been authorized by Congress? First-order rights review is, with few exceptions, taken off the table in the presence of congressional consent.

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[13] John Hart Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980), 102.

[14] The first is a view associated with theorists of the unitary executive. Harvey C. Mansfield, *Taming the Prince* (New York: Free Press, 1989); Jeffrey K. Tulis and Steven Macedo, eds., *he Limits of Constitutional Democracy* (Princeton: Princeton University Press, 2010). For a Lockean theory of extra-legal executive discretion, see Benjamin Kleinerman, *The Discretionary President: The Promise and Peril of Executive Power* (Lawrence: University of Kansas Press, 2009).

There is reason, as the Colombian example suggests, to doubt the hardiness of procedural review of action taken in the "emergency," whether this means war, natural disasters, or economic shocks. On the traditional separation of powers model, legislative consent *should* be enough to ensure structural integrity and filter out rights-trampling measures. Yet reality clouds the picture. The fact of political parties has been one great confounder, with party ties between Congress and the President altering incentives to check and balance by threatening to place policymaking on a higher plane than policing boundaries.[15] Further, in the emergency, there is even less reason to trust the "safeguard" of congressional authorization in light of its tendency to bend to presidential will when the "rally 'round the flag" effect is at its height.[16]

If any setting has exhaustively tested the merits of cordoning off a space of power that is "always ready for emergency" and "can reach where law cannot,"[17] it is Latin America, with its unbroken tradition of weak, factionalized legislatures and high-handed presidents. Today, strong presidentialism is under no immediate threat in Latin America—if anything, the recent trend of sweeping reelections and extended term limits suggest the opposite. Yet the "judicialization" of executive power continues apace. If, as Mansfield suggests, Lockean "prerogative" is at the core of executive action, and thus impossible to be contained by law, Colombia's arguably meddlesome yet well-intentioned Court patrolling the bounds of executive power may illustrate that, compared to safeguarding rights, the merits of theoretical consistency on structure are simply not worth the candle. In light of this, the idea that courts must excuse themselves from considering "political questions"

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[15] Richard Pildes and Daryl Levinson, "Separation of Parties, Not Powers," *Harvard Law Review,* Vol. 119, No. 8 (June 2006): 2311-2386.

[16] Mark Tushnet, "Controlling Executive Power in the War on Terrorism," *Harvard Law Review* Vol. 118, No. 8 (Jun. 2005): 2673-2682, 2674.

[17] Harvey Mansfield, *Taming the Prince*, xx.

should be dispensed with, particularly in emergency situations, when separated powers tend to fail in their structure-preserving missions, for we might say that courts are best serving the regime when they step in to protect rights.

A. The Emergency in Latin American Political History

When it comes to legal systems, argued Carl Schmitt, the exception has more to tell us than the rule. In the normal functioning of things, most constitutional republics understand their self-preservation to require that the powers of the state be kept separate to prevent the threat of tyranny.[18] Yet the emergency, whether in the form of an invasion, internal uprising, or—not uncommon today in Latin America and elsewhere—economic crisis, often requires a more forceful response, such as only a temporary concentration of power in government hands can provide. The question is: how can a republic of separate powers under law authorize this exceptional moment without destroying itself?

For some, there can be no separate regime of the exception without destroying the essence of the rule of law itself. Hans Kelsen, a contemporary and archenemy of Schmitt, movingly wrote as the Weimar Republic crumbled: "One must remain true to his colors, even when the ship is sinking." But few modern constitutionalists are as principled as Kelsen in endorsing a legal regime that contemplates its own destruction, and in a sense today, every constitutional democracy has some form of an emergency regime.[19] This is

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[18] Again, I resort to a well-worn observation of Madison: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." Federalist Paper No. 47.

[19] Many people feel that the main lesson imparted by the fall of the Weimar Republic was a refutation of Kelsen's radical legal positivism. As a matter of history, this conclusion is unfair to both Kelsen and to Weimar, as I attempt to show in other work (Katz, The Weimar Presidency), but still, the consensus seems to be that a government must occasionally exercise powers that cross the threshold of ordinary law if it is to survive. In particular, postwar Germany, having "learned its

contained in the idea of a "constitutional dictatorship," in which a concentration of state powers and restriction of citizens' liberties are allowed, temporarily, for the purpose of defending the constitutional order.[20]

Yet important questions—perhaps *the* important questions—remain over what form the dictatorship should take. One important divide is over whether the constitution must itself provide for the regime of the emergency, or whether it is sufficient to sidestep ordinary law, so to speak. That is, is it better, in the emergency, to "bend" the Constitution, allowing for regimes of exception to be called forth out of the "silences" of the law (i.e., what Justice Jackson of the U.S. Supreme Court called a "zone of twilight"[21]), or to build the emergency *into* it, even at the risk of authorizing a dictatorship that can destroy the rule of law in its entirety?[22] Roughly speaking, the two courses track the common law versus civil law divide. Common law jurisdictions such as the United States opt largely for

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lesson" from the Weimar Republic, provides for a regime of "militant democracy" in which enemies of the republic can be banned from democratic participation before they even make an attempt on the regime. Suzanne Baer, "Violence: Dilemmas of Democracy and Law," in David Kretzmer and Francine Kershman Hazan, eds., *Freedom of Speech and Incitement Against Democracy* (The Hague, London and Boston: Kluwer Law International, 2000), 63-98.

[20] See, e.g., Carl Schmitt, *Constitutional Dictatorship* (Berlin: Duncker & Humblot, 2008 [1928]); Carl Friedrich, *Constitutional Government and Democracy* (Boston: Little, Brown & Co., 1941); Clinton Rossiter, *Constitutional Dictatorship* (New York: Harbinger, 1963); Andrew Arato, "Goodbye to Dictatorships?," *Social Research,* Vol. 67, No. 4 (2000), 925-955.

[21] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 638 (1952) (JACKSON, J., concurring)

[22] Tulis and Macedo, *The Limits of Constitutional Democracy*; Kim Lane Scheppele, "Law in a Time of Emergency: States of Exception and the Temptations of 9/11," *University of Pennsylvania Journal of Constitution Law*, Vol. 6, No. 5 (May 2004), 1001-1083. In light of the extensive abuse of emergency powers in the region for most of its modern history, some have concluded that state of siege provisions must be banned from the legal order. For example, Diego García-Sayán describes how participants in a 1986 workshop on constitution-drafting expressed strong support for the proposal "to exclude from constitutional texts any norm that authorizes any kind of emergency powers." "Estado de emergencia en la región andina," Comisión Andina de Juristas (Lima: 1987), 58. Brian Loveman concludes his study of Latin America's long history of emergency regimes by arguing that unless regimes of exception are abolished or at least severely limited, "transitions to elected civilian governments guarantee neither democracy nor constitutional rule." Brian Loveman, *The Constitution of Tyranny: Regimes of Exception in Spanish America* (Pittsburgh and London: University of Pittsburgh Press, 1993), 404.

the first track, leaving the emergency uncodified or at least only partly so,[23] while many Latin American constitutions, by contrast, provide a precise mechanism (a "triggering device,"[24] as Bruce Ackerman puts it) by which the government, especially the President, may declare a "state of siege" and take on special powers.[25] The Colombian tradition corresponds to the latter.

The state of siege is an institution with very old historical and legal roots. Pre-colonial Latin American legal systems were heavily influenced by Spanish and French law, which preserved intact the ancient Roman institution of the state of siege, under which a "dictator" would, in the name of defending the republic, wield concentrated powers over a temporarily delimited period of time.[26] According to José Antonio Aguilar Rivera and Jorge González-Jacome, the state of siege was hardly an incidental part of early Latin American constitutions; on the contrary, it was an essential component, a reflection of drafters' deep distrust of nineteenth-century liberalism, with its misguided, they felt, faith

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[23] See, e.g., Kleinerman, *The Discretionary President.* The War Powers Act is an exception. But its failure to truly constrain the President's power to initiate "hostilities" is often cited in the American context as an example of why textual checks are doomed to fail in practice.

[24] Bruce Ackerman, "The Emergency Constitution," *Yale Law Journal,* Vol. 113 (2004): 1029-1091.

[25] International human rights law also takes the latter approach. For instance, Article 27 of the Inter-American Convention on Human Rights, "Suspension of Guarantees," allows a member state to "take measures derogating from its obligations" under the Convention "to the extend and for the period of time strictly required by the exigencies of the situation," although such action cannot violate international law, discriminate on the basis of impermissible criteria like race and sex, and may not suspend the rights to, among others, juridical personality, life, humane treatment, freedom from ex post facto laws, and so forth. Article 4 of the International Covenant on Civil and Political Rights (ICCPR) uses much of the same language. Finally, the so-called "Siracusa Principles" on the Limitation and Derogation Provisions in the ICCPR expands upon these principles. In particular, it explicitly rejects the "silence equals authorization" theory of emergency measures articulated by Justice Jackson: "No limitations or grounds for applying them to rights guaranteed by the Covenant are permitted other than those contained in the terms of the Covenant itself."

[26] Loveman, *The Constitution of Tyranny*, 19.

in the rule of law to provide for all conceivable emergencies.[27] As many as one hundred of the Latin American constitutions drafted in the nineteenth century authorized special emergency measures,[28] and many early Latin American constitutionalists, including Simón Bolívar (1783-1830), expressed great admiration for the American and French revolutions, but believed their new nations were too tumultuous, crisis-ridden, and untested to permit governments of limited powers.[29] Many felt, too, that the people of Latin America were too unschooled and lacking in civic virtues to live under republican government.[30]

Constitutional dictatorship is a tool for regime defense, yet it risks proving as or more dangerous than the emergency itself—to wit, again, the example of the fall of the Weimar Republic. It is perverse but undeniable that in weak democratic regimes, emergency powers are both more *necessary* and more *dangerous*, as Colombian constitutional theorist Rodrigo Uprimny has pointed out. Such weak regimes are usually economically and politically vulnerable, prone to serious crises to which ordinary institutions do not appear equal. Yet because of the fragility of democratic institutions and the rule of law in

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[27] Jorge Gonzalez-Jacome, "Emergency Powers and the Feeling of Backwardness in Latin America," *American University International Law Review,* Vol. 26, No. 4 (2011): 1073-1106; José Aguilar Rivera, *En pos de la quimera.*

[28] In *The Constitution of Tranny,* Loveman examines 103 nineteenth-century constitutions from 16 Latin American countries. Of these, all but two contained provisions for emergency powers.

[29] In his celebrated 1819 address at Angostura, Bolívar stated, "[I]t is a marvel that [the Constitution of] North America endures so successfully and has not been overthrown at the first sign of adversity or danger. Although the people of North America are a singular model of political virtue and moral rectitude; although that nation was cradled in liberty, reared on freedom, and maintained by liberty alone; and-I must reveal everything-although those people, so lacking in many respects, are unique in the history of mankind, it is a marvel, I repeat, that so weak and complicated a government as the federal system has managed to govern them in the difficult and trying circumstances of their past." "The Angostura Address" (February 15, 1819), in Frederick H. Fornoff and David Bushnell, eds., *El Libertador: Writings of Simón Bolívar* (New York: Oxford University Press, 2003), 31-53, 36. See, in particular, the essays by Simon Collier and Frank Safford in David Bushnell and Lester D. Langley (eds.), *Simón Bolívar: Essays on the Life and Legacy of the Liberator* (Lanham, MD: Rowman and Littlefield Publishers, 2008), 13-34, 99-122.

[30] Roberto Gargarella, *The Legal Foundations of Inequality: Constitutionalism in the Americas, 1776-1860* (New York: Cambridge University Press, 2014).

these regimes, the return to normalcy is more difficult, and the dangers of abuse of extraordinary powers much greater.[31] Indeed, during the late nineteenth and early-to-mid twentieth century Latin America, the threat of crisis would be continually invoked as a pretext for systematic abuse by anti-democratic regimes, as country after country slid from constitutional republic into presidential dictatorship.[32]

The 1886 Constitution of Colombia was among the most president-dominated in Latin America, granting presidents the ability to request delegated legislative powers from Congress and exercise these for long, unbroken stretches at a time. Over the years, crises, corruption and party fragmentation would tip the balance even further toward the president. After 1914, a custom developed of presidents requesting these powers more or less regularly, even in the absence of internal disturbances.[33] After a 1968 constitutional amendment, emergency economic decrees became a valid instrument by which the president could deal with economic crises. For example, in 1974 President López Michelsen used the state of economic and social emergency to make substantial reforms to the tax structure of the country. Shortly thereafter, in 1982, President Betancur nationalized a bank, defined new economic crimes, and implemented a tax reform, by emergency economic decree.

Under the constitution, Presidents could also declare a state of siege and use the emergency decree powers therein granted them to take on special powers that, under normal circumstances, were of the exclusive province of Congress: issuing legislative decrees, creating special tribunals of necessity, and limiting civil liberties. Decrees were supposed to

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[31] Uprimny, "The Constitutional Court and Control of Presidential Extraordinary Powers in Colombia," 47-48.

[32] Loveman, *The Constitution of Tyranny.*

[33] Carlos Restrepo Piedrahita, *Las Facultades Extraordinarias: Pequeña Historia de una Transfiguración* (Bogotá: Universidad Externado de Colombia, 1973).

lapse after the state of siege was lifted. It is telling, then, that since its independence in 1819, Colombia has spent more time as a presidential "virtual dictatorship" than not.[34] Presidents soon hit upon the strategy of extending the state of siege as long as possible (an overmatched Congress was usually happy to comply) or of pressuring legislators to convert decrees into permanent law as a condition for lifting the state of siege.[35]

Under these conditions, Colombia, particularly in the period between 1970 and 1991, when it spent an astonishing eighty percent of the time in an officially mandated state of emergency,[36] became a virtual garrison state feeding off a perpetual cycle of persecution and repression. Absent clear temporal and legal bounds to the exception, the extraordinary became the ordinary, the line between the ordinary and the extraordinary regime grew blurry, and in a "permanent emergency," defensive measures to safeguard the democratic order grew into a new status quo—a "normalization of the exception" in Giorgio Agamben's words,[37] with no clear path for returning to the original state of law.

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[34] Luz Estella Nagle, "Evolution of the Colombian Judiciary and the Constitutional Court," *Indiana International and Comparative Law Review,* Vol. 6 (1995): 59-90, 68. On the history of the abuse of emergency powers in Colombia, see., e.g., Carlos Peláez, *Estado de Derecho y Estado de Sitio: La Crisis de la Constitución en Colombia* (Bogotá: Temis, 1955); Libardo José Ariza, Felipe Cammaert and Manuel Alejandro Iturralde, *Estados de Excepción y Razón de Estado en Colombia* (Bogotá: Universidad de los Andes, 1997); Antonio Barreto, *The Dynamics of Emergency Powers Within Constitutional Systems: The State and the Civil Society of Colombia – Besieged Between Violence and Emergency Powers* (unpublished JSD proposal, Yale Law School, 2002); and Mauricio García Villegas, "Constitucionalismo perverso, normalidad y anormalidad constitucional en Colombia: 1957-1997," in Boaventura de Sousa Santos and Mauricio Garcia Villegas, eds., *El caleidoscopio de la justicia colombiana* (Bogotá: Uniandes, Siglo del Hombre, 2001), 317-370.

[35] Roger W. Findley, Fernando Cepeda Ulloa, and Nicolás Gamboa Morales, *Intervención presidencial en la economía y el estado de derecho en Colombia* (Bogotá: Universidad de los Andes, CIDER, 1983), 170.

[36] Mauricio García Villegas and Rodrigo Uprimny, "El control judicial de los estados de excepción en Colombia," in Mauricio García Villegas, César A. Rodríguez Garavito and Rodrigo Uprimny, eds., *¿Justicia para todos? Sistema judicial, derechos sociales y democracia en Colombia* (Bogotá: Editorial Norma, 2006), 531-569; Mauricio García Villegas, "Estado, derecho, y crisis en Colombia," *Revista Estudios Políticos de la Universidad de Antioquia,* Vol. 17 (2006): 11-44.

[37] Giorgio Agamben, *State of Exception* (Chicago: University of Chicago Press, 2005).

Yet, despite the long history of the abuse of emergency powers in Colombia, and, perhaps paradoxically, their manifest failure to contain political violence or improve economic conditions, today few in the nation seem to believe that abandoning the device altogether is a feasible solution to the nation's problems. To the contrary, the legal order of the 1991 Constitution doubles down on the emergency regime, albeit not in entirely traditional ways.

B. The 1991 Constitution: Legal and Political Controls on Emergency Powers

Over the last three decades, a spectacular expansion of written constitutionalism has swept across the most diverse corners of the world, from Central and Eastern Europe to South Africa to East Asia and various nations of Latin America.[38] In many regimes, new political charters have marked the transition from authoritarianism to democracy, from legal impunity in the face of state-perpetuated atrocities to rule-of-law regimes where the defense of human dignity and of fundamental rights represent touchstones of the new order. Many of these new constitutions share certain features: written bills of rights and constitutional courts equipped with judicial review are prominent among them.[39]

The 1991 Colombian Constitution is such a case. The thirteenth to govern Colombia since its independence from Spain in 1810, it is locally referred to as the "Constitution of Rights," a vanguard in its textual commitment to basic human rights, and even certain

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[38] "In today's world, written constitutions are the ultimate, formal source of state authority." Alec Stone Sweet, "Constitutions and Judicial Power," in Daniele Caramani, ed., *Comparative Politics* (3rd ed.) (New York: Oxford University Press, 2014): 162-180; Bruce Ackerman, "The Rise of World Constitutionalism," *Virginia Law Review*, Vol. 83, No. 4 (1997), 771-797.

[39] Stone Sweet, "Constitutions and Judicial Review," ("By the 1990s, the basic formula of the new constitutionalism—(1) a written, entrenched constitution, (2) a charter of rights, and (3) a review mechanism to protect rights—had be- come standard," 175). On the "third wave of judicial review," see, e.g., Tom Ginsburg, *Judicial Review in New Democracies* (New York: Cambridge University Press, 2003), 90.

new social, economic and "collective" rights. It has earned acclaim among comparative constitutionalists in having created one of the strongest rights-protecting regimes in the world, with the new Constitutional Court and the *tutela,* a new legal device allowing individuals to file their own constitutional challenges against violations of those rights.[40]

Yet the constitution had somewhat less than noble beginnings, the product of a "reactive process" by which political elites attempted to fend off public indignation at the persistent failure of state institutions to deal with the nation's crises.[41] Constitutional reform actually began at the instance of the strongest power, the executive branch: indeed, each of Colombia's presidents elected between 1974 and 1990 hammered home the theme of constitutional change even though, in all instances, proposed reforms aimed to decrease presidential power. All agreed that in order to improve state performance, Colombia needed a stronger and more independent judiciary, more political inclusion and local popular participation, and a more proactive and responsive Congress.

Yet with few exceptions, these reforms failed to clear the requisite procedural hurdles: some foundered in congressional deliberations; a few others were invalidated by the Supreme Court on procedural grounds. The failure, in 1988, of Virgilio Barco's ambitious package of reforms, which included controls on private campaign donations, provisions for internal party democracy, mechanisms to strengthen Congress' control over the cabinet, and the creation of a federal public prosecutor and judicial council of ethics,

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[40] Alec Stone Sweet calls the Colombian Constitutional Court one "of the world's most active and effective." "Constitutional Courts," in Michel Rosenfeld and András Sajó, eds., *The Oxford Handbook of Comparative Constitutional Law* (New York: Oxford University Press, 2012), 816-830. See, algo, Roberto Gargarella, Pilar Domingo, and Theunix Roux, eds., *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Hampshire, England: Ashgate, 2006), and D.M. Davis, "Socio-Economic Rights," in Michel Rosenfeld and András Sajó, eds., *The Oxford Handbook of Comparative Constitutional Law* (New York: Oxford University Press, 2012), 1020-1035, 1030-32.

[41] Gabriel Negretto, *Making Constitutions: Presidents, Parties, and Institutional Choice in Latin America* (New York: Cambridge University Press, 2013), 167.

prompted the president to call an unofficial referendum to authorize reform of the constitution by a constituent assembly. The plebiscite, which was highly supported by the student movement and the mass media, would coincide with the March 1990 congressional elections. After it won a comfortable victory, President Barco used his state of siege powers to issue a decree calling for a new, this time official, plebiscite in the May presidential election. Although the decree neatly dodged the requirement that Congress approve any proposed constitutional amendment, it was nonetheless upheld by the Supreme Court.[42]

Assembly procedures and the scope of reform were hammered out in an agreement between president-elect Cesar Gaviria and major party leaders in August 1990. Delegates were to be elected in a national district by the same formula used to elect legislators, and decisions would be adopted by majority rule. These procedures were ratified by the Supreme Court shortly thereafter. And although Colombia's two political parties, the Liberals and the Conservatives, which dated back to the mid-nineteenth century, had been the longest lasting in Latin America, Congress's continued slide into ignominy hastened the breakdown of the party system. On December 9, 1990, delegates were elected, with no one party gaining a majority, and five parties finished with 5 or more percent of seats. Even the stalwart Liberal Party, which won 34 percent of seats, underwent a massive atomization, the twenty or so separate lists it ran to maximize its returns having little in common in terms of a common program.

Yet despite the ostensible fragmentation of the delegates, there was surprising agreement among them on essential reforms aimed at limiting the president's powers and increasing the participation of Congress and the judiciary in the operation of government. On Gabriel Negretto's telling, the unlikely consensus emerged out of the perception,

[42] The existing amendment procedure required the approval of any reform in Congress.

shared among political elites and the public alike, that existing institutions were no longer acceptable, as well as party fragmentation, which, by obscuring the identities of future winners and losers from reform, yielded incentives for cooperation in a sort of "veil of ignorance" that decreased partisan conflict over institutional selection.[43] Five committees were formed to issue specific proposals that would be voted on in plenary sessions. According to Manuel Cepeda Espinosa's account, ten of thirteen sections and 74 percent of the provisions proposed by these committees were supported by two-thirds or more of the delegates.[44]

One important supporter of such reforms was President Gaviria himself, along with reformist elements of the ruling PL. Proposals emerging from the government included granting Congress the power to censure cabinet ministers and cutting down on discretionary intervention by the president in the economy, which, Gaviria felt, when unsupported by congressional action, was counterproductive. He proposed creating a new Attorney General's Office and a new Prosecutor General's Office, responsible for overseeing the integrity of public officers and prosecuting crimes, respectively. The government also proposed the creation of a Constitutional Court to review the constitutionality of laws and executive acts, whose members would be appointed from a list of candidates jointly put forward by the president, the Supreme Court, and the state council. In many cases over the course of the negotiations, the government's proposals were adopted in their entirety; in others, opposition parties managed to translate their influence into more stringent regulation of presidential power.

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[43] Negretto, *Making Constitutions,* 167.

[44] Manuel Cepeda Espinosa, *Polémicas Constitucionales*, xii.

The most important reforms made by the Assembly to Colombia's presidential system are found in Title VII, Chapter 6, "Concerning the States of Exception," which regulates the manner in which states of exception can be declared by the Executive, and imposes strict limits, procedural and substantive, upon them. The constitution provides for three types of emergencies. The President is authorized to declare, with the consent of all Cabinet Ministers (today, there are 17), states of: *External War* (but only after a declaration of war by the Senate, except where necessary to repel an aggression) (Type 1), *Internal Disturbance* (Type 2), or an *Emergency* of another sort, consisting of a "serious or imminent" threat to the "economic, social, or ecological order of the country" (Type 3). During Type 1 and 2 emergencies, the government could wield only those powers "strictly necessary" to repel the aggression, defend the country's sovereignty, and to restore normal conditions (Arts. 212 and 213). The branches' "normal functioning" could not be interrupted, and Congress would at all times maintain the power to "regulate" the state of emergency by means of statutory laws (Art. 152) and to convene itself, "at its own behest, with all its constitutional and legal powers" in order to hear reports presented by the government in which it must give reasons for the legislative decrees it should issue (Art. 213, ¶2).

Mandating the participation of various actors in the initiation and extension of states of emergency would also, it was reasoned, limit their abuse by quashing the temptation—to which, without exception, all of Colombia's twentieth-century presidents gave way—to extend the exception indefinitely in time. Accordingly, Type 1 emergencies would be governed by congressional declaration of the initiation of war. Type 2 emergencies

would expire after 180 days, unless extended by the Senate.[45] Catchall Type 3 emergencies could last for a maximum of 30 days, and required that the government provide from the start a stipulated deadline after which the emergency would expire. Further, within the year after a declaration of a Type 3 emergency, Congress could repeal, amend, or add to executive acts via its own decrees. Finally, decrees of all three types would be sent to the Constitutional Court the day following their promulgation for review—and even where the government failed to do so, the Court could review them, anyway (Art. 214, ¶6).

Besides the duplication and decentralization of the power to declare, regulate, and terminate the state of emergency, the Constitution, recalling Colombia's deplorable legacy of state-sponsored excesses against civilians, explicitly made rights unabridgeable, even in the state of siege. Repudiating the odious practice (common in the 1980s) of haling civilians before military tribunals for alleged collaboration with guerrillas, under the 1991 Constitution all civilians must be tried before a civil court, no matter the circumstances (Article 213). Human rights and fundamental freedoms could not be suspended (Art. 214).[46] International law was also made immune from suspension—placed "above," so to speak, the reach of national statutory law—and all laws regulating the state of emergency had to be consistent with its dictates.[47] Further, decrees emitted by the president during the

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[45] Article 213, ¶1. Note that Article 214, ¶4 leaves the requirements for cessation of Types 1 and 2 up for dispute: "As soon as the external war or the causes that gave rise to the State of Internal Disturbance shall have expired, the Government shall reestablish the public order and lift the State of Exception."

[46] The 1994 Statutory Act on States of Emergency also governs the emergency regime. The government could, in cases of war with a foreign power or internal disturbance, place restrictions on the press, radio, or television; restrict freedom of movement and freedom of assembly; and, by judicial order, intercept or record private communications, seek preventive detentions of individuals when there was evidence of their involvement in offences and search private residences (Arts. 27, 28, and 38). However, restrictions could may not affect core rights and freedoms (Art. 7), including the right to habeas corpus or judicial safeguards for the protection of fundamental rights.

[47] "In all cases, the rules of international human rights law shall be observed. The powers of government during the states of exception and judicial controls and guarantees of rights shall be

state of exception had to have a "direct and specific connection" with the situation described by the original declaration; the President could not, in other words, unilaterally expand the boundaries of the emergency after the fact.

A final source of checks on presidential power were provisions allowing multiplicity of actors increasing the *political and legal accountability* of the Executive. It was President Gaviria's government that championed a congressional power to censure individual cabinet ministers, and it also pushed for the creation of new "autonomous and independent organs" such as the Prosecutor General, the Controller General, the Ombudsman, and most importantly, the new Constitutional Court to defend citizens' rights against the state, and to oversee its lawful functioning.[48] Other facets of the new accountability regime included the relaxing of the presumption of the official immunity—a provision with no parallel in the American regime!—, allowing the President and cabinet ministers to be held legally responsible when they abused their power to declare states of exception, or for any other constitutional abuse committed in the exercise of emergency powers under an emergency situation (Art. 214, ¶5).

From the perspective of ridding Colombian democracy of its oligarchic tendencies, or improving the lives of the millions of individuals affected by the nation's civil war, the Constitution has garnered mixed reviews.[49] Yet there is no doubt that, from the point of

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established by law in accordance with international treaties. Measures adopted must be proportionate to the gravity of the events." (Article 214, ¶2)

[48] The Attorney General is tasked with supervising compliance with the Constitution and other laws. The Ombudsman is responsible for protecting and enforcing human rights and defending the "collective interests" of society. This include "[g]uiding and instructing [the people of Colombia] in the exercise and defense of their rights before the competent authorities or private entities" and "[i]nvoking the right of habeas corpus and engaging in protective legal action without prejudice to the right of interested parties." (Arts. 277, 282)

[49] Michael Reed-Hurtado, "The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America," UN High Commissioner for Refugees (UNHCR) (June 2013), PPLA/2013/03; Lawrence Whitehead, "Reforms: Mexico and Colombia," in Manuel A. Garretón and Edward Newman, eds., *Democracy in*

view of improving on Columbia's woeful record of hyper-presidentialism, the 1991 Constitution and the new oversight institutions it has created have had teeth. The Ombudsman, for example, has had a strong hand in the control and oversight of public bodies, particularly in cases which typically elude the reach of the courts.[50] If anything, it is more commonly argued that, in policing the bounds of presidential power, the people's watchdogs have been a little *too* effective.[51] Insofar as this is true, it is imperative to consider the centerpiece of the rule-of-law regime of the emergency, the Constitutional Court.

C. Defying A Legacy of Weak Courts

"The brutal truth," writes Luz Estella Nagle, "is that [in Latin America] the judiciary has long been little more than a maidservant—a Cinderella to the other branches of government."[52] A few years after the establishment of the Court, observers were astonished at its success in building a reputation for strength. The new Constitutional Court has had stunning success in reversing this legacy, and in curtailing executive emergency powers—"no mean feat," points out Uprimny, "in a country like Colombia, where emergency

Latin America: (Re)constructing political society (Tokyo: United Nations University Press, 2001), 66-95, 93-94; Pedro Santana, "Colombia en la encrucijada," *Revista Foro*, Vol. 45, No. 59 (2002): 37-46.

[50] "The review performed by the Ombudsman. . . allows for the investigation of aspects [of acts of state authorities] that are unlikely to be find a quick and efficient resolution through more formal, traditional means." Manuel José Corchete Martín, *El Defensor del Pueblo y la Protección de los Derechos* (Salamanca: Ediciones Universidad Salamanca, 2001), 19-20.

[51] Pedro Medellín Torres, *El presidente sitiado: ingobernabilidad y erosión del poder presidencial en Colombia* (Bogotá: Editorial Planeta, 2006); Ronald P. Archer and Matthew S. Shugart, "The Unrealized Potential of Presidential Dominance in Colombia," in Scott Mainwaring and Matthew S. Shugart, eds., *Presidentialism and Democracy in Latin America* (Cambridge: Cambridge University Press, 1997), 110-159; Daniel L. Nielson and Matthew S. Shugart, "Constitutional Change in Colombia: Policy Adjustment Through Institutional Reform," *Comparative Political Studies*, Vol. 32, No. 3 (1999): 313-341.

[52] Luz Estella Nagle, "The Cinderella of Government: Judicial Reform in Latin America," *California Western International Law Journal*, Vol. 30, No. 2 (1999): 345-379.

powers have been improperly utilized for several decades, even to the extent of putting at risk the maintenance of the rule of law."[53] "Where did these guys come from?," asked *Semana* magazine in 1997.[54]

However, until the mid-'90s, Colombia was another case that proved the rule. The Constitution of 1886, which the 1991 Constitution replaced, had looked to the U.S. "as an inspirational model" in designing Colombia's Supreme Court, but if the drafters faithfully copied the form of the American judiciary, they missed badly on the substance. A strong, independent high court was a poor fit for post-independence Colombia for a number of reasons, not least of which was the young nation's legal tradition, heavily imprinted by Roman civil law via France, Germany and Spain. Young Colombia had adopted the Continental version of the separation of powers, with its Rousseauvian statutory positivism and accompanying distrust of courts—a distrust that the ravages of the Spanish Inquisition in the New World did nothing to abate. Despite the fact that judicial review and the workings of the American Supreme Court were well known to Latin Americans by the 1880s, Colombia's original Supreme Court was not endowed with the faculty of judicial review.[55]

Beyond the humble status of courts in French and Colombian legal theory, another factor contributing to the historical weakness of the old Supreme Court was the uncommon strength of the executive in virtue of his order-preserving functions and the

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[53] Uprimny, "The Constitutional Court and Control of Presidential Extraordinary Powers in Colombia," 46-69.

[54] Hector Riveros, "¿Quiénes son esos señores?," *Semana* (July 07, 1997).

[55] Nagle, "Evolution of the Colombian Judiciary," 67, 69-70. ("The theory of the sources of law imported from France was based on the idea that law emanates only from the Congress through legislation or from the President through the exercise of decree powers, and that the judge can only apply such law. Under this notion a case decided by the courts does not become a binding precedent for later cases. Later cases do not consider prior cases, but rather the laws duly enacted by the political branches.")

oppressive reality of unceasing civil and political strife.[56] The 1886 Constitution is known as the "ultra-centralist constitution" because, relative to its hapless predecessors, which had tried and failed to impose stability on war-torn Colombia after its independence in 1810, the 1886 Constitution greatly strengthened the powers of the president at the expense of the other branches. In the context of conflict after conflict facing the young nation, the Colombian Supreme Court's already circumscribed authority would be curtailed over the ensuing decades by the broad special powers that the President was given—or claimed for himself—during the state of siege.

In 1910, after nearly three decades of virtual dictatorship, the Court was granted a weak form of judicial review (allegedly in light of Tocqueville's *Democracy in America*, which was widely translated and read in Latin America at the time).[57] The Supreme Court, after hearing the opinion of the Attorney General, could issue a final determination as to the *exequibilidad* (enforceability) of a legislative act vetoed by the executive, or of laws and decrees whose constitutionality was challenged by any citizen.[58] Yet in light of the Court's continued deference to the Executive, and the fact that the Supreme Court of

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[56] David Bushnell and Neil MacAulay, *The Emergence of Latin America in the Nineteenth Century* (2nd ed.) (New York: Oxford University Press, 1994). Colombia's early years were smattered with violence and instability in its geographical boundaries and political form. Bolívar's envisioned continental unification had fractured in 1831, with war erupting between present-day Peru and "Gran Colombia" in 1828. By 1830, Bolívar stepped down from the presidency, unable to hold the unified nation together any longer. Between 1831 and 1858, the new nation of Nueva Granada was beset by tension over federalism against centralism, and in 1858, the provinces managed to wrest control over Colombia from the central government in Bogotá and to establish a federated state, the Granadine Confederation. It would be short-lived, as the provinces again erupted into violence in 1860. The fighting ended in 1862, with the establishment of a new centralized republic. This would not be the last of Colombia's struggles with violence in its own borders, of course. The twentieth century was shot through with fighting: the "Thousand Days' War," which lasted from 1899 to 1902, the Colombia-Peru War of 1932-1933, the bloody period between 1948 and 1958, known as "*La Violencia*," and of course, the internal armed conflict that began in the 1960s and continues through today.

[57] Nagle, "Cinderella," 68.

[58] Ibid.

Colombia was permitted only to review the constitutionality of executive emergency decrees for procedural, as opposed to substantive reasons, this power turned out to be of very little significance. Review was a pro forma affair, consisting entirely of checking whether or not a simple procedure, obtaining the signature of all ministers, had been met.[59] Over the course of the twentieth century, the Supreme Court remained a victim of "intervention and manipulation": far from checking the president, in fact, it suffered the continual erosion of its powers by executive decree.[60]

Accordingly, one of the main tasks the drafters of the 1991 Constitution undertook was to reshape the judiciary into a more credible watchdog of powers and rights, a crucial tool in a new regime designed to assuage a public tired of executive overreach that there would be real limits placed upon presidential power. The feckless Supreme Court was stripped of jurisdiction over constitutional questions, and a new Constitutional Court was established to review all matters of constitutional law brought before it. The centerpiece of the new legal order, the Constitutional Court is made up of an odd number of

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[59] Rodríguez-Raga, "Strategic Prudence," 89. Scholars of Colombian constitutionalism have defined three periods of court review of emergency measures since democracy was reestablished after *La Violencia* in 1958. The first, from 1958 to the early 1980s, was characterized by great deference to the President's determination of the emergency as a "political question," with nearly all state of siege measures upheld, even when these had nothing to do with crises. The second, from the beginning of the 1980s through 1991, was marginally stricter. Although the Supreme Court maintained its rhetorical allegiance to the doctrine of exclusively formal review of executive emergency decrees, in rare instances it nullified decrees when they lacked sufficient relation (*conexividad*) with the state of siege. The third regime, post-1991, wrought a dramatic change in legal doctrine concerning the state of emergency. Whereas nine per cent of so-called Internal Commotion decrees were declared void by the Supreme Court between 1984 and 1991, 34 per cent were nullified by the Constitutional Court in its first four years.

[60] Nagle, "Cinderella," at 72. Nagle gives a partial list of extraordinary decrees issued by the President that have invaded upon judicial autonomy: 1. Decree 3519 of November 9, 1949, which established that a three-fourths majority of the Court was required to challenge decisions concerning extraordinary presidential decrees challenged for constitutionality; 2. Decree 1762 of 1956, which created a Chamber of Constitutional Affairs in charge of resolving constitutional challenges and whose members would be appointed by the government; and 3. Decree 3050 of 1981, which attempted to require a qualifying majority in Court decisions on constitutional issues, thereby obstructing any declaration of unconstitutionality.

justices, whose makeup, per the Constitution, should reflect diverse specialties in law. Justices are chosen by the Senate from lists presented by the President, the Supreme Court, and the State Council, in turn. Justices serve a term of eight years and cannot be reelected. (Art. 239)

The Court was endowed with a number of functions new to the Colombian judiciary. The Court was tasked with guarding the "integrity and supremacy" of the Constitution. It was empowered to perform constitutional review of individual citizen suits, convocations of a constitutional assembly, popular referendums, statutory laws, legislative and executive decrees, international treaties, and even, where challenged by individual citizens, amendments to the Constitution. For the first time, Court decisions would have res judicata effect. The reach of judicial review was also dramatically broadened by the implementation of a new legal cause of action, the *tutela,* through which citizens may file individual direct challenges against state action alleged to violate their rights.[61] Thoroughly studied from the angle of human rights protection, the *tutela* has broadly expanded citizens' access to justice given the few formalities required to file it.[62] By turning all Colombian citizens into potential "private attorneys general," in the American parlance, it has redrawn the landscape of governmental accountability, "a bridge," in the words of constitutional scholar and former Constitutional Court justice Manuel José Cepeda, "between reality and the Constitution, one which goes beyond a legal device and has become a substantive source of effective enjoyment of rights."[63]

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[61] On the *tutela* as an instrument for "social transformation," see, e.g., Gargarella et al., *Courts And Social Transformation in New Democracies*; García Villegas, et al.; *¿Justicia para todos?*

[62] It is worth clarifying that, although individual actions comprise a large portion of the Court's docket, the Court has the power to decide which *tutela*s it will hear, and ultimately only about 2% of these actions reach it.

[63] Quoted in Gabriel Bustamante Peña, "El origen y desarrollo de la acción de *tutela* en Colombia," *Semana* (September 2011).

Article 214, paragraph 6 requires the Constitutional Court to review all emergency decrees, and, in the absence of strict guidelines as to *how* such review shall be conducted, the Court has interpreted its job description in the broadest possible sense. In its first pronouncement on the topic in 1992, the Court, in a decision worthy of John Marshall himself, upheld a particular declaration of emergency while claiming for itself the power to review not only the procedural but also the substantive validity of emergency decrees. From this point on, the Court embarked on a policy of assessing whether the very reasons provided by the President for declaring a state of emergency were well founded. Specifically, the Court insisted that the initial decree declaring the state of emergency must make a convincing case that events requiring emergency measures are in fact new and cannot be handled by ordinary means.[64]

Through 2011, the Executive has issued 25 decrees declaring a state of emergency (including five extensions), seven of which have been annulled by the Court.[65] A closer look at some of those decisions is instructive with regard to the Court's understanding of its own jurisdiction and role in the scheme of separated powers. In 1995, the Court invalidated a decree declaring a state of internal disturbance. It reasoned that because that the violence taking place in Colombia in the mid-'90s reflected not phenomena of a "situational, transitory, or exceptional nature," but instead "deeply-rooted pathologies" relating to the political and economic order, there was no reason to treat it as a special occurrence requiring emergency mechanisms above and beyond the ordinary means at the State's disposal in dealing with routine functional problems.[66] By this logic, President Ernesto

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[64] Judgment C-004/92.

[65] Rodrigo Uprimny, "¿Una forma de gobierno parlamentaria en Colombia?," *Nueva Página*, Vol. 1, No. 1 (2004); Rodrigo Uprimny, "The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges," *Texas Law Review*, Vol. 89, No. 7 (2011): 1587-1610.

[66] Decision C-466/95.

Samper had been simply wrong in construing a pattern of ongoing violence as a novel and pressing occurrence. President Samper took the decision much as might be expected, threatening an amendment to clip the Court's wings and once more limit review of emergency decrees to procedural criteria alone. A proposal along these lines was discussed in both chambers during the second half of 1996 but was ultimately rejected.

A couple of years later, in 1997, the Court struck down another decree, this time one declaring a state of economic emergency. Here, the Court observed that the economic crisis in which the nation found itself "was totally predictable" in nature and hence not an occasion for a declaration of a state of emergency. The Court maintained that it although it would not "engage in an exhaustive list of the sum of powers and authorities presently possessed by the Government to face the collapse of tax revenues," ordinary measures would suffice to guide the nation out of the economic situation.[67] This decision, too, launched another proposal from the Executive to prohibit the Court from exercising substantive review of decrees declaring states of emergency. This time, the debate over the Court's powers took place in the middle of a wave of corruption scandals alleging ties between Samper's electoral campaign and the drug cartels, and the proposal soon lost congressional support.

Perhaps most controversial of all was a 2004 decision in which the Court struck down, 5-4, a proposed constitutional amendment, the Anti-Terrorism Act, to allow the military to conduct arrests, home searches, and wiretaps without a warrant issued by a judge or a prosecutor. The amendment was, of course, rife with controversy, and full of problematic implications for civil liberties. Yet Uribe's high approval ratings at the time—77% in June 2004, according to one poll—had been due, many agreed, to his hardline

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[67] Decision C-122/97.

stance against guerrilla movements and terror. The showdown between the interventionist court and the popular president attracted a great deal of media scrutiny, and in years hence, more than one of the justices admitted to having felt significant political pressure upon them in issuing a judgment. Ultimately, the court struck down the amendment, although for narrow procedural reasons having to do with its passage.[68]

The Court's own statements on its jurisdiction and mode of review have been provocative. A 1994 speech by the President of the Court proffered the following vision of emergency faculties and the separation of powers:

> Common citizens are permitted to do anything that is not specifically prohibited by law, but public servants must limit their actions to the duties outlined by laws and regulations. *The President of the Republic is not a common citizen and there are limits on his ability to exercise power*. The duty of the Constitutional Court is to *decide whether the rules and regulations are in accord with the Constitution*. In terms of reviewing laws, for example, this responsibility cannot be fulfilled by Congress, which issues them. *The chief executive cannot do this either, because this would imply dictatorship*. If we fail to fulfill our duty, the Senate of the Republic is there. The Constitution states that the Senate should act as our judge.[69]

From an American point of view, several points stand out. First is the presumption that the President, as a public officeholder, should be held to a *stricter* standard of responsibility than a private citizen. According to the American doctrine of sovereign immunity, the presumption is precisely the opposite.[70] Second, although the Court purports to derive its

[68] Decision C-816/2004. According to Rodriguez-Raga, some justices reportedly felt that this rationale was a copout. One judge whom Rodriguez-Raga interviewed offered that the case had raised discussion among the justices over the "substitution" doctrine eventually used in 2010 to strike down Uribe's bid for a third term, according to which Congress lacks the power to *substitute*, as opposed to merely reform, the constitution. Apparently, because the doctrine was not fully developed at the time and the majority could not agree on how to apply it to the case, the Court opted to limit its reasoning to procedural flaws in the Anti-Terrorism Act's passage. (101-2)

[69] Eduardo Cifuentes Muñoz, quoted in Nagle, "Cinderella," 84, emphasis added.

[70] "The President's absolute immunity is a functionally mandated incident of his unique office, rooted in the constitutional tradition of the separation of powers and supported by the Nation's history. Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." Nixon v. Fitzgerald, 457 U.S. 731 (1982).

faculty of review from "the Constitution," the Constitution actually says nothing about substantive review of decrees. Third and finally, the Court describes as "dictatorship" the process by which the chief executive decides upon the constitutionality of its own emergency decrees. From the perspective of Schmitt or Clinton Rossiter, this misunderstands the emergency regime, under which temporary "dictatorship" is precisely the reason, within certain absolute limits, for its being called into existence in the first place. But even a less extreme position, dominant in the American legal system, acknowledges the faculty of each branch to independently review the constitutionality of its own actions. This position goes by the name of "departmentalism," and it is widely supported, especially when the executive is acting pursuant to his powers as commander-in-chief.

How did a young court rise to such heights in such unfriendly circumstances? As the fraught history of courts in new democracies often attests, the whole thing could have gone spectacularly wrong. Take the case of the case of Russia from 1991-1993, which Tom Ginsburg uses to illustrate the dangers of a young court "acting precipitously." In challenging presidential decrees on separation of powers grounds, the new Russian Constitutional Court earned President Boris Yeltsin's enmity and "dashed" its image as a "neutral, technical body devoted to law." The result was Yeltsin's dissolution of Parliament and suspension of the Court's activity in 1993, as well as the eventual establishment of a new "superpresidential" system in which the Court had vastly reduced powers.[71]

How has the Colombian Constitutional Court thus far managed to avoid this fate? One answer has to do with the political savvy it has supposedly deployed in order to avoid major conflicts. Juan Rodríguez-Raga describes a technique of "strategic prudence" towards the political branches, on which the Court is circumspect in its behavior when

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[71] Ginsburg, *Judicial Review in New Democracies*, 101-4.

facing a strong administration and considering an issue salient for the executive, but far more assertive in striking down legislation when judges have strong preferences against it and when they anticipate that the incumbent would face high costs in attempting to sanction the court.[72] Miguel Schor also points out the importance of short-term political bargains in shaping the agenda and the scope of the Court's review.[73]

Another answer emphasizes that Colombian political and legal culture of late actually serves to bolster, not threaten, the Constitutional Court's autonomy. Arguably, the popular consensus in 1991 pushing for checks on executive power, the long history of abuse of the exception, and the popularity of the Court as a rights defender have kept it, in the main, from suffering threats of judicial impeachment, court packing or being shut down, as have some of its neighbors in Ecuador, Peru and Argentina.[74] As Manuel Cepeda explains, it was in direct response to past failings of the political system that the concepts of judicial review and judicial independence from politics gained in stature. Judicial review was first introduced in 1910 to curtail executive discretion over emergency powers, and when the device reappeared in 1968, after the bloody decade-plus of *La Violencia*, it was via a constitutional amendment that gave the Supreme Court ex officio power to review emergency decrees in particular.[75] And while Colombian courts have historically been deeply intertwined with politics, it appears that the population has now learned from this

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[72] Rodríguez-Raga, "Strategic Prudence," 75.

[73] Miguel Schor, "An Essay on the Emergence of Constitutional Courts: The Cases of Mexico and Colombia," *Indiana Journal of Global Legal Studies,* Vol. 16, Iss. 1 (2009): 173-194.

[74] On several occasions, however, Court decisions have provoked threats by the government to override the decision or to limit court power. In 2009, President Uribe managed to get passed an amendment directly rebuking the Court's 1994 decision to require decriminalizing all personal consumption of drugs.

[75] Cepeda Espinosa, *Polémicas Constitucionales*, 26. The amendment even specified a maximum period in which the Court had to rule on the constitutionality of emergency decrees, anticipating that delays could be used by the Court to avoid having to issue a judgment. Incidentally, the reform included a proposal to create a Constitutional Court, but this, of course, failed.

experience. As one former justice puts it: "We do not accept that a justice [should have] a personal relationship with someone from the executive [branch]. Scalia can go playing golf with the U.S. vice-president, and there may be some people complaining, but in general they don't care. That is unthinkable in Colombia."[76] The context of violence has also stimulated judicial independence in a different, perhaps counterintuitive way. According to Ceped the Court's decisions have won it a measure of popularity among the populace in that they help to alleviate the uncertainties created by the fighting—namely, by redressing blatant and routine rights violations like expropriations, displacements, destruction of means of sustenance, and so forth.[77]

Finally, there is the importance of the institutional landscape, especially the party system. Colombia's traditional political parties, the Liberals and the Conservatives, are among the oldest in Latin America. But their august lineage belies a longtime absence of ideological coherence, perpetual internal factionalization, a strong clientilist bent, marked top-heaviness, elitism, exclusivity and the sense among the population that these were strong unrepresentative.[78] In decades past, Congress was, as we have seen, a near non-entity in policymaking: held down by party squabbling, its inactivity became a license for the president to govern unaided via economic and state of siege decrees. And while the 1991 constituent assembly had set out to dislodge entrenched factions from Congress by reviving and opening up the party system,[79] the immediate effect was to replicate the problem

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[76] Rodríguez-Raga, "Strategic Prudence," 91.

[77] Manuel José Cepeda Espinosa, "Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court," *Washington University Global Studies Law Review*, No. 3 (2004): 529-700.

[78] Scott Mainwaring, "Party Systems in the Third Wave," *Journal of Democracy,* Vol. 9, No. 3 (July 1988): 67-81.

[79] José Buenahora, *El Proceso Constiuyente* (Bogotá: Tercer Mundo, 1992); Mónica Pachón, and Gary Hoskin, "Colombia 2010: An Analysis of the Legislative and Presidential Elections," *Colombia Internacional* (Universidad de los Andes, Departamento de Ciencia Política, 2011): 9-26.

of gridlock: from two entrenched parties, by 2002, there were 72 officially recognized parties in Colombia, 45 of which had representation in Congress.[80] A constitutional reform in 2003 attempted, with some success, to stimulate the formation of legislative coalitions by raising the threshold for participation in national elections, requiring parties to run a single list of candidates, and introducing the D'Hondt system to promote the formation of electoral coalitions.[81]

Complaints persist about typical non-competitive elections, corruption, indiscipline, and ineffectiveness in the legislature remain, albeit with one difference. In the present regime, Congress's participation is required in the authorization, or at least the extension of, states of exception. As a cultural matter, it is no longer tolerated that the executive sidestep his legislating partner, in view of which Congress's internal fragmentation makes it an ever greater hindrance to executive unilateralism, and an ever more unlikely threat to impose disciplinary measures on the Court. The weakness of Colombia's representative institutions has redounded to the favor of the courts in another sense, as Uprimny and García Villegas point out. In a "legislative vacuum," the Court comes to be seen as the appropriate authority for vindicating constitutional values in light of its broadening socially transformative potential, via devices like the *tutela*, for instance.[82] "[The] Court's progressivism is, for its part, made possible by the weakness of the opposing forces and those

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[80] Jonathan Hartlyn, "Presidentialism and Colombian Politics," in Juan Linz and Arturo Valenzuela, eds., *The Failure of Presidential Democracy: The Case of Latin America*, vol. 2 (Baltimore, Johns Hopkins Press, 1994), 220-253.

[81] Mónica Pachón and Matthew S. Shugart, "Electoral reform and the mirror image of inter-party and intra-party competition: The adoption of party lists in Colombia," *Electoral Studies*, Vol. *29*, No. 4 (2010): 648-660.

[82] Stephen Gardbaum, "The Place of Constitutional Law in the Legal System," in Michel Rosenfeld and András Sajó, eds., *The Oxford Handbook of Comparative Constitutional Law* (New York: Oxford University Press, 2012), 169-188, 175.

attempting to promote a constitutional counterreform."[83] In turn, the *tutela* has had the confounding effect of further weighting down the legislative process, casting courts in a sort of legislative role as a conduit of interest groups.

Of course, even in a healthily functioning regime of checks and balances, the respective powers of the branches will fluctuate, and with Uribe's landslide victory in the 2002 election, the Court was confronted with perhaps the greatest threat to its powers yet. Bearing witness to a simmering frustration in the executive branch over court checks on its powers, a series of constitutional amendments were proposed by Uribe in his first term. These would have, one, limited the Court's competence to hear *tutelas* that could require it to overturn judicial decisions by the Supreme Court and the Council of State; two, forbidden "positive rights-enforcing" decisions that would require expenditures not foreseen in the budget[84]; three, restricted constitutional review of emergency decrees; four, limited court competence in reviewing proposed constitutional amendments to strictly procedural matters; and five, required a two-thirds majority in order to overturn legislation.[85] At the time, Uribe enjoyed an approval rating of over 70 percent, and passage was not unlikely. Yet, despite Uribe's popularity, none became of these proposals, some of them even failing to reach a vote.[86]

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[83] Rodrigo Uprimny, and Mauricio García Villegas, "Tribunal Constitucional e emancipação social na Colombia," in Bolívar de Souza Santos, ed., *Democratizar a democracia. Os caminhos da democrâcia participativa* (Rio de Janeiro: Editora Civilizaçao Brasileira, 2002), 298-339. (available in English at http://www.ces.fe.uc.pt/emancipa/research/en/texts.html), 20.

[84] A pointed reference to a 2008 decision by the Court requiring the country to dramatically restructure the country's health care system. See, Davis, "Socio-Economic Rights," 1030-1031.

[85] Rodríguez-Raga, "Strategic Prudence," 114-5.

[86] This near-showdown is a good illustration of a "two-against-one" logic theory of institutional confrontations in tripartite political regimes. Here, the legislature played ally to the Court, perhaps taking into account the strong public support that the Court has enjoyed. Hence, a powerful president could be thwarted by a relatively weak Congress and an ambitious, although not yet fully legitimated new Court. Still, Uribe's popularity was ostensibly grounded in his hardline stance on

The activism of the Court has certainly attracted its critics, even outside of the Executive Branch. While in general the Court has increased transparency in lawmaking and in particular accountability in emergency decrees, its interventions have also "introduced very costly distortions" into the legislative process, for example by allowing politically disadvantaged groups to punch above their weight and force through policy changes not achievable via the normal legislative route. Others argue that the benefits of court activism simply do not outweigh their costs in terms of diminished legislative productivity and counter-majoritarian policy outcomes: on this account, decisions by the Court that do not reflect widespread consensus may engender long-standing conflicts, and pluralism may leave Colombian institutions with a diminished capacity to govern.[87] As one Court historian gloomily concludes, with such activism having "exceeded all foreseeable expectations," in retrospect, "the power given to the Court appears to have been ill-conceived and poorly orchestrated."[88]

The high-flying Court's string of victories was cut short in 2014, when a major scandal broke over bribe taking on the part of several justices, including President of the Court Jorge Pretelt, who had allegedly accepted money from an energy company in exchange for granting it a favorable ruling forgiving certain owed fees and duties. In March 2015, President Juan Manuel Santos introduced, and in July 2015 Congress signed into law a major constitutional reform proposal, the Balance of Powers Act. While spurred by corruption on the Court, the reform moved to clean up all three branches, and to "reset"

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the FARC and the internal armed conflict; yet the Court, too, was popular, even as it took a directly contrary position. The social demographics of this conflict bear further examination.

[87] Maurice Kugler and Howard Rosenthal, "Checks and Balances: Institutional Separation of Political Powers," in Alberto Alesina, ed.), *Institutional Reforms: The Case of Colombia* (Cambridge, MA: MIT Press, 2005), 75-102, 90, 97.

[88] Nagle, "Cinderella," 81.

the balance of powers between them, which had been upset, it was felt, by President Uribe's successful reelection reforms, and by the 1991 Constitution's having permitted federal courts to appoint each others' members.

The act took Colombia back, as it had been in 1991, to a system prohibiting presidential reelection, while installing an "empty seat" policy in Congress, whereby officials convicted of corruption and other crimes would be unseated and their seats left unfilled until the next election. The act created a new "supercourt" to hear cases against justices (the Tribunal de Aforados), its five members directly elected by Congress for eight-year terms. Judges would enjoy usual legal immunity for the content of their decisions unless it could be shown before the Tribunal that these decisions "were made with the intention of improperly favoring their own or other interests." A new Judicial Council was established to oversee the fiscal integrity of the bench. Reforms also stripped the courts of the power to nominate their own members, a practice long denounced as "I elect you; you elect me,"[89] and imposed a one-year hiatus on holding other public offices, to halt the "revolving door" by which officials like the attorney general, inspector general, the public defender, and judges would move from one office to another.[90]

Still, considering that reform was prompted by a public bribery scandal, that President Santos had initially called for far harsher measures against the Court, and that the Act left intact the core of the Court's strong powers of review, the Court did not end up as badly as it might have.

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[89] H.K. Sonneland, "Colombia Update: Constitutional Reforms Seek to Clean Courts," *COA.org* (2015).

[90] Acto Legislativo 2002 del 1 julio 2015 "Por Medio del Cual se Adopta una Reforma de Equilibrio de Poderes y Reajuste Institucional y se Dictan Otras Disposiciones." Available at: http://wp.presidencia.gov.co/sitios/normativa/actoslegislativos/ACTO%20LEGISLATIVO%2002%20DEL%2001%20JULIO%20DE%202015.pdf

Conclusion: Presidential Regimes between Weakness and Strength

What, if anything, does Colombia's emergency regime have to say to an American audience? Here I discuss one theme, the possibility and desirability of court review of discretionary executive power. A healthy plurality of American legal scholarship on the war powers of the President sees attempts to shackle the discretionary power of the executive as either futile or counterproductive.[91] On one version of this theory, Colombia's efforts to contain the state of emergency within clear textual limits might be viewed as "nominal" in the sense intended by Karl Loewenstein when he described national charters that express high-minded ideals which are in practice far-off and unattainable. Yet, as the Colombian example illustrates, this conclusion need not follow.

The Constitutional Court has garnered mixed reviews since its inception, but less for its ineffectiveness than because people disagree over the desirability of the institutional changes it has succeeded in bringing about. Countless provisions of the new constitutional order have yet to be effectuated in practice, particularly in the realm of the social and economic, but even critics acknowledge that the "constitutionalization of daily life"[92] continues apace, and has had major effects on the legal order, both at the institutional level and at the individual, in broadening citizens' access to justice. At the least, the Court's review of emergency executive decrees has had teeth: with rights insulated from statutory or discretionary action, and the emergency held to reason-giving requirements and time limits,

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[91] Harvey C. Mansfield, *Taming the Prince* (New York: Free Press, 1989); Tulis and Macedo, *The Limits of Constitutional Democracy;* Kleinerman, *The Discretionary President: The Promise and Peril of Executive Power.*

[92] Luis Eslava, "Constitutionalization of Rights in Colombia: Establishing a ground for meaningful comparisons" *Revista Derecho del Estado*, No. 22 (2009): 183-229.

an area of executive power considered for over two centuries to be outside the grasp of Congress and the courts has been brought within the fold of law. The resulting change to the functioning of Colombia's presidential system has been drastic, transforming the system from a wholly unipolar one to one in which the three branches effectively share the power to act in the emergency.

Executive prerogative *can* be tamed, the Colombian example seems to say. But should it? Echoing separation of powers theorists in the Lockean mold, Harvey Mansfield tells us that executive power "ensure[s] that the power of government [is] not diminished, must less stalemated, when it [is] separated into three branches." Democracies cannot escape the need for discretionary emergency power, because the "generalities of law do not conform to the particularities of human beings."[93] Has Colombia's present regime of regulation of the state of emergency purchased consensus, lawfulness and transparency at the cost of incoherence and indecision? Some would say so.[94] Others might respond that even if so, the choice is still at least a plausible one for a nation scarred with the worst of "extraordinary" periods of presidential abuses. But the history of Colombia in the emergency suggests an even stronger rebuke to the Lockean thesis: unilateralism is no necessary guarantee of "strength" as these thinkers have understood it. Colombia's functionally president-centered regime was not only unable to attain economic success and quell the internal violence that has plagued the nation throughout its history; it also lacked basic legitimacy. Accordingly, if the new constitutional regime has managed to increase the public's sense of "authorship" and adherence to the constitutional regime at the cost of shackling the executive branch, it may well be worth it.

93 Mansfield, *Taming the Prince,* xx-xxi.

94 Medellín Torres, *El Presidente Sitiado.*

Several objections might be made at this point. One would be to focus on the government's response to declared emergencies, and see whether performance has suffered. There is reason to think that thus far, the branches have achieved a *modus vivendi,* the President refraining from frivolous declarations of emergency; the Court responding in a relatively timely fashion and abstaining from unnecessary interference. In 2010, for example, President Santos declared a state of emergency in 28 of the nation's 32 departments in response to heavy rains and flooding in which at least 400 people were killed and over 3 million displaced. Santos issued several decrees, and Congress one legislative decree, the main regulatory aim of which was to require private infrastructure and telecommunications be made available for immediate public use, and to relax licensing requirements for the construction of new or temporary facilities. The Court upheld the entirety of the package of decrees, with the exception of one provision exempting new facilities from feasibility studies or licensing requirements. On October 28th, the Court upheld a September 2015 decree by President Santos declaring an economic emergency in Colombian territories bordering Venezuela after the latter shut its borders, allegedly to prevent smuggling and paramilitary violence.[95] On December 2nd, the Court upheld an October 6th decree establishing economic supports for border towns hard hit by the border closing.[96]

Another line of objection might point out the dissimilarities between the Colombian and American regimes. Firstly, unlike the Colombian president, the American president has no formal power to call the emergency into being: war-making requires a declaration by the Congress and while economic shocks can be responded to with executive tools, but with Congress in control of the purse strings, this power is limited. Secondly, the U.S.

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[95] Decision C-670/15.

[96] Decision C-724/15.

has no codified emergency regime, according to which review by courts is on weaker ground.[97] Thirdly, on a strict version of the separation of powers, discretionary action, as the core of what the executive does, is an improper object of judicial review. Fourth and perhaps most important are different historical and political conditions: the U.S. has two strong political parties, particularly little appetite for "autonomous and independent" organs intruding upon the functioning of the government,[98] and no great legacy of executive abuse.

But below the level of text, the differences are less overt, or at least less important. The formal inability of the American president to declare the emergency has not stopped the office from taking on greater and greater discretion, particularly in designing and carrying out the counterrterrorism regime, and in foreign affairs, committing the U.S. to "hostilities" in the Middle East in response to the crisis in Syria, for example. In the post-9/11 institutional landscape, the deformalization of law and procedure wrought by congressional abdication and presidential entrepreneurship is entirely reminiscent of Colombia's longtime pattern of executive dominance. There is reason enough to reconsider the wisdom of checks on executive prerogative, and to reflect on whether the U.S.' avoidance of unbridled presidentialism was the work of good design or good fortune.

Whatever the merits of judicial review of executive emergency power, the fact remains that the U.S. is an unpropitious environment for it. Federal courts have, with limited exceptions, eschewed substantive review of executive discretionary action on separation of powers grounds. It was during a rare exception, in which the Court invalidated the use of military commissions established by the President to try accused terrorists, that Justice

[97] Scheppele, "Law in a Time of Emergency."

[98] e.g., Edmond v. United States, 520 U.S. 651 (1997).

Thomas wrote to chastise the Court for "flout[ing] our well-established duty to respect the Executive's judgment in matters of military operations and foreign affairs." The Court's belief that it was "qualified to pass on the '[m]ilitary necessity' of the Commander in Chief's decision to employ a particular form of force against our enemies" was, for Thomas, "so antithetical to our constitutional structure that it simply cannot go unanswered."[99] Thomas found himself in the minority on that day, but court deference in the face of executive emergency discretion is simply the rule proven by the exception.

Beyond deference, there is the American bench's known antipathy for proportionality analyses of the sort Colombia's substantive review demands. Contra Justice Breyer's attempt to implement a balancing test to determine the validity of a D.C. gun control law, Justice Scalia wrote for the majority:

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.[100]

Had Scalia chanced to read the Colombian Court's 1997 decision invalidating President Samper's emergency decree, or its 2011 decision on the emergency measures after the flood, there is no doubt he would have been apoplectic. In the latter, the Court invalidated the decree's relaxing of licensing requirements for construction of new infrastructure on the grounds that building faulty structures could "have worse consequences than those the measure intends to counteract" and "threaten guarantees of collective rights to a healthy environment, public space, public health, and administrative integrity."[101] Although the

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[99] *Hamdan v. Rumsfeld* (THOMAS, J., dissenting), 548 US 557, 683 (2006).

[100] Scalia, J. 554 U. S. 570, 642 (2008).

[101] Decision C-226/2011 (issued on March 30, 2011), ¶4.1.

decision had little effect on the state's response to the humanitarian crisis, to an American court, it would have been considered an indefensible affront to the President.

A final problem with substantive review is its alleged indeterminacy.[102] Again, Justice Scalia puts the point memorably. Balancing interests is akin to "judging whether a particular line is longer than a particular rock is heavy."[103] The proportionality principle "becomes an invitation to imposition of subjective values."[104] Reasonableness review, meanwhile, risks "produc[ing] a discordant symphony of different standards, varying from court to court and judge to judge."[105]

At a time when the U.S. Supreme Court appears to have reached a peak of politicization—or at least, is so perceived—the fear that a reviewing court would wave around incommensurable substantive principles a smokescreen for partisan machinations is very real.

But this is not the final word on the matter. Scalia's invective against balancing obscures the fact that rights regimes are, for all intents and purposes, polyvalent. Rights balancing is an inherent feature of constitutional review, because no right can be categorical when its full exercise would intrude upon that of another. The doctrine of tiers of scrutiny involves comparisons of means and ends that embroil judges in the very sorts of incommensurable comparisons Scalia would reject. Particularly from the angle of redressing rights violations, the Colombian Court makes no apology for its "realist approach" and

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[102] American constitutional jurisprudence makes no real distinction between balancing and proportionality, notwithstanding the fact that, in other jurisdictions, these concepts, particular the latter, have specific technical meanings.

[103] *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 893 (SCALIA, J., dissenting) (1988).

[104] *Harmelin v. Michigan,* 501 U.S. 957 (1991), 986.

[105] *U.S. v. Booker,* 125 S. Ct. 738 (SCALIA, J., dissenting) (2005), 794.

frequent resort to "balancing tests," in view of its progressive attitude to rights jurisprudence and its success in delivering "outputs for groups long marginalized from political power" and in deepening the "social bases of democracy in a society long marked by inequality."[106]

More deeply, though, there is a problem with understanding constitutional courts, as is the Supreme Court, as apolitical beings, notwithstanding the obvious signs that Dworkin was right when he insisted that high court judges must be "philosophers."[107] Despite its fraying exterior, this thin pretense of being non-political is what keeps courts from performing a duty that only courts can do: serving as the last line of constitutional defense by engaging directly with first-order questions of structure, rights, and separation of powers. The Colombian Court believes this quite literally: recall the former Court President, Eduardo Cifuentes Muñoz, observing that deciding on the constitutionality of laws and rules is the duty of the Court, and cannot be performed by Congress or by the chief executive, lest each become his own judge.

This is *especially* important in view of the fact that the separation of powers ceases to work as intended during the emergency, when the president's first-mover advantage is most determinative, the "rally round the flag" effect is at its height, and when party loyalties between legislature and executive trump individual branch interests in checking and balancing.[108] And if temporary alterations to the separated powers regime are precisely the point, it is unclear that rights violations are to be countenanced in the same way. At least, the AUMF hardly took the step of announcing that U.S. citizens and non-nationals alike

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[106] Schor, "The Emergence of Constitutional Courts," 189, 192.

[107] Working in the Dworkinian tradition, see, e.g., David Robertson, *The Judge as Political Theorist: Contemporary Constitutional Review* (Princeton: Princeton University Press, 2010).

[108] Pildes and Levinson, "Separation of Parties," 2347-2350; Mark Tushnet, "Controlling Executive Power," 2678.

would be subject to violations of privacy, liberty, and so forth. The post-9/11 national security regime has been one unbroken series of fainthearted abdication of the legislative role and carte-blanche delegations to the President—to wit, the open-ended Authorization of the Use of Military Force (2001), Congress' strategy of continued non-engagement with the President's bombing campaigns in Pakistan, Libya and Syria, and the continued failure to issue a declaration of war against ISIS, despite the President's having presented a draft bill to Congress in February of last year.

The problem for the post-9/11 U.S., as it was for mid-century Colombia, is that procedural review of emergency powers is insufficient to redress the balance and make good on rights. As Pildes and Levinson point out, U.S. courts ordinarily review emergency executive action according to Justice Jackson's famous *Youngstown* framework, in which the sole test of its validity is the question, "*Has* Congress authorized such action?" Where it has, presidential authority is at its greatest; where it has not—that is, where the President acts against Congress' expressed wishes, that power was "at its lowest ebb"—; and finally, when Congress has not spoken clearly on the matter, the president and Congress are presumed to have concurrent authority.[109] The three-part framework is intuitive, useful, and easily applied. But precisely because the emergency undermines the conditions for effective checking and balancing by Congress, it does little to curb abuse of executive discretion and heightens the possibility of rights violations.

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[109] Justice Jackson's explicit invitation to balance "the imperatives of events and contemporary imponderables" is the starting point for Erwin Chemerinsky's theory of judicial review of "inherent" presidential power. Erwin Chemerinsky, "Controlling Inherent Presidential Power: Providing a Framework for Judicial Review," *Southern California L. Rev.*, Vol. 56 (1982): 863-911. In defining the scope of such power, Chemerinsky would have courts inquire, first, whether the exercised power is constitutionally committed to another branch; secondly, whether the effect of the conduct is to prevent performance of a legislative or judicial duty; and third, whether the effect of the conduct is to prevent review by another branch of government, at 909.

If, in the emergency, the political branches come together, acting as if of one accord, then, the *Youngstown* test has it precisely backward: it is at such times that congressional consent is most to be doubted, and courts are most important. In ordinary circumstances, politics can better take care of itself, and courts are better advised to exercise the "passive virtues" of political deference. But the emergency—the "no-man's-land between public law and political fact, and between the juridical order and life,"[110]—has a way of rendering the legal political. What is ordinarily reserved, under the political question doctrine, to the political branches—ineluctably political questions, we should be clear—cannot be avoided. In these supremely political circumstances, it is important that courts act as Guardians. We recall John Marshall's celebrated point that "It is emphatically the province and duty of the judicial department to say what the law is." This is no less true when the law assumes political dimensions. If this is unavoidably political work, so be it. Let the court give its reasons and be judged accordingly.

How this could work in the American context? What might substantive review of emergency action look like? The Constitutional Court of Colombia understands declarations of a state of emergency to be, not political acts, but legal ones, in view of the dictates of Articles 212 to 215 of the Constitution, which define the emergency in a way such that the determination of whether the facts support a declaration of emergency is not the President alone's to make. The President must act "reasonably" by linking the factual assumptions to the legal assumptions contained in those articles.[111] There is no analogous

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[110] Giorgio Agamben, *State of Exception,* 1.

[111] Wrote the Court in 2011: "[T]he Constitution restricts the President's discretion to weigh the factual preconditions that give rise to the declaration of a state of emergency. It requires that the facts on which the latter is based be: (i) different from those foreseen for the declaration of a state of internal disturbance or external warfare, (ii) ongoing and (iii) serious enough that they immediately threaten the economic, social, or ecological order, or represent a public calamity." Decision C-226/11, ¶2.4.1.

provision in the U.S. Constitution granting courts authority to review emergency executive action, but we should be clear that the idea that review of executive war powers is foreclosed to the Court on account of its "political" nature is, as Louis Fisher has demonstrated, a judge-made invention, and a relatively recent one at that![112]

The Colombian Court has defined a lawfully invoked state of the emergency to have the following characteristics: (i) it must be initiated by a decree signed by the President and by the Cabinet in full; (ii) it may limit certain fundamental rights but never suspend them, and may not violate international human rights law; (iii) it must be regulated by statute; (iv) all measures adopted in its name must be proportional to the severity of the facts; (v) it may not interrupt the normal functioning of the branches of government or agencies of the state; (vi) the President and the Ministers of government shall have no political immunity for an improperly invoked declaration of emergency, or for abuses of their extraordinary powers; (vii) the reasons motivating the declaration of emergency shall be reasonably related to the facts causing the general disturbance; and (viii) the decree by which the state of emergency is declared and all subsequent decrees shall be subject to review by the Constitutional Court and to review by the Congress on political grounds. Further, the Court pointed out, the 1994 Law on States of Exception provides that all measures related to the emergency shall be governed by the principles of necessity, proportionality, temporality, legality, publicity, and the inviolability of certain rights.[113]

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[112] Louis Fisher, "Judicial Review of the War Power," *Presidential Studies Quarterly,* Vol. 35, No. 3 (September 2005): 466-495. Writes Fisher, "The notion that courts are poorly suited to decide war power and foreign affairs issues does not emerge until after World War 1. The legal literature began to treat matters of foreign policy, war, and peace as beyond the scope of judicial cognizance. That position, appearing in a series of law review articles in the 1920s, attracted a wide following. That attitude spread to contemporary scholarship. Foreign affairs were thought to constitute 'the core of political questions cases,' and war powers—as 'the most sensitive and critical manifestation of the exercise of foreign relations'—represented 'the nub of the core.'" (468, citations omitted)

[113] Decision C-226/11, Syllabus, "Estados de Excepción—Características," and ¶¶ 2.3.3.1-6. The principles of *necessity* and *proportionality* have already been explained. The *temporality* principle

Short of wholesale importation of Colombian constitutional law and jurisprudence to the American context—unthinkable, at any rate—some innovations might be made along the following lines: extraordinary presidential powers would have to be activated by a presidential declaration stating the initiation of an emergency and the need for it, a presidential "clear statement rule," of sorts. This decree would have to be reviewed by the Supreme Court for the reasonableness of the request, the rational connection between the factual situation and the powers requested, and the emergency's limitation in time. Note that, even according to Colombian law, states of *war* need not be so limited ahead of time. Ordinary emergencies do, providing that Congress may vote to extend them. What this would mean for, say, a law like the 2001 Authorization of Military Force, would be that Congress, in its issuance, would have to specify whether the AUMF constituted a declaration of *war,* or of a temporary state of exception. Congress would be empowered to emit law on states of exception—a logical implication of Justice Jackson's framework—including, where it deemed reasonable, delineating absolute limitations on presidential emergency powers.[114] Ordinary constitutional rights—to privacy, freedom from search and

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requires that all exceptional measures be limited in duration, in accordance with the demands of the situation. The principle of *legality* requires that exceptional measures be compatible with the requirements of laws that remain in force and of international law. The *publicity* principle requires that the emergency be initiated by virtue of a public declaration in which the reasons motivating the decision are clearly laid out. Finally, the *inviolability* principle stipulates that the following rights, in accordance with Article 4 of the Colombian Constitution, Article 4 of the International Treaty on Civil and Political Rights, and Article 27 of the American Convention on Human Rights, may not be limited: the right to life and personal integrity; the right to be free from forced disappearance, torture, or cruel, inhumane or degrading punishment or treatment; the right to personal privacy; the prohibition on slavery, involuntary servitude and human trafficking; the prohibition on punishment by exile, life imprisonment and seizure of assets; liberty of conscience; religious liberty; the principle of the non-retroactivity, lenity, and legality of the criminal law; positive and negative voting rights; the right to marry and the protection of the family; the rights of the child, including to protection by the family, society, and the State; the right to not be imprisonment for civil infractions and the right to habeas corpus; and, finally, the prohibition on suspending guarantees of judicial due process that are indispensable to the protection of these rights.

[114] David J. Barron and Martin S. Lederman, "The Commander-in-Chief at the Lowest Ebb—Framing the Problem, Doctrine and Original Understanding," *Harvard Law Review,* Vol. 121, No.

seizure, and so forth—could not be limited unless these faculties had been requested by the President in advance, in the initial decree. (The writ of habeas corpus, per Article I, Section 9, can only be suspended by Congress.) The President could be haled into court for unlawfully extending the emergency or suspending inviolable rights.

So far, proposals in the U.S. context have made some advances along these lines. Vicki Jackson suggests that proportionality doctrine could be usefully applied in some areas of U.S. constitutional law, including free speech cases, Fourth Amendment search and seizure cases, disparate impact equality claims, and Eighth Amendment review of prison sentences.[115] Curtis Bradley and Jack Goldsmith suggest bolstering consent by requiring clear statement principles when presidential actions, one, are unsupported by historical practice in other wars, and second, implicate the constitutional rights of U.S. citizen noncombatants.[116] Mark Rahdert recommends a "double-check" approach inspired by the Supreme Court's *Hamdi* and *Hamdan* decisions, in which courts might force an ostensibly overreaching executive to seek affirmative congressional authorization for emergency ventures.[117] Bruce Ackerman has suggested implementing a variant of the South African "supramajoritarian elevator," requiring congressional authorization by a continual escalating numerical threshold in order to extend the emergency.[118] Martha Minow suggests emulating the South African and Polish constitutions' provisions specifying fundamental rights that must be respected even during an emergency declared under those constitutions, as

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3 (2008): 689-804, 696; Jules Lobel, "Conflicts Between the Commander in Chief and Congress: Concurrent Power over the Conduct of War," *Ohio State Law Journal,* Vol. 69 (2008): 391-467.

[115] Vicki C. Jackson, "Constitutional Law in an Age of Proportionality," *Yale Law Journal,* Vol. 124, No. 8 (2015): 2680-3203.

[116] Curtis A. Bradley and Jack L. Goldsmith, "Congressional Authorization and the War on Terrorism," *Harvard Law Review,* Vol. 118, No. 7 (2005): 2047-2133.

[117] Mark Rahdert, "Double-Checking Executive Emergency Power: Lessons from *Hamdi* and *Hamdan*," *Temple Law Review,* Vol. 80 (2007): 451-488.

[118] Bruce Ackerman, *Before the Next Attack* (New Haven: Yale University Press, 2007), 8.

well as soliciting the participation of judges and congressional leaders in overseeing executive actions, albeit mostly through *in camera* proceedings and closed sessions.[119]

There is a final sense in which Colombia's emergency regime might be worthy of attention. In June 2015, *Semana* magazine, one of the largest and most important publications in Latin America, ran a piece critical of the Balance of Powers Act, then working its way through the legislature. How, the article asked, could a separation of powers law, hastily passed without the imprimatur of a constitutional assembly and leaving untouched Colombia's electoral system, amount to any more than window-dressing? There was no way, it concluded, to see the Act as other than a symptom of Colombia's "odd fetishism" for constitutional revision. The truly revolutionary act, it finished ironically, would be for Colombians to start obeying the laws they have![120] The article makes a valid point, although we would, returning to Loewenstein's constitutional typology, maintain that the 1991 Constitution's greatest achievement was in evolving from a "nominal" or aspirational constitution to a "normative," that is, truly felt and enforced one, in virtue of setting down laws that took into account long-standing historical patterns of institutional behavior.

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[119] Martha Minow, "The Constitution as Black Box During National Emergencies: Comment on Bruce Ackerman's *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism,*" *Fordham Law Review*, Vol. 75, Iss. 2 (2006): 593-605, 593, 603, 604.

[120] Antonio Caballero, "Una revolución constitucional," *Semana* (May 23, 2015).

4: On Presidents, Populism and the Law

Who shall speak for the people?
who has the answers?
where is the sure interpreter?
who knows what to say?
...
The people is the grand canyon of humanity
and many many miles across.
The people is a Pandora's box, humpty dumpty,
a clock of doom and an avalanche when it turns loose.
The people rest on land and weather, on time
and the changing winds.

-Carl Sandburg, *The People, Yes,* 1936

Introduction: The Rhetorical Presidency

In 1907, constitutional scholar and future president Woodrow Wilson recognized that "the President is becoming more and more a political and less and less an executive officer."[1] This could be seen, observed Wilson, in the fact that the president's executive powers "are in commission," while "his political [by which he meant rhetorical] powers more and more centre and accumulate upon him and are in their very nature personal and inalienable."[2] Wilson celebrated this development, he himself believing that the president's role as public opinion leader superseded that of execution.[3] For Wilson, the true essence of the presidency was as public speaker, opinion leader, and national educator. "No one else," he observed, "represents the people as a whole, exercising a national choice. . . . He is not so much *part* of [governmental] organization as its *vital link of connection* with the thinking nation."[4]

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[1] Woodrow Wilson, *Constitutional Government* (New York: Columbia Univ. Press, 1907), 67.

[2] Ibid.

[3] Robert Eden, "The Rhetorical Presidency and the Eclipse of Executive Power: Woodrow Wilson's *Constitutional Government in the United States." Polity,* Vol. 28, No. 3 (Spring 1996): 357-378, at 369.

[4] Wilson, *Constitutional Government*, 68.

Wilson has since been variously credited (and blamed) for inaugurating a new style of "plebiscitary" presidential leadership, one whose power and authority derive less from constitutional articles than from "rightly interpret[ing] the national thought" in his position as the spokesperson for the nation at large.[5] For turn-of-the-century Progressives, the rhetorical president was a popular hero, a champion of the public against the greed of special interests. For many modern-day constitutionalists and legal conservatives, however, the Wilsonian president represents nothing less than an "assault on the Constitution."[6] The "originalist" renaissance of sorts that accompanied the rise the Tea Party movement and the Claremont McKenna school saw the figure of Woodrow Wilson dragged out of the historical dustbin as the intellectual architect of the American state's perceived slide toward totalitarianism.[7] It is true that Wilson-the-scholar both diagnosed and welcomed the president's evolution into a public leader, while Wilson-the-president presided over a great expansion of presidential rhetorical power. But debates over Wilson's culpability for the present presidential state of affairs overlook two crucial facts about presidential rhetorical leadership.

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[5] Sydney Milkis, *The President and the Parties: The Transformation of the American Party System Since the New Deal* (New York: Oxford University Press, 1993); Jeffrey Tulis, *The Rhetorical Presidency* (Princeton: Princeton University Press, 1987); Peri E. Arnold, *Remaking the Presidency: Roosevelt, Taft, and Wilson, 1901-1916* (Lawrence, KS: University of Kansas Press, 2009).

[6] Richard A. Epstein, *How Progressives Rewrote the Constitution* (Washington, D.C.: Cato Institute, 2006); See, also, Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2014).

[7] See, e.g., Glenn Beck, "The 9/12 Project," www.the912-project.com; Thomas G. West, *Vindicating the Founders: Race, Sex, Class, and Justice in the Origins of America* (Lanham, MD: Rowman & Littlefield, 1997); Ronald J. Pestritto, *Woodrow Wilson and the Roots of Modern Liberalism* (Lanham, MD: Rowman & Littlefield, 2005); Paul D. Moreno, *The American State from the Civil War to the New Deal: The Twilight of Constitutionalism and the Triumph of Progressivism* (New York: Cambridge University Press, 2013); John Marini, ed., *The Progressive Revolution in Politics and Political Science: Transforming the American Regime* (Lanham, MD: Rowman & Littlefield, 2005).

First, the rise of the "popular" presidency is hardly confined to North America. Latin America, with its unenviable tradition of *caudillismo*, has been conflating presidents and popular saviors since the time of independence, at least a hundred years before Wilson—although not in a manner any Progressive president would seriously want to imitate. Today, Latin American presidents are on much more solid legal ground, although presidential populism is alive and well, as suggested by the vast public overexposure of recent executives—the televised theatrics of the late Hugo Chávez on his "Aló Presidente" program, or ex-Colombian president Alvaro Uribe's relentless use of Twitter to snipe at current president Juan Manuel Santos—; by the spectacle of executives launching of "wars" on the media—Chávez, Ecuador's Rafael Correa, Argentina's Cristina Kirchner have all taken up arms against oppositional newspapers, radio and TV stations—; and particularly, by the personalization of campaigns and commodification of the presidential image—even in ignominy, as unmistakably demonstrated by the 50-foot inflatable dolls paraded around the streets of São Paulo Brazil of former Brazilian President Lula wearing prison garb and President Dilma Rousseff sporting a banner that reads "Impeachment." Even in the less heady climate of sober Europe, the "populist turn" of recent politics has dismayed liberals and EU defenders across the continent and brought nationalistic, race-baiting and xenophobic heads of state into the spotlight, to wit, the "populist" turn of former French president Nicholas Sarkozy, the right-wing turn of Poland and Hungary, and of course, the high-handed maneuvers of Russia's Vladimir Putin.

Secondly, even in the United States, far from a legacy of the Wilson era, the president's public face dates far back, to its very inception, perhaps. George Washington, saddled with the hopeless task of conveying the requisite presidential grandeur without taking on monarchical airs, famously felt himself "a prisoner of [his public] roles," adopting a formal and austere demeanor that "threw up an invisible barrier . . . with all but a select

handful of friends and family members."[8] Presidents, like it or not, are "public" figures because the public has cared enough to elect them to office—the heightened scrutiny of a president's very manners, gestures, or style of dress being the cost exacted for the public's troubles. Nor is the spectacle of presidents making direct appeals to the people new, dating back at least to Andrew Jackson—an American *caudillo* if ever there was one!—who pushed the plebiscitarian envelope ever further in laying claim to an "electoral mandate"—separate, it should be understood, from his constitutionally granted powers—to justify his attacks on the National Bank, his own party, and the other branches of government.[9] The American president, argued Attorney General Henry Stanberry before the Supreme Court in 1867, "represents the majesty of the law and of the people as fully and as essentially, and with the same dignity, as does any absolute monarch[.]"[10]

If the excesses of "popularism," as some put it, seem particularly salient in our media-saturated age, this is true—to a point. These symptoms are partly explained by technological developments which have ushered in the era of "audience democracy"[11] and effectively turned presidents into celebrities and name brands. It is hard to think of candidate Obama's August 2008 speech where, before 80,000 screaming supporters packed into Denver's Mile High football stadium, he formally accepted the Democratic presidential nomination, without feeling that the president has vastly outgrown his constitutional blueprint as a national clerk. But decrying the president's frequent speechmaking, overblown

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[8] Ron Chernow, *Washington: A Life* (New York: Penguin, 2010), 199.

[9] Richard J. Ellis and Stephen Kirk, "Presidential Mandates in the Nineteenth Century: Conceptual Change and Institutional Development," *Studies in American Political Development* 9 (Spring 1995): 117-186.

[10] Quoted in Clinton Rossiter, *The American Presidency* (Baltimore: Johns Hopkins University Press, 1987), 4.

[11] Benjamin Arditi, "Populism as an Internal Periphery of Democratic Politics," in Francisco Panizza, ed., *Populism and the Mirror of Democracy* (London: Verso, 2005), 72.

rhetoric, "manipulation" of public opinion, and highly managed and polished public persona, or urging, as Wilson's critics do, that these public tendencies be "rolled back" is both ahistorical and unrealistic, reminiscent of the ostrich burying its head in the sand. The president's public persona is, in fact, an *intrinsic part* of the office in its capacity as democratic agent of the people. We cannot excise the public element of presidential politics, both because it is practically impossible, and because this element is a crucial part of the role the president has to play in embodying and carrying forward the promise of democracy itself.

But neither does this mean that the problem should go ignored. In fact, the question of presidential public leadership clues us in to legal and theoretical quandaries at the heart of presidential systems. The implicit *tension* ("the charitable word used by kindly philosophical commentators,"[12] as Michael Tanner puts it) between the president's constitutional and rhetorical duties is not a historical anomaly, nor a fault of constitutional engineering, but a fact which cuts to the core of democratic politics, exposing and exemplifying the *latent conflict in democracy between law and power*. This chapter explores one manifestation of that tension in the presidential office, as embodied by the public facet of the presidency in his or her relationship with the people.[13]

Presidentialism, with its characteristic rigidity and dual legitimacy, is a system that strongly encourages the president to reach "beyond itself to assert control over others," to "alter system boundaries and recast political possibilities."[14] Presidents are expected to do

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[12] "Introduction," in Friedrich Nietzsche, *Twilight of the Idols* and *The Anti-Christ* (New York: Penguin, 2003), 8.

[13] In other chapters, we explore this tension as manifested in administrative power and in the state of the exception.

[14] Stephen Skowronek, *The Politics Presidents Make: Leadership from John Adams to Bill Clinton* (Revised Edition) (Cambridge: Harvard University Press, 1997), 4.

much more than they lawfully can. They must act to legitimate their turns in office, but doing so threatens to disrupt the existing order. One result, amply documented by Juan Linz, is the risk of overreach and inter-branch conflict.[15] Another, which I discuss here, is the "plebiscitarian component implicit" in the office itself: confronted with the tragic choice of languishing in a piddling office or breaking free of the constraints put upon it, presidents will turn their powers of popular persuasion against the strictures imposed upon the office.[16]

The ability of presidential leaders to "go public,"[17] deploying rhetorical tools to solidify a direct connection with a people, is not just a tool of the office as it has evolved, but an inherent proclivity, and one whose consequences are always potentially in conflict with the law. This *plebiscitarian* or *presidential populist* face of democracy—with its deeply promising but problematic elements of spectacle, charismatic leadership, anti-institutionalism, reformism, moralizing, persuasion, unreason or wild utopianism—may manifest itself to greater or lesser degrees in particular contexts, but it is nonetheless an inescapable part of democratic systems.[18] In this chapter, I aim to provide a theory detailing, first, the deep

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[15] Juan J. Linz, "The Perils of Presidentialism," *Journal of Democracy,* Vol. 1, No. 1 (Winter 1990), 51-69*,* esp. 54-63.

[16] The President is not the only one prone to confuse political and constitutional opposition. Recent statements like that of Senate Majority Leader Mitch McConnell (R-Ky), who vowed in 2010 to make Obama a "one-term President," and in February 2016 to withhold senatorial consent to *any* nominee Obama should submit to fill the seat left empty by the death of Antonin Scalia, seem no less than a basic denial of Obama's legitimacy as Commander-in-Chief.

[17] The term is of relatively late coinage, with Sam Kernell's *Going Public: New Strategies of Presidential Leadership* (4th ed.) (Washington, D.C.: Congressional Quarterly Press, 2006). In the sense that Kernell intends it, which is to say, regular and institutionalized appeals by the American president to the people at large for the purpose of "selling" an agenda, "going public" is a relatively new development. On the other hand, "going public" in the sense of bringing to bear the president's popular authority in areas where his constitutional powers have seemed most limited, most famously perhaps, in the case of Andrew Jackson's Bank Veto, is hardly new.

[18] For an argument linking populism with the irresoluble tensions lurking in democracy, see Margaret Canovan, "Trust the People! Populism and the Two Faces of Democracy." *Political Studies,* Vol. 47, Issue 1 (1999), 2-16.

affinity between presidents and populism, and secondly, presidential populism's reformist promise and its potentially destabilizing *effects* on legal frameworks.

Our intuitions about the deep affinity between presidentialism and populism stem, not from general misgivings about presidential rhetorical power—indeed, the phenomenon is problematic precisely *because* of its potentially redemptive features from the point of view of democracy—but rather, in view of the nature of the president's constitutional position. Stephen Skowronek suggests that presidents, in acting, must simultaneously engage with several institutional "orderings": firstly, their *constitutional* powers, which are for the most part fixed in time; secondly, the organization of *institutional* resources at their disposal, which have changed several times over the course of American history; and thirdly, the *political* ordering of institutional commitments, that is, basic configurations of ideology and interest which structure warrants for presidential action—the least dependable and most variable of the three, but crucial in sustaining the legitimacy of presidential action.[19] The presidency is thus a problematic entity, its formal powers emanating from law (i.e. the Constitution) although it depends, for the possibility of acting, upon a legitimacy largely consisting of winning the favor of the people. This essential mismatch in mandate and formal powers has been lamented by Progressive historians and, more recently, celebrated by theorists of the "unitary" executive, who see attempts at legalizing executive "prerogative" as quixotic.[20] To compensate for the relative weakness of

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[19] Skowronek, *The Politics Presidents Make,* 9-10.

[20] See, in the Progressive tradition, Herbert Croly, *The Promise of American Life* (Princeton: Princeton University Press, 2014 [1909]); Woodrow Wilson, *Congressional Government: A Study in American Politics* (New York: Columbia University Press, 1907). In the Unitary tradition, see Harvey C. Mansfield, *Taming the Prince* (New York: Free Press, 1993); Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (New York: Oxford University Press, 2011), John Yoo, *Crisis and Command: A History of Executive Power from George Washington to George W. Bush* (New York: Kaplan Publishing, 2009); Steven G. Calabresi and Christopher Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* (New Haven: Yale University Press, 2008). For an acute overview of the two traditions' support for an expansive

constitutional founts of power as compared to the public expectations heaped upon presidents, these have sought additional sources of power, among which is that which is democratic, or popular, in origin.

The link between presidential leadership and populism is not just one of convenience, with executives seeking democratic legitimation where constitutional powers seem to fall short, but exists because the two share a *similarity in their claims to represent the unified democratic will*. Populism *can* be the vehicle for charismatic authoritarianism in the manner of public acclaim for a Mussolini, a Perón, or a Huey Long, but it can also represent the manifestation of a unified, inclusive popular motion of true democratic sentiment and purpose. This ideal of the "democratic wish" has been invoked by social movements ranging from the Jacksonian democrats to the Progressives to civil rights reformers in the mid-to-late twentieth century.[21] Populism's peculiar Janus-faced nature, at once a democratic redeemer and a harbinger of authoritarianism, can be partly be explained by this myth of democratic unity: populism stands, simultaneously, for rule by the many *and* rule by the one. Even President Calvin Coolidge, a leader best remembered for his colorlessness and timidity, once testified that in such extraordinary moments, Congress, "subservient" to a plurality of interests, must give way to the President, who "comes more and more to stand as the champion of the rights of the whole country."[22] The president, as a sole actor, is the only governmental organ that can embody this vision of unity, of a *"single" democratic will*, as the countless reform movements that have channeled their visions

interpretation of executive power, see Stephen Skowronek's "The Conservative Insurgency and Presidential Power," *Harvard Law Review,* Vol. 122, No. 8 (October 2009): 2070-2103.

[21] For an account of American history as a struggle of the "populist" impulse against the entrenched institutions of the State, see James Morone, *The Democratic Wish* (New Haven: Yale University Press, 1998), especially at 8-9.

[22] Quoted in Rossiter, *The American Presidency*, 260.

through the office have discovered. Populism and presidential leadership are linked, therefore, in their common construction of, and desire to unleash, a singular will united the sovereign people and the singular executive against an oligarchical, elitist "few" deemed, by law, social organization, or custom, fit to rule. In such extraordinary times, presidents and the masses alike come to find that constitutional checks muzzle them, limit their room for action, or grant illegitimate power to an undeserving, even undemocratic, opposition. In their common grievances with the law, we perceive again the complementarity of the fit between the two partners.

I turn to the consequences of the plebiscitary union between presidents and peoples. Populism, as we have seen, codes laws and institutions as mechanisms of systemic domination by elites and accordingly targets these creations with its coalition of the one and the many. There are three domains, in particular, in which the tensions between real legal problems and dangerous popular solutions work themselves out. First is the perceived illegitimacy of legal *constraints on popular power*. The presidential-populist coalition is correct in perceiving that law which fails to respond to democracy has a deficit. And although it may see elite conspiracies wherever it goes, occasionally it may be right, helping to stave off the slow decline of mass democracy into a narrow oligarchy of political or economic elites.[23] However, to this problem the coalition responds with the equally troubling solution of abolishing checking and balancing mechanisms, often to the point of delegitimating higher legal "constraints" altogether. Second is populism's impatience with slow-moving legal processes and preference for instantaneous reform. It is true that the

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[23] See, for example, Sam De Canio's account of the Free Silver movement challenging Richard Hofstadter's well-known criticism of the Populists as paranoid conspiracy-mongers, "Populism, Paranoia, and the Politics of Free Silver," *Studies in American Political Development,* Vol. 25, No. 1 (April 2011): 1-26.

world has gotten faster—in the sense, for example, of new possibilities of instantaneously making war or transacting financially[24]—and that legislative bodies often seem too plodding, ineffectual and overtasked to adequately respond to these changes. But if populism's typical impatience with slow-moving representative institutions finds no institutional remedy, it can take the drastic step of destroying these institutions altogether. Third is populism's frustration at the exclusion of certain rhetorics, sentiments, and grievances from public sphere. On the one hand, social rationalization, as Max Weber feared, is inimical to cultural values, leading in the extreme case to a boring—or even inhuman—conflict-free politics of problem solving and administration. On the other hand, some of the cultural values that populism seeks to voice can be unflattering or even dangerous. Nixon's "silent majority" responded enthusiastically to the candidate's "dog-whistle" racial rhetoric, feeling, with relief, that their racial anxieties, hitherto swept out of mainstream political dialogue, were now being attended to.

The problem is this: we can agree with populism's critiques of law, but the solutions it proposes are problematic, too. The President shares this awkward space at the margins of democracy and law, and that it behooves us to consider this tension as an inherent feature of our presidential constitutional system, one we must address by continually thinking through it. The problem of presidentialism, to put it differently, is to find the

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[24] William Scheuerman insightfully makes this point in his *Liberal Democracy and the Social Acceleration of Time* (Baltimore: Johns Hopkins University, 2004), which we draw upon extensively below. He expresses a concern with the increasing deformalization of the law and the legislative process, exemplified on the one hand, by increasing use of congressional committees to draft and debate legislation, and on the other, by the rise of extra-legislative organs relieving congressional bodies of their lawmaking responsibilities and informally and more quickly "making law." International arbitration bodies, for example, are designed to respond quickly to transactional disputes, but the codes they promulgate lack the normative legitimacy of law passed by legislatures, which depend for their legal authority on the fact that they a) are representative of the community as a whole, b) promulgate law through deliberation and consensus, and c) are limited to passing more or less general, prospective and non-discriminatory norms.

light between the positions of Alexander Hamilton, who claimed that "energy in the Executive" was a leading measure in the definition of good government, and that of James Madison, who famously believed that "the accumulation of all powers in the same hands, whether of one, a few, or many" is the definition of tyranny. Democracy requires, for its stability, a stable executive with power enough to stand up to the particular interests in the legislature, but not so much power as to become arbitrary and tyrannical. As Aristotle might see it, democracy hovers constantly between the possibility of oligarchy and tyranny, its fate in some sense decided by the executive. The populist hope of executive redemption embodies both the promise and peril of this tenuous existence, for the line between the indomitable "little guy" standing up to the interests and the demagogue doling out hatred and paranoia can be frighteningly thin.

A. Populism Between Law and Democracy

Whether taking up a call to "public leadership," appealing to an "electoral mandate" for change, invoking a "warrant for authority," or deploying the power of "going public," the President seeks in public approbation the necessary supplement to a constitutional toolkit that is never adequate. This combination of plebiscitary proclivities, conflation of government with state, distrust or resentment of mediating institutions, chafing against limits, and rhetorical substitution of "the People" for a mere plurality resembles another phenomenon often said to plague democracy: *populism*. This is not mere coincidence.

What is populism? It is now almost a cliché to refer to the cliché of how nebulous the concept is.[25] Most accounts of populism skirt the problem by either building populism's "empty core" into the definition, or by offering highly specific accounts of its manifestations in particular contexts: peasant revolts in tsarist Russia, farmers' alliances in the pre-industrial United States, labor movements in twentieth-century Latin America, or catch-all "people's parties" in post-colonial Africa.[26] A frustrating lack of theory or analytical unity plagues these otherwise interesting studies.

Later generations of theorists offered more conceptual essays defining the phenomenon, albeit often in ways too nonspecific as to be useful. One contributor, for example, describes populism as a "creed or movement" which emphasizes that "*virtue resides in the simple people, who are the overwhelming majority, and in their collective traditions*"[27]—criteria which any number of democratic ideologies might meet! Another study observes that populism always involves anti-elitism and the veneration of "the People", but concludes that because these concepts are so context-dependent—*who*, exactly, makes up "the People"?—attempting to reduce populism to "a single core" is hopeless, and instead suggests we make do with a typology of seven different types of populism.[28] Another

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[25] A list of treatises on populism that begin with reference to this fact includes Margaret Canovan, *Populism* (New York: Harcourt, 1981); Ghita Ionescu and Ernest Gellner, *Populism: Its Meaning and Characteristics* (London: Weidenfield and Nicolson, 1969); Ernesto Laclau, *On Populist Reason* (London: Verso, 2005); Francisco Panizza (ed.), *Populism and the Mirror of Democracy* (London: Verso, 2005); Michael Kazin, *The Populist Persuasion* (Ithaca: Cornell University, 1997); Paul Taggart *Populism (Concepts in the Social Sciences)* (Philadelphia: Open University Press, 2000).

[26] See the accounts by Richard Hofstadter, Alistair Hennessy, and Peter Worsley in Ionescu and Gellner, *Populism*.

[27] Peter Wiles, "A Syndrome, Not a Doctrine: Some Elementary Theses on Populism" in Ionescu and Ernest Gellner, *Populism*, 166.

[28] Canovan, *Populism*.

concludes, perhaps in a gesture of frustration, that populism should be "regarded as an emphasis, a dimension of political culture" rather than as a proper ideology.[29]

Encouragingly, however, the most illuminating theories of populism tell us that there is something important to be learned from populism's "empty-heartedness." That is, what even dissimilar populist movements *do* appear to have in common—the exaltation of popular culture, the veneration of collective or national traditions, strong patriotic or nationalist themes, a "mystical" union of the people, the primacy of the popular will, an emphasis on moral over programmatic demands—are elements also present, to a great extent, in all modern democracies. Take, for example, Paul Taggart's definition of populism as an "episodic, anti-political, empty-hearted, chameleonic celebration of the heartland in the face of crisis."[30] The critical tone notwithstanding, in some political systems, this sounds like politics as usual: traditionalist, moralistic, nativist, popular. This is precisely the point: the reason that populism seems at once inaccessible but familiar is that, in important ways, populism and democracy are Siamese twins.

Francisco Panizza calls populism "a mirror in which democracy may contemplate itself, warts and all."[31] For Margaret Canovan, populism resides in the necessary tension in democracy between its two faces, the pragmatic and the redemptive,[32] or as Michael Oakeshott describes them, between the politics of skepticism and the politics of faith.[33] A useful image to characterize the democratic political system is that of the pendulum

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[29] Peter Worsley, in Ionescu and Gellner, *Populism*.

[30] Paul A. Taggart, *Populism*, 8.

[31] Francisco Panizza, "Introduction: Populism and the Mirror of Democracy," in Panizza, *Populism and the Mirror of Democracy*, 1-32, at 30.

[32] Margaret Canovan, "Trust the People!," at 6-7.

[33] Michael Oakeshott, *The Politics of Faith and the Politics of Scepticism* (New Haven: Yale University Press, 1996).

swinging between the extremes of cheerless, rationalistic science and legality, on the one hand, and the irrepressible, shape-shifting energy of a people, on the other. Populism thus introduces an element of ardent belief, emotion, hope and faith to an otherwise cheerless, uninspiring backdrop of elite-led procedural democracy or a rational-scientific problem-solving administrative regime.

Populism seems, in this way, like a manifestation of a *true* democratic politics, a "democratic wish" for a unified, popular counter to the liberal status quo, a politics of contestation, emotion, affect, and excitement that periodically materializes to sweep away the clutter of accumulated institutional arrangements.[34] And practically speaking, *all* democratic politics is populist in that it rhetorically emphasizes that true sovereignty resides in the people, and that direct representation (and not trusteeship by elites) should be the mode of governance. All democratic politicians make appeals to anti-rational, abstract, largely meaningless concepts and symbols like "patriotism," "liberty," and "the People," to the endlessly bountiful supply of virtuous imagery from a national past, tradition, and culture.[35] Such symbols, as politicians know, are rhetorical geese that keep laying golden eggs. Observe, for example, the ability of the Founding Fathers, Lincoln, Martin Luther King, Jr, and the "American troops" to be endlessly reinterpreted and reappropriated to serve the interests of the Left and the Right alike—or for a Latin American example, take the infinitely malleable political sympathies of Simon Bolívar. This shape-shifting quality makes sense if populism is considered, not as a separate ideology, but as a reliably available strategy of democratic political discourse.

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[34] For an account of American history as a struggle of the "populist" impulse against the entrenched institutions of the State, see James Morone, *The Democratic Wish*, especially at 8-9.

[35] Ernesto Laclau, "Populism: What's in a Name?," in Panizza, *Populism and the Mirror of Democracy*, 32-49.

But if populism is an element always present in democracy, the fact that democratic politicians may deal in "populist" rhetoric does not make the political system itself "populist." Populism is an ingredient of democracy that that becomes more or less pronounced at different times. Populist *tendencies* seem—and rightly so—different from the populist *movements* that emerge within democracies. Take, for example, the grassroots mobilization of American farmers into the 1890s' People's Party; the urban, corporatist authoritarianism of Getulio Vargas' Brazil in the 1930s and '40s and Peronist Argentina in the '40s and '50s; the anti-federalist, anti-civil rights tirades of George Wallace; the indigenous uprising of Mexico's Zapatistas in 1994; the petulant but visible Tea Party, with its curious blend of nativist, libertarian and social Christian ideologies. Surely these movements are not just "politics as usual"?

Further, we shouldn't forget that populism, like democracy, has a second, "darker" side, too. Benjamin Arditi sees populism as an "drunken guest at the dinner party," a constant embarrassment, with his rude manners and disregard for party etiquette, to his hosts, who nonetheless having already invited him, cannot now get rid of him without being impolite themselves![36] But this tongue-in-cheek account puts the problem a little lightly. Populism can be an "embarrassment" for the political elites running a democracy, but sometimes the problem is more than one of manners. Populism's shape-shifting quality can also transform it suddenly from a "shadow" of democracy into something fundamentally hostile to democracy itself. Populism, observes Canovan, has both a characteristic "style"—direct, simple, tending to oversimplify complex, nuanced political questions into Manichean clashes of good versus evil, or to recast the complexities of society into a bipartite

[36] Benjamin Arditi, "Populism as an Internal Periphery of Democratic Politics," in Panizza, *Populism and the Mirror of Democracy*, 72-98, 90.

struggle between "the People" and a corrupted cabal of elites—and a characteristic "mood" of heightened intrigue and struggle, which leads it to trade in the exaggerated language of survival and destruction, sin and salvation, and hence to transform "ordinary, routine politics" into something distinctly more existential. Directly related, argues Canovan, is populism's tendency to focus these heightened political emotions on a charismatic leader:

> Personalized leadership is a natural corollary of the reaction against politics-as-usual. Rejecting ossified institutional structures, including bureaucratic layers of organization, populists celebrate both spontaneous action at the grassroots and a close personal tie between leader and followers.[37]

Ominous, certainly. But we should not be too quick to associate populism solely with dangerous manipulation on the part of leaders and irrationality on the part of the led. Although the not-too-distant memory of the rise of Hitler, Mussolini and other fascist leaders may evoke frightening ties between mass politics, demagogues and "Caesarism," Canovan reminds us that populist movements within mature, well-established democratic systems have tended to agitate *not* for the abolishment of free elections and the establishment of dictatorship, but for devices of *direct democracy* like the Swiss system of popular initiative and referendum. The sweep of history shows populism's curious ability to be both the epitome of democracy and the harbinger of authoritarianism. Not just empty-hearted, then, populism is curiously Janus-faced: a crusade of the marginalized against elites as well as a rhetorical device for elite manipulation, the "true face" of democracy and yet its exact opposite.

B. Populism and Presidentialism Against Law

[37] Margaret Canovan, "Trust the People!," at 6-7.

The parallels between populism and presidentialism are by now clear: we can see both as engines of popular mobilization, existing at the margins of politics and law and signaling the redemptive possibilities of democracy as well as its perdition. Both stand for the mythical promise of the "democratic wish," the fantasy that a united people can halt the inertial accretion of institutions they no longer recognize, demolish a complex of power-wielding bodies that no longer serve them, raze the political playing field and thus begin anew the process of forming a state in their own image. Each promises a politics of the extraordinary, the moment at which the power of real life triumphs over rote mechanisms of governance.

But the shortcomings of these two visions are evident. A politics of the extraordinary may be exciting, but it is unsustainable. It holds an understandable allure for both president and people, uniting them in a program of popular consensus and reformist vigor. For the people, the politics of the extraordinary offers the promise of a mythic unity, a true popular sovereignty, and the chance to redeem the polity by reshaping it. For the president, an extraordinary politics offers the solution to the enduring problem of political legitimacy, granting him a warrant for sustaining his political legitimacy through regime transformation, the only way to match a programmatic energy to his constitutional powers.[38]

Unfortunately, though, demolition is a poor way to sustain a state, and conversely, the realities of governance are never particularly attractive from a popular point of view. Administrative agencies, for example, precisely the sort of organs that *do* efficiently govern

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[38] Stephen Skowronek, *The Politics Presidents Make: Leadership from John Adams to Bill Clinton* (Revised Edition) (Cambridge: Harvard University Press, 1997); Stephen Skowronek and Matthew Glassman, eds., *Formative Acts: American Politics in the Making* (Philadelphia: University of Pennsylvania Press, 2007).

a state, are generally disliked by the people because they "wield power unlegitimated by formal mechanisms of representation."[39] By definition, an extraordinary politics spurns rules, procedure and norms, a fact which can account for its flexibility and capacity to excite, but which signals a troubling problem: how can the rights and norms which protect individuals exist in a legal vacuum?

Meanwhile, the "democratic wish" is a compelling myth, but it is just that: a quixotic longing for an "imaginary community."[40] It is an ideal which can sustain interest, but not a consensus around real, programmatic political reform. And as a blueprint for political action, it is hopelessly limited. Worse, the vision of unity and strength in community set out by the "democratic wish" can be problematic, not to say dangerous. Who, exactly, is to be included in this community? Who is to challenge the legitimacy of an insider/outsider boundary that is drawn by an autonomous people on ethnic, racial, or religious grounds?[41] Likewise, a president may make appeals to a "national community," but what happens to those who feel unrepresented by their elected leader?

We have already noted populism's paradoxical ability to seem, at times, democratic and authoritarian. Now we arrive at an explanation. Populism, with its myth of democratic unity, is simultaneously rule by the many *and* rule by the one. Together, the democratic wish and the politics of the extraordinary exemplify this vision of unity: with the advent of a time of true popular sovereignty the masses become one, free from checks and impediments to the people's voice. The very appeal and the danger of this ideology, of course, lie in this fictitious construction of a "single" will, which the People, and often the

[39] Morone, *The Democratic Wish,* 2.

[40] Ibid, 30.

[41] Paulina Ochoa Espejo, *The Time of Popular Sovereignty* (University Park: Pennsylvania State University Press, 2011).

President, claim to represent. The dangers of mass groupthink have been well documented—by classical liberals like Mill and Constant, by nineteenth-century elite theorists like Pareto and Michels, and by twentieth-century survivors of the Holocaust including Benjamin, Adorno, and Arendt, who found the very essence of totalitarianism in its aim to ensnare men in an "iron band of terror" and make "each single man a part of one mankind." Arendt pointedly argued that politics was not about Man or Mankind, but about *men* in the plural.[42]

An uneasy balance exists between democratic promise and the erosion of law itself. In reducing a sea of diverse voices to a sole one, populism superimposes an ideology of sameness, harmony and spontaneity onto a legal-political system (democracy) which, by definition, entails pluralism, slowness, thought, and deliberation. William Scheuerman puts it thusly:

> A conceptual configuration valorizing a *normatively unregulated sovereign 'decision'* [as does the populist mass] probably has to see the modern rule of law's self-proclaimed aspiration to regulate state action by means of cogent general norms ultimately as just another attempt to *enslave politics to moralistic normativities*, and hence as a hindrance to authentic political action. From this viewpoint, the idea of the separation of powers can only amount to a challenge to state unity and sovereignty; an independent judiciary probably has to be seen as a way of circumventing political decisions in the name of a dubious anti-political belief in neutrality; the very contrast between a rule based on impartial norms and that of particular individuals must be conceived of as a quest to deny the irresistible truth that politics fundamentally concerns concrete, existential conflicts[.][43]

Thus, the presidency can be seen as a dual office, a legal institution that reaches beyond legality when it channels its popular authority in order to circumvent laws that bind its powers and frustrate its quest for authority. Populism likewise depends on legal processes—democratic elections, the separation of powers, the regular turnover of politicians—for its voice to be heard at all but, parasitically, tries to do away with these laws,

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[42] Arendt, *The Origins of Totalitarianism* (New York: Harcourt, Brace, Jovanovich, 1968), 451.

[43] William E. Scheuerman, *Between the Norm and the Exception* (Cambridge: MIT Press, 1994), 35.

which at some point threaten to limit its unadulterated sovereignty and to derail its reformist agenda. Like flies trapped in a web of laws, they struggle and squirm against the constraints that bind them. That is, for both the populist and the plebiscitarian president, legitimacy is *not* found in slavish obedience to legality and procedure, but in truly reflecting the demands of the sovereign people, however radical or destructive these may be.[44] Both are phenomena illustrating the moment at which the inherent tension between democratic legitimacy and law reaches a breaking point.

C. Consequences of the Presidential-Populist Struggle against Law

I next consider three potential consequences of the populist-presidential animus toward law: the prioritization of majoritarian democracy over liberal constraints; the "speeding up" of legislative processes; and the language of anti-intellectualism or unreason. In this way, an "institutionalized"[45] populism or plebiscitarianism targets, respectively, constitutional limitations, the ideal of careful, slow deliberation as a basis for legislation, and the very intellectual consensus that holds deliberation together.

I. Democratic Passions, Liberal Constraints

Since Plato's observation that life under democracy "has neither law nor order," political and legal theorists alike have made efforts to unpack, and occasionally to prescribe relief for, the profound tensions inherent in constitutional democracy, a conceptual

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[44] But the paradox is that legalists believe that *laws* themselves express the popular will. See, e.g., Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (Chicago: Chicago University Press, 1995).

[45] By an "institutionalized" populism, we mean either the election of a populist or plebiscitarian party to an incumbency, or the capitulation of officials in power to the rule-bending demands of these movements. We enter into the dynamics of populist movements and governing bodies in Part II of the chapter.

marriage of two seemingly competing phenomena—the unyielding structures of written law and the changeable will of the people. The not-too-distant advent of mass democracy in the late 18th and 19th centuries brought a fresh wave of democratic and legal theory endeavoring to show how the hard-earned gains of democrats could be not only compatible, but actually complementary with the liberal rule of law, once the exclusive purview of monarchists.[46] Some liberals remained unconvinced, however, as ardent defenders of the salutary aspects of constitutionalism but skeptical that "the masses" possessed the capacity for self-rule. Historically, the debate has played out as a struggle for the "soul" of the people, between thinkers like Rousseau, who exalt the noble incorruptibility of the sovereign popular body, and those, who like Gustave Le Bon, see in the "crowd" only irredeemable suggestibility, baseness and mediocrity.

The history of modern-day democratic constitutionalism[47] serves as an eloquent illustration of this tension. The American Federalists clearly saw the difficulties, and took a moderate stance, attempting to set in motion an "essentially democratic"[48] system while weaving a net of legal restraints—federalism, the separation of power, judicial review—to tame it. The specter of the agitated populist mass triumphing over reason and legal restraint is just what prompted James Madison-as-Publius to famously defend the salutary aspects of federalist power-sharing and the election of national representatives. In

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[46] Nadia Urbinati, *Representative Democracy: Principles and Genealogy* (Chicago: University of Chicago Press, 2006), 21-23, 41-48.

[47] Although today we tend to loosely use the term "democracy" to describe our political system of the United States, for the Founding Fathers this would have come as a surprise. Most of the Founding Fathers "were not notably democratic in outlook," and the constitutional framers took special care "to build into their Constitution elaborate checks against excessive popular interference on government." Canovan, *Populism,* 175; Urbinati, *Representative Democracy,* 1, 3; Bernard Manin, *The Principles of Representative Government* (New York: Cambridge University Press, 1997), 79-86.

[48] Akhil R. Amar, *America's Constitution: A Biography* (New York: Random House, 2005), 472.

Federalist #10 he counsels that the greatest virtue of a "well-constructed Union" is its tendency to control the "mortal disease" of faction, the "great object" of the Constitution being

> To secure the public good, and private rights, against the danger of such a [majority] faction, and at the same time to preserve the spirit and the form of popular government[.][49]

These "undemocratic" sentiments would eventually come under attack by waves of reformers in different guises, including the Jacksonians of the 1820s, the Populist Party of the 1890s, the turn-of-the-century Progressives, and the "participatory" activists of the 1960s and 1970s. The Progressives articulated a particularly trenchant critique of the U.S. Constitution, which they saw, with its endless checking and balancing, as a creaky, outdated contrivance that left the people chained and gagged, unable to deploy their numerical strength against the rising power of oligopolistic political and financial elites. They saw the separation of powers as a reactionary vestige of the American Revolution, a legacy of the Founding Fathers' dread of monarchy and "profound suspicion of human nature."[50] They retold the story of the Constitution's birth as an attempt by a conservative, property-rich minority in the young nation to force a property-protecting, oligarchic instrument upon a poor, rural majority nation,[51] one Progressive even going so far as to deem the U.S.

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[49] James Madison, in Alexander Hamilton, John Jay, and James Madison, The Federalist (ed. Jacob E. Cooke) (Middletown: Wesleyan University Press, 1961), no. 10, 45. Presciently, Madison lists, among a long catalogue of potential maladies that could seize the republic, the "rage for paper money," and calls for an "abolition of debts," "an equal division of property," or "for any other improper or wicked project." Madison was admirably right-on-the-money (if the expression may be forgiven) in this regard, foreseeing both the nature of the demands of actual populist movements—the Greenback movement, the Populists, the Progressives, and so forth—and the fact that the federalist structure of the union would help thwart their progress. Think, for example, of Governor Huey Long, a "tinpot dictator" ruling the roost in his home state of Louisiana, but a sole voice (if a strident one) among the chorus of national senators.

[50] Herbert Croly, *Progressive Democracy* (New Brunswick, NJ: Transaction Publishers, 1915), 40.

[51] Charles Beard, *An Economic Interpretation of the Constitution of the United States* (New York: Macmilllan, 1921), 324-325.

Constitution "the most undemocratic instrument to be found in any country in the world today."[52] From the campaign trail in 1912, president-to-be Woodrow Wilson would convey much of the force of the Progressive critique, thundering that "the laws of this country do not prevent the strong from crushing the weak.[53]"

The Progressive movement stumbled during World War I and was largely extinct by the end of the Wilson presidency, but it nonetheless had great success in sweeping away many "undemocratic" provisions of the American legal system, managing to broaden both the administrative power and democratic credentials of state governments and the presidency alike, and thus to enact much of their vision of a government that would be simultaneously more powerful and more popularly accountable.

For all their exaltation of the "national community" and "the People," however, the regime-building Progressives were not *quite* the populists that the Founders had feared. The two groups share an emphasis on direct democracy and a vision of government as the agent of an unmediated popular voice, but they part company over the crucial question of reason and rationality in politics. The Progressives, although believing that the People were supreme over government, sought to yoke them to a different master—science, reason, and morality. And so they appealed to man's better nature, to the promise of a thinking community to break the bonds of localized prejudice and ignorance, to rationality and education as tools for the improvement of society. "In the drift of our emotional life," wrote Walter Lippmann in 1914, "the genuine hope is to substitute for terror and weakness, a frank and open worldliness, a love of mortal things in the discipline of science."[54]

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[52] Franklin Pierce, *Federal Usurpation* (New York: D. Appleton and Co., 1908), 172.

[53] Walter Weyl, *The New Democracy* (New York: Macmillan, 1920), 118, and Woodrow Wilson, "The New Freedom," excerpted in Ronald J. Pestritto, *Woodrow Wilson: The Essential Political Writings* (New York: Lexington Books, 2005), 107-123, at 111.

[54] Walter Lippman, *Drift and Mastery* (New York: M. Kennerley, 1914), 174.

Echoing this seraphic view of man, Herbert Croly argued that democracy should wager its success on man's reason, integrity, and ability to learn: "If among the citizens of a democratic state the intelligence should prove to be the enemy of the will, if individually and collectively they must purchase enlightenment at the expense of momentum, democracy is doomed to failure."[55] Populism, on the other hand, welcomes the direct democratic fruits of the Progressives' labors but decries a reason- or science-based politics as elitist,[56] and doggedly defends from outer interference the traditions and way of life of the "little man," even when these exhibit the sort of dogma and chauvinism that embarrassed Progressive counterparts.

One problem, of course, is that, stripped of Progressive rationality and self-restraint, liberal value pluralism, or the inclusivity of the deliberativists, the prospect of an uninformed, anti-rational—a *populist* public, that is—wielding the tools of direct democracy seems, well, rather scary.[57] One question for reformers and publics alike is, what is "the People" likely to do with its newfound liberty? In the following decades, Progressive direct democratic devices, standards of popular participation, and visions of an activist presidency have made substantial headway toward becoming political fixtures, even (or perhaps *especially*) outside of the United States, but their ideal of a rational, broad-minded public has fallen by the wayside.[58] The recent normative theory of "deliberative

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[55] Croly, *Progressive Democracy,* 27.

[56] The recent outcry over "policy czars" in the Obama administration thus represents the playing out of a conservative, populist stock-in-trade that has been around since the Progressives, if not the Jacksonian era.

[57] Writing in 1955, Richard Hofstadter pronounced, "[I]n a populistic culture like ours, which seems to lack a responsible elite with political and moral autonomy,…it is possible to exploit the widest currents of public sentiment for private purposes." Hofstadter, "The Pseudo-Conservative Revolt," *American Scholar*, Vol. 24, No. 1 (Winter 55), 9-27.

[58] Walter Lippman, *The Phantom Public* (New Brunswick, NJ: Transaction Publishers, 1993 [1925]).

democracy" attempts to solve the problem, placing a similar value on popular empowerment, but substituting, as binding "constraints" on popular irrationality and selfishness, substantive requirements including, variously: small assemblies of debating citizens, a commitment to value pluralism and tolerance, the ready availability of information, the provision of adequate time for considering the alternatives, and so forth.[59] Today, we scoff at the Progressives' faith in a thinking public that could learn to refrain from particularistic, short-sighted or discriminatory lawmaking, but are the ideals of deliberative democracy any less exacting?

A second is, when does the majoritarian revolution against liberal constraints stop? The modern rule of law has always been grounded on the idea that governmental action must be predictable and restrained. Certainly, the excesses of monarchical power worried early liberals like Locke and Montesquieu, but most problematic for them was the fact that power outside of law was necessarily "poorly regulated and unpredictable," thus making it impossible for individuals to sustain even a bare minimum of political and social autonomy.[60] The liberal rule of law, in constraining the sovereign power (whether king or populace or other governing bodies), limited the potential for state action to that which was based on clearly formulated, publicly declared rules. For John Locke, the number one mouthpiece of bourgeois liberal law, observance of the law ensures a predictability and

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[59] On the normative foundations of deliberative democracy, see Jurgen Habermas, *Between Facts and Norms* (Cambridge: MIT Press, 1991); Jurgen Habermas, "Three Normative Models of Democracy" and "On the Internal Relation between the Rule of Law and Democracy" in *The Inclusion of the Other* (Cambridge: MIT Press, 1998), 239-252 and 253-264; Seyla Benhabib, "Models of Public Space," in *Situating the Self: Gender, Community, and Postmodernism in Contemporary Ethics* (New York: Routledge, 1992), 89-120; Carlos Nino, *The Constitution of Deliberative Democracy* (New Haven: Yale University Press, 1996); Jon Elster, ed., *Deliberative Democracy* (New York: Cambridge University Press, 1998), Joshua Cohen, "Deliberation and Democratic Legitimacy," in James Bohman and William Rehg, eds., *Deliberative Democracy: Essays on Reason and Politics* (1997), 67-92; and Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton: Princeton University Press, 2012).

[60] Scheuerman, *Between the Norm and the Exception,* 69.

regularity of procedure and state punishment which is necessary for individual freedom. Under a government of capricious, irregular demands, then, man could not truly be free.

The populist president and public, in their rejection of constraints on the democratic will, are hard pressed to end the "permanent revolution" and guarantee a stability of regime that ensures the freedom of the citizen.[61] Take the recent case of Bolivia's Evo Morales. Few could doubt that the time was ripe for a legal "revolution" in a country where, as late as 1961, the indigenous people, an estimated 71% of the population, remained politically disenfranchised. But even after passing a new constitution, in 2009, renaming the country "the Plurinational State of Bolivia," ensuring indigenous representation in the Legislative Assembly, setting an upper limit on land ownership, and granting indigenous systems of justice full legal status, Morales' work was far from done. The administration sharpened its rhetorical commitment to "twenty-first-century socialism" and engaged in a flurry of political activity, signing trade deals with Venezuela's Hugo Chávez, nationalizing foreign-controlled oil, mining and gas industries, paying students to attend school, organizing indigenous political summit meetings at which to discuss environmental, labor, and economic policy, and so forth. Remarkably, Morales' seems to see his own democratic legitimacy as inextricably tied to his status as a movement leader, in terms of a "permanent referendum," as an administration official put it. This is a telling comment on the democratic theory of a presidency that justifies its continued existence in completely non-constitutional and plebiscitarian terms, as if Morales' presidential "mandate" were really less about formal powers and more about being judged by an ongoing popular plebiscite.[62]

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[61] Urbinati, *Representative Democracy* (discussing the "paradigmatic problem" of revolutions: "When and how to end a revolution?"), 185.

[62] Ironically, then, Morales lost a February 2016 referendum on reforming the constitution to allow him a fourth term in office, particularly in light of the fact that, while arguments sounding in institutional integrity and the continued "mission" of the administration were made, all evidence

Resting presidential legitimacy upon continued popular favor, in a manner reminiscent of the "divine mandate" of the ancient Chinese emperors, is blatantly incompatible with a government of fixed term limits and separated powers, but it is one which, even in other contexts, has intuitive appeal.[63] Still, one cannot be a movement leader and govern at the same time. Arendt spoke of the "perpetual-motion mania" that terrorizes vanguardist totalitarian movements, which are in continual danger of becoming "'ossified' by taking over the state machine and frozen into a form of absolute government," thus putting "an end to the movement's interior drive."[64] Populism, with its politics of perpetual challenge to the status and the notion of presidents-as-movement-leaders it carries with it, cannot survive this challenge. Once in power, it is faced with a terrible dilemma: either to preside over a destabilizing regime of constant motion—for Arendt, the embodiment of revolutionary totalitarianism—or to take up residence in office and institutionalize, thus losing its very core as a movement.[65]

II. Social Acceleration and the Mass Production of Law

We all seem to know that the legislative branch is also the "deliberative" branch, and that representative government is "government by discussion."[66] But why, of

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points to the fact that the real reason Morales lost was because of a scandal involving influence trafficking with a former mistress.

[63] James Ceasar has denounced the same tendency toward "government by opinion poll" in the United States in *Presidential Selection: Theory and Development* (Princeton: Princeton University Press, 1979). James P. Pfiffner, *The Modern Presidency* (6th ed.) (Boston: Wadsworth, 2010), 49-53, discusses the institutionalization of a "campaign approach" to governing in the White House. But Lawrence R. Jacobs and Robert Y. Shapiro, *Politicians Don't Pander: Political Manipulation and the Loss of Responsiveness* (Chicago: University of Chicago Press, 2000) argues that politicians pay attention to public opinion in order to manipulate it.

[64] Arendt, *The Origins of Totalitarianism,* 306, 389.

[65] We will discuss this tension between motion and structures of governance in part II.

[66] Harold Laski, "The Problem of Administrative Areas," in *The Foundations of Sovereignty and Other Essays* (Clark, NJ: Lawbook Exchange, 2003 [1921]), 30-102, 36.

necessity, should this be true? The liberal thinkers of the Enlightenment felt that "laws human must be made according to the general laws of nature,"[67] that is, that the laws promulgated by assemblies should be universal in character and unchanging, all the better to serve as guidelines for the proper moral conduct of earthly beings. As such, they could only be generated by a Parliament that was, first, representative of the entire population of the commonwealth. Thus, for John Stuart Mill, Parliament was "an arena in which not only the general opinion of the nation, but that of every section of it…can produce itself in full light."[68] But to arrive at the *true* national interest it was not enough to be geographically diverse; rather, Parliament also had to be, as Edmund Burke put it, a "*deliberative* assembly" representing "*one* nation, with *one* interest," a body in which "not local purposes, not local prejudices ought to guide, but the general good, resulting from the general reason of the whole."[69] Arriving at the general good required the assembly's submission to the "general reason of the whole" by allowing its legislative decisions to be guided by reasoned exchange. Hence, John Locke describes Parliament as the site of "mature deliberation,"[70] while Montesquieu wrote that assemblies perform the function of supplying "the reflection that one can hardly expect from the absence of enlightenment in the court concerning the laws of the state and the haste of the prince's councils."[71] Proper and legitimate

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[67] John Locke, *Two Treatises of Government and a Letter Concerning Toleration* (Stilwell, KS: Digireads.com Publishing, 2005), endnote 9, 148-9.

[68] Quoted in Hannah Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1972), 83.

[69] Burke,"Speech to the Electors of Bristol," quoted in Gordon Wood, *Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina Press, 1998), 175.

[70] Locke, *Two Treatises*, 119.

[71] Montesquieu, Charles de Secondat, *The Spirit of the Laws* (New York: Cambridge University Press, 2002), 56.

legislative decisions, then, could only emerge through *reason* and not unchecked will, the product of lengthy rational debate.

These musings left an appreciable footprint in the North American constitutional framework, for ironically, soon after the American revolutionaries had formally sloughed off English control over the colonies, the constitutional Framers proceeded to adopt a notion of virtual representation[72] by Congress similar to that which had been espoused by the British Parliament. James Madison, in Federalist Paper No. 10, details the two great merits of the "republican" form of government as distinct from "pure Democracy." One was the extended authority over a broader "sphere" of citizens and land that only a republic (and not a true democracy) could project. In this way, the American Congress could represent, as Mill had hoped, "every section" of the national opinion. Second was its delegation of the affairs of government to a "small number of citizens elected by the rest."

On this second point, many of Madison's arguments for the superiority of representative government, so familiar to American students of the *Federalist Papers*, are heavily indebted to the English classical legacy: the "wisdom" of elected legislators; the salutary effect of passing public opinion through the filter of representation; the freedom from petty localism of a broad-minded, nationally apportioned Congress, and so forth. For the advantage that government by a "small number" of elected citizens had over direct self-legislation by a mass population lay not merely in its increased feasibility, but in the fact that it was better equipped to *discern* the national interest than even the people themselves could be! Burke, the author of this claim, saw nothing paradoxical in this. He argued that through the "communion of interest and sympathy" between the governing and the governed, wise representatives could discern and communicate in the national assembly their

[72] Wood, *Creation of the American Republic*.

constituencies' true interests, which he believed had little to do with voters' own opinions, but were rather more akin to questions of "scientific fact."[73] Although Madison echoes Burke's hope for national harmony through concerted legislative action, he did not share his faith in the continued availability of "enlightened statesmen" to lead wise congressional debate. If such noble citizens were to be in occasional short supply, it would have to be constitutional structure that would reconcile "clashing interests, and render them all subservient to the public good." Enter the Madisonian safety valve, the federalist principle, by which "the majority, having such coexistent passion or interest, [might] be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression."[74] A "well-constructed Union," then, was one so designed as to be able to "break and control the violence of faction."[75]

Whether through enlightened debate or constitutional checks on rash majorities, the insights of the early European and American liberals suggest that the legislature, as it was first conceived, was to be a place where decisions would be taken cautiously, thoughtfully—and above all, *slowly*. "The bodies that are the depository of the laws," wrote Montesquieu, "never obey better than when they drag their feet."[76] Even Locke, the first great defender of the popular "right to revolution," believed that the people should be restrained from rash decisions and only exercise their "right to resume their original Liberty" and revolt against their political rulers after sustaining a "long train of abuses."[77] Thus, for the production of laws, time was a friend, and speed an enemy: the multitude is

[73] Burke, quoted in Hannah Pitkin, *Concept of Representation,* 173 and 180.

[74] Madison, *The Federalist,* no. 10, 56.

[75] Ibid.

[76] *The Spirit of the Laws*, 56.

[77] Locke, *Two Treatises on Government*, 140.

foolish, writes Burke, "when they act without deliberation," but "the species is wise, and, given time, as a species it always acts right.[78]"

Unfortunately, this noble ideal has not aged well. Classical accounts of the separation of powers describe the operations of the three branches taking place in three different time horizons: the executive characterized by "energy" and "dispatch"; the judiciary, by slower, more "deliberate reflection"; the legislature, the slowest of all, granted a warrant for lentitude in recognition of the uniquely delicate nature of deliberative lawmaking. But the assumption that all time horizons are created equal has fallen away in a world of post-industrial capitalism, a world of increased speed and decreased borders in which speed is a uniquely valued commodity. Even by the early twentieth-century intellectuals including Heidegger, Dewey, Adorno and Arendt had begun to lament contemporary society's "mania for" and "cult of technical speed," warning of the "abolition of distance" and "ever-quickening increase in human knowledge and power" in a hyper-accelerated society.[79]

Flooded by a sea of demands, legislatures adapt by delegating legislative functions or by self-specializing, for example into committees.[80] In the process, however, they shed their deliberative, egalitarian core, becoming in the public eye increasingly unreachable and elitist. A certain loss of legislative legitimacy, or at least prestige, results. My account builds upon this, Scheuerman's story of social acceleration and law, by considering the *plebiscitarian strain* in mass politics as both *cause and effect* of these developments. I have already discussed Linz' famous observation that the "dual legitimacy" of presidential

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[78] Edmund Burke, "Speech on the State of the Representation/Speech on the Reform of Representation in the House of Commons," in (Shapiro, 2012), Peter J. Stanlis, ed., (New Brunswick, NJ: Transaction Publishers, 2009), 398.

[79] John Dewey and Theodor Adorno, quoted in William Scheuerman, *Liberal Democracy and the Social Acceleration of Time,* 7.

[80] Barbara Sinclair, *Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress* (Washington, D.C.: Congressional Quarterly Press, 2012).

systems predisposes them to conflict, as each can reasonably claim to be the "voice of the People." During periods of perceived legislative unproductiveness—increasingly the status quo in fast-moving societies, per Scheuerman—the legislature's public image problems worsen. Faced with the additional task of staunching the fires of a hostile public opinion, these incredible shrinking legislatures find themselves hurled into worsening conflict and gridlock and immobility. Popular support is funneled towards the executive branch, which poises itself as the "popular" branch leading a crusade against the compromised elites of national assemblies, and the cycle of inefficiency, polarization, unpopularity, and marginalization begins again.

Of course, the populist paradigm is not the cause of social acceleration, but it certainly exacerbates the problem. Ordinarily in conflictive inter-branch situations, the elective mechanism fulfills its role, as the public exercises its will in "throwing the bums out" of the institution they find at fault. But when the crisis seems so acute as to preclude waiting for the next electoral cycle, when the populist's typical impatience with slow-moving representative institutions finds no electoral outlet, the branches may take the extreme step of demanding the other's destitution: Congress can request a presidential impeachment; the president may stage a national referendum on the actions of Congress.[81] The problem is that, in such situations, the executive holds the trump cards of speed and visibility. This advantage is exacerbated by other features of today's mass politics—the personalization of campaigns, the perceived degradation of public discourse into a "sound-byte politics," the increased public visibility of executives, the technology of near-instantaneous media

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[81] Aníbal Pérez-Liñán, *Presidential Impeachment and the New Political Instability in Latin America* (New York: Cambridge University Press, 2007).

coverage—[82] to form a potent cocktail of popular spectacle and democratic ire funneling power back toward the executive, who complies by pushing politics forward in ever faster, and more purely plebiscitary directions.[83]

One salient example of the phenomenon is the prevalence of government-initiated popular referenda on major political or constitutional questions, a staple of democracy in post-transition Latin America. From the 1980s onwards, most Latin American countries adopted institutions of direct democracy, and today the region's constitutions provide for a wide variety of direct democratic instruments. There is nothing *necessarily* inconsistent about constitutional democracy and direct democratic instruments such as the referendum. Moreover, it is true that some populist leaders, such as Argentina's Menem or Brazil's Collor de Mello made scant use of the referendum, suggesting that executive-led populism needs not thrive on direct popular votes. Yet, there can be little doubt of the plebiscitarian color of recent referenda inasmuch these are, first, nearly always initiated by government actors,[84] second, conducted in ways that often deviate from constitutional procedure, if

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[82] See, e.g., Elvin Lim, *The Anti-Intellectual Presidency: The Decline of Presidential Rhetoric from George Washington to George W. Bush* (New York: Oxford University Press, 2008).

[83] Presidential destitution by congressional impeachment has been a common outcome in recent years in Latin American democracies. Pérez-Liñán argues that, rather than a worrisome outcome, these impeachments can represent a newly activated public channeling its sovereign will through national assemblies to check overweening executives. Empirically, however, presidents tend to "win" most of the referenda they initiate, suggesting that "going public" is a strategy which disproportionately favors executives. Likewise, assembly-led presidential expulsions tend to have an anti-democratic taint to them, as the recent impeachment of Paraguay's Fernando Lugo, by "parliamentary coup" as supporters declare, suggests. *Presidential Impeachment and the New Politics of Instability in Latin America.*

[84] David Altman estimates that 87 percent of all national direct democratic events conducted in Latin America in the twentieth and early twenty-first century were initiated by governing authorities. Altman, "Democracia directa en el continente americano: autolegitimacion gubernamental o censura ciudadana?," *Política y Gobierno,* Vol. XII, No. 2 (2005): 203-232, 217; Anita Breuer, "The Use of Government-Initiated Referendums in Latin America: Towards a Theory of Referendum Causes," *Revista Chilena de Ciencia Política,* Vol. 29, No. 1 (2009), 23-55, 25.

not becoming explicitly anti-institutional,[85] and third, often used in conflict-ridden situations by political actors—usually executives—to bolster their legitimacy against their rivals and avert their own overthrow. In such cases, referenda take on a personalistic or partisan aspect, instead of the "higher law" as which we are accustomed to think them: they become a mechanism for legitimating executive action, delegitimating congressional resistance, or quite simply for evading and rewriting constitutional restraints in ways that tend to increase executive power.[86]

Now, provided the institutional mechanisms are in place, there are plenty of good reasons to occasionally position the people at the front and center of legislative activity. Uruguay, for example, adopted the device in 1919, in hopes of emulating the virtues of Swiss-style canton democracy.[87] Recent referenda, however, offer examples, particularly in Latin America, of executives channeling the force of lopsided but transient majorities into lasting institutional reforms, skirting time-consuming processes of constitutional reform through debate and exchange with opinionated legislative elites. These referenda, then, forsake the traditional legislative ideal of time-consuming deliberation for instantaneous "yes/no" votes.[88] This can be acceptable in some circumstances—after all, the plebiscites of

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[85] For example, recently referendums to abolish presidential term limits have been held in Bolivia in 2016, and in Venezuela in 2007 and 2009. In Colombia, one would have been held in 2008, but the Constitutional Court deemed the referendum itself unconstitutional.

[86] James Madison himself feared that routine "appeals to the people," that is to say, popular referendums, would "carry an implication of some defect in the government," that could, in time, "deprive the government of that veneration which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability." Madison, *The Federalist,* no. 49, 340.

[87] Francisco Soto Barrientos, "El Referéndum en Latinoamérica: Un Análisis desde el Derecho Comparado," *Boletín de Derecho Comparado,* Vol. 35, Iss. 136 (2013): 317-346.

[88] Pointed out Schmitt in *Legality and Legitimacy,* "The people can only respond yes or no. They cannot advise, deliberate, or discuss. They cannot govern or administer. . . . Above all, they cannot pose a question, but can only answer yes or no to a question placed before them." (Durham: Duke University Press, 2004), 93.

Rome were largely public, non-deliberative affairs—but to extend the parallel ancient Rome, plebiscites of yore rarely demanded that the public take positions on complex questions of policy and systemic design, and were typically extraordinary measures.[89] Today's plebiscites, on the other hand, have real constitutional import. And it seems that *no one* is content to think of legitimating constitutional revision in such a non-proceduralist, if strongly democratic, fashion: the publics of such nations appear to consider such institutional revision as just "politics as usual," the stuff of class struggle and localized political combat against outsiders, certainly not a rationalistic politics, or a blueprint for the nation as a whole. On the other hand, critics of Latin America's "neo-populism" point to the same phenomena, the *politicization* of higher law and the *growth* of executive power, to argue that these plebiscitarian processes of constitution writing are far from legitimate, and to suggest that these "populist democracies" now verge on the quasi-authoritarian—or perhaps more credibly, the anti-institutional.[90]

Increasingly, these movements have resulted in the promulgation of constitutions that increase executive influence relative to other branches of government or that, in codifying party platforms as higher law, politicize and effectively delegitimate constitutional law. These documents are both too short-lived and too durable: one the one hand, being

[89] Clinton Rossiter, *Constitutional Dictatorship* (New Brunswick, NJ: Transaction Publishers, 2009) (1948), esp. "The Roman Dictatorship," 15-28.

[90] As Eoin Carolan puts it, "'[t]he contemporary trend towards majoritarianism, in reality, is nothing less than a move towards a modern absolutism." *The New Separation of Powers* (London: Oxford University Press, 2009). 95. On the related concepts of "rentier populism" and "delegative democracy," see Sebastián L. Mazzuca, "Rentier Populism and the Rise of Super-presidents in South America," (89-105), Lucas González, "Unpacking Delegative Democracy," (240-268) and Enrique Peruzzotti, "Accountability Deficits of Delegative Democracy," (269-286), in Daniel Brinks, Marcelo Leiras, and Scott Mainwaring, eds., *Reflections on Uneven Democracies: The Legacy of Guillermo O'Donnell* (Baltimore: Johns Hopkins University Press, 2014), 36, 48, 68 It was common, for instance, during the Chávez era in Venezuela or the Kirchner administrations in Argentina, for the opposition media to accuse these leaders of being anti-institutional or "anti-republican." (see, e.g., Mariano Grondona, "La polémica en torno al 'gorilismo anti-K," *La Nación* (April 18, 2010)).

products of particular political movements, they lack in bipartisan legitimacy, meaning that the alternation of regimes in power tends to bring constitutional revision and a resultant—although not necessarily dangerous—instability. On the other hand, the executive-People connection fosters an increase in presidential power through the referendum mechanism, a trend that turns out to be a secular expansion so long as the political capital lasts, as future presidents rarely see fit to double back on the expansion of their own privileges.[91]

The controversy surrounding presidential reelection illustrates the issue. Today, Latin America is said to be experiencing "reelection fever," with thirteen countries revising their constitutions since the 1990s to allow for presidential reelection, whether consecutive or alternating, two-term or indefinite.[92] From the populist-democratic point of view, the legal empowerment of an incumbent president to hold sequential terms in office is not just a crucial tool for maintaining the continuity of ongoing programs of reform[93] but a political right, allowing a self-determining people to determine the person fit to represent it.[94] At

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[91] For example, Steven Levitsky and Maria Victoria Murillo discuss how the frequent replacement of Latin American constitutions may confirm a "serial replacement" theory of institutional change characteristic of weak institutions. "Building Institutions on Weak Foundations: Lessons from Latin America," in Daniel Brinks, Marcelo Leiras, and Scott Mainwaring, eds., *Reflections on Uneven Democracies: The Legacy of Guillermo O'Donnell* (Baltimore: Johns Hopkins University Press, 2014), 189-213.

[92] Among those countries that have revised their constitutions to allow for some form of reelection are: Argentina, Bolivia, Brazil (in 1998), Costa Rica (in 2003), Colombia (in 2005), Dominican Republic (in 1994 and 2002), Ecuador, Nicaragua, Peru (voting for immediate in 1993, although partly recanting in 2000), and Venezuela. There have also been two failed attempts at implementing presidential reelection, in Honduras in 2009, when then-president Mel Zelaya apparently tried to extend presidential tenure by referendum and was removed by a "judicial coup"; and in Paraguay in 2011, when the Congress rejected a proposed constitutional amendment on these lines. Colombia, which revised its constitution in July 2015 to go back to a system forbidding reelection, and Bolivia, which in February 2016 rejected President Morales' bid to abolish presidential term limits, are now continental outliers in these terms.

[93] By way of an illustration, a Bolivian MAS higher-up was quoted in 2009 as saying that President Evo Morales' socialist revolution is "a political project which we have said, and still say, needs 15 or 20 years to be implemented."

[94] Interestingly, the Supreme Courts of Costa Rica, in 2003, and Paraguay, in 2003, struck down constitutional law prohibiting presidential reelection on the grounds that they violated the self-governing autonomy of the people.

the same time, presidential reelection evokes the terrifying homegrown staple of *caudillismo*, once described as "a noninstitutional way of satisfying the authoritistic orientation latent" in Latin America's political culture.[95] With this theoretical framework in mind, a 2011 Latinobarometer survey report sees ominous implications in the fact that out of a total 53% of Latin America's population who support presidential reelection, fully 73% come from families which received only a basic level of education. The report concludes that "reelectionism is a quite populistic instrument appealing to the less educated masses of the population."[96] As an empirical matter, this seems correct, given the undisguised presidential "continuism" institutionalized in the latest spate of constitutional alterations, many through popular referendum. Ironically, given the reanimation of Bolívar as the emblem of choice for Hugo Chávez's "continuist" regime, the "Liberator" himself famously said at the 1819 Congress of Angostura: "The continuation of the authority by the same individual has frequently been the end of democratic governments. Repeated elections are essential to popular systems because nothing is more dangerous than allowing a citizen to remain in power for a long period of time. The people get used to obeying him and he gets used to governing them; this is the origin of fraud and tyranny[.]"[97]

Tyranny or not, the neo-populist phenomenon in Latin America has provoked a "flood of proposals to write drastic changes into the body of . . . fundamental law" akin to what the American historian Richard Hofstadter described in the context of early U.S. Cold War politics as a sign as the "pseudo-conservative" populist McCarthyites'

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[95] Hugh Hamill, "Introduction," *Caudillos: Dictators in Spanish America* (Norman, OK: University of Oklahoma Press, 1992) (1965), 6.

[96] Corporación Latinobarómetro, "2011 Report (Informe 2011)," (Santiago de Chile: Latinobarómetro, October 2012), 74 (author's translation).

[97] Simón Bolívar, "The Angostura Address" (February 15, 1819), in Frederick H. Fornoff and David Bushnell, eds., *El Libertador: Writings of Simón Bolívar* (New York: Oxford University Press, 2003), 31-53, 32.

"widespread latent hostility" toward governing institutions.[98] Whether the "hungry masses" are pseudo-conservatives or the oppressed indigenous, the spectacle of the charismatic president-candidate stirring up popular anti-status quoist resentment in order to push for root-and-branch reform of a compromised legal system, is much the same. A plebiscitarian mass politics links executives and peoples in a union which bids, through sped-up, non-deliberative processes of reform—that is, to revise the legal status quo and to continually *remake* higher law. And if the liberal ideal of reasoned debate as the basis for law-making—the paradigm upon which modern separation-of-powers regimes are founded—still has any validity in the matter, these developments appear to augur the emergence of a "new" form of legislation that seems at once irregular and illegitimate. After all, admonishes the today quite moldy figure of Edmund Burke, "[W]hat sort of reason is that in which the determination precedes the discussion; in which one set of men deliberate, and another decides; and where those who form the conclusion are perhaps three hundred miles distant from those who hear the arguments?"[99]

III. A Discourse of Unreason

Jeremy Bentham, that "unabashed creature of the Enlightenment,"[100] once described Parliament as a place in which "ideas meet, and contact between ideas gives off sparks and leads to evidence."[101] For 17th- and 18th-century liberals, Parliament embodied the quintessential Enlightenment faith in ratiocinative, deliberative processes. Legislative

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[98] Hofstadter, "The Pseudo-Conservative Revolt."

[99] Edmund Burke, "Speech to the Electors of Bristol," in *The Writings and Speeches of Edmund Burke,* Vol. II (New York: Cosimo Classics, 2008), 96.

[100] Ian Shapiro, *Moral Foundations of Politics* (New Haven: Yale University Press, 2012), 19.

[101] Quote attributed to Jeremy Bentham in Carl Schmitt, *The Crisis of Parliamentary Democracy* (Cambridge: MIT Press, 1988 [1923]), 7.

decisions were "matters of reason and judgment,"[102] not of the unchecked will, and emerged only from rational deliberation by the sorts of venerable societal elites who could be trusted to make good use of their positions of privilege.

On the other hand, the present-day perception of parliaments and legislatures has made a mockery of this ideal of debate guided by reason. Widely perceived as swarming wasps' nests of pampered, venal and petty elites jealously defending their fiefdoms, the lowly regard in which Congresses and assemblies are held shows us just how far we have come since the arch-rationalism of a Bentham, or the stodgy paeans to elite parliamentary wisdom of Burke.[103] More than just unpopularity, however, the common understanding that legislative "debate" is anything but has done great damage to the deliberative ideal. And in truth, the sordid reality of legislation moves increasingly away from "reasoned debate," more likely, instead, to consist of quid-pro-quo exchanges, hostage-style tactics, or the extraction of local favors, or "pork," through the tacking-on of so-called bill "riders." Legislation by compromise, seemingly lacking in ideology or direction, is the result, as laws increasingly take the form of thousand-page omnibus bills designed to please no one but placate all.[104]

This is the stuff of politics, it is said. It is best, we are told, not to delve too deeply into the legislative process, lest we discover that making laws is as nauseating a business as

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[102] Burke, "Speech to the Electors of Bristol," 95.

[103] According to the 2011 Latinbarometer annual report, between 1996 and 2010, an average of just 28% of Latin Americans reported feeling confident in their congresses or parliaments, as compared with a 53% level of support for the President, 37% for "government" defined in the abstract, and 71% for the Church. In the U.S., approval of Congress stood at 13% as of March 2016. Justin McCarthy, "No Improvement in Congress Approval, at 13%," *Gallup Politics* (March 9, 2016).

[104] Sinclair, *Unorthodox Lawmaking,* 154 ("Omnibus legislation . . . increased as a proportion of the congressional agenda of major legislation from none in the Congresses of the 1960s to a mean of 7 percent in the 1970s Congresses and a mean of 13 percent in the 1980s. In the 1990s and 2000s, an average of 12 percent of major measures were omnibus.")

making sausages. But meanwhile the faith of publics in their legislatures suffers. As Carl Schmitt put it in 1922, parliament, like "every great institution," presupposes certain fundamental ideas, in this case an openness of discussion. Schmitt diagnosed a "crisis" of modern liberal democracy in the "increasingly poor fit of the ideal of deliberation" with the realities of "parliamentary wheeling and dealing." Schmitt asks, "Who still believes in this kind of openness [of discussion]? And in parliament as its greatest 'platform'?"[105] Institutions *can* outlive their original rationale, but "if the principles of discussion and openness really are inapplicable," as Schmitt writes, it is hard to see "how the truth and justice of parliament could still be so evident," or where we might "find a new intellectual foundation" for legislative government.[106]

Populist movements since have built, albeit unconsciously, upon Schmitt's parliamentary postmortem, his impatience with constricting legal structures, and his rejection of reason in politics. I argue that populism's anti-rationalism comes in three varieties: the first two are rejections of the status quo, the third a "truer" vision of politics, all characteristic of Schmitt's plebiscitarianism in some way. The first is a rejection of *established political structures*. This includes "insiders" and institutions in places of power—political parties, representative bodies, administrative corps, universities, interest groups, corporations—as well as the organizational criteria—age, professionalism, expertise, educational level, campaign dollars—according to which these institutions operate. Schmitt himself built upon Max Weber's diagnosis of modern society's tendency toward legal rationalization,[107] famously lambasting proceduralism as a stultifying "crust of repetition," and exposing the

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[105] Schmitt, *The Crisis of Parliamentary Democracy*, 7.

[106] Schmitt, *The Crisis of Parliamentary Democracy*, 2.

[107] See *Legality and Legitimacy*, 7-10, and Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Chicago: University of Chicago Press, 2006) (1922), 27-30.

latent contradiction between sovereignty and "legality," which has the "meaning and purpose of making superfluous and negating the legitimacy of either the monarch or the people's plebiscitarian will as well as of every authority and governing power."[108] Populism today perceives, however dimly, the same contradiction. It yearns for a democracy that is simple, transparent, immediately responsive to the people. It "denounces backroom deals, shady compromises, complicated procedures, secret treaties, and technicalities that only experts can understand" as a form of elitist mystification of the public. "Populists claim that all this complexity is a self-serving racket perpetuated by professional politicians"—a term that has evolved almost into a slur—and that "the solutions to the problems ordinary people care about are essentially simple." Thus, professionalism *can't* be good. Meritocracy *isn't* meritocratic. Expertise is a defect. Populists elect charismatic "outsiders" to replace the corrupted "insiders" of Washington, D.C., Caracas, Sao Paulo, Mexico City and elsewhere, as if periodic "house-cleanings" were required to scrub and delouse those with prolonged exposure to politics.

The second form entails a rejection of *dominant values,*[109] particularly modern, scientific or universalist ones. Populism draws up Manichaean, existential oppositions—"[t]he people versus the interests, the public versus the plutocrats, the toiling multitude versus the money power"[110]—as if regnant societal values were a "foreign" contamination of the political body. (Appeals to "real America" against the "pointy-headed elites" are a case in point.) Populism often shuns natural science for theology, economic prescriptions for communal practices, progress for tradition, abstract notions of "mankind" for the

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[108] Schmitt, *Legality and Legitimacy,* 9.

[109] Points out Canovan, the crucial difference between populism and social movements is that while both are anti-system, populism "challenges not only established power-holders but also elite values." Canovan, "Trust the People!," 4.

[110] Richard Hofstadter, *The Age of Reform* (New York: Vintage Press, 1955), 62.

immediate community. Although not necessarily conservative—populism in Latin America, for example, has been associated with indigenous activism, social democracy, labor unions, and environmentalism—populism is reliably anti-technocratic and tends to reject the prescriptions of intellectual leaders—in Latin America, the free market economics of the Washington Consensus has been a prominent target—with a combination of rage and gleeful triumphalism. It calls for replacement values in the traditions of the heartland and the community. Often it makes use of religious imagery or of crude themes of xenophobia, jingoism, or nationalism, which can serve as assertions of both communal values and the transcendence of the will of the majority. The 19th-century Populist Party platform combined both in its calls to "restore the government of the Republic to the hands of 'the plain people,'" and its strong belief that "the voice of the people was the voice of God."[111] Populism deals in themes of consensus, like-mindedness, of a "right" set of values.[112] But it may do so in narrow exclusionary ways that suppress ethnic or political heterogeneity, value pluralism, dissent, or "outsiders." The belief in universalism, in government by

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[111] John D. Hicks, *The Populist Revolt: A History of the Farmers' Alliance and the People's Party* (Minneapolis: University of Minnesota Press, 1931), 406-7, 441, 444. Although it need not be the case, populism in the United States has often been of the agrarian variety, following in the philosophical tradition of Thomas Jefferson, with its strongly rural, communitarian elements. Writes Richard Hofstadter in *The Age of Reform*: "The American tradition of democracy was formed on the farm and in small villages, and its central ideas were founded in rural sentiments and on rural metaphors (we still speak of 'grass-roots democracy') . . . The American was taught throughout the nineteenth and even in the twentieth century that rural life and farming as a vocation were something sacred. Since in the beginning the majority of the people were farmers, democracy, as a rather broad abstraction, became in the same way sacrosanct." (5) Populism often invokes some variant of the Jeffersonian belief that the popular will did not need to be checked "so long as it was the true voice of a small homogenous community." In Jefferson's words, "those who labor in the earth are the chosen people of God, if ever he had a chosen people, whose breasts he has made his peculiar deposit for substantial and genuine virtue." Quoted in Michael Federici, *The Challenge of Populism: The Rise of Right-Wing Populism in Postwar America* (Westport, CT: Praeger, 1991), 28. Jefferson refused to accept the idea that "the popular will needed to be checked so long as it was the true voice of a small homogenous community." Ibid, 30.

[112] Jane Mansbridge discusses Aristotle's idea of *homonoia,* or "oneness of mind," as a central good in a polity in *Beyond Adversary Democracy* (Chicago: University of Chicago Press, 1983), 14.

discussion, Schmitt reminds us, "belongs to the intellectual world of liberalism. It does not belong to democracy." Democracy requires "first homogeneity and second—if the need arises—elimination or eradication of heterogeneity."

Finally, populism rejects rationalism in its "characteristic mood" of persecution, its view of politics as existential struggle. "Populist politics," writes Canovan, "is not ordinary, routine politics. It has the revivalist flavour of a movement, powered by the enthusiasm that draws normally unpolitical people into the political arena. This extra emotional ingredient can turn politics into a campaign to save the country or to bring about a great renewal."[113] Like Schmitt, the populist sees in modernity a "demagification" and "mechanization" of politics, believing that the reliance on mutually agreed-upon rules and procedure "leads to [a] pluralism . . . devoid of sovereignty."[114] Populists see in the political status quo myriad threats to their country, regime, class or self. They tend to see governmental action as a form of favoritism toward other sectors that hurts them. Government itself, although "democratic", is held hostage to other, more powerful sectors: the "liberal elite," as the Tea Party puts it, the global "criminal banking cabal" led by the Fed, the IMF, and others, as many on the Latin American left claim. The credibility of populist claims of existential threat may be somewhat weakened by the fact that peddlers of "crisis talk" have devised a nearly inexhaustible list of potential "outsiders" against whom to marshal fear and hatred as "threats" to the regime: in the United States alone, the list includes native Americans, German- and Irish-Catholics, Freemasons, Japanese and Chinese immigrants, Socialists, Jews, Hispanics, Communists, labor, the financial sector, and so forth.

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[113] Canovan, "Two Faces," 4.

[114] Schmitt, *Political Theology,* 3.

From the liberal paradigm of law—a paradigm, I hasten to reaffirm, upon which modern democratic political and legal systems are built—the consequences of these various forms of unreason or irrationality are troubling. On the view of politics as a deliberative process, politics is founded upon compromise between individuals who may often disagree. Anti-rationalism forecloses the possibility of reasoned debate, civil disagreement, or consensus through compromise, all of which we see as foundational for self-government. Unsurprisingly, recalcitrance, emotionalism, the rejection of shared premises—scientific tenets, for example, or the validity of universal human rights—can be expected to lead to impasse in deliberation. How, indeed, does one debate an attitude? Reach common ground absent shared foundational values? Thoughtfully respond to a poorly defined "sphere of frustration"?[115] From the Rawlsian perspective of the rational, deliberating public, a certain criterion of reasonability is required. That is, reasonable citizens must concede "burdens of judgment," recognizing that the mere fact that other people disagree with them about the good or the right doesn't undermine their legitimacy as free and coequal citizens.[116] "Unreasonable" citizens thus not only refuse to recognize the validity of positions that contradict their own, they also show themselves unwilling to play by accepted rules of the Rawlsian representative government in a way that is not only illiberal but also anti-political!

At the level of institutions or regimes, the collapse of the possibility of debate yields extremism,[117] extremism in turn leading to institutional polarization and immobility. Institutional failure following a prolonged period of immobility and dysfunction has been

[115] Leo Löwenthal, *False Prophets* (New Brunswick, NJ: Transaction Publishers, 1987), 102.

[116] John Rawls, *Political Liberalism* (New York: Columbia University Press, 2011), 55.

[117] The theme of "segmented publics" and political extremism is one explored in various works by Cass Sunstein, including *Republic.com* (Princeton: Princeton University Press, 2001).

the downfall of more than one presidential regime in Latin America, a region in which the political spectrum, relative to the United States, is "stretched out" broadly enough to include real Marxism, on the one hand, Catholic authoritarianism on the other.[118] Even so, the temperate American political system has seen flickers of this tendency: across the twentieth century, polarization in Congress has spiked during periods of increased economic inequality, and today, the the 114th Congress (2014-16) is considered the most polarized in history.[119]

Another reason why "unreason" seems so problematic in the first place is that it is notoriously difficult to root out. This is partly for reasons older even than the democratic tradition: Spinoza famously believed that "all men certainly seek their advantage, but seldom as sound reason dictates; in most cases appetite is their only guide, and in their desires and judgments of what is beneficial they are carried away by their passions, which take no account of the future or of anything else."[120] men are moved by opinion more readily than by true reason."[121] Visceral reactions may better instigate political participation than reasoned calculus, and populism, never afraid to stoke the fires of emotion, has also shown itself a useful tool for giving voice to neglected attitudes and unspoken resentments, ever ready to shed light on seamier sides of politics where other politicians fear to tread. The "silent majority" feels a conspiratorial delight in the expression of inconvenient

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[118] Louis Hartz famously argued that the United States' tradition of liberal egalitarianism had kept it from developing an indigenous Marxist movement. *The Liberal Tradition in America: An Interpretation of American Political Thought Since the Revolution* (New York: Harvest, 1991 [1955]).

[119] Adam Bonica, Nolan McCarty, Keith T. Poole, and Howard Rosenthal, "Congressional Polarization and its Connection to Income Inequality," in James A. Thurber and Antoine Yoshinaka, eds., *American Gridlock: The Sources, Character, and Impact of Congressional Polarization* (New York: Cambridge University Press, 2015), 357-377.

[120] Quoted in Albert O. Hirschman, *The Passions and the Interests: Political Arguments for Capitalism before Interests* (Princeton: Princeton University Press, 1977), 44.

[121] Baruch Spinoza, *Ethics, with the Treatise on the Emendation of the Intellect and Selected Letters,* Seymour Feldman and Samuel Shirley, eds., (Indianapolis: Hackett Publishing, 1992),

"truths" that others had left unsaid, of things they had "felt all along." Emblematic of this almost prurient pleasure in the forbidden is George Wallace, the archetypal fire-breathing Southern Populist, who regularly flaunted a "country boy's relish in disconcerting, even disheveling ceremony and citified starchiness."[122] At one Milwaukee rally, the "Great Inciter" goaded his audience members: "Who is it that beats up our newsboys, rapes our women, attacks old women? You know who it is—it's your colored brothers."[123] Leo Löwenthal and Norbert Guterman's 1949 study of demagoguery and authoritarianism describes the "false prophet" who, similarly, "seems to steer clear of the area of material on which liberal and democratic movements concentrate; his main concern is a sphere of frustration that is usually ignored in traditional politics . . . that area of moral uncertainties and emotional frustrations that are the immediate manifestations of malaise." The populist agitator's appeal, they conclude, is in that he "offers attitudes, not bread."[124]

Theatricality and lowbrow appeals have long been a staple of populist politics, but recent attention has been devoted to studying newer manifestations of the syndrome in an era where technology has brought about the nearly instantaneous diffusion of news and "infotainment" to a ready public. Recent observational studies of the quality of political rhetoric suggest a "dumbing-down" effect perhaps provoked by the need of politicians to compete for the public attention with entertainment industry figures who, inevitably, prove more entertaining.[125] The tendency is to incentivize a heightening of the element of "spectacle" in politics. More than gaffe-hunting and scandal-mongering—old hat for the

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[122] Marshall Frady, quoted in Michael Kazin, *The Populist Persuasion* (Ithaca, NY: Cornell University Press, 1998), 230.

[123] Ibid, 233.

[124] Leo Lowenthal and Norbert Guteman, *Prophets of Deceit* (New York: Harper & Brothers, 1949), 91-92.

[125] Elvin Lim, *The Anti-Intellectual Presidency*.

media, anyway—the risk is that televised discourse will devolve into political soap opera, as public figures discover that more exposure is better than less, and that colorful extremism outsells sober pragmatism. One social psychologist describes the problem: "talk shows featuring the battle of good versus evil sell better than those that explore shades of gray; it's more entertaining to watch people throw rocks at each other over the wall than it is to watch the slow, difficult process of dismantling the wall and understanding each other's point of view."[126] Political decisions often demand engaging with complex moral questions, but the televised format favors simplicity, casting populist narratives of "anti-establishment" crusades by "ordinary people" in a particularly favorable light. As the media scholar Daniel Hallin observes, "television loves nothing more than a story about a 'little guy' who stands up to the 'powers that be.'"[127]

But as Lowenthal and Guterman—two refugees from National Socialist Germany—suggest, it can be difficult to distinguish between the David and Goliath struggle of the "little guy" against the interests and in the "populist agitators" trading on fears and hatred. The "Red scare" of the early Cold War era, more than any other episode in American history, perhaps, illustrated the explosive potential of the combination of mass media exposure and populist fear-mongering and elite-bashing. Of Senator Joseph McCarthy, the demagogic leader of the "Red Hunters," historian Michael Kazin writes:

> McCarthy understood instinctively how to play an Everyman, and one whom the viewing public would not switch off. During his brief years of glory, the popularity of TV soared. By the end of 1954, Americans owned 35 million sets—representing a tenfold increase since the beginning of the decade. To see McCarthy's frequent performances on such interview programs as *Meet the Press* was to discover a clever showman who knew his severe charges would go down easier when mixed with a seemingly guileless humor and informality. . . .

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[126] Jonathan Haidt and Jesse Graham, "When Morality Opposes Justice: Conservatives Have Moral Intuitions that Liberals may not Recognize," *Social Justice Research*, Vol. 20, No. 1 (2007): 98-116.

[127] Daniel C. Hillin, "Network News: We Keep America on Top of the World," in Todd Gitlin, ed., *Watching Television: A Pantheon Guide to Popular Culture* (New York: Pantheon Books, 1986), 9-15.

> Besides his breezy demeanor, the senator made effective use of the kind of crisp, memorable phrases that would come to be known as "sound bites." Some were clever—defining McCarthyism as "calling a man a Communist who later is proved to be one" . . . Buried in the middle of a long speech or columns of newsprint, such lines were relatively insignificant. But on television, they were a kind of blunt revelation . . . "I'm not equipped to use lace-handkerchief kind of tactics. We may have to use lumberjack tactics, bare-knuckle tactics, because these are the only kind of tactics the Communists understand." With the Korean War under way and military recruiting ads festooning the broadcasts, that comment put smug, gritless journalists on the defensive (and, by extension, anyone who shared their opinions). Sure, my methods may be a bit rough, implied the man named Joe, but what are *you* doing to fight communism? (Kazin, *The Populist Persuasion,* 187-8)

As conservative extremism crescendoed into civilian arrests, attacks on civil liberties, and a climate of paranoia, Edward R. Murrow famously launched his on-air crusade to pull the nation back from the brink of hysteria, counseling viewers in 1954 to "remember always that accusation is not proof and that conviction depends upon evidence and due process of law . . . We will not be driven into an age of unreason."[128]

Conclusion: On Presidential Populism and Democracy

I have argued in this chapter that there is a deep affinity between presidentialism and populism. This is not out of an innate suspicion of presidential power—indeed, as I will argue in the next chapter, there are moments when strong and even populist presidents can be beneficial—nor to suggest that particular or even all presidential systems are dysfunctional, but rather, in view of the inherent nature of the president's constitutional position. As an office which finds itself trapped between the cross-cutting imperatives of constitutional maintenance and systemic improvement or reform, the presidency's "popular mandate" constantly exceeds its constitutional powers, forcing officeholders to engage in a perpetual search for extra-constitutional sources from whence to bolster their own authority.

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[128] Kazin, *The Populist Persuasion*, 190.

I have discussed one such manner of negotiating the limits of presidential constitutional powers: the assumption of a public leadership role. This role can, of course, be benevolent, but it cannot be "originalist." That is, insofar as the president sticks to the separation-of-powers script common to all presidential systems, "public legitimation" of a "presidential agenda" makes little sense. This is because, for the architects of legal systems, the president was never conceived as a proponent of political proposals, nor a courter of public opinion in the first place. (When Ralph Ketcham describes an early "president above parties," he means that the office was intended to show strength by resisting the sway of popular opinion.[129]) In assuming a position of public advocacy for a particular agenda, the president takes on a legislative function unforeseen by (if not contradictory to) the constitutional logic. The fact of this development may not always be dangerous, but it tends to be neglected, particularly by constitutional designers who have failed to consider the central role that public rhetoric has come to occupy in the presidential toolkit. This is why a focus combining the perspectives of law and politics is critical to understanding the presidential office and to evaluating the performance of constitutional systems in general.

Here enters the utility of populism as a rhetorical tool. To advocate for particular political programs, the president must take on *legislative* or at least *quasi-legislative* functions in formulating an agenda and defending it. The president, then, must persuade us—or at least capitalize on our forgetfulness—that, contra the separation of powers that undergirds our political system, he or she, too, has a positive legislative role to play. In the presidential-populist ticket, the latter does just this. Populism emphasizes and heightens the president-popular connection; it challenges the exclusivity or even the legitimacy of

[129] Ralph Ketcham, *Presidents Above Party: The First American Presidency, 1789-1829* (Chapel Hill: University of North Carolina, 1984).

parliaments as law-making bodies; it emphasizes instantaneous results and heightens impatience with the status quo in a way calculated to favor executive unilateralism. In all of these ways, populism is not just a rhetorical strategy, but a paradigm which renders executives agents for passing—not just enacting—law.

I have discussed three ways in which presidential populism, with its impatience with laws and its tendency to channel the unmediated popular will through the figure of the fearless leader, can be a menace to the stability of legal systems: its rejection of reason in politics; its commitment to perpetual and instantaneous popular legislation; and its emphasis on the indivisibility of popular sovereignty against constitutional balancing. When these qualities are taken to excess, a presidential-populist politics can threaten to evolve into, worse than a "shout" of the frustrated masses, a bona fide theological autocracy.

But at the same time, populism is a facet of democracy both beneficial and necessary. Populism may be true reflection of democracy in all of its chaotic exuberance and unpredictability. Populism's "irrationality," rather than a "pathological form of politics," serves a crucial function of highlighting the internal tensions in democracy between its "pragmatic" and its "redemptive" sides, neither of which can exist without the other.[130] Max Weber, keen diagnostician of modernity that he was, feared that increasing *rationalization* of both law and the bureaucratic structures of State and Capital might choke off human freedom and action. His turn, in his later writings, to a "leadership democracy" betrays just this fear, and the hope of countering it with such a unity of will and purpose as a plebiscitary politics could provide.[131] Even if it were possible to exorcize it from politics, a politics without populism would risk devolving into a "procedural dictatorship," as

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[130] Canovan, "Trust the People!," 12.

[131] David Beetham, *Max Weber and the Theory of Modern Politics* (Cambridge: Blackwell, 1985), 6-7, 11, 28-29.

Schmitt himself feared, as flat, boring—inhuman, even—as Marx's conflict-free administrative state. The populist "shout" is a necessary reminder, then, of the promise of an "exceptional" politics, when "the power of real life breaks through the crust of a mechanism that has become torpid by repetition."[132]

The populist element also helps stave off mass democracy's decline into a narrow oligarchy of political or economic elites, as the populists—sometimes rightly—fear. Populism, then, has a serious role to play as a catalyst of popular participation. As Canovan reminds us, populist movements in well-established democracies tend to *bolster* democracy by agitating for participatory devices like the initiative and referendum. Further, against the prospect of legislation by "wheeling and dealing," populism represents a ally of democracy—for what, indeed, could be less democratic than venal, horse-trading legislatures producing complex, technical, compromise-filled legislation that actually reflects the will of *no one*? Populism, with its relentless mantra of purity and transparency in politics, its anti-status quo propensity to "throw the bums out!" can actually pump new blood into tired systems. And, in truth, sometimes political "house-cleanings" are useful and necessary. The recent return of populism to American politics represented by the Tea Party, on the right, and Occupy Wall Street, on the left, may have been more characterized by visceral sentiment than policy coherence, but these two movements played important roles in turning public attention to elite impunity in the political and financial sectors. Such interventions may be wild, unpredictable, and less than well-conceived, but nonetheless, as Stephen Skowronek writes of the presidency, "there is something of enduring value to a democratic society in an office that routinely disrupts established power arrangements and

[132] Schmitt, *Political Theology,* 15.

continually opens new avenues of political activity for others."[133] Populism's anti-establishment furor, like the blood of patriots that Thomas Jefferson called for from time to time in order to refresh "the tree of liberty," can perform a crucial function in jostling and revitalizing exhausted political systems.

A further reason to stay our fears about populist streaks in democracy is that normatively, the cost to stamping them out is too high. Many tolerant societies have agreed to *some* enforceable limitations on public morality and discourse, but populists past and present have been guilty of so many sins against reason—bigotry, racism, misogyny, nativism, even teetotalism—that efforts to penalize all of them would necessarily verge on the totalitarian. Like the idealistic American Progressives, we probably expect too much if we would hold our publics to a standard of "public rationality." Or as E.E. Schattschneider insists, "Democracy was made for the people, not the people for democracy. Only a pedagogue would suppose that the people must pass some kind of examination to qualify for participation in a democracy."[134] Like Madison's comment on the dangers of faction, populism may be a "sickness" of the polity, but to get rid of it would be a cure worse than the disease itself! Certainly, if our insistence on criteria to be met for full participatory citizenship threatens to disenfranchise large swathes of society, we have traded away an imperfect democracy for an oligarchy of the "reasonable." Paradoxically, stamping out democracy's "undesirables" would mean the end of democracy.

But have we been led into a dangerous moral relativism? Is there no way to draw a line between democratic vitality and majoritarian excess, between debating and squabbling, between a "moral" politics and a "Big Brother"-like paternalism? If some critics of

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[133] Skowronek, *The Politics Presidents Make,* 15.

[134] E.E. Schattschneider, *The Semi-Sovereign People: A Realist's View of Democracy in America* (Boston: Wadsworth, 1975), 132.

modernity, notably the provocative Slavoj Zizek, can stomach a vision of politics where debate is traded for agonism, reason for mere "narrative" and "fantasy," where political "discourse" is just the trading of one irrationalism for another, many of us are disquieted by this vision.

I believe that we can impose standards on what constitutes a benign efflux of democracy and what does not, drawing a distinction between the activist president and the caudillo, or the tyrant. If it is possible to envision rethinking the separation of powers while saving democracy, alternation, party competition, and disagreement remain a *sine qua non* of liberal democracy, and their extinction is a telling augur of the point at which the tension between liberalism and democracy evolves into an imbalance and an inundation of the one by the other.

5: Presidential Policymaking Between Law and Application

> The makers of the Constitution seem to have thought of the President as what the stricter Whig theorists wished the king to be: only the legal executive, the presiding and guiding authority in the application of law and the execution of policy. His veto upon legislation was only his check on Congress—was a power of restraint, not of guidance. He was empowered to prevent bad laws, but he was not to be given an opportunity to make good ones. As a matter of fact he has become very much more. He has become the leader of his party and the guide of the nation in political purpose, and therefore in legal action.
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> -Woodrow Wilson, *Constitutional Government*, 1907

Introduction: The Legislative Presidency

In August of 2009, with negotiations for national health care reform in full swing, the United States Congress took its annual summer recess. For some legislators, the return to their home districts was less than a vacation. As conservative groups like the Tea Party mobilized vigorously against the bill, swing-state Democrats were met with angry public confrontations, organized protests, acts of vandalism, and even death threats.[135] Some flinched, threatening to withdraw their support. When Congress returned from recess in September, President Obama assembled a joint Congress, hoping to restore the flagging momentum. Obama announced his own proposal for the bill, which charted a moderate course between the left's national single-payer system and the right's employer-based coverage. "The time for bickering is over," insisted Obama, emphasizing the pressing need for reforms in the face of mounting costs and economic hardship. "I will not accept the status quo as a solution. . . . Everyone in this room knows what will happen if we do nothing. . . . I still believe we can replace acrimony with civility, and gridlock with progress."[136]

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[135] Philip Rucker, "Lawmakers concerned as health-care overhaul foes resort to violence," *The Washington Post* (March 25, 2010).

[136] Barack Obama, "Remarks by the President to a Joint Session of Congress on Health Care," *White House – Press Office* (September 9, 2009).

By November, the House had passed its own health care bill on a close a 220–215 vote, and forwarded it to the Senate for passage. The Senate returned with its own bill on December 23, but consolidation of the two proved elusive. In February, momentum stalled again in the Senate as, in a moment of bitter irony for supporters of reform, Republican Scott Brown was chosen in a special election to fill the seat of ardent health care reform supporter Ted Kennedy, who had died in August 2009. Having lost the filibuster-proof supermajority, some Democrats prepared to scale back for a less ambitious bill; others, like House Speaker Nancy Pelosi and President Obama, remained insistent on comprehensive reform. In late February, Obama laid out a "Senate-leaning" proposal to consolidate the bills, brokering a summit with leaders of both parties to force through passage of the compromise bill.

House Democrats agreed to pass the Senate bill on condition that it be amended by a subsequent bill addressing several budgetary concerns, to be passed through the reconciliation process. A last holdout was a group of "Blue Dog" pro-life Democrats led by Congressman Bart Stupak, opposed to the Senate bill because of language allowing for the possibility of federal funding for abortion. Too late for the Senate to revise the offending language, President Obama agreed to issue Executive Order 13535, pledging to bar the use of federal funds to support abortions. This concession won the support of Stupak and his group and assured passage of the bill, which passed the House by a vote of 219 to 212 on March 21, 2010, and was signed into law by President Obama on March 23, 2010.

From start to finish, President Obama played a leading role in the law's passage, setting health care reform as *the* policy priority of the administration; issuing detailed proposals as counterweights to House and Senate bills; brokering legislative compromises between legislative factions and the two houses; "going public" at crucial moments—early on to draw public and media attention to the issue, and later to forcibly *shame* Congress

into activity as gridlock loomed—thus supplying the needed momentum to ensure passage; and finally, using the tools of the administration (in this case, the executive order restating the prohibition on federal abortion funding) to shape the content of the bill. The Patient Protection and Affordable Care Act may have had a particularly fraught birth, but its trajectory offers a perfect illustration of the president's new arsenal of "everyday" legislative functions.

Incredibly, in spite of all these activities, Obama was roundly criticized for his *non-presence* in the health care debate. Things have changed since the days when the Framers called for fortifying the "weakness" of the executive against "dangerous encroachments" by Congress.[137] We are now used to presidents who boast their own "policy agenda," who "set legislative priorities," and we treat governmental inaction largely as a failure of leadership on the president's part.[138] The American president is the "motor" of our government of separated, power-sharing institutions, as Robert Dahl puts it, whereas it is Congress that "applies the brakes." What "forward movement there is to the system" the President supplies; Congress, by contrast, is "the force of inertia."[139] This has been common knowledge, in fact, for the better part of a century, although constitutional theory has failed to catch up.

This chapter explores the practices of the "legislative presidency."[140] It argues that when presidents act "legislatively"—and, increasingly, they do—they do so through one of two channels: the *inter-branch* (legislative) and the *intra-branch* (administrative). The first

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[137] Alexander Hamilton, John Jay, and James Madison, *The Federalist* (ed. Jacob E. Cooke) (Middletown: Wesleyan University Press, 1961), no. 51, 347.

[138] Richard Ellis, *The Development of the American Presidency* (New York: Routledge, 2012), 131.

[139] Robert Dahl, *Pluralist Democracy in the United States: Conflict and Consent* (Chicago: Rand McNally, 1967), 136.

[140] Stephen J. Wayne, *The Legislative Presidency* (New York: HarperCollins, 1978).

consists in attempts to "make" policy by reaching across the gap between branches to influence either the legislative agenda[141] or the outcome of legislative debates. The second denotes efforts to consolidate executive control over administration and to channel its resources into the service of a particular agenda. These two roles map onto one major fault-line of presidency scholarship: the congressional route describes the Neustadtian tradition of presidential "power as persuasion"; the second, the administrative route, corresponds to William Howell's account of executive influence as unilateral and formal.

Second, I give a functionalist account of the political dynamics governing the President's "two faces" by connecting these, respectively, to the "two regimes" of divided and unified government. Richard Pildes and Daryl Levinson tell us that the distinction between party-unified and party-divided government "rivals, and often dominates" the differentiation between branches in explaining interbranch political dynamics.[142] I agree, and I follow empirical work linking conditions of unified and divided government to the legislative and administrative approach by the President, respectively. On this account, where the President can make use of the "legislative" power to persuade, he will, and where this option is foreclosed, he will resort to the unilateral power to command. I conceive, then, of executive unilateralism as coming from a place of weakness—in short, what can be achieved by the power to persuade trumps that which can be accomplished through the power to command.

Third, I consider what these dynamics mean from the perspective of constitutional theory. At a minimum, both faces of the legislating president constitute an affront to the

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[141] Paul Light, *The President's Agenda: Domestic Policy Choice from Kennedy to Clinton* (Baltimore: John Hopkins University Press, 1999).

[142] Daryl J. Levinson and Richard H. Pildes, "Separation of Parties, Not Powers," *Harvard Law Review*, Vol. 119, No. 8 (2006): 2311-2386.

separation of powers. How can we regroup and devise a normative program of checks in light of the sorts of legislative behavior the President *does* exhibit? Contra Pildes and Levinson, who see the greater discipline and productivity of unified government as a *threat* to constitutional integrity, I argue that efficiency should be recognized as a crucial value in our system, in light of which the constitutional system is working "best" when the branches are working in sync. On this view, unilateral presidential legislation, which creates policy subject to the risks of incoherence, impermanence, and overreach, is a greater ill than the blurring of functions. The dynamics that create and are created by unilateralism also take a toll from the point of democratic legitimacy, as the growing literature on the present dysfunction of our political system attests.[143] Today, where legislative outputs win the favor of one, but not both branches, it is easy to see them as the product of self-interest or ideology, in light of which belief in the project of shared governance, on which our system depends, becomes strained.

The prescription, in this connection, would be that, contra the old separation of powers, *more* cooperation between Congress and the President in the generation of legislation and administrative policy is to be encouraged. That is, the new checks and balances is built on an ever fuller dissolution of the separation of powers. (I make one important exception, discussed in Chapter 5, and this is in the "state of emergency," whereby the fruits of cooperation can pass over into the rash, thoughtless legislating that the Framers feared.) A "coalition"-type arrangement between Congress and the President whereby administrative policy is exchanged for votes is one way to achieve this, as I explore in the companion

[143] Thomas E. Mann and Norman Ornstein, *It's Even Worse Than it Looks: How the American Constitutional System Collided with the New Politics of Extremism* (New York: Basic Books, 2012); Jack M. Balkin, "The Last Days of Disco: Why the American Political System Is Dysfunctional," *Boston University Law Review*, Vol. 94 (2014): 1159-1199; Mark A. Graber, "Belling the Partisan Cats: Preliminary Thoughts on Identifying and Mending a Dysfunctional Constitutional Order," *Boston University Law Review*, Vol. 94 (2014): 611-657.

chapter on Brazil. The idea is sure to offend traditional separation of powers theorists and defenders of "neutral competence" alike, but it is not clear that its advantages do not offset its flaws.

What would it take to bring about the coalitional legislative presidency? One virtue of the idea is that it already reflects existing practice. Some might say this is the political system working as intended; for others, this is "Madison's nightmare."[144] But the simple solution of going back to the "ways things were" is no longer available to us. Modern-day governments are expected to do a great deal more than their predecessors, a truth that runs across the political spectrum. Our government is expected to "keep things running" like a 24/7 hotline, even as we deliver it mixed messages, through periodic elections and separate powers, about *what* exactly we would like it to do.[145] Our system is prone to gridlock between branches and inaction, such as would benefit greatly from an injection of the "energy and dispatch" we sometimes see in moments of cooperation between the President and the Legislature. Accepting these periods as the "high points" of governance that they are helps us to transform a "bug" of the system into one of its paramount features.

1. The Legislative Presidency

For the majority of America's history, the executive branch played a minor role, if any, in the legislative process. But over time, this task has become an increasingly important, and time-consuming, part of the job. Today, the legislative business of a president includes giving public addresses, lobbying party leaders, stumping for fellow party

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[144] Peter M. Shane, *Madison's Nightmare: How Executive Power Threatens American Democracy* (Chicago: University of Chicago Press, 2009).

[145] Joel D. Aberbach and Mark A. Peterson, eds., *Institutions of American Democracy: The Executive Branch* (Oxford: Oxford University Press, 2005).

members, holding Cabinet and staff meetings, formulating policy, and more. Today, it is no exaggeration to claim, as one scholar of the presidency does, that legislative involvement "anchors the very definition of the 'modern' presidency."[146]

The office, thus described, would have been unrecognizable to the Framers of the American Constitution. The anti-monarchical impulse of the Philadelphia Convention is well-documented, and among state governors, the models for the national executive, most lacked a veto, were limited in term lengths and many were appointed by the legislature.[147] Even the most ardent presidentialists among the Framers, Hamilton and Adams, never considered endowing the president with proactive legislative powers. Only two clauses of the Constitution directly involve the president in the legislative process: the first is the veto, which, given Hamilton's description in *Federalist* 73 of it as a "shield to the Executive," was likely less intended to grant the president equal stature in shaping policy and more to prevent bad laws and to protect the office itself from capture. The second states that the president shall "from time to time" recommend to Congress "such measures as he shall judge necessary and expedient." This, too, is no grant of preeminent constitutional power. Most likely, there were two tightly circumscribed legislative roles envisioned for the president: first, stopping imprudent legislation, and second, occasionally proposing ideas for bills to Congress, to which the latter was under no obligation to listen.

Since 1787, there has been a dizzying expansion in the physical size of the "presidency" and in the roles the President is expected to play in policymaking. Today, the

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[146] Andrew Rudalevige, "The Executive Branch and the Legislative Process," in Aberbach and Peterson, *Executive Branch*, 419-451, 420.

[147] Gordon Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill, NC: University of North Carolina Press, 1998), 136-143. Peter M. Shane, "Boundary Disputes: Jerry Mashaw's Anti-Formalism, Constitutional Interpretation and the Unitary Presidency," in Nicholas R. Parrillo, ed., *Administrative Law from the Inside Out: Essays on Themes in the Work of Jerry Mashaw*, (Cambridge: Cambridge University Press, forthcoming).

"presidential program" is a crucial part of any presidential campaign. Congress must clear space on its agenda for a steady stream of policy proposals originating from the Executive Branch. Whole offices in the Executive Office of the President (EOP), the White House Office, and the major government agencies are dedicated to formulating policy stances and sketching up proposals for legislation, to wit, the Council of Economic Advisers, Domestic Policy Council, Office of Science and Technology Policy, Office of Urban Affairs, and numerous others. A large staff is dedicated to the task of "congressional liaison," tending to the President's ongoing relationship with Congress. More than just "executing and implementing" the law, the president now is a legislative "first mover," actively *designing* and *advocating* for legislative initiatives.

A. The "Legislating" President

With the sheer proliferation of offices has come an expansion of government reach, and consequently of the possible policymaking roles a President can take on. Obviously lacking the power to enact law, the executive has developed a cottage industry of creative tools useful for leading by *persuasion.* These can run from backroom dealing to outright preemption and other more-or-less legitimate forms of executive-legislative interfacing. An entire office, that of Legislative Affairs, is devoted to lobbying Congress for consideration of, and building legislative majorities around, presidential proposals. Loosely, speaking presidential legislative activities can be grouped under the categories of *formulation* and *advocacy.*

1. Formulation

Before the Great Depression and the programmatic achievements of the FDR administration, there was "at best a grudging acceptance that the President would be 'interested' in the doings of Congress." Today, however, "it has come to be taken for granted that he should regularly initiate and seek to win support for legislative action as part of his continuing responsibilities."[148] The New Deal represented a major turning point in the President's ability to formulate policy.

During the "early, simpler days of the Republic," Congress had jealously guarded its power to initiate and enact laws. But gradually, a branch that refused to innovate or significantly expand its personnel came to be outclassed as a policymaker, the complications of global capital, industrial relations, immigration, and economic policy exposing its shortcomings.[149] During the Great Depression, the sheer complexity of the issues and urgent need for swift action tipped the balance even further toward the executive branch and Franklin D. Roosevelt, equipped with his "Brain Trust" of advisors. Out of 90 major laws passed between 1932 and 1935, 70 per cent were "executive products," with only 30 percent created in Congress. Between 1933-1940, out of twenty-four major enactments, just two were formulated mostly by Congress.[150] A 1935 *Newsweek* report concluded, "Congress has lost most of its effective power over the content of legislation."[151]

Whereas the first American presidents were elected for good character and past services rendered to the country (to wit, William Henry Harrison's campaign slogan

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[148] Fred Greenstein, "Change and Continuity in the Modern Presidency," in Anthony King, ed., *The New American Political System* (Washington, D.C.: American Enterprise Institute Press, 1978), 45-86.

[149] Robert A. Caro, *The Years of Lyndon Johnson: Master of the Senate* (New York: Knopf, 2002), 65-68.

[150] Rudalevige, "Executive Branch," 427.

[151] Raymond Moley, "Can a Location Run Congress?" *Newsweek* (May 6, 1935), quoted in Caro, *Master*, 1073.

"Tippecanoe and Tyler too," evoking his military successes), today's presidential elections are prospective affairs, candidates seeking to distinguish themselves on the strength of particular platforms, drawn up in minute detail months, even years prior to the general election.[152] The president's program has become a fixture in governance for the simple reason that it meets the needs of governance, and of the many actors in government. Presidents see potential electoral and policy benefits in it, as well as a means to make a mark on history; for Congress, the presidential program provides a guide to the national mood and priorities and allows it to shed some of the huge burdens of fact-finding and drafting.[153]

Presidents may not be able to tell legislators *what* to think, but they are pretty effective in telling them what to *think about,* at least. The two are not unrelated, as Lyndon Johnson's congressional liaison Larry O'Brien recognized. Asked by a reporter in 1965, "How do you twist an arm?," O'Brien replied, "If you're talking about persuasion: we initiate by proposing."[154] The power to propose, the power of agenda-setting, represents a huge advantage for the president in shaping the content of ensuing laws.

One reason for the agenda-setting advantage is the path-dependent nature of collective decision-making processes. Not only is a bill more likely to be enacted once proposed by the President, but also, once enacted, it tends to endure.[155] William Howell has found that the president's position as a "first mover" is determinative in allowing the executive branch to "set the tone" legislatively, forcing Congress to overcome major collective

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[152] James W. Ceaser, *Presidential Selection: Theory and Development* (Princeton, NJ: Princeton University Press, 1982); Ralph Ketcham, *Presidents Above Party: The First American Presidency, 1789-1829* (Chapel Hill: University of North Carolina Press, 1984).

[153] Rudalevige, "Executive Branch," 420, 423-4.

[154] Quoted in Andrew Rudalevige, *Managing the President's Program: Presidential Leadership and Legislative Policy Formation* (Princeton, NJ: Princeton University Press, 2002), 113.

[155] Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis* (Princeton, NJ: Princeton University Press, 2004).

action problems in responding, which it often does tardily and ineffectively.[156] Generally, the limited information and resources, varied ideological commitments, and high membership of Congress—a "they" not an "it"—heighten its collective action problems and saddle its proceedings with inertia and immobility. While constitutional drafters like Hamilton and Madison considered this slowness a bulwark against the enactment of stupid laws, they did not foresee what would happen if the President's "speed and dispatch" were deployed in doing Congress's work for it. No wonder, then, that scholars starting with Clinton Rossiter have, with emotions ranging from admiration to anxiousness, referred to the President as the "chief legislator."[157]

Another reason for the first mover advantage in legislation is simply that presidential policy proposals take up a fair share of the congressional agenda. Out of over 8,600 bills filed *within* Congress in 2003-04, just over a thousand were ever reported from committee, with just 454 becoming law.[158] In the postwar era, presidents sent an average of 141 proposals each year to Congress, peaking in the activist New Frontier and Great Society years at nearly 300, bottoming out under Reagan, who averaged a not-so-shabby 80 proposals per year. When the President proposes, Congress normally pays attention: presidents get a least a committee hearing on nine of every ten bills they push and serious consideration of over 80 percent of their most important proposals.[159]

Cyclic mechanisms of policy development, like the drafting of the annual State of the Union address or the budget process, as well as sunset provisions writing into laws,

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[156] William G. Howell, *Power without Persuasion: The Politics of Direct Presidential Action* (Princeton, NJ: Princeton University Press, 2003).

[157] Clinton Rossiter, *The American Presidency* (New York: Harcourt, Brace and Co., 1956).

[158] Rudalevige, "Executive Branch," 428.

[159] Ibid, 426-427.

allow the president increased opportunities to dump reams of bills upon congressional desks, which means that every year, Congress will spend much of its precious time *reacting* to initiatives from the White House. The "action-forcing nature of the budget cycle," as Rudalevige describes it, illustrates one scenario in which the White House has pushed the temporal advantage, empowering itself at Congress's expense in the face of dithering and doubt. Large budget deficits, nearly constant since the early 1980s, have served to foist fiscal issues into the spotlight, and to make the OMB a "more potent player" in policy formulation.[160] Not only do cyclical processes afford opportunities to set the president's imprimatur upon legislative policy each calendar year, they also contribute to bolstered expectations that the President can, and *should*, draft policy. In 1953, a House committee chair chastised Eisenhower for tardiness in providing a presidential agenda: "Don't expect us to start from scratch on what you people want. That's not the way we do things here—*you* draft the bills, and *we* work them over."[161]

Another reason for the agenda-setting advantage can be explained by visibility. In the contemporary media age, proposing a program of national policy almost always entails defending it publicly, and the president's guaranteed news slot effectively guarantees that national—and therefore, Congressional—attention will follow. "Going public" on positive policy plans may not always produce congressional agreement, but can at a minimum, help to dictate the sorts of issues Congress will consider.[162] It is therefore a key legislative strategy for presidents, if not for securing votes, then for channeling public

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[160] Ibid, 426.

[161] Ibid, 424.

[162] George C. Edwards III, *On Deaf Ears: The Limits of the Bully Pulpit* (New Haven: Yale University Press, 2003).

sentiment to change the timing of congressional deliberations, as the 2009-10 Health Care odyssey vividly illustrated.

2. Bargaining/Brokering

From the vantage of 1787, the United States had a system of separated and distinct—if not *powers*, then at least *functions*.[163] By the 20th century, however, it was not wrong to call it a "government of separated institutions *sharing* powers," as Richard Neustadt wrote.[164] Powers were *separated* in the sense that they rested in different bodies; *shared* in the sense that these diverse actors had to find common ground on which to act. Like squabbling partners in a three-legged race, these two branches have often struggled to make the partnership work. Early in the nation's history, the boundaries were vastly less porous. A decorous Washington, for example, reportedly refused to solicit Congress's advice on policy dilemmas, lest he "overstep" the boundaries between branches. Today, however, presidents often find their historical legacies defined in terms of the major legislation they are able to stitch together out of loose congressional majorities. Take the 1964 Civil Rights Act under Lyndon Johnson, the Reagan budget of 1981, the deficit-reducing budgets of President Bush and Clinton in 1991 and 1993, and the 2010 Affordable Care Act, "Obamacare," testaments all to great creativity, diplomacy, and entrepreneurship in dealing with Congress.

To act is to legislate, and, for the President, who lacks actual legislative power, to pass legislation is to bargain. The President becomes one negotiator more; presidential power, as Neustadt recognized, comes to stand for the art of *persuasion*. Presidents may

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[163] M. J. C. Vile, *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1967).

[164] Richard Neustadt, *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan* (New York: Free Press, 1991), 29.

engage in simple exchange or "horse trading," i.e. trading benefits, whether parks or nominations, for votes. They can define alternatives in order to steer majorities toward their preferred outcome. They may spotlight issues that will resonate with the public, often to force Congress to take otherwise unpleasant action. They can use the nomination power strategically, to select individuals loyal to or symbolic of a particular program—for example, a "tough" SEC Chairman, to signal that financial regulation is a priority. They can "go public" to draw public raise both support for proposals and the administration generally. And they may wield the veto in order to define the content of proposals.

Scholars like Kernell and Edwards have recently argued that the "rhetorical presidency" has spelled the demise of the Neustadtian bargaining model as the personalization of campaigns, decline of party politics, and strengthening of the "electoral connection" between representative and constituency loosen the bonds between President and Congress. Together, these account depict a Congress of unruly grandstanders bucking party trends to pander to the "folks back home," party elites no longer able to "deliver" ready-made legislative coalitions, and a President increasingly distanced from Congress, "going public" in often-futile attempts to turn public opinion against the legislative branch. Yet reports of bargaining's death have been greatly exaggerated. Empirical evidence suggests that the factors accounting for the condition of "individualized pluralism"[165] may be waning: partisan identification among voters is back up from a low in the 1970s,[166] the decline of the

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[165] A term coined by Sam Kernell to refer to the increased atomization of Congress, in which party discipline declines, regionalism prevails, and the President is as a result increasingly unable to negotiate legislative coalitions. He contrasts this state of affairs with "institutionalized pluralism," which, he suggests, prevailed through the mid-to-late twentieth century, at the time Neustadt was writing.

[166] Matthew Dickinson, "The President and Congress," in Michael Nelson (ed.) *The Presidency and the Political System* (9th ed.) (Washington, D.C: Congressional Quarterly Press, 2010), 401-34.

committee system and centralization of party leadership has been in decline since the 1970s,[167] and polarization between the two parties stands at an all-time high.[168] No doubt that, so to speak, "what the Constitution set apart, the parties [cannot] completely put together,[169]" but to deny the unifying force of responsible party government in America is a stretch.

The tools of presidential bargaining are a mixed bag, and there is no simple recipe for how and when to use them. Nonetheless the telltale sign of institutional build-up in the White House suggests that every president, like it or not, is now resigned to the reality of, and equipped to perform the task of, brokering agreements with Congress. "Congressional liaison" was originally a subsidiary task, performed through Bureau of the Budget or the White House counsel's office. In 1953, Eisenhower created a specialized congressional relations office in the White House to formalize those dealings. Today, the Legislative Affairs Office has about a dozen members assigned to the House and Senate. Press aides take to the airwaves to shape the agenda. "Statements of administration policy" (SAPs) are issued by the OMB to advise legislators how the White House wants them to vote on a given measure. Departments have their own legislative liaison offices. Presidents have also utilized ongoing or temporary centralized staff groups to manage legislative affairs, like Reagan's Legislative Strategy Group, or Clinton's "Intensive Care Unit" lobbying for the health care reform package.[170]

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[167] Julian E. Zelizer, *On Capitol Hill: The Struggle to Reform Congress and Its Consequences, 1948-2000* (Cambridge: Cambridge University Press, 2004), 256.

[168] Adam Bonica, Nolan McCarty, Keith T. Poole, and Howard Rosenthal, "Congressional Polarization and its Connection to Income Inequality," in James A. Thurber and Antoine Yoshinaka, eds., *American Gridlock: The Sources, Character, and Impact of Congressional Polarization* (New York: Cambridge University Press, 2015), 357-377.

[169] Dickinson, "President and Congress," 422.

[170] Rudalevige, "Executive Branch," 437.

Bargaining is certainly an art, not a science. Of the youthful Kennedy administration's amateurish attempts at congressional liaison, Vice-President Lyndon Johnson complained, "[you] can't start yelling 'frog' at everybody and expect 'em to jump." Whether a president will be *successful* at persuading his or her colleagues down Pennsylvania Avenue to adopt and put forth his agenda depends on a number of factors: party discipline and ties, political climate, personal negotiating skill, interest group activity, public opinion, even "political capital."[171] Moreover, with no constitutional or statutory authority for presidential bargaining, there is no guarantee that Congress will listen. In fact, the President fails as often as he succeeds.[172] Even the erstwhile "Master of the Senate," President Johnson, had so precipitously depleted his political capital that by 1969, as an aide complained, "he couldn't get [a resolution honoring] Mother's Day through" Congress.[173]

Bargaining with Congress may pay off handsomely for a strong President with a compliant Congress, but the President has little control over the Congress he is dealt, so to speak. When persuasion is not an option, what is the President to do? He or she can resign him or herself to inaction, or instead attempt to "go it alone," and make policy from *within* the White House. This is the second facet of the legislative president, the "managerial" side. To it I now turn.

B. The "Administrating" President

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[171] As far as timing goes, pushing major legislation early in a term is usually better than latter: "move it or lose it," one scholar advises. Expectations for busied first "hundred days", but, given the substantive ad logistical difficulties of complicated policymaking, legislative sessions go quickly and political capital depletes as honeymoon ends. Light, *The President's Agenda*, 218.

[172] Jon R. Bond and Richard Fleisher, *The President in the Legislative Arena* (Chicago: The University of Chicago Press, 1990), 1.

[173] Quoted in Rudalevige, "Executive Branch," 433.

When Neustadtian persuasion hits a wall, what is a president to do? As "administrative" or "managerial"[174] presidents since Theodore Roosevelt have done: double down on unilateral policymaking wherever possible. Over the years, unilateral executive action has been on the rise, broadening the range and number of issues with which the Executive Branch concerns itself: from territorial expansion to initiating overseas hostilities, from economic regulation to environmental protection, and from civil rights to reproductive policy, virtually no significant policy area or level of government has been left untouched by these presidential "power tools."[175]

The "Presidency" in the singular is, in reality, a huge corporation encompassing over a hundred different offices. The executive branch initially consisted of the president, a cabinet of four men—the Secretaries of the State, Treasury, and War, and the Attorney General—and a private secretary or two (whom the president had to pay for out of pocket). Soon, executives soon started to feel weighed down by the "almost insupportable burden," as Washington put it, of dealing with a stream of constant office-seekers, mountains of correspondence, budget balancing, legislative clerical duties, and the like.[176] The number of federal employees ballooned. When James Monroe took office in 1817 there were only about 4,500 federal workers in the executive branch, three-fourths of whom worked in the post office. At the time of Lincoln's inauguration that number was close to 37,500.[177] Industrialization's complex consequences brought about new policy domains to

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[174] Peri E. Arnold, *Making the Managerial Presidency: Comprehensive. Reorganization. Planning* (Princeton: Princeton University Press, 1986); James Pfiffner ed., *The Managerial Presidency 2nd edition* (College Station, TX: Texas A&M University Press, 1999).

[175] Phillip J. Cooper, *By Order of the President: The Use and Abuse of Executive Direct Actions* (Lawrence, KS: University Press of Kansas, 2002).

[176] Ellis, *The Development of the American Presidency*, 251.

[177] Ibid, 270.

deal with, and by the inauguration of Herbert Hoover, the number of executive branch employees reached nearly 200,000 in addition to the postal service and defense. By 1936, the end of Roosevelt's first term, the figure had grown to 420,000,[178] while today, that number stands at over 2.1 million.[179] Running the Executive Branch is a full-time affair in which thousands of individuals take part, and which the president is endowed with increasingly varied and specialized tools to oversee. Once in office, the machinery of administration functions as a constant generator of policy.

Such growth has meant not just staff increases, but, more controversially and more central to this chapter, the repurposing of existing presidential tools to expand their reach into areas of "legislative" activity. Such tools include proclamations, signing statements, and administrative orders (delegations of executive authority, determinations, findings, letters, memoranda, and executive orders).[180] One study finds twenty-nine different varieties of such "unilateral directives."[181] While these tools were of little external consequence in the early Republic, today, with hundreds of offices and millions of staff members, it is obvious that the power to effect changes "internal" to the administration has unexpected "external" consequences. We might say that, in contrast to the "legislating" president, the managerial president exercises power, first, by shaping already-made laws after they are

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[178] Federal government employees, by government branch and location relative to the capital: 1816-1992 (Table Ea894-903), in *Historical Statistics of the United States,* Millennial Edition Online. Accessed: http://hsus.cambridge.org/HSUSWeb/toc/showTable.do?id=Ea827-985

[179] Total Executive Branch Civilian Full-Time Equivalent (FTE) Employees, 1981–2013 (estimated) (Table 17.2), Office of Management and Budget Historical Tables. Accessed: http://www.whitehouse.gov/omb/budget/Historicals

[180] For a thorough overview of the tools of presidential magisterial power, see Harold C. Relyea, "Presidential Directives: Background and Overview," *CRS Report for Congress,* Congressional Research Service, (Nov. 26, 2008). Accessed: http://www.fas.org/sgp/crs/misc/98-611.pdf.

[181] Graham G. Dodds, *Take Up Your Pen: Unilateral Presidential Directives in American Politics* (Philadelphia: University of Pennsylvania Press, 2013).

passed, and secondly, through the pursuit, outside Congressional channels, of a policy agenda of the White House's own making.

1. "After the Fact" Application

Does the President's duty to "take care that the laws be faithfully executed," and to "preserve, protect, and defend the Constitution" necessarily exclude a bit of creative license? Defenders of Congress from James Madison to Louis Fisher today have argued that, because statutes embody the congressional will, "creative" interpretations of enacted laws flouts Congress's original intent and, therefore the Constitution. Others stoutly defend the President's license to use his or her discretion on how to carry these out. At any rate, it is clear that the interactions between the President and congress do not cease once a bill is signed into law, and that Presidents possess, and have broadly deployed, the power to shape laws after they are passed.

Most of the time, the Executive Branch merely puts into motion actions specified in law. But what does this mean? Often, execution requires determining manageable standards for implementation, standards which often are not found in the text of the law itself. For example, the No Child Left Behind Act, passed in 2002, required public schools to administer a yearly statewide standardized test in order to meet performance criteria and secure continued receipt of federal funding. But while states were made responsible for determining what constituted "Adequate Yearly [Student] Performance" and what teachers were "highly qualified," it was not until the Department of Education had issued rules governing what kind of tests were required and how state standards for measuring pupil proficiency could be defined that states could move ahead with implementation. Perhaps it would have been impossible for Congress to have enumerated all of the minutiae of education policy. Yet vagueness on matters of intent, scope, or standards are not uncommon in

legislation, and in such cases, executive officials have wide berth to move policy in directions lawmakers did not contemplate.

One tool for doing so is the rule-making process. The process is crucial, for the substantive policies that implement a statute are largely determined by the administrative regulations issued pursuant to that law. A President cannot force an agency to defy a constitutional statute, but can influence the exercise of agency discretion in enacting policy. Thus, President Nixon's decision in 1970 to rechristen the old Bureau of the Budget the Office of Management and Budget (OMB) was not a change in name only. After the change, proposed rules by competing agencies had to be passed before OMB in draft form, while interagency disputes over rule substance or effects would be settled with OMB guidance before publication. Reforms centralized control over goings-on in the bureaucracy, thereby allowing Nixon further ammunition to continue his assault on governmental waste and mismanagement, and setting the stage for the skirmish between Nixon and his Congress over the impoundment question, as Nixon steadfastly refused to spend money allotted by Congress for use in environmental programs the President opposed. The retaliatory Congressional Budget and Impoundment Control Act of 1974 followed in response to Nixon's perceived abuse of the impoundment power. The Supreme Court case, *Train v. City of New York* (1975), further clipped the President's wings. Nonetheless, a confrontational precedent had been set of "hunkering down" in the Executive and challenging Congress after the fact.

After Nixon, Presidents have held onto centralized presidential review of rulemaking under the OMB, with supervisory power especially located in the Office of Information and Regulatory Affairs (OIRA). Since Nixon's reforms, the OMB has had the highest percentage of political appointees of any agency. Reagan's Executive Order 12,291 (1981) stipulated that agencies must do cost-benefit analysis for all rules that they are

considering to promulgate, and that OMB is authorized to review agency cost-benefit analysis, a power that the anti-regulatory Reagan administration used to slow agency action.[182] Presidential review and OIRA cost-benefit analysis has continued unabated under the Clinton (EO 12866, Clinton Order) and Obama administrations, as well, although what may count as a cost or benefit has expanded in a pro-regulatory direction.

Another tool is the signing statement. Signing statements were once innocuous tools to explain the President's reasons for signing a bill into law and to "promote public awareness and discourse."[183] More recently, however, they have been used to assert a presidential prerogative to ignore or only partially enforce a law that a President dislikes. Some observers have found this particularly unsettling. In 2006, Charlie Savage noted that President George W. Bush had "quietly claimed the authority to disobey more than 750 laws enacted since he took office, asserting that he has the power to set aside any statute passed by Congress when it conflicts with his interpretation of the Constitution."[184] One Bush signing statement set aside requirements that the Department of Homeland Security forward to Congress and its Government Accountability Office (GAO) certain information withheld from the public. That same year, an ABA Blue Ribbon Task Force concluded: "Presidential signing statements that assert President Bush's authority to disregard or decline to enforce laws adopted by Congress undermine the rule of law and our

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[182] The legality of these OMB practices have never been decided upon by a court, at any level. *Public Citizen Health Research Group v. Tyson*, 796 F.2d 1479 (D.C.Cir.1986)) avoided the question of whether OIRA's interference was lawful. *Environmental Defense Fund v. Thomas*, 627 F. Supp. 566 (D.D.C. 1986) was one of the few cases to decide any issues about OMB review. The Reagan OLC issued a memo arguing that their powers were valid under either Jackson's *Youngstown* category 1 or 2. "Proposed Executive Order Entitled 'Federal Regulation'" *Office of Legal Counsel* (February 13, 1981).

[183] Neil Kinkopf, "Signing Statements and the President's Authority to Refuse to Enforce the Law 2," *ACS Law* (June 15, 2006.

[184] Charlie Savage, "Bush Challenges Hundreds of Laws; President Cites Powers of His Office," *Boston Globe* (Apr. 30, 2006), at A1.

constitutional system of separation of powers."[185] Moreover, whereas the partial veto was declared unconstitutional by the Supreme Court,[186] signing statements have escaped such scrutiny, though they serve a similar—and to some, constitutionally dubious—function, allowing Presidents to disregard *parts* of laws that they dislike. Scholarship since has taken a more measured approach to the signing statement, yet the question of the legal force such "guidelines" should have has not been resolved.

Less prominent tools such as guidelines, memoranda, and proclamations have typically been used for "symbolic" functions, such as to declare lands national parks. But there are eyebrow-raising exceptions. For example, President Obama unrolled, via memorandum, two "deferred action" programs, Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of American (DAPA), that would exempt young children of undocumented immigrants as well as parents of young children born in the United States from deportation, programs potentially affecting as many as five million people.[187]

2. Preemptive Policy-Making

Administrative tools have also proved useful to presidents in a more proactive sense, allowing them to make good—to the extent legally possible—on policy wishlists drawn up as candidates, but which proved difficult to obtain in practice. Implementing policy through administrative action has several advantages over requesting Congress pass

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[185] The report claimed that in cases where the president has constitutional objections to a bill, the proper action is either to veto it (Constitution, Article I, section 7) or to swallow his doubts, sign into law, and "faithfully execute" it (Constitution, Article II, Section 3. ABA Blue Ribbon Task Force Report on Signing Statements, (Aug. 8, 2006) *American Bar Association.*

[186] *Clinton v. City of New York,* 524 U.S. 417 (1998).

[187] Michael D. Shear, "Obama, Daring Congress, Acts to Overhaul Immigration." *The New York Times* (Nov. 20, 2014).

a specific law: it is often faster, sidestepping Congress's byzantine committee system, blustery debates and long-winded filibusters, and frustrating tendency toward partisan obstructionism, as well as the time-consuming process of bargaining and horse-trading. It is usually less politically risky—"discussion of the Code of Federal Regulations puts normal people to sleep—indeed, this is part of its advantage as a quiet vehicle for policy redirection."[188] And, best of all, as it depends on legal tools already available to the President, it requires no persuasive skill or making of concessions.

Executive orders, proclamations, national security directives and memoranda are just *some* of the presidential instruments that can be used to further a policy agenda. Gaining direct influence over the rule-making process and internal management is a crucial—perhaps *the* crucial tool for disseminating a president's policy. To wit, most innovative bureaucratic managers in the White House have started out by redesigning the lines of accountability within the administrative state: Teddy Roosevelt attempted to eliminate firing protections for civil servants. FDR moved the Bureau of the Budget (BOB) to the Executive Office of the President (EOP), where it could be kept under closer watch. Nixon brought the old BOB (rechristened the Office of Management and Budget, or OMB) into even closer confidence, stacking it with political allies who would carry out the risky strategy of impounding congressionally allocated funds. Reagan's central clearance process required all agencies to report the costs and benefits of proposed regulations to OMB and required them to choose the alternative that imposed the "least net cost to society." By centralizing and providing clear standards for the sort of rules that the bureaucracy could generate, Reagan equipped himself with a crucial tool for not just reining in an "expensive,

[188] Rudalevige, "The Executive Branch," 442.

unrestrained bureaucracy," as he saw it, but also for imposing his preferences upon the Executive branch.

William J. Clinton offers a recent example of a president making use of administrative tools to their fullest capacity. Although rarely described as "imperial" in his use of executive power, in his two terms Clinton contributed greatly to expanding the reach of administrative mechanisms. Within a week of taking office, he had issued presidential memoranda implementing the so-called "gays in the military" policy, suspending the Bush administration's abortion gag rule and renewing aid to NGOs providing birth control counseling, eliminating the ban on abortions performed in military hospitals, and directing the FDA to allow importation of the "abortion pill." On environmental policy, he set aside by proclamation nearly two million acres of land in Utah as a national monument and pushed through several controversial executive orders granting the EPA "interim guidance" over industrial permitting decisions by state and local governments.[189] In his final month and a half, he "hustled through" a series of executive actions that lifted ethics requirements on administrative officials, prohibited the importation of diamonds from Sierra Leone, created a 120,000-square mile ecosystem preserve off the Hawaiian coast, and imposed several last-minute regulations on lower limits on arsenic levels in drinking water and ergonomics rules in offices.[190] National security directives have long been used to shape American foreign policy in ways rarely reviewed by the legislative branch. Clinton used over seventy-five such directives, or PDDs (Presidential Decision Directives) as they were called in his administration, to extend a moratorium on nuclear testing, crack down on alien

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[189] Cooper, *By Order of the President*, 128.

[190] Kenneth R. Mayer, *With the Stroke of a Pen: Executive Orders and Presidential Power* (Princeton, NJ: Princeton University Press, 2001), xi.

smuggling, specify US foreign policy in Latin America and the Caribbean, outline measures for ocean conservation policy, among others.

And while his policy priorities departed sharply from those of his immediate predecessors, he apparently "found the White House regulatory strategy of his predecessors too good to pass up."[191] Putting his own spin on Reagan's heavily centralized control of bureaucracy, Clinton issued a number of key unilateral devices early on that made all new OMB-issued regulation pass over the desk of a personal Clinton appointee, centralized economic policymaking in a council consisting entirely of Clinton appointees, and "stream-line[d]" the regulatory process by directly connecting agency and department heads with the political apparatus in the White House.[192] As James Blumstein, an OMB official from the George H.W. Bush administration, put it, "The Clinton administration not only accepted, but also extended the Unitarian premises of the Reagan and Bush administrations.[193] Argues Elena Kagan (at the time, Clinton's Deputy Director of the Domestic Policy Council), "Clinton came to view presidential administration as perhaps the single most critical—in part because [it was] the single most available—vehicle to achieve his domestic policy goals."[194]

The following two presidencies have certainly followed suit. The second Bush administration is now notorious for its "wartime" overreach on civil liberties, but, not unrelatedly, it is also associated, if not wholly accurately, with the administrative theory of the

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[191] Christopher S. Kelley, "The Unitary Executive and the Clinton Administration," in Ryan J. Barilleaux and Christopher S. Kelley, eds., *The Unitary Executive and the Modern Presidency* (College Station, TX: Texas A&M University Press, 2010), 111.

[192] Ibid, 111-2.

[193] Ibid, 112.

[194] Elena Kagan, "Presidential Administration," *Harvard Law Review*, Vol. 114, No. 8 (2001), 2290-2385.

"unitary executive," asserting the President's total control over the executive branch.[195] Bush issued over 171 signing statements over two terms that challenged over 1,168, nearly double the 600 challenges issued by every other president before Bush *combined*.[196] Presidential memoranda in the Bush administration also codified some of the president's most controversial policy decisions, including the initiative to expand the social services provision by faith-based organizations, and famously, the Bush OLC's (Office of Legal Counsel) "torture memos" justifying the torture of captured terrorist suspects in defiance of the Geneva Convention. Obama has also used unilateral mechanisms to achieve similarly controversial ends, including the "white paper" condoning the killing of American civilians believed to be "senior operational leaders" of al-Qaida or an "associated force," his "We Can't Wait" initiative, and the aforementioned deferred action programs, DACA and DAPA.

2. The "Two Faces" of the Legislative President under Divided and Unified Government

"Finding an American who does not think our politics are dysfunctional," wrote Thomas Mann and Norm Ornstein in 2012, "is much harder these days than finding Waldo."[197] Around that time and since, commentators have complained of our intractable "vetocracy,"[198] fretted that our "best days are behind us,"[199] warned that the "ero[sion in]

[195] Christopher S. Kelley, "Introduction: What is the Unitary Executive?" in Kelley and Barrileaux, *Unitary Executive*, 1.

[196] Ibid, 7.

[197] Thomas E. Mann and Norman Ornstein, "Five Delusions About Our Broken Politics," *Brookings Institution* (June 13, 2012).

[198] Thomas L. Friedman, "Down With Everything," *The New York Times* (April 21, 2012).

[199] Fareed Zakaria, "Are America's Best Days Behind Us?," *Time* (March 3, 2011).

the public confidence in the ability of our representative institutions to govern effectively."[200] The term "dysfunction" can have a host of meanings. But widely, commentators agree that policy inaction, and the lack of "common interest" unifying the parties are the main markers in the present context. Divided government, once considered no great challenge to good government,[201] is now more than ever a cause of gridlock.[202]

Richard Pildes and Daryl Levinson argue that the distinction between party-unified and party-divided government "rivals in significance, and often dominates" the differentiation between branches in explaining interbranch political dynamics. Although Madison's view of "rivalrous, self-interested branches" is still taken literally as a guide to interbranch relations, it has been made "clearly anachronistic" by the rise of political parties, which "diminished the incentives of Congress to monitor and check the President."[203] One of the few places in constitutional law where parties do play a role, claim Pildes and Levinson, is in the celebrated concurrence of Justice Jackson in the *Youngstown* case. Wrote Justice Jackson:

> [The] rise of the party system has made a significant extraconstitutional supplement to real executive power. No appraisal of his necessities is realistic which overlooks that he heads a political system as well as a legal system. Party loyalties and interests, sometimes more binding than law, extend his effective control into

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[200] Michael J. Barber and Nolan McCarty, "Causes and Consequences of Polarization," in Nathaniel Persily, ed., *Solutions to Political Polarization in America* (Cambridge: Cambridge University Press, 2015), 15-58.

[201] David R. Mayhew, *Divided We Govern: Party Control, Lawmaking, and Investigations, 1946-1990* (New Haven, CT: Yale University Press, 1991).

[202] Updating his research a decade later, Mayhew found that lawmaking has become more partisan than in any period since World War II, with virtually all major legislation coming during periods of unified party control and passing on narrow, party-line votes. *Divided We Govern: Party Control, Lawmaking, and Investigations, 1946-2002* (2nd. ed.) (New Haven, CT: Yale University Press, 2005). See also Sarah H. Binder, *Stalemate: Causes and Consequences of Legislative Gridlock* (Washington, DC: Brookings Institution Press, 2003); George C. Edwards III, et al, "The Legislative Impact of Divided Government," *American Journal of Political Science*, Vol. 41 (May 1997): 545-563.

[203] Pildes and Levinson, "Separation of Parties,", 2314-2315.

> branches of government other than his own and he often may win, as a political leader, what he cannot command under the Constitution.[204]

Party competition, the authors urge, must be considered as a main ingredient in a "realistic" assessment of the President's powers, and a driver of the institutional behavior that separation of powers law aims to regulate. Competition between the legislative and executive branches will vary depending on whether the House, Senate, and presidency are divided or unified by political party. As Pildes and Levinson argue, these dynamics shift from competitive when government is divided to cooperative when it is unified. In periods of unified government, high levels of interbranch cooperation and legislative productivity can be expected. Under divided government in which parties and polarized, policy agreement will be more difficult, and interbranch "confrontation, indecision and deadlock" more likely.[205] As political competition in government tends to track party lines more than branch ones, Pildes and Levinson conclude that "the United States has not one system of separation of powers but (at least) two."[206]

What are the consequences of these dual regimes on executive behavior? We might expect that where parties are cohesive and polarized, as today, divided government will displace policymaking from the legislative to the administrative process, although both the sharp, secular increase in the use of unilateral directives over the years and the diverse meanings that unilateral directives convey (signing statements, for example, more typically register a President's disagreement with legislative outputs, while executive orders may serve regulatory ends, or simply "hortatory" or "symbolic" purposes) make it difficult to isolate this effect. And certain accounts emphasize that use of unilateral directives is

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[204] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), quoted in ibid, 4.

[205] Ibid, 26-7, quoting James L. Sundquist, *Constitutional Reform and Effective Government* (rev. ed. 1992), 96–97.

[206] Ibid, 4-5.

consistent, even most fully explored, during periods of unified government.[207] But proof that under unified government, both the tools of "persuasion" and of "command" are used is not to say that under divided government, the President is not more likely to resort to the latter. For example, one study concludes that presidents use executive orders both to *support* legislation passed by their party and to *preempt* legislation that is on their policy agenda.[208] And evidence suggests that presidents use signing statements[209] and executive orders of a policymaking nature[210] to circumvent a difficult Congress. Elena Kagan's historical account of "presidential administration" emphasizes that, under President Reagan and Clinton, assertions of greater presidential policy control over the regulatory activity of executive branch agencies were motivated in large part by divided government. Clinton in particular turned to unilateral action against a cohesive and hostile Republican majority in Congress that prevented him from pursuing his policy agenda through legislation.[211] President Obama, saddled with a Congress bent on his undoing, has, under the slogan "We Can't Wait," used executive directives to make policy on everything from student loan

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[207] Howell, *Power Without Persuasion;* Terry M. Moe and William Howell, "Unilateral Action and Presidential Power: A Theory," *Presidential Studies Quarterly*, Vol. 29, No. 4 (1999): 850-873

[208] Michelle Belco and Brandon Rottinghaus, "In Lieu of Legislation: Executive Unilateral Preemption or Support during the Legislative Process." *Political Research Quarterly*, Vol. 67, No. 2, 413-425 (2014).

[209] Christopher S. Kelley and Bryan W. Marshall, "The Last Word: Presidential Power and the Role of Signing Statements," *Presidential Studies Quarterly*, Vol. 38 (2008): 248–267; Neal Devins, "Signing Statements and Divided Government," *William and Mary Bill of Rights Journal*, Vol. 16 (2007): 63-79.

[210] Kenneth R. Mayer, "Executive Orders and Presidential Power," *The Journal of Politics*, Vol. 61, No. (1999): 445-466; Christopher J. Deering and Forrest Maltzman, "The Politics of Executive Orders: Legislative Constraints on Presidential Power," *Political Research Quarterly,* Vol. 52, No. 4 (December 1999): 767-783; Jeffrey A. Fine and Adam L. Warber "Circumventing Adversity: Executive Orders and Divided Government," *Presidential Studies Quarterly*, Vol. 42, No. 2 (2012): 256–274 (finding that "symbolic" and "routine" executive orders are more prevalent during periods of unified government, whereas major policy directive occur more frequently during periods of divided government).

[211] Elena Kagan, "Presidential Administration," *Harvard Law Review*, Vol. 114 (2001): 2245-2385, 2348-50.

reductions to solar energy projects to immigration.[212] Moreover, studies of the Latin American context bear out this trend, although with the important caveat that a good many proactive lawmaking powers already lie with the President.[213]

It seems unilateral powers are best understood as a supplement to persuasive, coalition-building power, or a substitute where it fails; that is, where the President *can* make use of the power to persuade the legislature, he will do so. Statute-making is a preferred route of passing presidential policy, for the reasons that statutes are more institutionalized because legislation is hard to pass and hard to overturn.[214] Executive directives are not only more limited in scope, but also, when used to preempt congressional will, on particular weak political and legal ground.[215] The Supreme Court's decision in *FDA v. Brown & Williamson Tobacco Corp.* (2000) seemed to confirm this principle. In response to a directive by President Clinton, the FDA attempted to regulate cigarettes as a "drug" or "device" under the Federal Food, Drug, and Cosmetic Act of 1938. The move plausibly fell within the original text of the Act, but it clearly conflicted with the preferences of the

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[212] Office of the Press Secretary, "We Can't Wait: Obama Administration Announces Seven Major Renewable Energy Infrastructure Projects that Would Power 1.5 million Homes to be Expedited," The White House (August 7, 2012); Arne Duncan and Melody Barnes, "We Can't Wait to Help America's Graduates," Blog – The White House (October 26, 2011); Barack Obama, "Remarks by the President in Address to the Nation on Immigration," The White House – Immigration Action (Nov. 20, 2014).

[213] Gary W. Cox and Scott Morgenstern. "Latin America's Reactive Assemblies and Proactive Presidents," *Comparative Politics*, Vol 33, No. 2 (2001): 171–189; Carlos Pereira, Power Timothy and Lucio Rennó, "Under What Conditions Do Presidents Resort to Decree Power?" Theory and Evidence from the Brazilian Case," *Journal of Politics*, Vol. 67 (2005): 178–200.

[214] Executive orders are rarely overturned—of roughly 4,000 executive orders issued between 1942 and 1996, only 86 were challenged in court, and presidents won in 86 percent of those cases (Terry M. Moe and William Howell, "Unilateral Action and Presidential Power: A Theory," *Presidential Studies Quarterly*, Vol. 29, No. 4 (1999): 850-873)—yet there is evidence that Congress is more likely to revisit and amend legislation to which signing statements have been attached. Ian Ostrander and Joel Sievert, "The Logic of Presidential Signing Statements," *Political Research Quarterly,* Vol. 66, No. 1(March 2013): 141-153.

[215] Deering and Maltzman, "The Politics of Executive Orders."

Republican majority in Congress. The Court, in a contested 5-4 party line decision, refused to grant the FDA ordinary *Chevron* deference on the grounds that in "extraordinary cases" there could be "reason to hesitate before concluding that Congress has intended such an implicit delegation [of regulatory authority]."[216] The Court failed to state what made the case "extraordinary," but the fact that a President had commanded an agency to take action that an opposite-party Congress had *not* authorized was surely material.

The Court, however implicitly, seems to give its imprimatur to Pildes and Levinson's theory of the "party regime," we might say, of checking and balancing—a rationale, it should be pointed out, wholly unrelated to the separation of powers. Implicitly at work here is a theory that less deference is owed to executive action taken against the wishes of the existing Congress (begging the question, "who" is the Congress that speaks through statute?[217]). This suggests, at the least, that interbranch cooperation is an important constitutive element to what we understand as "legitimate" law and policy. It is this intuition that we build on in the next section, in connection with the separation of powers.

3. Constitutionalizing the Legislative Presidency by Politicization

I have now engaged with the mismatch between law and presidentialism itself at the heart of separation-of-powers theory. The separation of powers of Kant, Locke, Montesquieu was itself the bulwark of the rule of law, by denying the executive power the sovereign power of law-giving. The Framers recognized that individual motives and ambitions

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[216] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), 159.

[217] As Justice Breyer wrote in dissent, "That Congress would grant the FDA such broad jurisdictional authority should surprise no one. In 1938, the President and much of Congress believed that federal administrative agencies needed broad authority and would exercise that authority wisely–a view embodied in much Second New Deal legislation." Ibid (BREYER, J., dissenting), 165.

could scuttle the whole scheme. Improvising on the classical foundations, they fortified checks and balances, which, although somewhat blurring the boundaries between separate powers, would contribute to regime survival by ensuring that the "interest of the man" would be "connected with the constitutional rights of the place." They were right about the importance of motives in shaping constitutional form, but they guessed wrong as to what those motives would be. Today, with the President refusing to play second fiddle, and the People quite content with this new role, the separation of powers works against the rule of law, as form starts to fight function. The formal weakness of the executive's constitutional powers over legislation spurs the President to attempt to acquire more control over outcomes, in ways that do violence to the original design. The separation between law and execution (and between form and function) breaks down, as institutional practice takes on one of two observable patterns. The "legislating president" tugs the branches together into a more cooperative arrangement, like a parliamentary system. Here, presidential power most closely resembles Richard Neustadt's "power as persuasion." Alternatively, the "managerial president," appearing when relations between President and Congress are poor, although not exclusively so, makes greater use of post-legislating tools of command, as William Howell detailed.

Ultimately, both paradigms defy separation of powers theory by exposing how constitutional arrangements "above politics" in theory are in practice subject to political forces like party politics. Indeed, these patterns make no sense in a constitutional system in which ambition is made to counteract ambition, except in this light. Politics seeps into legal structures at the cracks, tingeing supra-political constitutional law and process with a dark irony—the fiction of the judiciary's being "above politics" is belied, for example, by the desperate lengths both partisan camps will go to secure the appointment of friends in

high places.[218] "Neutral" legal language becomes unable to capture the political reality we observe. This is less of a problem, say, in a monastic constitutional order like that of the British, where in the absence of a written constitution, political and constitutional changes play out at the same level. But in a dualist system, such as the American one, a politicized legal order seems to be "at war with" its own immobile constitutional system.[219] If, to use Jon Elster and Stephen Holmes' metaphor, writing a constitution is an act by which a people binds itself, then the resulting document should be binding on political activity but not so tight and rigid that it constrains activity. The American Constitution is starting to look a little like what Karl Loewenstein called a "nominal constitution" and likened to a "suit still hanging in the closet," too baggy to be worn, unless one day the "the nation grows into it."[220]

There might be no reason to talk about the theoretical problems of the legislative presidency if they stayed quietly in the dusty corners of the theory world, but the truth is, they pop up in very uncomfortable ways. The politicization of constitutional structure has transformed the appointment power, for instance, into a site of squabbling, double-talk and obstruction.[221] In 2012, President Obama's use of the recess appointment to deal with a looming "vacancy crisis" in judicial posts[222] prompted an arms race with the recalcitrant

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[218] Witness, of course, the standoff between President Obama and the Senate concerning a replacement for the late Justice Scalia.

[219] Bruce Ackerman, "The Holmes Lectures: The Living Constitution," *Harvard Law Review*, Vol. 120, No. 7 (2007): 1737-1812.

[220] "Der Anzug hängt zur Zeit noch im Schrank; er soll aber getragen werden, wenn die Figur der Nation in ihn hineingewachsen ist." Karl Loewenstein and Rüdiger Boerner, *Verfassungslehre* (Tübingen: Mohr Siebeck, 2000), 153.

[221] Stephen L. Carter, *The Confirmation Mess: Cleaning Up the Federal Appointments Process* (New York: Basic Books, 1994); Benjamin Wittes, *Confirmation Wars: Preserving Independent Courts in Angry Times* (Lanham, MD: Rowman & Littlefield Publishers, 2006)

[222] An AFJ report on judicial appointments concluded that during President Obama's tenure, over 10% of all federal judgeships stood vacant, an increase in judicial vacancies of 65%. At a

opposition-controlled Senate, which began holding pro-forma proceedings in nearly empty chambers lasting a few minutes apiece to keep Congress formally "in session." The President, deeming these proceedings a sham, continued to fill vacant judicial positions until the practice was rebuked by the Court, affirming the D.C. circuit court, which had asserted that "[t]he manipulation of official appointments" is among "the most insidious and powerful weapon[s] of . . . despotism."[223]

What are the theoretical takeaways from this unfortunate episode and others like it? One is confirmation of the president's "first-mover" status in setting the tone of and carrying out the government's legislative priorities—whether through appointments, generation of policy proposals, or public speechmaking—as well as the high expectations upon him to act, as if inaction were a kind of abdication. Another is the way in which constitutional dynamics track, and are given meaning by, political ones.[224] But the broad point, which transcends the present moment, is that the polarization of our constitutional institutions has dangerous consequences. This is true institutionally: Congress and President Obama emerged the worse for wear, having resorted, straight-faced, to legalistic fictions, while conducting dirty politics with the greatest of cynicism. And it is true in terms of the persistence of law as a checking mechanism in itself: the increasing absurdity and irrelevance of the Court's "formalist" lens to describe the unfolding events actually threatens its own authority. Its own lens was inadequate to the task of understanding the ways in which routine powers were jerry-rigged to fit new situations and deployed in creative,

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comparable point in the Clinton and Bush second terms, judicial vacancies had declined by 35% and 39%, respectively, compared to their predecessors. Alliance for Justice, "The State of the Judiciary: Judicial Selection During the 113th Congress," *A Report by Alliance for Justice* (Oct. 2013).

[223] 573 U.S. ___ (2014), affirming *Noel Canning v. NLRB*, 705 F.3d 490, 503 (DC Cir. 2013) (quoting *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 883 (1991)).

[224] See e.g., Geoffrey P. Miller, From Compromise to Confrontation: Separation of Powers in the Reagan Era, *George Washington Law Review*, Vol. 57, No. 3, (1989): 401-426.

confounding ways—permanent-temporary judicial appointments by the President on the one hand, sham proceedings by Congress in response. This is not surprising, perhaps, where, as in the recess appointment case, we witnessed politics warring with legal form.

The point, then, is that the practices of the legislating president confound law as a checking mechanism, both in the sense that the separation of powers no longer corresponds to the dynamics of "real" executive power, and in that by politicizing constitutional structures, it imbues formalist law itself with an unintentional ironic quality.

So far, the response of American legal theory to the widening breach between form and function has been unsatisfying. On the one hand, there are those who double down on rigidity, sacrificing evolution and practicality (formalism, originalism). Courts have typically resolved executive-legislative power struggles by making such heroic last stands for formalism.[225] In invalidating Obama's recess appointments, the Court was taking just this line. Of course, besides denying the President a way of resolving the inter-branch impasse, this judgment was willingly deaf to the political reality of a pantomime being used as a way to nullify the appointment power. Thus, formalism becomes not only a vise on action and innovation, but a smokescreen for politics and ideology, too.

On the other side, right-wing proponents of "unitary executive" theory go to tortured lengths to convince us that the modern contours of the office are as intended all along, while a timid left cowed by the strident perorations of the late Justice Scalia denies the affronts committed against "original meaning."[226] Per the unitarians, the fact that

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[225] See, for example, the Supreme Court's holdings in *Bowsher v. Synar*, 478 U.S. 714 (1986), *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), and *Morrison v. Olson* 487 U.S. 654 (1988).

[226] Sanford Levinson is in the rare minority of those on the left who unabashedly call for a new constitutional convention to rewrite our flawed text. See, e.g., *Framed: America's 51 Constitutions and the Crisis of Governance* (New York: Oxford University Press, 2007). And others on the left deny originalism its necessary pride of place, recognizing the unitary executive is a modern

presidents themselves have always expounded a capacious view of their own power is enough to legitimate it on an "original understanding."[227] Meanwhile, in Jack Balkin's "framework originalism," the continued buildup of the executive branch represents a vindication by Congress of the duty "to help the president carry out his duties to faithfully execute the laws and perform other constitutional functions."[228] "We are all originalists," said Justice Kagan at her Supreme Court confirmation hearing.

But perhaps the way forward is *not* backward-looking. Can we conceive of a new normative program with a set of checks equal to the task of confronting the legislative behavior the President *does* exhibit? The practices of the legislating president have broken down law as a checking mechanism, but by politicizing constitutional structures, they also suggest a new check in the form of politics itself.

Building upon the insight that the real work of constitutional checking is done by political parties,[229] we might conceive of a system of checks and balances that is dynamic and variable, and constituted by political factors. Today, we are used to the hypocrisy of political claims cloaked in the mantle of constitutionalism: each party rails against

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invention. See, for instance, Lawrence Lessig and Cass R. Sunstein, "The President and the Administration," *Columbia Law Review* Vol. 94, No. 1 (1994): 1-123, 5-6; Morton Rosenberg, "Congress's Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive," *George Washington Law Review*, Vol. 57, No. 3 (1989): 627-703; Mark Tushnet, "A Political Perspective on the Theory of the Unitary Executive," *University of Pennsylvania Journal of Constitutional Law*, Vol. 12 (2010): 313-329.

[227] "It would be very difficult indeed to argue that for more than two centuries, from George Washington to George W. Bush, presidents have always uniformly asserted a view of presidential power that was both rejected by the framers and that was at odds with the constitutional text." Steven G. Calabresi and Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* (Yale University Press, New Haven: 2008), 438.

[228] Jack Balkin, *Living Originalism* (Cambridge: Belknap Press, 2011), 4-5.

[229] See, e.g., Mark Tushnet, *The New Constitutional Order* (Princeton, NJ: Princeton University Press, 2003); Bruce Ackerman, "The New Separation of Powers," *Harvard Law Review*, Vol. 113, No. 3 (2000): 633-725; James A. Gardner, "Democracy Without a Net? Separation of Powers and the Idea of Self-Sustaining Constitutional Constraints on Undemocratic Behavior," *St. John's Law Review*, Vol. 79 (2005): 293-317, 308.

"unaccountable" agencies when these do not promote its agenda—Democrats threaten to cut military spending, for instance, while Republicans insinuate against the IRS. Opposition congressmen chasten the legislative president, then quickly recant as soon as the White House is occupied by one of their flock. Yet if we take parties to be the constituent units in the checking and balancing system, these positions would cease to be mere hypocrisy. With this shift in framework, ambition would again counter ambition, and the interest of the officeholder would correspond (better, at least) with that of the office itself.

If what we are seeing is already a breakdown of the separation of powers whereby the President has taken such a role in the process of generating legislation, then perhaps the prescription for resetting the unbalanced system is to continue to push this blurring of boundaries. On this view, *more* legislative involvement in the administrative process of translating statutes into policy is to be encouraged. Unilateral power, which creates policy predisposed to incoherence, impermanence, and ideological overreach, comes to seem a greater ill than blurred functioning, what Pildes and Levinson fear is too much cooperation. The new checks and balances is built on an ever fuller dissolution of the separation of powers.

One form this regime could take would be a more coalitional version of the current system we have, in which policy is bartered for legislative outcomes. The President would continue to cultivate a role as a legislative coalition-builder; Congress would have more of a hand in the translation of statutes into administrative policy. The idea is sure to offend traditional separation of powers theorists and defenders of "neutral competence" alike, but it is not clear that its advantages do not offset its flaws.

With this idea in mind, I devote the remainder of the chapter to addressing objections. One critique would focus on the illiberal nature of the legislative-executive coalition, as antithetical to our separation of powers. To this I might reply first, that even under

unified government, the President is "checked" because, in a long-term governing relationship, the approval of a party coalition has to be won for specific proposals. The "electoral connection" of legislators to their local districts works to ensure that the interests of the individual politician will never wholly align with those of the President, even if he is the party leader. Secondly, although the Progressive Era is long gone, the value of *efficiency* is one that remains of cardinal importance in government, in the best Progressive spirit. (Naturally, there are those who cast both efficiency and its opposite in originalist terms, as well as others who dispute whether locating originalist values and translating them into modern circumstances is possible at all.) Third, periods of unified government already betray precisely this sort of collapse of boundaries, in which case we may as well try to theorize, not ignore them. Delegation of legislative functions, including drafting, is already a reality, and a subtler account of different trustees of law-giving power is the best option for regulating them.[230]

Another critique would claim that such an arrangement is too foreign to our institutions. As it happens, however, American political scientists have already issued just such a recommendation. The 1987 Report of the Committee on the Constitutional System criticized the gridlock and diminished accountability it associated with divided party control.[231] It proposed a set of reforms stopping short of constitutional amendment, designed to reunify and streamline government: straight-ticket voting, allowing sitting members of Congress to serve in the President's cabinet, and eliminating staggered elections for the

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[230] Abbe R. Gluck, Anne Joseph O'Connell, and Rosa Po, "Unorthodox Lawmaking," *Columbia Law Review,* Vol. 115 (2015): 1789-1866

[231] Committee on the Constitutional System, "A Bicentennial Analysis of the American Political Structure" (Washington, January 1987).

President and members of Congress. That none has borne fruit so far does not mean that the recommendations are politically infeasible or institutionally nonviable.[232]

Another objection is that interbranch cooperation under a cohesive majority party runs the risk of trying to "do too much too quickly, too extremely, and with too little deliberation or compromise."[233] Too much policy is the problem, runs the argument. One response has already been made: irregular forms of lawmaking are already a reality, and to deny this fact is like the ostrich burying its head in the sand. Another, which will be explored in the next chapter, is that the coalitional form demands deliberation in order to sustain support, which could provide a salutary corrective to the Madisonian's fear of a swift rush of unconsidered legislation.

Another critique will hold that the unification of the legislature, the legislating president and the bureaucracy can only result in the worsening of collusion, politicization of the bureaucracy, and the oft-nefarious effects of interest group politicking. I reiterate that, insofar as theory attempts to scoop up practices already established in fact, no great change will be made to existing channels of policymaking. Furthermore, contra Hamilton's teachings on the singular executive, a more coalitional structure over policymaking would help increase public accountability over regulatory outcomes. Besides, it is unclear that to "politicize" the administration by making it responsive to a legislative coalition would truly be a retreat in terms of the ideals of civil service. For one thing, Latin America, where coalitional mechanisms are more common at the level of constitutional text as well as political practice, does have strong civil service protections, and there is little evidence that institutional form (coalitional presidentialism, unilateralism) has meaningful

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[232] Gluck et al.

[233] Pildes and Levinson, "Separation of Parties," 2337.

effects on public administrative performance. Besides, the American public sector already has a thick political layer[234] as well as a substantial penchant for pork. The establishment of a legislative-administrative governing coalition would not necessarily worsen these trends; in fact, in helping to ensure cooperation between the two political branches, it could ensure that there would be *one* clear administration policy, eliminating the poor bureaucrat's chore of trying "to survive in a force-field dominated by rival political leaders."[235]

Finally, what about the judiciary? Would the "politicization" of the administrative apparatus mean courts too would be expected to come right out and play politics, too? Is it not essential for the authority of the Court that it refrain from speaking in the language of politics? To a great extent this is true. I point out in response only that, where questions of great political moment are at stake—consider *Bush v. Gore, Shelby County v. Holder, NFIB v. Sibelius*—the Court's formalist fictions have not spared the "decent drapery" of the Court from being rudely torn off.[236] The Court must continue to deal in the language of the law, but to be explicit about the political stakes and motives involved would plausibly only aid the Court in maintaining its legitimacy. After all, where, as in the recess appointment case, the Court is forced to choose a victor between two competing branches, is the Court not making a fundamentally political decision?

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[234] Hugh Heclo, *A Government of Strangers: Executive Politics in Washington* (Washington, D.C.: Brookings Institution, 1977).

[235] Ackerman, "New Separation of Powers," 699.

[236] Of the French Revolution, wrote Edmund Burke, "But now all is to be changed. All the pleasing illusions, which made power gentle, and obedience liberal, which harmonized the different shades of life, and which, by a bland simulation, incorporated into politics the sentiments which beautify and soften private society, are to be dissolved by this new conquering empire of light and reason. All the decent drapery of life is to be rudely torn off." *Reflections on the Revolution in France* (New York: Oxford University Press, 1993), 77.

The president is now the "embodiment of government," as Lowi put it in 1984, and so "it seems perfectly normal for millions upon millions of Americans to concentrate their hopes and fears directly and personally upon him."[237] I have sought to show just how strange, from a separation of powers perspective, this realization is. This account does not make the claim that we should dispense with law and structure as checks on the outer reaches of executive power.[238] It does not plump for a sphere of "unbound" executive discretion that no law can reach. It argues instead that, since the *real* action of checking and balancing takes place below the surface of the constitution, we should direct our attention toward those power centers that *do* affect the scope and size of presidential power, and accord them their proper status.

My examination of the governing arrangements of Brazil attempted to illustrate an institutional system to harness the promise of the legislative presidency—the energy, democratic mandate, and unifying drive it gives legislation—a "coalition"-type arrangement might be called for. Under such an arrangement, Congress and the President votes and administrative policy are linked, supplemented by the "democratizing" measure of a Public Prosecutor empowered to be bring suit against agencies in the name of the people. Both institutions demand that the executive be extremely attentive to political factors, even in the exercise of nominally "unilateral" functions. As a result, contra Woodrow Wilson, the President's "two faces" as party leader and Chief Executive come to be more in line—the President is once more "the leader of his party" as well as its guide "in legal action." The consequences, surprisingly, can be greater systemic control over the limits of that power.

[237] Lowi, *Personal President,* 96.

[238] This is close to what the Unitarians argue. See e.g. Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic*, (New York: Oxford University Press, 2010).

6: Normalizing the Emergency

"In view of the ease, expedition and safety with which Congress can grant and has granted large emergency powers, certainly ample to embrace this crisis, I am quite unimpressed with the argument that we should affirm possession of them without statute. Such power either has no beginning or it has no end."
-Justice Robert Jackson, *Youngstown Sheet & Tube Co. v. Sawyer* (1952)

"We must define the nature and scope of this struggle, or else it will define us."
- Barack Obama, Address at the National Defense University, Fort McNair, Washington, DC (May 2013)

Introduction

What the Constitution separates, the President is forced to put together. I have discussed two manners in which the President negotiates the limits of his formal constitutional powers: deployment of the "populist seduction" against actors and institutions that limit, and secondly, the assumption of a role in shaping legislation before and after the fact. Here, I turn to a third and final bridging mechanism: the "normalization" of emergency politics.

Is an emergency politics becoming the new normal? Giorgio Agamben pointed out in *State of Exception* (2005) that where democratic governments alter their political structures in times of crisis, there is a danger that the so-called "state of exception" may be prolonged indefinitely.[1] Witness how, following the Paris terrorist attacks of November 13, 2015, the French government declared a three-month state of emergency, during which time it drafted a constitutional amendment to create a state of emergency in the constitution. Declared Prime Minister Manuel Valls, the state of emergency would be extended

[1] Giorgio Agamben, *State of Exception* (Chicago: University of Chicago Press, 2005).

"until we have gotten rid of the Islamic State," which he warned, could take "a generation."[2] Or even longer.

Is the "state of emergency" a natural or a legal phenomenon? The term seems to suggest some external force that acts upon a political regime, but because it also denotes a particular response by the state, it is most definitely also a human creation, with all the dangers of imprecision and error to which these are subject. States of emergency have been declared during droughts, floods, bank runs, hyperinflation, revolts, demonstrations, civil wars, and as a response to acts of terrorism. The breadth is striking, and fallible human decisions about the breadth and extent of an emergency unavoidable.

The US has no constitutionalized emergency or "state of siege" regime, not in the way countries like India, Spain, South Africa, or Colombia do. But this does not mean that it does not make full use of it. In this chapter, I use the example of the post-9/11 terrorism regime to talk about some of the institutional manifestations of the American "state of emergency." The point of the empirical account is to show how the invocation, by political actors, of a temporary state of crisis has resulted in permanent or semi-permanent institutional changes. Haunted by the specter of terrorism, the US has embarked upon a whole new constitutional regime, characterized by ample unitary executive discretion, particularly in the making of and prosecution of war; a secondary role in policymaking for Congress, in part by design and in part by dysfunctionality; a deferential court system placing minimal checks on executive action; decreased procedural protections for accused criminals; and maximal incursions by administrative agencies into the private lives of citizens.

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[2] "Migrant crisis: EU at grave risk, warns France PM Valls," *BBC News* (January 22, 2016); Kumaran Ira, "French National Assembly enshrines state of emergency in constitution," *World Socialist Web* (February 17, 2016).

At the hands of political actors, the concepts of "war" and "crisis" have been stretched in hitherto inconceivable ways. The first time the phrase "the war on terror" was uttered in public, in a September 20, 2001 address by President Bush to a joint session of Congress, the words might have sounded like rhetorical excess reflecting the heat of the moment, or perhaps a convenient political catchphrase à la LBJ's "War on Poverty."[3] Yet in retrospect, this was an error. The U.S. has been in a state of national emergency since September 14, 2001, and while many people dispute that "this is a war," the actions of the government suggest otherwise, with all of the secrecy, legal exceptions, procedural shortcuts, limitations of rights, and expansions of executive prerogative—not to mention sheer human casualties—that accompany conventional wartime. And while a debate rages in legal theory over whether or not the U.S. has an "emergency constitution,[4] a de facto "National Security Constitution" has indeed been put in place, a funhouse mirror reflection of the original separation of powers in which "the executive acts, Congress acquiesces, and the courts defer," as Posner and Vermeule put it.[5]

In the first section of the chapter, I argue that the selection and diffusion of the term "war" has had drastic consequences in the post-9/11 environs of fear and misinformation. Well before the U.S. Constitution itself was framed, it was already well-

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[3] Proclaimed President Bush on that day, "Our 'war on terror' begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated." Address to a Joint Session of Congress, Sept. 20, 2011.

[4] Bruce Ackerman, "The Emergency Constitution," *Yale Law Journal,* Vol. 113 (2004): 1029-1091; Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (New Haven: Yale University Press, 2006); Kim Scheppele, "Law in a Time of Emergency: States of Exception and the Temptations of 9/11," *University of Pennsylvania Journal of Constitution Law*, Vol. 6, No. 5 (May 2004), 1001-1083; Kathleen M. Sullivan, "Do We Have An Emergency Constitution?," *Bulletin of the American Academy* (Winter 2006), 30-33; Oren Gross, "What 'Emergency' Regime?," *Constellations,* Vol. 13, Issue 1 (March 2006), 74-88.

[5] Eric Posner and Adrian Vermeule, *Terror In The Balance: Security, Liberty, and the Courts* (New York: Oxford University Press, 2007), 3.

established that wartime favors the executive branch, with its characteristic "[d]ecision, activity, secrecy, and despatch," as Alexander Hamilton put it with enthusiasm. The post-9/11 political landscape has borne out predictions of overgrown executive power, with the contravention of the Geneva Conventions, the warrantless wiretapping of private conversations, the establishment of military tribunals by the executive branch, the detention of prisoners without habeas corpus, and the condonation of torture as a means to extract confessions from prisoners. Folding counter-terrorism efforts into a "war" of uncertain duration and scope allowed the Bush administration to compact disparate conflicts and challenges into one whole, to exact public cooperation through fear-mongering, and to extend the state of emergency long into the future, as the acquiescence of his successor, President Obama, to these practices attests. More lastingly, it has also brought about a permanent, or semi-permanent, expansion in constitutional definitions of executive power.

The second part of the chapter considers the effect of judicial "deference" on the legal state of affairs. When it comes to national security, I would argue, Posner and Vermeule's new separation of powers understates the matter: "the Executive acts, Congress goads, and the Courts sanction" is closer to the truth. It is vital to acknowledge, however, that even when courts "defer," they continue to "make" law. In some cases this is via a kind of Orwellian redefinition that grounds pathbreaking executive action, such as targeted killings, in old texts, thus giving the impression that such actions were normal to begin with.[6] In others, "avoidance" serves to uphold executive assertions of prerogative—

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[6] "In our time, political speech and writing are largely the defense of the indefensible. Things like the continuance of British rule in India, the Russian purges and deportations, the dropping of the atom bombs on Japan, can indeed be defended, but only by arguments which are too brutal for most people to face, and which do not square with the professed aims of the political parties. *Thus political language has to consist largely of euphemism, question-begging and sheer cloudy vagueness. . . . But if thought corrupts language, language can also corrupt thought.* A bad usage can spread by tradition and imitation even among people who should and do know better. *The debased language that I have been discussing is in some ways very convenient. . . .* Political language

for example, in refusing to hear one case brought by human rights lawyers who alleged that interceptions of their phone calls would violate their privacy, the Court effectively gave a blank check to ongoing wiretapping. As such judicial precedents accrete, the contours of executive power are defined by a kind of adverse possession, and they become harder to challenge in the future. Avoidance *is* lawmaking.

The chapter goes on to ask *who* or *what* guards the Constitution, preserving the normalcy of our institutions in a time of exception. I have already discussed the much-cherished paradigm of the Constitution as a self-correcting "machine" regulating the balance of power between branches of government.[7] Many commentators on the presidency agree as a point of fact, and defend as desirable, a model whereby the powers of the President "wax and wane" depending on various factors: the personality of the office-holder, popular support, party strength, policy initiatives, and the domestic and international situation.[8] In the American tradition, the main approach to constitutional maintenance relies on political contestation. Consequently, many accounts of the separation of powers highlight the rigidity, slowness, and precedential accretion that accompany judicial decisionmaking and advise the courts to keep away from considerations of the legality of the emergency.

—and with variations this is true of all political parties, from Conservatives to Anarchists—is designed to make lies sound truthful and murder respectable, and to give an appearance of solidity to pure wind." George Orwell, "Politics and the English Language," in *A Collection of Essays* (New York: Harcourt, 1981 [1946]), 156-170.

[7] Michael Kammen, *A Machine That Would Go of Itself: The Constitution of in American Culture* (New Brunswick: Transaction Publishers, 2006).

[8] Woodrow Wilson was the first, to my knowledge, to make this point. His *Congressional Government* was written in 1885, at a time when 19th century Congresses were more powerful than their obscure presidential counterparts. However, the balance between the two shifted substantially during the twentieth century, on the heels of two world wars, a Great Depression, and the Cold War. See, e.g., *The Personal President: Power Invested, Promise Unfulfilled* (Ithaca, NY: Cornell University Press, 1985), 2 ("In the 1980s, presidential government is the deception.").

Yet our recent experience with the "war on terror" gives serious reason to doubt that the model is working as envisioned. Procedural theories like the theory of checks and balances often rely on congressional consent to legitimate executive action, but in the emergency, such consent proves a notoriously weak reed on which to base constitutionality. In the present context, Congress has consistently and conspicuously relinquished its role in making war. I conclude that, for political reasons, to rely on congressional will to stay the President's hand in the emergency is unrealistic. But we have greater hope that courts can help make the checks and balances regime workable in the emergency. Accordingly, I recommend the radical (at least in the American context) solution of judicial review of declarations of the emergency. As the last defenders of rights, they must take responsibility for such decisions—political though they may be—precisely because the traditionally political branches, caught up in the politics of the emergency, are likely to abdicate their own, coordinate responsibilities.

Sobering truth that it is, exploitation of the emergency is a perpetual temptation for the President, and Posner and Vermeule are quite correct that at such times, the other branches have the tendency to fall in line. Power is channeled to the executive, dissent quiets, the other branches adopt an attitude of compliance and cooperation, decisions are made by a narrower and narrower group of individuals. The arrangement can be very useful, with all of the efficiency and dispatch that Hamilton wished for. Yet it circumvents the democratic bases and procedural regularity of legislation, and is given to trampling upon rights. For constitutionalists, this is a pattern to take heed of and ultimately, to reject as a workable mode of governance.

A. A New Legal Order: The "War on Terror" and the "Emergency Constitution"

Presidential authority may wax and wane, but over the last century, the history of the formal constitutional powers of the American president has been one "continuous story of uni-directional increase."[9] Accounts may differ as to the starting point and cause (the Spanish-American War? the New Deal? the World Wars? the Cold War?) but a broad consensus exists as to the fact that expanding problems of routine governance, the globalization of American power, and a continued series of crises catalyzed a massive expansion of the presidency during the twentieth-century.[10] The twenty-first century has added its own chapter to this history of presidential growth, the politics of the '00s and '10s indelibly marked by the "War on Terror." To a degree unknown in prior "conventional" wars, the indistinct *territorial* and *temporal* boundaries of modern-day conflicts have erased the bounds between foreign and domestic policy, leaving few areas of government untouched.

As it turns out, the phrase "war on terrorism" was not an invention of the second Bush administration, but actually dates back to 1984, when the Reagan Administration coined it after the Beirut barracks bombing as part of an effort to obtain legislation freezing assets of terrorist groups and turning the forces of government against them. The "existential frame for a new war" was set.[11] In reference to post-9/11 counter-terrorism operations, the first use of the phrase was apparently fortuitous, a fact of deep and painful irony if true. Stepping off the presidential helicopter at Camp David on September 16, 2001,

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[9] Garry Wills, *Bomb Power: The Modern Presidency and the National Security State* (New York: Penguin, 2010), 3.

[10] See, Introduction, fn. 9-21.

[11] Shane Harris, *The Watchers: The Rise of America's Surveillance State,* (New York: Penguin, 2010), 32.

President George W. Bush made the apparently unscripted remark, "This crusade—this war on terrorism—is going to take a while. And the American people must be patient. I'm going to be patient. But I can assure the American people I am determined."[12] The phrase came into widespread use after making its way into Bush's televised address before Congress on September 20, 2001: "Our 'war on terror' begins with al-Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated." These statements would be fateful, invoking the idea of "war" at the same time as its endlessness is asserted.[13] From there, the phrase came into widespread use, attracting widespread debate and criticism.[14]

What's in a name? No one doubted that, after the 9/11 attacks, the United States would immediately switch into a heightened state of alert, or that *some* military response to the attacks was warranted. But how long would the crisis last before we would return to normalcy? How deep would the sacrifices asked of the American people be? How far would government assertions of power extend? These were far from predetermined, and

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[12] Kenneth R. Bazinet, "A Fight Vs. Evil, Bush And Cabinet Tell U.S.," *Daily News* (New York) (Sept. 17, 2001). It was originally the word "crusade" that initially had onlookers in hysterics. George Saliba, a professor of Islamic Science at Columbia, observed, "Using the word 'crusade' casts the matter in theological terms, as a case of our religion against theirs. It says, I will recruit God to my side. This is a dead end and has never produced a positive result." The administration later apologized for the comments and the word was not used again. Jonathan Lyons, "Bush enters Mideast's rhetorical minefield," *Greenspun.com (Reuters)* (Sept. 21, 2001).

[13] It is a declaration of an exception alongside a waiver of the crucial aspect of emergency law—that it has a definite end-point after which normality returns. Honing in on the crucial issue of time and the boundaries of the emergency, Justice O'Connor wrote for the Court in 2004, "We recognize that the national security underpinnings of the 'war on terror,' although crucially important, are broad and malleable. As the Government concedes, 'given its unconventional nature, the current conflict is unlikely to end with a formal cease-fire agreement.' . . . If the Government does not consider this unconventional war won for two generations, and if it maintains during that time that Hamdi might, if released, rejoin forces fighting against the United States, then the position it has taken…suggests that Hamdi's detention could last for the rest of his life." *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004), at 521.

[14] Bruce Ackerman, "This is Not a War," *Yale Law Journal,* Vol. 113, No. 8 (June 2004): 1871-1907.

the urgency and moment supplied by the choice of "war" to encapsulate the scope of counter-terrorism operations supplied an easy answer.

Confronted with the worrying prospect of American involvement in the Anglo-French war, James Madison fretted in 1793, "War is in fact the true nurse of executive aggrandizement."[15] That the executive branch, with its "[d]ecision, activity, secrecy, and despatch" is uniquely suited to, and thrives in, conditions of war has long been known. "War-talk," as Bruce Ackerman calls it, is of great strategic use to presidents:

> There is something about the presidency that loves war-talk. Even at its most metaphorical, martial rhetoric allows the President to invoke his special mystique as Commander in Chief, calling the public to sacrifice greatly for the good of the nation. Perhaps the clarion call to pseudo-war is just the thing the President needs to ram an initiative through a reluctant Congress. Perhaps it provides rhetorical cover for unilateral actions of questionable legality. We are not dealing with a constitutional novelty . . . . [16]

The effects of the "rally round the flag" phenomenon,[17] vocal demands for swift defensive action, and the added convenience of "repackaging" separate battles into a single "war" serve to neutralize opposition and decrease start-up costs for further military actions after that.[18] All of this redounds, of course, to the advantage of the presidency.

William Scheuerman, in *Liberal Democracy and the Social Acceleration of Time,* provides an interesting institutional account of why this is so, and what consequences can follow. According to Scheuerman, the separation of powers rests upon an assumption that

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[15] James Madison, in Ralph Ketcham (ed.), *Selected Writings of James Madison* (Indianapolis: Hackett Publishing, 2006), 235.

[16] Ackerman, "This is Not a War," 1872.

[17] David Cole, "An 'Emergency Constitution'?" *NY Review of Books* (Oct. 19, 2006) (Congress "generally rallies around the President, spurs him on, grants him expansive powers, and ratifies his initiatives," particularly during a national emergency).

[18] The effect of momentum is powerful, as Ackerman points out: "Under the classical paradigm, each of these wars had to be justified on its own merits—the case for invading Afghanistan treated distinctly from the case against Iraq, and so forth. But once the public is convinced that a larger "war on terrorism" is going on, these separate wars can be repackaged as mere "battles." *Not a War*, 1876.

the three branches work in different time horizons: the executive characterized by quickness; the judiciary by slower, more "deliberate reflection"; the legislature, the slowest of all in view of the uniquely delicate, deliberative nature of lawmaking. Yet in our "increasingly high-speed world," a world of post-industrial capitalism, evaporating borders, and, especially relevant here, the irregular war on terrorism, speed is a uniquely valued commodity:

> [A] high-speed society places a premium on rapid-fire political and legal practices: the widely endorsed conception of the unitary executive as an "energetic" entity best capable of acting with dispatch means that social acceleration often promotes executive-centered government and the proliferation of executive discretion while weakening broad-based representative legislatures as well as traditional models of constitutionalism and the rule of law. Slow-going deliberative legislatures, as well as normative admirable visions of constitutionalism and the rule of law predicated on the quest to ensure legal stability and continuity with the past, mesh poorly with the imperatives of social speed, whereas a host of antiliberal and antidemocratic institutional trends benefit from it.[19]

All time horizons are not created equal, it turns out. The main institutional response, according to Scheuerman, has been increased delegation, either to internal committees or, more likely when it comes to foreign policy, to the executive branch.[20] Open-ended

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[19] William Scheuerman, *Liberal Democracy and the Social Acceleration of Time* (Baltimore: Johns Hopkins University, 2004), xiv.

[20] A broader theoretical treatment of expedience as a rationale for institutional change would include deformalization of law in ordinary times. Recent calls urging President Obama to lift the nation out of the government shutdown by unilaterally raising the debt ceiling suggest another manifestation of emergency politics becoming routine. The highly delegated and narrow drafting prerogatives ceded to private actors during the recent drafting process of the TTP and TTIP treaties represents another. Is the emergency spreading to the domain of "normal" law? Consider the abuse of the War Powers Act, the absent legal framework surrounding post-9/11 prosecution of the "War on Terror," or even recent "urgent" action by President Obama in light of Congress's exaggerated do-nothing strategy, including raising the possibility of invoking the 14th Amendment to justify unilaterally raising the debt ceiling. In these cases, the President is not only permitted but seemingly *required* to transcend the law in the name of "national defense." And as the temporal and spatial limits of emergencies seem to evaporate before our eyes—note, for example, the "borderless" war on terror, the "contagion" effects of the recent financial crisis, or the increasing discord in the European Union over "stateless" refugees and migrants—we enter a state in which crises become routine, emergencies attain a status of seeming normality, and consequently, executive power can no longer even be said to "transcend" the law, because in fact, it is effectively *constructing a new legal order* with every action.

resolutions like the Authorization of Military Force (AUMF) leave difficult decision-making (for example, defining "all necessary and appropriate force") to speedier, more flexible bodies like the Pentagon or the NSA. Terrorism, with its "time-sensitive threat situations," differs from conventional wars, requiring "a certain speed, agility and tactical responsiveness" such as the Executive Branch is best equipped to provide.[21] That all this should take place under the mantle of "war" only heightens the president's advantage by triggering a regime of judicial and legislative deference.

Increased speed in legislation has come at a high cost, however. With the abdication by legislatures of the decision-making onus comes the "normalization" of once-temporary "exceptional" executive discretion in traditionally legislative realms—not just conducting, but initiating war.[22] The new separation of powers resembles Posner and Vermeule's "emergency constitution": an executive who acts first, a reactive legislature that debates less and less, and a judiciary that views its own role as to obstruct government action as little as possible. The unintended consequence of society's increased "need for speed," per Scheuerman, is the "disfiguring" of liberal democracy's very underpinnings.[23]

The changes wrought to the post-9/11 order bear out Scheuerman's diagnoses. To date, one of the greatest casualties of the "war on terror" has been the laws of war themselves. The Geneva Conventions, for example, established in 1949 to eradicate "the evils inseparable from war," have been read into near-irrelevance as concerns counter-terrorism.[24] A 2002 administration memo written by Bush Attorney General Alberto Gonzales

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[21] Charlie Savage, "C.I.A. Is Said to Pay AT&T for Call Data," *N.Y. Times* (Nov. 7, 2013), at A1.

[22] Louis Fisher, *Presidential War Power* (Lawrence: University of Kansas, 2013).

[23] Scheuerman, *Liberal Democracy*, at 45.

[24] Preamble, Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva, August 12, 1949).

maintained that "none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world" because Geneva applied only to "regular" conflicts—an ironic concession given the administration's prolific use of the term "war"—and because "al Qaeda is not a High Contracting Party to Geneva."[25] And while the Supreme Court rejected this position in *Hamdan v. Rumsfeld* (2006), finding that Article 3 explicitly applied to persons detained in "conflict not of an international character [i.e., between non-state actors],"[26] the number of provisions of international law deemed binding upon the American government have been far outstripped by those that have not been enforced, including protections against unduly long or arbitrary detention, cruel or humiliating treatment, and torture[27]—particularly in the camps at Guantanamo, which have been referred to by members of the international community as a "legal black hole."[28] New "battlefield" policies fall afoul of domestic law, too—the Eighth Amendment's prohibition on cruel and unusual punishment, the Sixth Amendment's right to a speedy trial, the Fourth Amendment's prohibition on warrantless searches and seizures,

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[25] Memorandum on Humane Treatment of Taliban and al Qaeda Detainees (Feb. 7, 2002), and John Yoo, Memorandum Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002).

[26] 548 U.S. 557 (2006), at 629-630. (Justice Stevens wrote for the majority: "[T]here is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories. Article 3 . . . provides that in a "conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum," certain provisions protecting "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by . . . detention." One such provision prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.").

[27] Concluded the now-notorious 2002 memo by Assistant AG Jay Bybee, "[U]nder the current circumstances, necessity or self-defense may justify interrogation methods that might violate [sections of U.S. Code implementing the Convention Against Torture]." Memorandum for Alberto R. Gonzales Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A.

[28] Johan Steyn, "Guantanamo Bay: The Legal Black Hole (Twenty-Seventh F.A. Mann Lecture)," *Statewatch* (Nov. 25, 2003). A report by the International Committee of the Red Cross worried that "US authorities have placed the internees in Guantanamo beyond the law," an apt metaphor. *Guantanamo Bay: Overview of the ICRC's Work for Internees* (Jan. 30, 2004)..

the "principle of freedom"[29] offended by indefinite detention—even if courts haven't often seen fit to deem it as such.[30]

The new legal order has exacted a high price from civilians, too. Unprecedented intrusions into privacy rights began immediately after the September 11 attacks, when President Bush secretly authorized the National Security Agency (NSA) to use wiretaps to monitor private phone calls without seeking court authorization. After a leak disclosed its existence in December 2005, the program became the subject of great public controversy. It was shut down in January 2007—at least, until Congress passed two statutes in 2007 and 2008 reauthorizing the policy.[31] The Obama administration has defended the constitutionality of the enabling statutes and insisted that warrantless wiretaps are an "essential tool" in the fight against terrorism.[32] Worst of all from the rights perspective may be the curtailment of free speech by a provision of the Patriot Act which, in a manner reminiscent of the Alien and Sedition Acts, criminalizes the provision of "material support or resources"—i.e., political advocacy on behalf of—to foreign terrorist organizations, and which the Supreme Court upheld on grounds of "the common defense."[33]

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[29] Owen Fiss, "Aberrations No More," *Utah Law Re*view, Vol. 4 (2010): 1085-1099.

[30] Ibid; Owen Fiss, "The World We Live In (Arlin M. and Neysa Adams Lecture in Constitutional Law)," *Temple Law Review,* Vol. 83, No. 2 (Winter 2011): 295-308, 296.

[31] Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552; Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436.

[32] Eric Holder, Senate Confirmation Hearings (Jan. 16, 2009).

[33] *Holder v. Humanitarian Law Project,* 561 U.S. 1 (2010), at 35. On June 2, 2014, the Court showed further appetite for curtailment of free speech, turning down an appeal from James Risen, a *New York Times* reporter facing jail for refusing to identify a confidential source. The *Times* describes the case as "a confrontation between what prosecutors said is an imperative to secure evidence in a national security prosecution and what journalists said is an intolerable infringement of press freedom." The Court's one-line rejection gave no reasons for its decision to side with the government. Adam Liptak, "Supreme Court Rejects Appeal From Reporter Over Identity of Source," *The New York Times* (June 2, 2014).

It is in the ambit of the trial, in the degradation of rights of due process, that the changes have been the most visible. At the behest of the executive branch, citing battlefield necessity, the *de jure* legal guarantees of the courtroom have ceded to necessity, the consummate *de facto* (executive) rationale. Procedural guarantees of the accused have been narrowed, remedies forestalled, avenues for review of government actions choked off. Characterizing the new order are detentions without formal charges and without trial,[34] warrantless searches of suspects' residences,[35] trial by ad hoc military tribunals,[36] and limitations of the rights to confront witnesses,[37] against self-incrimination,[38] and against torture.[39] The 2002 Bush memorandum maintained that conventional prisoner protections did not apply given that "the war on terrorism is a new kind of war."[40] Military commissions, which remove important safeguards of due process, concentrate functions in a single non-judicial official, adhere to less rigorous standards for their composition, and are subject to less stringent review procedures, are the sole venue for trying suspected terrorists.[41]

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[34] *Padilla v. Rumsfeld,* 542 U.S. 426 (2004) (raising the issue whether the President has the authority to detain an American citizen on U.S. soil as an "enemy combatant"); *Hamdi v. Rumsfeld*, *supra,* note 9 (raising the issue whether the President has the authority to detain an American citizen captured on the battlefield in Afghanistan as an "enemy combatant") But Ahmed Khalfan Ghailani has languished in prison for ten years, and no trial is forthcoming. *U.S. v. Ghailani*, 733 F.3d 29 (2d Cir 2013).

[35] *In Re Terrorist Bombings of U.S. Embassies of East Africa*, No. 01-1535-cr (2d Cir. November 24, 2008).

[36] The practice went on for five years before the Court put a stop to it in *Hamdan v. Rumsfeld, supra,* note 14.

[37] *U.S. v. Moussaoui.* 382 F.3d 453 (4th Cir. 2004).

[38] *U.S. v. Abu Ali,* 528 F.3d 210 (4th Cir. 2008).

[39] *Arar v. Ashcroft*, 585 F.3d 559 (2d. Cir. 2008).

[40] The memo went so far as to argue that the "new paradigm" of the war on terrorism "renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions."

[41] No terrorist accused of crimes since 9/11 has been tried in a civil court.

Yet they have been justified by appeals to exigent circumstances[42] and "military necessity"[43] and by the credulous hope of executive apologists that "the military court system established by Congress—with its substantial procedural protections and provision for appellate review by independent civilian judges—will vindicate [individual] constitutional rights."[44]

Even preemptive strikes have been brought into the defensive mindset of alleged military necessity. In 2011, Anwar Al-Awlaki became the first American citizen to be hunted and killed without trial by his own government since the Civil War, on grounds that he posed an "imminent" and "specific" threat to national security.[45] In 2013, an Obama official volunteered that a strike on war-torn Syria might "not fit under a traditionally recognized legal basis under international law," but would nevertheless be "justified and legitimate under international law" given novel circumstances and the mission's humanitarian aims.[46] Obama went to great lengths to avoid such a mission, for which some civil libertarians commended him, but there can be no mistaking that the flexible, need-based jurisprudence asserting the President's authority to undertake a Syrian bombing campaign is just the same as that of Alberto Gonzales's notorious 2002 memorandum.

By the mid-to-late 2000s, the War on Terror's rhetorical heyday seemed to have passed. The British government announced that it was abandoning use of the phrase in

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[42] Writes Justice Thomas, in his dissent in *Hamdan,* "In these circumstances, "civilized peoples" would take into account the context of military commission trials against unlawful combatants in the war on terrorism, including the need to keep certain information secret in the interest of preventing future attacks on our Nation and its foreign installations so long as it did not deprive the accused of a fair trial," at 725.

[43] *Hamdan, supra,* at 590.

[44] Ibid, at 587, citations omitted.

[45] Scott Shane, "The Lessons of Anwar Al-Awlaki," *The New York Times* (Aug. 27, 2015).

[46] Charlie Savage, "Obama Tests Limits of Power in Syrian Conflict," *The Washington Post* (September 8, 2013).

April 2007. A former head of MI5 explained, "I never felt it helpful to refer to a war on terror," in view of the fact that the 9/11 attacks were "a crime, not an act of war."[47] President Barack Obama's election in 2008 promised a major change in policy, or at least in rhetoric. Obama did refer to a "war against a far-reaching network of violence and hatred" in his 2009 inaugural address, but subsequently abandoned the term. In March 2009 the Obama administration requested that Pentagon staff members also avoid use of it, after which the Defense Department officially changed the name of operations from "Global War on Terror" to "Overseas Contingency Operation."[48] In May 2013, Obama stated, "Beyond Afghanistan, we must define our effort not as a boundless "global war on terror"—but rather as a "series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America."[49]

Most commentators, however, have been nonplussed by the change.[50] For one thing, notwithstanding Obama the candidate's "sincere" promises of change, Obama the President has to a great degree "assumed the institution's perspective" and "conformed to

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[47] Richard Norton-Taylor, "MI5 former chief decries 'war on terror,'" *The Guardian* (Sept. 2, 2011).

[48] Noted an internal memo to the Pentagon, "this administration prefers to avoid using the term 'Long War' or 'Global War on Terror.' Please use 'Overseas Contingency Operation.'" Scott Wilson and Al Kamen, "'Global War on Terror' Is Given New Name, *The Washington Post* (March 25, 2009).

[49] Address of May 23, 2013.

[50] See, for example, Garry Wills, *Bomb Power*; Bruce Ackerman, *The Decline and Fall of the American Republic* (Cambridge: Harvard University Press, 2010), Peter M. Shane, *Madison's Nightmare: How Executive Power Threatens American Democracy* (Chicago: Chicago University Press, 2009); Eric Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (New York: Oxford University Press, 2011), Julian Zelizer, Blog Post, "When It Comes to Expansive Presidential Authority, Is Obama Much Different Than Bush? If So, How Do You Like It?" *Politico – Arena* (Oct. 6, 2009). Although a tiny minority, some conservatives, including David Horowitz, attribute great importance to the rhetorical change: "Far from shouldering his responsibility as the commander-in-chief of America's global War on Terror and embracing it as this generation's equivalent of the Cold War, Obama showed his distaste for the entire enterprise by dropping the term "War on Terror" and replacing it with an Orwellian phrase — "overseas contingency operations."" "How Obama Betrayed America . . . And No One is Holding Him Accountable." David Horowitz Freedom Center (2013) (online pamphlet).

his predecessor's approach,"[51] leaving unchanged basic features of the Bush administration's counter-terrorism policies. These include military detention of suspects without charge or trial, the use of military commissions to try accused terrorists, the Guantanamo Bay facility, denials of habeas corpus to detainees, surveillance and wiretaps, and most visibly, targeted killings, have been preserved, in some cases heightened.[52] Offers Michael Hayden, CIA and NSA Director under the Bush administration, "[W]e've seen all of these continuities between two very different human beings, President Bush and President Obama. We are at war, targeted killings have continued, in fact, if you look at the statistics, targeted killings have increased under Obama."[53] Hayden meant it as a compliment, praising the "practical consensus" that had emerged on counter-terrorism strategies. For many on the left, Obama's practical similarities with the Bush "terror presidency" have constituted an outright "betrayal."[54]

Tellingly, too, the Obama administration has refused to entirely cede the prerogatives of "war-naming." In December 2015, the administration insisted that the United

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[51] Jack Goldsmith, *Power and Constraint* (New York: W.W. Norton, 2012), 28-29.

[52] Ibid, 5-17. Goldsmith also notes, regarding extraordinary rendition, the practice of taking a person from one country to another outside judicial process and against the person's will for interrogation or detention purposes, that because "the public knows little about how (if at all) the Obama administration actually conducts renditions, it is unclear how (if at all) the actual practice has changed under Obama from the late Bush period." (15)

[53] Michael Hayden, "Law, policy, and the war on al-Qaida: an emerging consensus? (2012 Josh Rosenthal Fund Lecture)," (University of Michigan, Gerald R. Ford School of Public Policy, Sept. 7, 2012).

[54] Roger Hodge, *The Mendacity of Hope: Barack Obama and the Betrayal of American Liberalism* (New York: Harper Collins, 2010) (Obama's "record on torture, detention, and executive authority is even worse [than his capitulation on finance and health care reform]" and "our constitutional system may never recover"), 235; Paul Street, *The Empire's New Clothes: Barack Obama in the Real World of Power* (New York: Routledge, 2010), John MacArthur, "Some Liberals Finally Onto Obama's Betrayal of Liberalism," *Harper's* (Sept. 14, 2011); Bruce Ackerman, "Obama's Unconstitutional War," *Foreign Policy* (March 24, 2011) ("Obama is bringing us closer to the imperial presidency than Bush ever did"); Owen Fiss, "Obama's Betrayal," *Slate Magazine* (Dec. 4, 2009) ("[T]he sad fact is that Obama has not carried through on [his] promise [to distance himself from Bush's unilateralism] and now presides over the very horror he himself had the courage to denounce.")

States "currently remains in an armed conflict against al-Qa'ida, the Taliban, and associated forces, and active hostilities against those groups remain ongoing."[55] As the fight against terror has broadened to include Islamic State militants in Iraq and the Levant (ISIL), Obama officials have been hard-pressed to define the conflict. In September 2014, Secretary of State John Kerry deemed such semantic debates "a waste of time." But, he ten admitted, "If people need a place to land . . . yes, we're at war with ISIL."[56] Kerry may have been right about the debate about semantics: on March 4, 2016, American aircraft conducted airstrikes on an Islamist training camp in Somalia, a country with whom the U.S. is emphatically *not* at war.[57] "There are a lot of lines that [President Obama has] drawn in the sand," opines Jack Goldsmith. "Just about every one of which he seems to have crossed now."[58]

A new, holistic paradigm of the rule of law and the separation of powers dramatically different from our own emerges in the "new normal." Law serves military necessity, while the executive branch takes its place as the driver in a tripartite scheme of *unequal* powers. The longer this goes on, the longer the sedimentary effect of precedent is heightened: people and institutions acclimate to the new normal as the whole system abides by its own novel and autonomous logic. The *Hamdi* court recognized this risk in 2004, insisting that the President was not being granted a "blank check" for extra-legal action:

> [W]e understand Congress' grant of authority [in the AUMF] for the use of "necessary and appropriate force" to include the authority to detain for the duration of

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[55] Barack Obama, "Letter From the President—War Powers Resolution," *The White House – Office of the Press Secretary* (December 11, 2015).

[56] Karen DeYoung, "Is it a 'war'? An 'armed conflict'? Why words matter in the U.S. fight vs. the Islamic State," *The Washington Post* (October 7, 2014).

[57] Helene Cooper, "U.S. Strikes in Somalia Kill 150 Shabab Fighters," *The New York Times* (March 7, 2016).

[58] Greg Miller and Karen DeYoung, "In Syria, Obama stretches legal and policy constraints he created for counterterrorism," *The Washington Post* (September 23, 2014).

> the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.[59]

The Court saw that the specter of a permanent emergency is a threatening possibility in an "indefinite," "unconventional" war. But it concluded, "that is not the situation we face as of this date." Twelve years later, with the U.S. still embroiled in "armed conflict" in Afghanistan, Iraq, Syria, and elsewhere, there is no end in sight to the "war on terror."

B. Guarding the Constitution in a Time of Emergency? A Jurisprudence of Abdication

An ongoing debate in the legal academy concerns whether America has a unitary or a dualist constitution, that is, whether the response to emergencies can happen within the "business as usual" framework, or whether it requires a new set of powers and constraints to guide a swifter, more focused response. (Recall Scheuerman's insight, that the liberal democratic constitution envisioned normal government functioning as a slow, deliberate affair.) Because the American constitution, unlike many other world charters, lacks a specific mechanism for invoking a state of emergency or state of exception, the formal answer is that it is unitarist.

But look a bit deeper, and it seems that the practices witnessed under our de facto "emergency constitution" are quite similar to those found in formal states of emergency found in dualist constitutions.[60] We have a dualist system in practice, only we do not

[59] *Hamdi v. Rumsfeld*, 521.

[60] South Africa's Section 37 provides for the declaration of a "state of emergency" by Act of Parliament, subject to an "elevator" requirement whereby a majority is required to extend it, and subsequently a three-fifths majority to extend it a second time. Other dualist emergency provisions include Article 36 of the French Constitution (the constitutional State of Siege) and Article 356 of the Indian Constitution, on the state of emergency, during which legislative power may be formally

signal the switch between "tracks" of constitutionalism via a declaration of emergen[61]cy. In eras past, a declaration of war served this function. (Consider the Supreme Court's refusal, in the *Youngstown Steel* case*,* to condone President Truman's attempted exercise of emergency powers in lieu of congressional authorization via an authorizing statute or a declaration of war.[62]) Now, as we have seen post-9/11, it is the invocation of wartime necessity that functions as the railroad switch that, when flipped, sends the train onto a new track. President Bush gave the emergency a name, and the other branches fell into a new pattern of behavior. Therefore, the term "war" has more just a symbolic function in our constitutional system: in September 2001, President Bush called the emergency a war and, for the purposes of government practices, it became one, with the heighted mobilization, heightened spending, and heightened rights violations that accompany a conventional war.

That old line from *Schechter Poultry v. U.S.,* "extraordinary conditions neither create nor enlarge constitutional power,"[63] remains an article of faith in American jurisprudence. But as Paul Kahn points out, the post-9/11 legal landscape seems instead to prove the truth of Carl Schmitt's most quoted observation, "Sovereign is he who decides on the state of exception."[64] Just before Weimar's collapse, Schmitt mocked liberals who believed that the emergency situation could be neatly kept within the bounds of the law, and the fall of the Republic gave him unfortunate reason to think that he was right. We seem to be

vested in president and judicial authority to enforce rights suspended. We will discuss the Colombian formal state of emergency at length in the next chapter.

[61] The AUMF of 2001 was neither broad or specific enough to constitute a declaration of war or of a state of emergency, and the "War on Terror" has appreciably gone far beyond its confines.

[62] "The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power, and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that this seizure order cannot stand," 589.

[63] Schechter Poultry v. U.S., 295 U.S. 495 (1935), 528.

[64] Paul W. Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (New York: Columbia University Press, 2011).

doing so in the American context today. Defenders of the liberal separation of powers and the rule of law *want* to argue that the "switch" between normal and emergency orders is a *legal* decision, but how, when its origins are unquestionably in a trick of presidential semantics, when we lack any language resembling law to rebut claims of "military necessity," can such a claim be credible? *Who* can rebut the declaration of emergency?

Even if we concede the first point to Kahn and the Schmittians and admit that the declaration of the emergency involves a political question, which I believe we must, I insist nonetheless that the answer to the second must be *the Court*. First, if to define an emergency as a war it to make it one, then conceding the power of naming to the President is tantamount to allowing him to unilaterally initiate and make war, in express violation of the Constitution.[65] As Ackerman tells it, once the term "war on terror" was invoked, the media and government actors "uncritically" repeated it until it was impossible to deny.[66] Seemingly, once events reach some loosely plausible "crisis" threshold and are described as a "war"—say, "on terror"—the phrase becomes impossible to eradicate.

Second, courts, as politically insulated bodies, are best positioned to stop the degradation of rights and law that often accompany declarations of war. The "rally 'round the flag" effect saps the vitality of the public watchdogs Jack Goldsmith calls the "sousveillance" system of public checks on the President (the public, attorneys and other legal watchdogs, and the press).[67] A *Washington Post* Pentagon correspondent explained,

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[65] The stipulations of the War Powers Act of 1973, which requires that the President notify Congress within 48 hours of committing armed forces to military combat, do not change this fact. The Act shifts the time at which Congress's authorization is required; it does not waive the need for it.

[66] Ackerman cites a speech by then-presidential candidate John Kerry: " I do not fault George Bush for doing too much in the War on Terror; I believe he's done too little . . . . We cannot win the War on Terror through military power alone. . . ." John Kerry, "Fighting a Comprehensive War on Terrorism," Remarks at the Ronald W. Burkle Center for International Relations, University of California at Los Angeles. Quoted in Ackerman, 1876.

[67] Goldsmith, *Power and Constraint, 204.*

"There was an attitude among editors: Look, we're going to war, why do we even worry about all this contrary stuff?"[68] The President, as we have seen, profits from the state of emergency, giving reason enough to doubt whether checks internal to the executive branch, such as Neal Katyal's proposed administrative "national security court," would be sufficiently independent.[69] Furthermore, the sequence of events surrounding the use of military tribunals, wiretapping programs, extraordinary rendition, and even torture illustrates that, far from a check, Congress has often been the executive's most ardent cheerleader or remained silent in the face of ostensibly illegal practices.[70] The rush of patriotic fervor, not to mention ties of party, can, as Pildes and Levinson point out, sap Congress of its will to check in crisis time.[71] That a Republican-dominated Congress has of late been blocking President Obama's attempts to shut down the notorious detention camp at Guantanamo Bay is no proof of Congress' independence of the "emergency" president, either. More to the point, whether due to reflexive obstructionism, national security grandstanding, NIMBYism, or genuine belief, it hardly suggests that Congress is the body to right the worrying "one-way ratchet" through which rights are eroded.[72]

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[68] Howard Kurtz, "The *Post* on WMDS: An Inside Story," *The New York Times* (Aug. 12, 2004).

[69] Neal Katyal criticizes the idea of a specialized court to handle the lawfulness of surveillance and targeting via drones. "It is hard to think of something less suitable for a federal judge to rule on than the fast-moving and protean nature of targeting decisions. Fortunately, a better solution exists: a 'national security court' housed within the executive branch itself. Experts, not generalists, would rule; pressing concerns about classified information would be minimized; and speedy decisions would be easier to reach. Neil Katyal, "Who Will Mind the Drones?," *The New York Times* (Feb. 20, 2013).

[70] See, e.g., *Interrogation of al Qaeda Operative*, Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency from the Office of Legal Counsel (Aug. 1, 2002).

[71] Richard Pildes and Daryl Levinson, "Separation of Parties, Not Powers," *Harvard Law Review,* Vol. 119, No. 8 (June 2006): 2311-2386.

[72] Baher Azmy, "Why Obama's Plan for Closing Guantanamo Is Unjust," *Rolling Stone* (February 26, 2016).

Third, the American "new normal" is all the more dangerous in that it takes place outside the margins of the law. The South African state of emergency provides clear stipulations as to who can declare it, when it begins, what limits to power and rights protections remain in place throughout it, and how it ends.[73] In the American case, the scope of the emergency is poorly defined, both as a statutory and a jurisprudential matter. The AUMF is a manifestly open-ended document, authorizing the President "to use all necessary and appropriate force" against those "nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" of September 11, 2001.[74] Having failed to convince Congress to pass a new authorization of force against the Islamic State, President Obama continues to use the AUMF to authorize military action against terrorist groups, whether these are plausibly connected to the 9/11 attacks or not. Even the White House press secretary expressed bafflement at Congress's "unwilling[ness] to take any steps that would constrain the president's ability to wage war."[75] Court decisions upholding White House invocations of "inherent Commander-in-Chief powers" in response to unprecedented emergency actions have been routine.[76] In

[73] What is more, fully half of Section 37 is devoted to an enumeration of detention procedures and prisoner rights (Section 6).

[74] Public Law 107-40, 107th Congress Joint Resolution: To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States. The AUMF is actually a compromise, of sorts, as apparently, the Bush Administration initially sought even broader authority to "deter and pre-empt any future acts of terrorism or aggression against the United States." Congress rejected the Administration's initial proposal as overly broad and instead crafted a resolution targeted at those responsible for the September 11 attacks and those countries harboring the responsible parties. David Abramowitz, "The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism," *Harvard International Law Journal,* Vol. 43, No. 1 (2002): 71–82, 73-75.

[75] Scott Wong, "GOP: Obama war request is dead," *The Hill* (April 13, 2015).

[76] See, e.g., *Ameur v. Gates,* 950 F.Supp.2d 905 (U.S. Dist. Ct. for E.D. Virginia, 2013) (upholding U.S.'s sovereign immunity against enemy combatant's nonconstitutional claims against the United States regarding his detention, transfer, treatment, and conditions of confinement during his detention at United States military facilities in Afghanistan and Cuba), *Qassim v. Bush*, 407 F. Supp. 2d 198 (D.D.C. 2005), 202 (while prisoners' indefinite detention was illegal, "Guantanamo Bay is a

grounding such acts, not on the uniqueness of the situation, but rather in inherent powers, or delegated powers where the truth of the delegation is questionable, courts have made these very difficult to assail. Insulated from review by *stare decisis,* standing and political question doctrines, and structural hierarchies of courts, common law precedents build up like stratums of sedimentary rock, and extraordinary powers once reserved for emergencies take on the appearance of normalcy, even in non-emergency situations. The history of the warrantless wiretap, as we have seen, is one example of the evolution.[77]

Given this reality, we must conclude that courts have failed in their duties of review. This is not to say that there have been *no* jurisprudential checks on executive power. As Todd Sutton and Owen Fiss show, a consensus of sorts has developed around a few "vague" principles: the executive cannot act with unfettered discretion in seeking to target terrorist threats; some constitutional rights operate outside U.S. territory; citizens and noncitizens alike are owed some measure of due process even under the laws of war.[78] Yet in the main, the effect has been to give official sanction to "practices that at first seemed like temporary excesses of the Bush administration," but which now "are entrenched legal doctrines."[79]

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secure military installation under the command of military officers whose mission is an ongoing part of the President's duties as commander in chief. Petitioners cite no authority for the proposition that I can order the military to allow a civilian, much less a foreign national, access to a military base, and of course I cannot."), *Machado v. Scherzer,* 311 F. Supp. 3d (D.D.C. 2015), *Vance v. Rumsfeld*, 701 F.3d 193 (7th Cir. 2012) (finding that a military authority exception to Administrative Procedure Act barred action against federal government).

[77] Owen Fiss, "Aberrations No More," note 17, 1088-89.

[78] Trevor Sutton, Foreword, in Owen Fiss, *A War Like No Other: The Constitution in a Time of Terror* (New York: The New Press, 2015), 1-5, 3.

[79] Sutton, Foreword, *x.* Kim Scheppele echoes this point. "The U.S. Constitution has capaciously expanded to adjust to all expansions of executive power without appearing to fail. The Constitution's meaning has changed as it has been aggressively interpreted by Cold War executives and as both Congress and the courts ratified this new meaning through acquiescence." Scheppele "Law in a Time of Emergency," 1022.

Political scientist Louis Fisher argues that allowing the President to initiate war is bound to be destructive of the rule of law.[80] He has seemingly been proven right: after Bush's declaration, the other branches have fallen neatly in line, deferring to the executive's greater military competence as rights, freedoms and procedure are sacrificed at the altar of military necessity.[81]

In light of the observations sketched out here about the crucial *temporal element* of the state of emergency, I venture the claim that the American legal system took a wrong turn during the early Bush years in conceding to the Executive Branch the power to define the scope of the "war on terror." Typical in this regard is Justice Thomas' statement in dissent in *Hamdan* that "The President's findings about the nature of the present conflict with respect to members of al Qaeda operating in Afghanistan represents a core exercise of his Commander in Chief authority that this Court is bound to respect."[82] Having waived such authority over the scope of the conflict, courts since have had no choice but to condone absurd outcomes including, for example, the Orwellian redefinition of the phrases "concrete, specific, and imminent threat," invoked to justify the targeted killing of Anwar Al-Aulaqi in 2011.[83]

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[80] Louis Fisher, "Presidential Power in National Security: A Guide to the President-Elect," *The White House Transition Project: Reports* (The White House Transition Project, 2007): 1-16, 6.

[81] Kim Scheppele describes a similar phenomenon taking place in the executive's denial of habeas corpus rights to detainees. Here, the key performative role is played by the term "enemy combatant": "The avoidance of separation of powers constraints in the domestic war on terrorism has reached its height with the claimed presidential power to label suspect individuals as enemy combatants who are immune from legal process altogether. . . . The "enemy combatant" label is the logical endpoint of a process in which the rule of law has been progressively undermined by assertions of executive power to determine when the rules no longer apply." Scheppele, "Law in a Time of Emergency*,* 1008.

[82] *Hamdan,* at 724-5.

[83] *Al Aulaqi v. Obama,* 727 F.Supp.2d 1 (D.C. District Court) (2010), *passim.* Mark Mazzetti, Charlie Savage and Scott Shane, *How An American Came to Find Himself In the Crosshairs*, NY Times, Mar. 9, 2013, A1.

What would it mean for the Court to control the scope of the conflict? What about the first of Schmitt's challenges to the liberal rule of law, which is that the decision on the emergency is *itself* a political question? Surely courts have no business in that role? In the next and final section of the chapter, I argue that precisely *because* the emergency, as Schmitt pointed out, is a political decision, it must be courts who intervene to decide upon it.

C. The Guardian of the Constitution? Checking and Balancing as a Political Act

Who, to borrow from Weimar once more, is the "guardian of the Constitution"? What forces or institutions defend and preserve the integrity of the legal order? In the United States, one answer predominates: it is through vigorous inter-branch contestation that arbitrary power can be given its rightful place in the constitutional system.[84] On Benjamin Kleinerman's characteristic telling, Congress fulfills its duty of checking and balancing through "investigative committees and active participation;" courts, through "ringing denouncements of unconstitutionality," even if only to inform political judgments.[85]

But courts cannot be *too* involved in patrolling the outer bounds of executive discretion, Kleinerman insists. When it comes to foreign affairs, they lack enforcement power and expertise. They are slow in acting. Most importantly, "because the executive is acting

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[84] Justice Roberts make the point unequivocally, "I believe the system the political branches constructed adequately protects any constitutional rights aliens captured abroad and detained as enemy combatants may enjoy." *Boumediene v. Bush,* 553 U.S. 723 (2008) (ROBERTS, dissenting), 801. See, also, Harold Bruff, *Untrodden Ground: How Presidents Interpret the Constitution* (Chicago: University of Chicago Press, 2015); Goldsmith, *Power and Constraint;* Kleinerman, *The Discretionary President: The Promise and Peril of Executive Power* (Lawrence: University of Kansas Press, 2009).

[85] Kleinerman, *The Discretionary President*, 228, 244.

outside or even against the law, *there is simply no good legal rule by which to make these sorts of judgments*."[86] Drawing upon Locke's account of executive "prerogative," Kleinerman offers us one more reason counseling judicial restraint in policing emergency powers: "In attempting to judge [acts of executive discretion] via the law, the courts inevitably . . . . [are] constrained either to legalize them, thus making them a precedent for the future, or to deny them[.]"[87]

In other words, courts must refrain from deciding questions inherently *political* in nature, both because these are not questions they are equipped to decide, and because executive actions must not be formalized into a body of precedent. In other words, executive action exists in a legal "black hole" and it should stay that way!

In the paragraphs that follow, I dispute this claim and advocate for its opposite, a strong practice of court review of "political" questions of emergency power.

First of all, the idea that by "avoiding" review, a court avoids setting precedents is a common but misleading fiction. Take what is considered one of the Court's greatest innovations, the "political question" doctrine.[88] If the Court can avoid the Solomonic task of divvying out powers between the branches, it will. This has allowed the Court to avoid wading into interbranch grudge matches it is likely to lose, but in no way does it keep it from actually weighing in on the balance of powers. For example, in *Clapper v. Amnesty International USA*, the Court denied standing to plaintiffs who alleged that they were

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[86] Ibid, 15.

[87] Ibid.

[88] Important cases establishing the doctrine include: *Marbury v. Madison*, 5 U.S. 137 (1803) (holding that in the performance of strictly executive duties, the Secretary of State was not held to any legal standards); *Luther v. Borden,* 48 U.S. 1 (1849) (the guarantee of a republican form of government is a political question); *Coleman v. Miller,* 307 U.S. 433 (1939) (the mode of amending the federal Constitution is a political question); *Goldwater v. Carter,* 444 U.S. 996 (1979) (the President's authority to terminate treaties); *Nixon v. U.S.,* 506 U.S. 224 (1993) (Senate authority to try impeachments).

likely to suffer harm through interceptions of private phone calls. In so doing, the Court *had* dodged a constitutional question; at the same time, by raising the standing bar to a level likely to "chill" further individual appeals, it in effect reinforced the unfettered authority of Congress and the President to set surveillance policy invasive of privacy rights.[89] Indeed, as Trevor Sutton and Owen Fiss point out, it has largely been through court avoidance of review that "practices that at first seemed like temporary excesses of the Bush administration," have now become "entrenched legal doctrines."[90] We do violence to the Constitution when we pretend that in "avoiding" the constitutional issue, the Court is not *making constitutional law*. It is, only it does so by upholding claims of constitutionality advanced by the President.

Second, Kleinerman recognizes that his vision of checks and balances "requires active legislative elites who have at their disposal an original constitution with which they can signal the people regarding executive malfeasance and usurpation."[91] He fears that, where courts get in the business of active review of emergency executive action, Congress

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[89] 133 S. Ct. 1138 (2013), at 1155. Although see, *Klayman v. Obama,* 957 F.Supp.2d 1 (D.D.C. 2013) (holding that bulk telephony metadata collection constitutes an invasion of a reasonable expectation of privacy). (On April 7, 2014, the Supreme Court denied certiorari on appeal. *Klayman v. Obama,* 134 S.Ct. 1795). In dissent, Justice Breyer pointed out that, in 2011, the Foreign Intelligence Surveillance Court (FISC) had approved 1,674 of 1,676 applications for permission to wiretap, 30 with modification. Breyer was making a point about standing, namely that "we only to assume that the Government is doing its job (to find out about, and combat, terrorism) in order to conclude that there is a high probability" that plaintiffs' communications would be intercepted, thus causing them to suffer a cognizable injury (at 1161). He did *not* raise the more urgent questions of whether, under the Fourth Amendment, FISC should have authority to permit warrantless wiretaps at all, or whether said court constitutes any sort of check on the NSA. (For example, a former NSA official reportedly called FISC a "kangaroo court with a rubber stamp." Spencer Ackerman, "Fisa chief judge defends integrity of court over Verizon records collection," *The Guardian* (Jun. 6, 2013).

[90] Sutton, Foreword, *x.* Kim Scheppele echoes this point. "The U.S. Constitution has capaciously expanded to adjust to all expansions of executive power without appearing to fail. The Constitution's meaning has changed as it has been aggressively interpreted by Cold War executives and as both Congress and the courts ratified this new meaning through acquiescence." Scheppele, "Law in a Time of Emergency," 20.

[91] Kleinerman, 17.

will lose its "incentive to assert itself against the executive aggrandizement."[92] Even under normal conditions, there may be institutional barriers that keep Congress from acting despite its disapproval of the President's action.[93] I have discussed above the reasons why, during the emergency, the asumption of "active legislative elites" and a vigilant people may not hold. Even worse, the presumption that congressional silence on national security matters should be taken as "consent" should be disturbing to all who subscribe to the theory of checks and balances: "[T]he most glaring institutional fact about the war on terror so far is how little Congress has participated in it."[94] That congressional silence on national security measures has, thus far, been taken as "consent," is, at a minimum, evidence that the branch's "interest" in checking executive power may be swamped by other factors.

In light of the Framers' concern with rash, ill-conceived legislation, with the government's tendency to "intemperate and pernicious resolutions,"[95] courts would perform a service by showing themselves *less* deferential to the political branches when the two cooperate in the emergency, and consequently at the time when rights are *most* susceptible. It will be argued that judicial deference to political leadership is warranted during wartime, but so, presumably, is *heightened* scrutiny, lest fear and necessity transform the public into a sort of tyrannical majoritarian faction—"a number of citizens," in Madison's words, "united and actuated by some common impulse of passion, or of interest, adversed to the

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[92] Ibid.

[93] Martin H. Redish and Elizabeth J. Cisar, "'If Angels Were to Govern': The Need for Pragmatic Formalism in Separation of Powers Theory," *Duke Law Journal,* Vol. 41, No. 3 (Dec. 1991): 449-506, 492.

[94] Ibid, 37.

[95] Federalist No. 10 and 62. For a typical statement of judicial deference to military expertise, "[T]he common law of war is flexible, responsive to the exigencies of the present conflict, and deferential to the judgment of military commanders." *Hamdan v. Rumsfeld,* 548 U.S. 557, at 691 (THOMAS, J., dissenting).

rights of other citizens"[96]—perhaps the main evil our republican constitution was designed to avoid. If this sounds farfetched, recall *Korematsu v. U.S*'s toleration of a wartime executive order eviscerating the liberty rights of Japanese-Americans in the name of "military urgency" and "[p]ressing public necessity."[97]

Third and most fundamentally, a strong tradition of review would accompany a wholesale repudiation of the fiction that the Court, in checking other branches, can remain anything like a non-political body. Beyond the question of good and bad constitutional law, the constitutional avoidance and political question doctrine should be rejected, in the ambit of national security, at least.[98] We are used to believing that courts' legitimacy depends on their *non*-political status.[99] But who after *Bush v. Gore* truly believes in the fiction of courts "above politics"? Is such a fiction necessary? *Can* it be necessary, with the formalist façade worn so thin?

Empirical studies of court review of emergency powers show that, on the rare occasions where we *do* witness such energetic review, it is attuned, not only to rights protection, but also to the logic of the separation of powers.[100] Of course, the notion leaves some

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[96] Federalist No. 10.

[97] *Korematsu v. U.S.,* 323 U.S. 214 (1944), at 223 and 216.

[98] A broader theoretical treatment of this issue would consider whether it must be dropped full stop. For now, we consider that executive invocations of "necessity" or "urgency" could be considered a branch of law requiring the Court to *heighten* its scrutiny, not avoid considering the matter altogether.

[99] "Their insulation and the marvelous mystery of time give courts the capacity to appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry." Alexander Bickel, *The Least Dangerous Branch* (New Haven: Yale University Press, 1967), 50.

[100] Tushnet explains: "Under the separation-of-powers mechanism, nearly all of the work of regulating power is done by the principle that the President can do only what Congress authorizes. Its primary concern is what Professors Bradley and Goldsmith call Executive Branch unilateralism, a fear that Presidents acting on their own might make unsound decisions, engaging in too much (or too little) military action, intruding on liberties too much (or too little). Under the judicial-review mechanism, courts enforce two sets of principles: principles allocating power between the President and Congress, and principles protecting individual liberties, such as those embodied in the Fourth

sputtering. Take Justice Scalia's dissent in *Boumediene v. Bush* (2008): "[How] does the Court weave a clear constitutional prohibition out of pure interpretive equipoise?"[101] This may not be pure categorical legal reasoning, but empirical studies of the Court's jurisprudence agree that this mode of "balancing" is an accurate reflection of how courts decide.[102] Writes one author:

> when liberties are limited during national emergencies, the Judiciary, more often than not, will defer to the political branches of government when they are working together. This means that the Court has been less influenced by rights provisions and more concerned with the separation of powers, or congressional approval, of executive actions. . . . Courts routinely decide cases in accordance with whether or not the individual justices on the bench are adequately convinced that Congress has authorized the Executive's actions. As such, cases concerning the war powers become questions of procedure (which branch of government has authority to act), rather than a question of substance (can the government do that without infringing upon individual rights).[103]

At the same time, while we recognize that courts are *in fact* making political decisions all the time—each time they check the other branches, in fact—it does not therefore follow that they are doing it well. As a matter of fact and theory, the aforementioned version of the separation of powers rationale has tended to mean that "where both legislature and executive endorse a particular trade-off of liberty and security, the courts have accepted that judgment."[104] The troubles with this strategy are illustrated by one 2008 Supreme Court decision. The Court reasoned that an exception to the requirement that all searches

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and Fifth Amendments. Its primary concern is that the government as a whole will act improvidently." Mark Tushnet, "Controlling Executive Power in the War on Terrorism," *Harvard Law Review* Vol. 118, No. 8 (Jun. 2005): 2673-2682, 2674.

[101] *Boumediene v. Bush,* 553 U.S. 723 (2008) (SCALIA, J., dissenting), 833.

[102] Samuel Isaacharoff and Richard Pildes, "Emergency contexts without emergency powers: The United States' constitutional approach to rights during wartime," *I-CON*, Vol. 2, No. 2 (2004): 296-333; and Amanda DiPaolo, *Zones of Twilight: Wartime Presidential Powers and Federal Court Decisionmaking* (Lexington, KY: Rowman & Littlefield, 2010).

[103] DiPaolo, ibid, 2.

[104] Samuel Issacharoff and Richard Pildes, "Emergency contexts without emergency powers," 332.

be authorized by a warrant could be waived in light of "the Constitution's grant of authority over foreign affairs to the President, the President's longstanding assertion of that authority, and the apparent acquiescence of Congress and the Supreme Court to that authority."[105] In other words, agreement between the two political branches could supersede even language as clear as that of the Fourth Amendment.[106]

The Court can and should do better than existing practice, which has merely reaffirmed and sanctioned presidential aggrandizement. The political branch-consensus model risks falling into a dangerous value neutrality. A different approach would be a revived non-delegation model, tasking courts with reviewing the foundations of a delegation by Congress of regulatory power. Such an approach could be achieved in a number of ways: it could focus on "core functions" of Congress, on the reasons for the delegation, on the breadth of the delegated functions, or on its duration.[107]

There will be numerous more objections to the scheme. Would this not interfere with the common law system's virtue of executive flexibility? To this I would reply that such review is needed because not merely executive precedent, but the whole regime has shifted. As I have argued here, it is not so much that checks and balances, the classic "guardian" of the American Constitution, have failed, as that they have not been given a chance to act. I believe that a more vigorous court that explicitly and candidly acknowledges the political nature of the checking function it exercises, along with its two companion branches, is most likely to preserve the authority of the bench itself, as well as of the constitutional system more generally.

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[105] *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 157 (2d Cir.) (2008), 162.

[106] What is a warrant but a legal device by which a court gives judicial sanction to executive invocations of necessary departures from ordinary due process?

[107] In *Constitutional Dictatorship,* Clinton Rossiter proposes a series of criteria for the declaration of a state of temporary dictatorship (New Brunswick, NJ: Transaction Publishers, 2002) (1948).

Fourth and finally, contra Kleinerman (and Locke), it need not follow that when a court is deciding "politically," so to speak, it is making precedent. *Erga omnes* effect need not follow from a court decision. For this I turn to the unusual mode of decision-making by the Constitutional Court of Colombia.

Conclusion: Transcending Courts' "Non-Political" Stature

In a government of limited powers, there may always exist a gap "between the President's paper powers and his real powers," as Justice Jackson put it. The emergency is a particularly interesting case for examining this relationship because it represents a situation when more power is required by the executive than is customarily granted him. But because in the main courts have refused to acknowledge a new normal at all, the prospects for a return to a pre-9/11 jurisprudence seem dim.

Still, the example of the "War on Terror" makes a strong case for judicialization or legalization. For one thing, a wide gap between constitutional theory and executive practice allows us to grow accustomed to practices that could never themselves be codified. For thinkers in the mold of John Locke, who rejected all attempts to legalize executive "prerogative," textual or judicial constraints on executive "prerogative" are either ineffectual or dangerous. Yet, as Justice Jackson writes, "[N]o doctrine," he writes, "that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture."[108] Yet this is what is tolerated in practice. Can we even *conceive* of a Court holding or, further, a legislative

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[108] *Youngstown Steel* (JACKSON, J., concurring), 554.

enactment allowing the President to send troops abroad without consent?[109] Probably not. To "judicialize" emergency powers allows us not only to be more realistic about what rights we are willing to trade away in the name of self-preservation, but imposes far more stringent protections than what is tolerated outside of legal norms.

I come back to where we started—the question, is this a war or not? This "war on terrorism" is *not* a war in the sense that it was not formally declared, lacks an identifiable enemy, has no clear start- or end-point, and lacks any formal legal validity according to international law.[110] It *is* a war, however, in the sense of having justified a thirteen-year military buildup and reshaped the domestic schemes of separation of powers and rights protection. The central argument of this chapter has been that the "war on terror" has sent the American regime down an alternate constitutional path, that legislative and judicial acquiescence have rendered temporary measures permanent, and that such failures are evidence of a truncated operation of the separation of powers to the exclusion of statutory constraints and court review. The way out of this state of affairs will require nothing less than a concentrated effort to bring the emergency into the fold of law.

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[109] The hapless War Powers Resolution may seem to do as much, but this is surely not its intent or a fair reading of the statute.

[110] Scheppele writes, "Even though the Bush administration has been able to do virtually everything it has wanted to in the war on terrorism, it has not succeeded in justifying what it has done to an international public or, increasingly, to substantial segments of the American public either." "Law in a State of Emergency," at 1069.

Conclusion: Checks and Balances in a Shifting System

New separations of powers are experiencing a minor vogue, it seems. It kicked off with Bruce Ackerman's assault in the Linzian mold on "triumphalist success stories packaged as the American, French, and German "models" of constitutional government," in which he proposed that new constitutions adopt a form of "constrained parliamentarianism" in their stead.[1] Thereafter, Richard Pildes and Daryl Levinson told us that the traditional separation of powers had to be replaced with a "separation of parties" tracking mechanisms of political competition if we are to preserve the "vital aspiration" of inter-branch checks and balances.[2] Sanford Levinson argued that the U.S. Constitution's "undemocratic" structure betrays the Framers' own commitment to democratic self-governance and called for a constitutional convention to reform the Electoral College, the Senate, judges' term limits, and the powers of the presidency.[3] Surveying English, Irish, and American constitutional law, Eoin Carolan proposed an alternate tripartite scheme of courts, government and administration which he claims would do a better job of representing the individual citizen's interests in effective social action and individual protection.[4] Most recently, Jon D. Michaels proposes a new "administrative separation of powers" in which the administrative sphere is understood as a self-regulating ecosystem policed internally

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[1] On this model, a prime minister and cabinet would remain in office at the pleasure of the chamber of deputies, while at the same time, Parliament would be constrained by a written constitution, a bill of rights, and a constitutional court. Bruce Ackerman, "The New Separation of Powers," *Harvard Law Review,* Vol. 113, No. 3 (2000): 633-725, 637.

[2] Richard Pildes and Daryl Levinson, "Separation of Parties, Not Powers," *Harvard Law Review,* Vol. 119, No. 8 (2006): 2311-2383.

[3] Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)* (New York: Oxford University Press, 2006), 16. In the same mold, see, e.g., Larry J. Sabato, *A More Perfect Constitution: Ideas to Inspire a New Generation* (New York: Walker & Co., 2007), and Lawrence Lessig, "A Conference on the Constitutional Convention," *The Huffington Post* (August 10, 2011).

[4] Eoin Carolan, *The New Separation of Powers* (London: Oxford University Press, 2009).

policed by agency heads, civil servants, and the public, and in relation to which judges, presidents, and legislators would aim primarily at preserving the administration's well-functioning, internally rivalrous climate.[5]

No doubt, it is a propitious time to make gloomy prognostications about our institutions.[6] No less a staunch defender of the Constitution than the conservative law professor Steven G. Calabresi worries that the "very idea of the separation of powers is in a state of crisis today."[7] This project follows its forerunners in suggesting that new legitimating ideals are needed to guide our constitutional system (Ackerman, Carolan), in critiquing the undemocratic features of the old regime (Levinson) and in zeroing in on the mismatch between ideals and actual practice as the "driver" of a new separation of powers (Pildes and Levinson, Michaels). But it departs from these influences in several ways. First, it contributes to constitutional theory by highlighting the destabilizing effects of the Presidency in the constitutional order, an office perpetually at odds with the legal structures that attempt to fence it in. Secondly, it pushes forward studies of presidentialism in laying out a tripartite analysis of extralegal sources of presidential power. And finally, it speaks to the agenda of comparative politics, highlighting common practices of a Pan-American presidentialism as a source of guiding normative ideals.

Presidential power disrupts fixed constitutional structures. This is an intrinsic feature of execution, which inevitably gives new meaning to laws as it applies them. It is also a reflection of the changes wrought by mass democracy, which has exaggerated the

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[5] Jon D. Michaels, "Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers," *New York University Law Review*, Vol. 91, 2016 (forthcoming).

[6] Jack Balkin catalogues a number of these in "The Last Days of Disco: Why the American Political System is Dysfunctional," *Boston University Law Review,* Vol. 94 (2014): 1159-1199.

[7] Steven Calabresi, Mark E. Berghausen, and Skylar Albertson, "The Rise and Fall of the Separation of Powers," *Northwestern University Law Review,* Vol. 106, No. 2 (2012): 528-550, 548-9.

presidency's plebiscitary, rational-bureaucratic, and discretionary features. We in the Weberian modern world are disenchanted; we want someone to lead. Yet society also requires predictability and routine; we want solutions to life's problems, and we demand efficiency and swiftness from our government. The vaunted singularity Hamilton praised in the executive redounds to that power's very growth; in addition to the predictably distorting effects of application of the law after-the-fact, the President's accountability and visibility correspond to increased demands upon the office, and new, creative invocations of power in order to meet them: witness the plebiscitary president, the legislating president, and the emergency president.

These new forms demand methods of control that do not depend on rigid patrolling of the constitutional separation of powers, but rather, channel the very source of power on which the new presidential forms rely, politics. Popular control must mean more than "throwing the bums out" if the president's power to command majorities is to be counterbalanced. No doubt, as compared to Latin America, the power of populism is tame in the United States, the president's lofty exhortations often falling "on deaf ears." But the U.S. is no less susceptible to the "populist temptation," and the tragic excesses of Hugo Chávez's Venezuela help to illustrate a point of some relevance: where the old order loses its legitimacy and its luster, the people *will* be invoked by leaders wishing to clean house and, crucially, the old institutions must channel this force so that the revolution may have more than a purely destructive effect. As for presidential policymaking through and outside legislative channels, I argue that it should be channeled by structuring mechanisms of cooperation between the President and the original lawmaking institution, Congress, lest the burdens of norm generation be irrevocably translated to the executive branch or, perhaps even worse, result in the two branches immobilizing policymaking entirely. Brazil's experiments with coalitional presidentialism and popular controls of administration,

though not without problems, have provided the system with a way to tame fractious parties and a sprawling bureaucracy while keeping the President accountable to political forces. Finally, there is Colombia's pioneering new attitude to judicial review of the state of emergency, in which the Court is tasked with scrutinizing, not only the mode of declaring an emergency, but also the reasons for it, its duration and the scope of the powers involved in its furtherance. In the process, the idea of a "depoliticized" judiciary falls, albeit implicitly, by the wayside.

This "new" separation of powers turns to the sites of presidential influence on policy—the people, Congress, and the courts—and reconceives their roles so that, depending on the circumstances, they can function as facilitators of presidential power but also constraints. The people bestow upon the President an "electoral mandate" for action, but the very democratic and state institutions they attempt to capture blunt that power as the populist impulse to rebuild is channeled through them. Congress "captures" policymaking as administrative policy is exchanged for votes, but in functioning more like a bargaining partner of the President than a veto point per se, it is better positioned to shape the content of policy off the bat. Courts acknowledge their role as the defenders of rights in the emergency, even where this role positions them at the edge of a legal abyss, exposing the myth of the "political question" doctrine for what it is.

Some of the strong challenges that will be made to this proposal have already been addressed. Wouldn't the greater politicization of institutions like the Court and the bureaucracy prove utterly ruinous to the "decent drapery" of nonpolitical authority they possess?[8] I believe that to acknowledge the political nature of the work of courts and

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[8] Edmund Burke, *Reflections on the Revolution in France* (New York: Oxford University Press, 1993), 77.

administration is not necessarily to cede the place of technical and legal reasoning altogether, and indeed, that to do so *strengthens* their institutional position by clarifying the stakes of the struggle. (Besides, few today are convinced by the façade of "neutrality," in either its administrative or judicial face.) Further, though counterintuitive, I believe that said politicization is not incompatible with the values of professionalization, in particular because it defuses the "oversight arms race"[9] being waged between Congress and the President and which has yielded a "politicized, strategic bureaucracy, subject to fragmented and conflicting accountability."[10] From the point of view of a Ted Lowi or a Mancur Olson, politicizing the administration by allowing *more* popular access to the state by popular sectors seems the stuff of nightmares.[11] The noxious effects of interests in government seem to work primarily through congressional channels, as our current debate over campaign finance illustrates, and that perhaps certain channels for popular control may be less compromised than others, for instance, the Brazilian Public Prosecutor, which ostensibly voices legal claims and not political. Finally, this project's critique of the separation of powers may inevitably be taken as a call for a unitary, unbound executive. Yet in parting company with separation of powers formalism, I am not plumping for an "unbound" sphere of executive power that must remain "beyond the sphere of law." In fact, I claim that, instead, by being realistic about the checks that *do* limit executive power in practice, we have the greatest chance of controlling that power.

[9] Cynthia Farina, "Undoing the New Deal Through the New Presidentialism," *Harvard Journal of Law and Public Policy* Vol. 22 (1998): 227-238, 235; Sidney A. Shapiro & Robert L. Glicksman, "Congress, the Supreme Court, and the Quiet Revolution in Administrative Law," *Duke Law Journal,* Vol. 1988, No. 5 (1988): 819-878.

[10] Pildes and Levinson, "Separation of Parties," 2361.

[11] Theodore Lowi, *The End of Liberalism* (New York: W.W. Norton, 2009) (1979); Mancur Olson, *The Rise and Decline of Nations* (New Haven: Yale University Press, 1982).

As I have insisted, this project is no encomium to Latin American democracy. It uses the example of our Southern neighbors in order to discover creative accommodations to problems that the U.S. also faces. Through the comparative lens, a more pragmatic, consensual, and certainly president-centered face of constitutionalism emerges. I believe that such a practical accommodation to the *reality* of presidential politics offers us the best chance to properly check overgrown executives, and I have explored several mechanisms of control that track such practice, growing and changing with different administrations and regimes, and that respond to the real source of presidential power, which is to be found in political *authority,* not formal constitutional powers. This project proposes a new conceptual language to describe the political practices we see, and gestures at new ideas of what it might mean for our presidential system to "work well." The new separation of powers aims to take a mirror to the office of the president and its everyday workings, to target the pressure points where it acts upon institutions and is in turn acted upon, and finally, on the strength of these observations, to propose suggestions for designing a viable presidentialism that limits, but is not at war with itself.

A final note about constitutional change and permanence. Although I salute the courage of conviction of a Sanford Levinson, I do not insist that a constitutional revolution is required to achieve this new separation in practice. I believe that because these recommendations originate from practice, adapting our system to fit them will be much less painful than the corresponding shock treatment for scholars of constitutional law. This is because, as Pildes and Levinson tell us, the separation of powers survives more as an ideal than in practice, at which level our own "unorthodox" channels of lawmaking can be clearly witnessed. Moreover, rewriting extant institutions would not solve the problem of

the executive: it would merely put in place new static checks that the disruptive force of executive power could "work around."[12]

Recall George Washington's exhortation that errors of constitutional design should be corrected "in the way which the Constitution designates." He warned, "let there be no change by usurpation, for this, though it may in one instance be the instrument of good is the ordinary weapon by which free governments are destroyed."[13] It is true that our call for imbuing old institutions with a new spirit may smack of "usurpation." But to bring constitutional theory in line with reality is to ultimately vindicate the whole design. Letting the law develop smoothly to fit reality is to protect the institutions we already have.[14] As our "Darwinian" constitutional forefather Woodrow Wilson reminds us, our Constitution is a "living organism." As such, it "must obey the laws of life, not of mechanics; it must develop."

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[12] I do not claim that this structure is the new self-regulating Newtonian machine, although, built upon the idea that political power in the foundations necessarily waxes and wanes, it could prove an attractive and durable model. Still, the reality of secular institutional growth confounds even the best-laid constitutional blueprints, as has been the norm in our system and elsewhere.

[13] Quoted in Franklin Pierce, *Federal Usurpation* (New York: D. Appleton and Co., 1908), 1.

[14] Lowi, *The End of Liberalism* (defining "political illegitimacy" as the "distance between the *form* of the rule of law and the reality of its implementation"), xix.

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