Folk Theories and Constitutional Values

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ABSTRACT

Abstract constitutional values often motivate separation of powers doctrine and doctrines in other areas of law. A jurist favors one doctrinal position over another because, under some implicit positive theory, it promotes a consequential value: for example, abstract liberty, rule of law, or democratic values. Yet this jurisprudential posture falters if theory is incomplete or inapt. As an object lesson into the perils of incomplete functionalism, I consider the relationship between the so-called unitary executive and democratic values. I acknowledge a theoretical account of the unitary executive along the lines of the one that animates judicial decisions; I then argue that, viewed in a more complete setting, judicial decisions seemingly promoting a unitary executive may engender pluralism and undermine the value of accountability. I empirically examine the relationship between electoral accountability and innovations relating to one such offensive institution—the legislative veto—in the context of the American states between 1970-2010. I find that the offending institution of the legislative veto is, if anything, associated with stronger, not weaker, executive accountability for administrative actions, questioning the soundness of democratic values as a motivation for pursuing a unitary executive. I conclude with thoughts on the role of courts in managing functionalist constitutional values.

Introduction

Abstract constitutional values often motivate separation of powers doctrine and doctrines in other areas of law (e.g, Pildes 2014). Amid otherwise embarrassingly thin textual support— it is no accident that this mode of reasoning pervades constitutional law, and its sparse separation of powers and federalism guidance in particular (e.g., Chemerinsky 1997)—a jurist favors one doctrinal position over another because, under some implicit positive theory, it promotes a functionalist value: for example, warding off "tyranny", or advancing abstract rule of law or democratic values.[1] If courts had good working theories of institutions, this might be a reasonable approach to resolving constitutional disputes where the relevant text is silent.

But many times courts do not have such theories. Often, courts work off incomplete folk theories of institutions that provide poor or even mis-directed guidance. As an object lesson into this observation, I consider one prominent doctrinal perspective that is motivated in large part by functionalist values: the theory of the "unitary executive," which derives significant force from the view that concentrating administrative authority in the hands of the executive promotes political accountability. This perspective has an impressive legacy of supporters, including perhaps most vocally Alexander Hamilton,[2] but also other founding era leaders,[3] along with more recent thinkers.[4] The common view is that removing institutions

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[1]A word on vocabulary is in order at the outset. "Functionalism" is often played against "formalism" as an interpretive methodology; with the former attending to the general purposes of the constitution, for example, the balance of power between the branches, and the latter tending to focus on constitutional text and generally presuming, for example, well defined roles for the branches. See, e.g., Strauss (1987), Manning (2011) for an account of these methodological approaches. However, many times "formalist" jurists motivate or justify their (generally) textual interpretations by reference to values such as liberty or political accountability. I understand these as "functionalist" values, in the sense that they gain meaning and influence from a positive view of how institutions operate, and it is in this sense that I use the term in this article.

[2]Hamilton's key thoughts on this topic appear in Federalist No. 70, where he famously wrote that "one of the weightiest objections to a plurality in the Executive . . . is, that it tends to conceal faults and destroy responsibility." I discuss his views in more detail below.

[3]See Farrand (1966), noting that during the Federal Convention John Rutledge, said "A single man would feel the greatest responsibility and administer the public affairs the best."

[4]The list of supporters of this theory is truly voluminous. For prominent supporters and seminal works,

and devices that impede the exercise of "executive power" produces a more unitary executive, simplifies lines of responsibility for administrative actions, and promotes the value of political accountability (see, e.g., Cross 1990). As suggested by the most recent major separation of powers decision handed down by the Supreme Court, *Free Enterprise Fund v. PCAOB*,[5] Hamilton's theory of the executive continues to animate modern doctrine (see Metzger 2018, Mashaw & Berke 2018 for discussions of accountability interfacing with recent decisions and debates).

This Hamiltonian theory is not necessarily wrong, but it is simplistic and incomplete in at least one critical way: it neglects separation of powers dynamics. In particular, it ignores how institutions adapt and respond to judicial decisions; it ignores that judicial invalidations may operate predominately to re-channel the means of legislative influence over the bureaucracy, shifting effort from the invalidated device to other constitutionally perfected devices (e.g., Levitas and Brand 1983; Hammond and Knott 1996; Fisher 1998; Huq 2013; Stiglitz 2014b; see generally de Figueiredo, Jacobi and Weingast 2006). Moreover, we do not know the mapping between legislative effort as applied through various tools and influence over the administrative state. These factors generate a disturbing ambiguity: it is not clear whether invalidating a device offensive to the unitary executive results in a more or less unitary system; such invalidations may invite pluralism and diminished accountability, precisely the opposite of what Hamilton's folk theory suggests (Huq 2013, Stiglitz 2014b).

Plausible as this counter-narrative may be, the mechanisms remain to be fleshed out,[6] and evidence on the electoral significance of unitary judicial decisions is a void. This article undertakes these exercises. I first develop a theoretical account sympathetic to the unitary executive and its perspective on political accountability: it shows how simplifying lines of

see, e.g., Lessig and Sunstein (1994), Calabresi (1995), Kagan (2001).

[5]561 U.S. 477 (2010) (quoting Federalist 70 and 72)

[6]For example, if the legislative response to the judicial decision is more effective than then legislative device invalidated in the judicial decision, why did the legislature not use the secondary device in the first instance?

responsibility enhances the value of political accountability. Then, in a modest tweak of this theory, I further argue that removing one device of legislative control can in fact engender pluralism and undermine political accountability. The essential intuition is that invalidating one device may channel legislative efforts into another more costly (and hence previously unused), but also more effective, tool of control.[7]

Based on this theoretical ambiguity, I then empirically examine whether unitary innovations enhance or attenuate the relationship between various aspects of government performance and the executive's political accountability. I do so in the context of the American states, which provide an ideal testing ground for implications of constitutional theories, such as that of the unitary executive. The states tend to have broadly similar constitutional frameworks, bounded by a core common history and the federal constitution (Dorf 1998; Acemoglu et al 2002), yet they also differ in key respects relevant to constitutional debates. I focus on the legislative veto, a potent device of "plural" control over the administrative state, fostering a rival executive in the form of the legislature (Calabresi 1995). The Supreme Court invalidated this device at the federal level in 1983, *INS v. Chadha*,[8] but states exhibit substantial variation in the presence of the veto, and I use this variation to study the consequences of adding and removing unitary institutions. To my knowledge, this is the first study to examine empirically the relationship between electoral accountability and changes in institutions pertaining directly to the unitary executive theory.[9]

The results, in brief, from this empirical exercise defy the expectations of the operative theory. Across metrics of government performance, the presence of the legislative veto, if anything, enhances gubernatorial political accountability; invalidating the veto, there-

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[7]I formalize this argument in the online appendix.

[8]INS v. Chadha, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983).

[9]A large literature, discussed below, examines cognate features of political systems: for example, party organization or divided government. But to my knowledge no study examines reform in separation of powers systems as relates to institutions that were criticized by unitary executive theorists (such as the legislative veto).

fore, appears to result in an *attenuated* relationship between government performance and electoral fortunes. Thus, a more complete theory of political institutions that attends to dynamics shows that unitary judicial decisions have ambiguous effects; and empirical evidence suggests that unitarian innovations are at least sometimes counter-productive with respect to their motivating functionalist value.

In this way, these exercises suggest several observations regarding the role of courts in managing functional constitutional values on structural issues.[10] Most directly they indicate that tinkering with institutions to promote functionalist values is a fraught business; courts will often be incompetent in it. This calls for a degree of judicial humility; it suggests that—at least with respect to structural questions—such values should not play an important role in justifying or motivating judicial decisions. Such a jurisprudential posture might be achieved in several ways, including for example, by restricting motivations to textual and other arguably more reliable tools of construction, by consciously "under-enforcing" the complete structural vision of the constitution (Sager 1978), or by more expansive use of the political question doctrine (Huq 2013).[11]

Three main parts follow this introduction. First, I discuss the theory of the unitary executive, and develop a simple theoretical model of unitariness and political accountability. Second, I describe the institutional domain under empirical consideration in this article, and I present the empirical application, along with a number of robustness exercises. My discussion follows and focuses on the role of courts in managing functionalist constitutional values more broadly.

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[10]The case would be different for individual rights, where the first focus is on the welfare of the individual, rather than the putative health of our constitutional institutions.

[11]Though this jurisprudential posture would largely sideline the courts as active managers of constitutional values on structural questions, leaving instead their management to the political branches (e.g., Wechsler 1954), it further suggests that courts would continue to play an important role in ensuring the basic integrity of the political process.

Doctrine, Model, and Institutional Domain

Doctrine and Motivation

The unitary executive theory maintains, in short, that "executive power" must be vested in the president, in one form or another, at least including removal powers over officers exercising executive discretion (Calabresi and Rhodes 1992). Textually, the Constitution yields fairly thin explicit support for the position; typically, proponents rely on the vesting and take care clauses: that "The executive Power shall be vested in a President",[12] and that the President "shall take care that the Laws be faithfully executed."[13] Perhaps due to this thinness—particularly when viewed against often countervailing text, such as Article I's necessary and proper clause[14]—functionalist arguments importantly underpin the perspective (e.g., Cross 1990, Lessig and Sunstein 1994; Calabresi 1995; Kagan 2001). For instance, in the recent *Free Enterprise Fund v. PCAOB*, the Supreme Court cited the Hamiltonian logic as a reason to invalidate double for cause removal. Thus, political accountability, along with other functionalist attributes, such as "vigor," motivate the prominent theory of the unitary executive (see generally Calabresi and Yoo 2008).

Given his centrality, Hamilton's views are worth laying out more fully:

> [O]ne of the weightiest objections to a plurality in the Executive . . . is, that it tends to conceal faults and destroy responsibility . . . It often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures, ought really to fall. It is shifted from one to another with so much dexterity, and under such plausible appearances, that the public opinion is left in suspense about the real author . . . though we may clearly see upon the whole that there has been mismanagement, yet it may be impracticable to pronounce to whose account the evil which may have been incurred is truly chargeable. (Federalist No. 70).

In some ways, Hamilton anticipated significant strands of social science literature. For ex-

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[12]U.S. Const. art. II, 1.
[13]U.S. Const. art. II, 3.
[14]U.S. Const. art. I, 8.

ample, important parts of the theory of the firm arose in response to problems of team production in which the marginal product of individuals cannot be easily observed (Alchian and Demsetz 1972). And a similar logic motivates a considerable range of modern perspectives of political accountability. Perhaps most relevant,[15] the economic voting literature in comparative politics develops much the same intuition as Hamilton, sometimes cuing directly off him (e.g., Anderson 2007), arguing that simplified lines of responsibility enhance electoral accountability for economic performance (e.g., Powell and Whitten 1993; Whitten and Palmer 1999; Anderson 2000; Nadeau et al 2002; Duch and Stevenson 2008, Kayser and Peress 2012). Yet these studies tend to focus on factors such as voting cohesion in the governing party or other aspects of party organization, generally not in separation of powers systems, and generally not in dynamic settings. As such, they provide limited insight into questions involving inter-branch dynamics and institutional reform.[16] This existing literature does not engage with separation of powers dynamics and the possibility that the branches adapt their behavior over time to varying constraints (e.g., de Figueiredo, Jacobi and Weingast 2006; Huq 2013; Stiglitz 2014b). Here I study this issue.

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[15]More generally, Hamilton's position that a plural executive would "conceal faults" reflects a concern about the information available to voters that runs through much of the modern literature on elections (see, e.g., Beseley 2006).

[16]Similarly, several studies examine the relationship between economic or fiscal performance and gubernatorial ratings or election returns at the state level, sometimes cuing off the comparative politics literature, but these state-level studies too do not focus on the institutions relevant to the unitary executive theory and often examine static institutional settings. For example, Rudolph (2003) examines a cross section of survey data to study whether attributions of gubernatorial responsibility for state fiscal circumstances condition on divided government and the governor's budget powers; Lowry et al (1998) examine a panel of election returns and find greater responsiveness in gubernatorial vote shares to fiscal performance in the context of unified government; Leyden and Borrelli (1995), likewise, examine a panel of election returns and find greater responsiveness in gubernatorial vote shares to state unemployment in the context of unified government. Substantively, none of these studies focus on institutional features relevant to the on-going unitary executive debate or inter-branch dynamics pursuant to changes in such institutions.

Institutional Dynamics and Constitutional Values

Hamilton's core concern, therefore, can be stated succinctly: with two or more entities involved in the execution of some policy, it can be very difficult to determine who "authored" any failure in that domain.[17] With only one entity involved in a policy domain, that is, the negative outcome may be chargeable to that entity, and voters may on that basis draw reliable inferences about its qualities—competence, honesty, and so on. However, with two or more entities involved in the domain, it will not be clear who to charge the failure to—in the separation of powers context, for instance, it will be unclear whether the executive or the legislature is chargeable for some failure. This ambiguity reduces the information value of the negative outcome, such that the voter cannot draw reliable inferences about the relevant qualities of the executive (or legislature), thereby frustrating the effectiveness of elections as a device to shape policy outcomes.

That is Hamilton's basic insight. This insight, valid insofar as it goes, has been adopted by unitary executive theorists to mean that removing devices that impede executive control over administrative agencies will enhance political accountability. The difficulty with this position is that constitutionally perfected substitutes almost always exist for the offending device. For instance, after the Court invalidated the legislative veto in *INS v. Chadha*, thus eliminating a device that violated unitary precepts, it appears that Congress responded by augmenting a variety of other tools of influence (Levitas and Brand 1984; Smith and Struve 1983; see also Stiglitz 2014b). What might be accomplished through the legislative veto might similarly be accomplished by appropriations riders, to give one example.[18]

The simple recognition that substitute devices exist carries at least two implications. A weaker but still important implication is that invalidating an offensive device is likely to be less effective than one might otherwise suspect—that material ambiguity in authorship

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[17]I formalize Hamilton's view and the critique presented below in an online appendix, available at [website.com].

[18]For an intriguing account of the limits of the funding powers, see Price (2018).

may remain, even if prior to the judicial decision the offending device was initially fully responsible for any such ambiguity. This follows from the fact that substitute devices of influence and control exist and that the forces giving rise to the use of the original device are unlikely to have changed as a result of the judicial decision.

A stronger and more counterintuitive implication is that invalidating an offensive device may in fact exacerbate the inferential problem of the voter. This follows, again, from the fact that substitute devices of influence and control exist. If these substitute devices prove more effective at influencing execution, the outcome in the policy domain will be even less informative about the executive's qualities than if the invalidation never took place. The natural question is why the substitute device was not used initially if it was more effective than the original device. Here, the response is straightforward: the substitute may also be costly to deploy. The use or non-use of a device depends, of course, not only on the extent of its influence but also on its costs. It is quite possible that more effective but more costly tools of influence may only be used once courts invalidate less effective and less costly tools.

Some highly effective (potential) tools of congressional influence, in other words, may be off the table so long as more casual tools of influence remain in play. For instance, it is very much within Congress's ability to dramatically augment its staff resources, oversight activities, and management of the bureaucracy through statutory controls. But so far, it is not in Congress's interest to do so. That it is not in Congress's interest to do so is principally a function of at least two characteristics of the current environment. It would be costly and taxing to overhaul the committee structure, for instance, even if doing so would benefit members' interests on other margins. And at present Congress has more casual tools of influence, such as haphazard oversight, along with various devices that moderate contrary administrative impulses, such as the Civil Service Protections and for cause removal for officers. Were the Court to remove for cause protection, however, those more costly devices may hold new appeal.

In this way, removing a specific device of plural administrative control has ambiguous effects. It may render outcomes more informative about the executive's ability and thereby enhance the value of accountability. Or it may make outcomes less informative about executive ability and thereby diminish the same value. It all depends on what substitute devices exist and on their cost structure.

Empirical Application

Institutional Domain

Over the years, the courts have invalidated a variety of institutional devices for offending unitary principles. At the federal level, for example, consider the following landmark cases: *Buckley v. Valeo* (1976), *INS v. Chadha* (1983), *Bowsher v. Synar* (1986), all in one form or another cordoning off executive discretion from legislative tampering. For the empirical portion of this analysis, I focus on the institution of the legislative veto, a device that allows the legislature to review and veto administrative actions after delegating authority to agencies (see de Figueiredo & Stiglitz 2017 for a general discussion; Stiglitz 2018b for a theory of delegation premised on voter information and trust).[19] The Supreme Court invalidated this device in 1983 decision of *INS v. Chadha*. Though the Supreme Court viewed the veto as an impermissible exercise of legislative powers, the 9th Circuit decision, authored by future Justice Kennedy, was quite uncertain whether the veto represented an exercise of legislative or executive (or, in the context of those facts, judicial) powers. With respect to executive powers, then-Judge Kennedy noted that the purpose of the device was to "share in the administration of the statute," an "egregious" interference with executive power "undercutting [a] . . . purpose of the separation of powers doctrine, which is to insure efficient administration by the unambiguous assignment of responsibility to specific

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[19]See also Stiglitz 2018c, 2018d for empirical support of Stiglitz 2018b.

branches," (*Chadha v. INS*, 634 F.2d 408, 432 (9th Cir. 1980)). On this understanding, the legislative veto fits well within the set of institutions thought to violate unitary principles.

[Figure 1 About Here]

Though the Court invalidated the veto at the federal level in 1983, the veto has had a much more varied existence in the American states. The first state to adopt the veto appears to be Kansas, in 1939, shortly after the device came into fashion at the federal level during President Franklin Roosevelt's administration (Dean 1992). States, one by one, adopted the veto through mid-century, with adoptions rapidly increasing in the 1970s. Perhaps riding the same intellectual and institutional wave as *Chadha*, state courts began to invalidate the veto in the late 1970s, thus anticipating the federal decision; in copycat fashion, additional invalidations followed the *Chadha* decision. Figure 1 displays the rise and fall of the legislative veto in the states since 1950.[20] Its variation and measurability make the legislative veto an attractive subject of study.

Moreover, as suggested by then-Judge Kennedy's opinion, the veto represents just the sort of unitary device that would concern Hamilton. It is of course exceptionally challenging to directly discern how influential the veto is: even if we had credible and comparable measures of regulatory content and the preferences of the relevant actors, we would still require some way to account for threatened, non-observed use of the veto—threats that need not even ever be explicitly communicated. Nevertheless there is substantial indirect evidence of the veto's importance. That, for instance, the veto was a legal and academic battleground suggests its importance. State-level case studies, further, suggest that the legislative review committees are actively involved in the rule-making process (e.g., Ethridge 1981, Falkoff 2016).

Along these same lines, and consistent with the dynamic perspective of this article,

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[20]Data on legislative vetoes extracted from relevant Books of the States, along with various state-level law reviews. This summary figure is closely related to one that appears in Stiglitz (2014b).

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a constellation of empirical findings suggest that legislatures move into substitutes when deprived of the veto. At the federal level, in the aftermath of *Chadha*, which eliminated a (legally enforceable) legislative veto, numerous scholars studied the "dynamics of power" set off by the decision (Eskridge and Ferejohn 1992). The general idea from the case studies in this strand of the literature is that Congress asserted itself along other margins (e.g., Levitas and Brand 1984; Smith and Struve 1983), amplifying statutory controls for instance (e.g., Fisher 1993). At the state level, similarly, I find that the state legislature in Missouri modified the state Administrative Procedure Act (APA) to emphasize veto by appropriations riders and more generally changed its drafting practices in response to a judicial decision that invalidated the legislative veto in that state (Stiglitz 2014b).[21]

The legislative veto, therefore, appears to be an important and conceptually relevant institutional device that, critically, we can also credibly measure and varies over time in the states. I use this state-level variation in the presence of the legislative veto to test whether the relationship between regulatory outputs and electoral accountability conditions on this institution of pluralism in the executive.

Metric of Regulatory Output: Energy Prices

The basic concept of this study, as explained below, involves estimating whether incumbent electoral performance is more or less sensitive to policy outputs with the legislative veto in place. A threshold challenge to this design is finding a policy output that is both relevant and measurable. A relevant policy outcome (a) is sensitive to the regulatory environment, (b) is plausibly influenced by the use or threatened use of the legislative veto, and (c) plausibly matters to citizens' vote choices. The states' macroeconomic performance might matter to

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[21]This despite the fact that in related research, I find in a non-dynamics setting that executive agencies are more responsive to presidential electoral incentives than independent agencies (2014a). This difference hones on the fact our interest is in the dynamics—e.g., suppose we remove one feature of the system via a judicial decision—what might we expect to happen?

vote choices, for instance, but the relationship between the legislative veto and, say, changes in a state's household income is likely attenuated. On the other hand, many environmental regulations likely meet the relevance criterion, but they cannot be easily measured across states or time.

Energy prices represent one regulatory output that meets the demands of the relevance and measurability criteria. Since shortly after the turn of the (last) century, states have heavily regulated electricity rates. State public utility commissions (PUCs) regulate the electric power industry through both ratemaking hearings and rulemakings. For instance, PUCs have issued a series of rules pursuant to statutes establishing Renewable Energy Standards, which require providers to generate electricity using specified percentages of renewable energy sources (e.g., Rader and Norgaard 1996). Other rulemaking efforts concern the reliability of electricity provision, for example, or "least cost" utility planning, which encouraged providers to meet demand at the lowest cost subject to certain constraints. Such regulatory efforts both have consequences for electricity rates and can be affected by the legislature through vetoes and other devices.

Moreover, these regulatory efforts carry implications for electricity rates, and rates diverge greatly over the states.[22] In 2010, for example, residents in Idaho paid $23.40 per million BTU of electricity, whereas residents of Connecticut paid more than double that amount, $56.43 per million BTU. Based on the average household's consumption of roughly 38 MMBtu per year,[23] this figure suggests that residents in Connecticut pay over $2,000 for a year's worth of electricity, considerably higher than the $900 that Idaho residents pay for the same amount of electricity. Such amounts of money are likely to be noticed by voters

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[22]Of course, the cost of generating and distributing electricity also diverges in states, and this explains part of the variation in rates. For instance, states in the northwest have access to abundant hydro resources (e.g., Blumm 1983), which make the states less sensitive to changes in the price of carbon based primary fuel inputs.

[23]http://www.eia.gov/tools/faqs/faq.cfm?id=97&t=3

and plausibly manifest in voting behavior.[24]

Further, and critically, it is possible to obtain residential electricity rates for all states for the last forty years.[25] In the analysis below, I focus in particular on changes in residential rates, the rates that most voters pay, between the election year and the previous year. The focus on changes—rather than levels—follows the larger literature on "economic voting", which sensibly posits that voting should be more sensitive to changes than to levels because levels often depend on long-run factors outside of the control of political actors (see, e.g., Ebeid and Rodden 2006). The question I examine is whether the presence of the legislative veto hampers voters' ability to punish governors for growth in residential rates, under the premise that voters prefer lower to higher rates.[26]

Basic Design

When administration performs "poorly", does the legislative veto dampen the electoral consequences of this maladministration for the executive? To investigate the question of whether the executive's accountability is conditioned on the presence of the veto, I first estimate the following,[27]

$$v_{st} = \alpha_s + \gamma_t + \Gamma Z_{st} + \beta_1 veto_{st} + \beta_2 rate_{st} + \phi veto_{st} X rate_{st} + \epsilon_{st} \tag{1}$$

where v_{st} is the incumbent party's vote share in state s for the gubernatorial election held at time t,[28] α_s is a state fixed effect, γ_t is a time fixed effect, Z is a vector of political and

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[24]For a review of the vast literature in this area of voting, see Healy and Malhotra (2013).

[25]I obtain data on state-level electricity rates between 1970 and 2010 from the Energy Information Administration.

[26]This premise assumes that consumers are sensitive to short term prices, discounting concerns about reliability of service. This perspective is consistent with the general tendency for voters to behave myopically; see Healy and Lenz (2014) for a review of the relevant literature and a psychological theory of the phenomenon.

[27]All models estimated with OLS.

[28]Data on gubernatorial electoral returns derived from various CQ publications.

economic covariates,[29] $veto_{st}$ is an indicator for whether state s possesses a legislative veto at time t, and $rate_{st}$ is the year-over-year percentage change in residential electricity rates.[30] This fixed effects setup permits us to account for long-run state level characteristics,[31] such as an "accountability culture," operating to universally downgrade elected officials, as well as for time trends common to all states. This latter feature thus responds to concerns stemming from the possible relationship between national political and economic events and gubernatorial accountability; including year fixed effects effectively benchmarks state performance to national performance (Kayser and Peress 2012).

Under this design, the main effect of regulatory outputs on incumbent vote share is represented by the coefficient β_2, reflecting the effect in states that do not have the legislative veto. Generally, one would expect a negative β_2 coefficient, indicating that rising energy prices reduce incumbent vote shares. This coefficient is of passing interest, but our main interest is in the coefficient on the interaction between the legislative veto and government performance, ϕ. This coefficient informs us whether the legislative veto dampens or amplifies the electoral consequences of regulatory outputs. To the extent the veto dampens accountability, as predicted by the unitary perspective, one generally expects the coefficient on the interaction term to offset the main effect, at least in part. On the other hand, if the veto amplifies accountability, one would expect a negative coefficient.

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[29]All specifications include the following covariates: indicators for divided government, line item veto, and legislative term limits; log population, log household income, a measure of unemployment and a measure of year-over-year changes in unemployment. The unemployment measure is actually based on deviations from non-farm payroll trends, following Wolfers (2007). The idea is to capture a "gap" between existing employment and expected employment. Expected employment is given by the employment the trend, obtained by passing the payroll data through a Hodrick-Prescott filter. The major advantage of this approach over simply using unemployment figures is that we can construct a longer series for this variable than we can for state-level unemployment. Notice that a positive "gap" indicates higher than expected employment, so the sign on this coefficient is theoretically opposite that of unemployment. Where the two series overlap, the correlation between them is -0.48.

[30]Throughout, I exclude Hawaii and Alaska, as is common in the literature due to their unusual economies.

[31]Note that most economic vote studies cannot include country or state fixed effects, as they examine static institutional environments.

Initial Results

Consider the relationship between residential electricity prices and incumbent vote performance, which run contrary to Hamiltonian expectations. Focus first on the first column of table 1, which reports the most straightforward specification as relates to the full sample of gubernatorial elections. What is of most interest to us is that the coefficient on the interaction term is strongly negative, indicating that in the presence of the veto increases in residential rates correlate with reductions in incumbent vote shares. The magnitude of the coefficient suggests that an increase of one standard deviation in rates ($\sigma = 0.075$) reduces incumbent vote shares by roughly 2.5 percentage points. The coefficient is significant at the ten percent level. The story is much the same in models 2 and 3. For those models, we remove states that require the legislature to affirmatively pass all regulations as statutes and therefore arguably do not delegate authority to the executive (i.e., the "Schechter" states, model 2),[32] as well as states that have direct elections for their Public Utility Commissions (model 3); both sets of states bear little similarity to our federal system, and we would expect the veto to exert little influence on the relationship between regulatory outputs and gubernatorial vote shares. Together, this suggests that states with more plural structures—that is, with the legislative veto—exhibit stronger connections between regulatory outputs and gubernatorial electoral fates, a pattern contrary to unitarian expectations. The formally plural, and not the unitarian, government appears to promote accountability for regulatory outputs.

A natural concern with this empirical design is that the legislative veto may arise endogenously to the political environment. For instance, if the veto is adopted during a time of widespread regulatory abuses, and those abuses correlate with rate increases, the association between the veto and regulatory outputs in the energy domain may reflect those abuses

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[32]By Schechter, I of course allude to *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). I identify such states primarily based on Schwartz (2010); they are West Virginia, Colorado, and Tennessee.

rather than anything about the information environment presented to voters. Alternatively, one might speculate that the veto is adopted at a time when the tides operate against accountability in the state, and that the association between the veto and regulatory outputs understates the true effect in question.

To provide an initial probe of these possibilities, I construct lead indicators for veto adoptions and lag indicators for veto losses. The lead indicators take a "1" in the two elections prior to veto adoption, and the lag indicators take a "1" in the two elections following veto loss; both indicators take "0"' elsewhere. If veto adoption and loss is exogenous, these leads and lags should have relatively precise zero coefficients, suggesting that the adopting or losing states have trends similar to states that did not experience adoptions or losses. The coefficients on the leads and lags, as shown in models 4-6 of table 1, all return with insignificant coefficients, though the magnitudes on the interactions are large in some specifications and suggest that veto changes should not incautiously be accepted as exogenous.

[Table 1 About Here]

Judicial Interventions

One way to focus attention on veto changes that we can regard as more plausibly exogenous is to examine only changes that follow from judicial interventions. Although courts, of course, also fit into our political system, they tend to be more insulated from popular pressure than governors and legislatures. Moreover, litigation tends to run on its own timetable, making it less likely that the timing of the veto loss correlates with problematic political or economic conditions. For this exercise, I keep all elections for states that did not have an adoption or loss in the series, as well as elections for states that lost a veto due to judicial intervention if the veto was in place that year or if the election occurred after the year of the invalidation; I drop all other elections. This procedure thus focuses on changes in states that might

plausibly be regarded as exogenous. I then re-run the analysis above.

The results from this exercise, reported in table 2, largely resemble those from the initial results, though we estimate the coefficients of interest more precisely. The governor is more harshly punished for residential rate increases, that is, in the presence of the legislative veto. The magnitude of the coefficient is roughly the same as in the preliminary results, but as I suggest the coefficient on the relevant interaction term is more precisely estimated.[33] Moreover, if we examine the loss lags we tend to see attenuated coefficients, again none significant, suggesting that this subset of changes in the presence of the veto might plausibly be regarded as exogenous. (Notice that we do not have leads in this exercise because we dropped pre-adoption observations for the relevant states.)

[Table 2 About Here]

In sum, if we examine only those changes in veto status relating to judicial invalidations, we see much the same story: paradoxically, enhanced gubernatorial accountability in the presence of the legislative veto. Here, as above, the veto makes the electoral consequences of rate increases far more severe: a one standard deviation increase in residential rates decreases the incumbent's vote share by between 2 and 2.5 percentage points.

Discussion

With respect to one important regulatory output, therefore, we have seen that the presence of the legislative veto leads to enhanced—not attenuated—executive accountability. This pattern sits uneasily with the most straightforward reading of Hamilton. As commonly understood by the courts,[34] removing an institution of plural control should simplify the lines of responsibility for administrative actions and permit voters to hold the executive

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[33]For model 1, $p = 0.04$; for model 2, $p = 0.01$; for model 3, $p = 0.07$.

[34]See, e.g., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010)

accountable. On the basis of interbranch dynamics, this article questions the view that removing devices of plural control necessarily produces simplified lines of responsibility. If we view the legislature as an institution likely to respond to new judicially imposed constraints by adapting its behavior and reasserting its interests in constitutionally perfected ways, it is entirely plausible that the executive may find itself more harassed by the legislature after the relevant judicial decision. An implication of this perspective is that institutions formally violating the postulates of the unitary executive theory may in fact advance the values pursued by that vision of constitutional lawmaking.

This article has focused on the legislative veto as an illustrative example, but the central debates today about the unitary executive focus on the President's removal powers. In particular, debate arises around the for cause removal protections that officers of independent agencies enjoy. However, these removal protections should be viewed similarly to the veto, as many suggest that Congress exerts relatively greater control over independent agencies (e.g., Strauss 1984, Crane 2015). This analysis urges us to consider what might happen in the Court invalidated *Humprey's Executor* and for-cause protection (e.g., Rao 2011), perhaps as part of a broader questioning of the administrative state (Metzger 2018).[35]

The main suggestion of this analysis is that one should not casually buy into the institutional fork theories that populate current doctrinal understandings. Where Congress cares about agency independence—where it matters—Congress may devise alternative, constitutionally perfected substitutes, for example, altering administrative procedures, changing confirmation practices, or vesting agencies with independent budget or litigation authority (Dalta and Revesz 2012). Some of these adjustments may fall before a hostile Court, but many will not, and so material ambiguity exists over the practical consequences of resolving the removal question in favor of the unitary executive (see Huq 2013, 2014 for a similar conclusion).

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[35]See also In re Aiken County, 645 F.3d 428 (D.C. Cir. 2011)(Kavanaugh, J., concurring).

Though this analysis is a case study and therefore has inherent limitations, it also suggests several broader lessons. Most clearly, it calls for a degree of humility when courts reconfigure structural institutions to effectuate some constitutional value, such as political accountability, or liberty. Viewed dynamically, the consequences of such judicial decisions are difficult to predict, and courts are likely incompetent in the task. This humility might express itself in at least three non-exclusive ways. First, courts might explicitly disavow functionalist motivations as the basis for interpretive stances on structural questions. Instead, courts might rely more explicitly on the traditional sources of text and structure of the Constitution, precedents, as well as respect for general interpretive values such as reliance and stability. Second, where the text and other traditional sources run out of plausible content on structural questions, perhaps it is best to acknowledge this candidly, and regard the issue as a political question lacking a judicially manageable standard;[36] recently, Huq (2013) persuasively argued that courts adopt this position with respect to removal. Alternatively, if abstract values cannot be purged from the analysis, courts might "under-enforce" the full structural vision of the constitution (Sager 1978).

In a number of other areas, courts animate doctrines touching structural questions through reference to abstract constitutional values premised on folk theories. To take a partial list, many federalism doctrines find similar motivation in constitutional values: the anti-commandeering doctrine roots in part in concerns over liberty and political accountability, *Printz v. United States*, 521 U.S. 898, 919-24 (1997); see also *New York v. United States*, 505 U.S. 144, 168-69 (1992); we understand the federalist-inspired limits of the commerce clause, in part, based on the value of state experimentation, *United States v. Lopez*, 514 US 549, 581 (1995); or of the limits to the spending clause in liberty and political accountability, *NFIB v. Sebelius*, 132 S. Ct. 2566, 2602 (2012). The value of political accountability,

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[36]See Fallon (2006) for an excellent analysis of this aspect of the political question doctrine; his discussion on practical desiderata, 1287-1293, is particularly relevant.

likewise, motivates much of the force behind the contentious non-delegation doctrine, *Department of Transp. v. Amtrak*, 135 S. Ct. 1225, 1234-40 (Alito, J., concurring) (see also Stiglitz 2018a). Here, too, this analysis suggests, greater humility may be on order.

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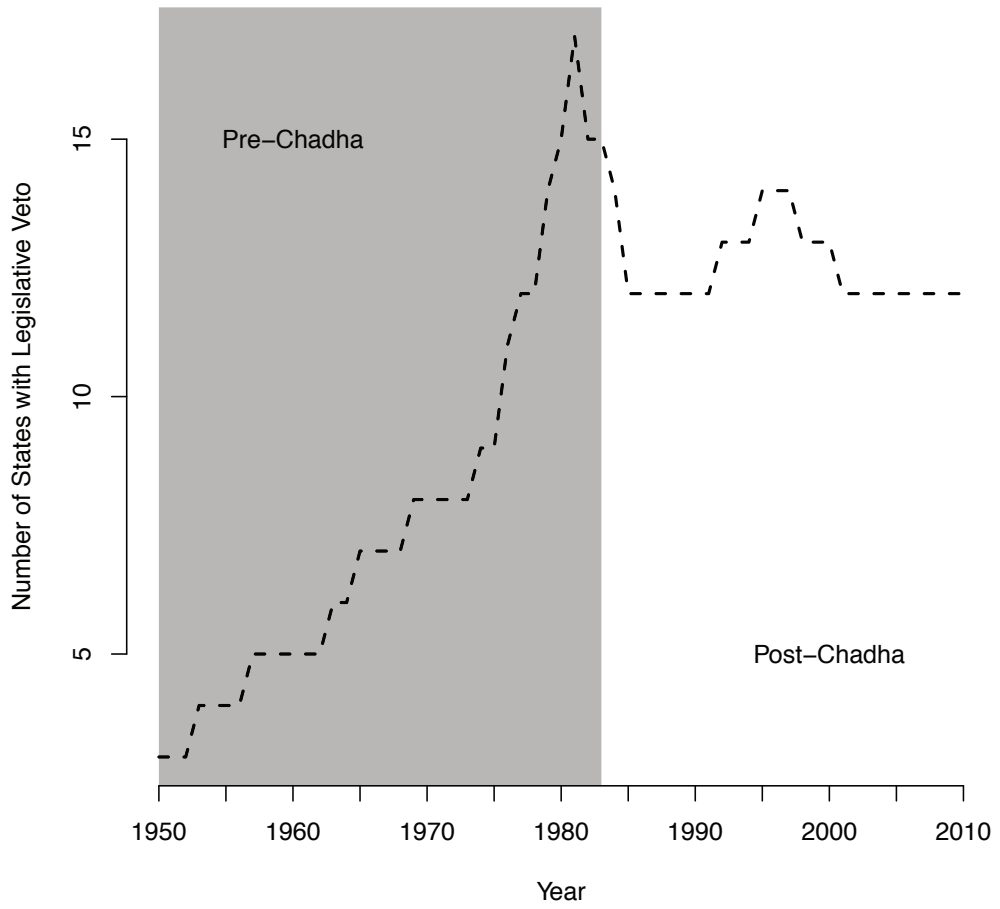Figure 1: Incidence of the Legislative Veto: 1950-2010

Table 1: Executive Accountability and Energy Regulation

	M1	M2	M3	M4	M5	M6
Electricity Rates	0.44	-5.64	-11.19	-0.76	-6.95	-13.38
	(12.03)	(10.55)	(11.23)	(11.93)	(10.5)	(11.4)
Veto	6.15	6.44	6.41	6.49	6.33	5.73
	(2.07)	(2.05)	(2.09)	(2.76)	(2.76)	(3.3)
Rates X Veto	-33.85	-35.56	-37.91	-31.68	-33.51	-32.49
	(20.39)	(20.95)	(22.03)	(19.69)	(20.33)	(21.78)
Veto Lead	–	–	–	-2.95	-4.02	-13.42
				(4.87)	(5.02)	(7.46)
Rates X Veto Lead	–	–	–	58.09	57.57	117.71
				(51.61)	(52.18)	(70.29)
Veto Loss Lag	–	–	–	-2.66	-3.02	-3.22
				(4.1)	(4.08)	(4.79)
Rates X Veto Loss Lag	–	–	–	15.55	18.05	58.75
				(40.57)	(37.46)	(41.96)
Year FE	Y	Y	Y	Y	Y	Y
State FE	Y	Y	Y	Y	Y	Y
Covariates	Y	Y	Y	Y	Y	Y
Schechter States	Y	N	N	Y	N	N
Elected PUCs	Y	Y	N	Y	Y	N
N	473	453	341	473	453	341
R-squared	0.25	0.26	0.26	0.26	0.27	0.28

Standard errors clustered by state and reported in parentheses. All models include a set of political and economic covariates: (log) population, (log) state household income, year-over-year changes in household income, a measure of state unemployment, and year-over-year changes in that measure of unemployment, an indicator for whether the governor has line item veto authority, an indicator for legislative term limits, and an indicator for divided government (coded to zero for Nebraska).

Table 2: Executive Accountability and Energy Regulation (Judicial Interventions)

	M1	M2	M3	M4	M5	M6
Electricity Rates	-4.39	-12.39	-15.78	-6.23	-13.4	-19.44
	(12.56)	(10.31)	(11.61)	(11.8)	(9.76)	(10.5)
Veto	8.55	7.72	6.13	9.49	7.88	6.16
	(2.02)	(2.01)	(2.02)	(4.4)	(3.77)	(3.74)
Rates X Veto	-26.43	-31.56	-27.17	-26.99	-32.22	-28.12
	(12.9)	(12.28)	(14.78)	(14.54)	(15.47)	(18.03)
Veto Loss Lag	–	–	–	3.77	2.84	2.14
				(4.33)	(3.95)	(6.64)
Rates X Veto Loss Lag	–	–	–	9.87	9.68	22.34
				(40.04)	(35.88)	(45.84)
Year FE	Y	Y	Y	Y	Y	Y
State FE	Y	Y	Y	Y	Y	Y
Covariates	Y	Y	Y	Y	Y	Y
Schechter States	Y	N	N	Y	N	N
Elected PUCs	Y	Y	N	Y	Y	N
N	341	323	264	341	323	264
R-squared	0.22	0.24	0.26	0.2	0.22	0.23

Standard errors clustered by state and reported in parentheses. All models include a set of political and economic covariates: (log) population, (log) state household income, year-over-year changes in household income, a measure of state unemployment, and year-over-year changes in that measure of unemployment, an indicator for whether the governor has line item veto authority, an indicator for legislative term limits, and an indicator for divided government (coded to zero for Nebraska).

Appendix: Folk Theories and Constitutional Values

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This appendix formalizes the argument presented verbally in *Folk Theories and Constitutional Values*. The objective of the model is to capture how pluralism affects political accountability in the simplest possible form. I first characterize the classic Hamiltonian logic, and then show how it contains material ambiguities if viewed dynamically.

Hamilton's Concern

Consider initially an executive who must decide between two policy choices $x \in \{s, p\}$ based on some authority previously delegated by the legislature. This policy choice may be viewed as either favoring special interests ($x = s$) or the public ($x = p$). In like manner, the executive may be either captured by special interests ($\tau = s$) or publicly focused ($\tau = p$). The probability that he is publicly focused is π.

The types differ in the value they derive from the policy choices. With respect to policy, executive of type τ receives the following payoff, $u_\tau(x) = I_{x=\tau}$, so that each type receives a return from policy only if it matches his type. Both types also benefit from re-election. Let $R \geq 0$ represent the value of continuing in office. The voter does not know the type of the executive, but he does observe the policy choice, x, and on this basis might make inferences about the type of the executive. I assume that the voter wishes to elect a publicly focused executive and that re-election is therefore a function of the voter's beliefs that the executive is of this type. In particular, let $\mu(x)$ reflect the voter's posterior belief that the executive is publicly focused upon observing policy x, and let $F(\mu)$ provide a mapping from beliefs to the probability of re-election, where F is strictly increasing in μ and $F(0) = 0$ and $F(1) = 1$. This approach to modeling re-election essentially follows Fox and Jordan (2011).

With this in hand, we can characterize the relevant equilibria,[1] which tend to facilitate political accountability or favor the voter's policy interests.

Proposition 1 *If $R \leq 1$, an "accountability" equilibrium exists in which executive of type*

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[1]Throughout, my interest is in salient perfect Bayesian equilibria.

τ selects $x = \tau$, the voter learns the type of the executive and re-elects the special interest executive with probability 0 and the public focused executive with probability 1. If $R \geq \frac{1}{F(\pi)}$, a "disciplining" equilibrium exists in which executives of both types select $x = p$, and the voter re-elects the incumbent with probability $F(\pi)$. If $R \in (1, \frac{1}{F(\pi)})$, a "semi-disciplining" equilibrium exists in which the executive of type $\tau = p$ selects $x = p$ and the executive of type $\tau = s$ selects $x = s$ with probability $\gamma*$ and $x = p$ with probability $1 - \gamma*$, where $\gamma*$ satisfies $\frac{1}{R} = F(\frac{\pi}{1-\gamma(1-\pi)}).$[2]*

The accountability regime is a separating equilibrium, with the types of executives choosing different policies ($x = \tau$). This allows the voter to learn whether the executive is captured by special interests, hence facilitating political accountability. The equilibrium is sustained by a relatively low interest in re-election: because the special interest type cares more about policy than re-election, he selects $x = s$, allowing the voter to identify him and throw him out of office with probability one. The public focused executive, on the other hand, maximizes both policy and re-election interests in his strategy. This means we need only check the captured executive for deviations. He deviates only if $R > 1$, such that re-election is sufficiently attractive that he forgoes his favored policy.

Elections can also alter the executive's behavior if his interest in re-election is sufficient. This is seen most clearly in the "disciplining" equilibrium. Here, strategies call on both types to pool on $x = p$. The voter cannot update based on observed policies, and so re-elects the incumbent with probability $F(\pi)$. The captured executive is again the type with the greatest risk of deviating; let the voter have off the path beliefs that reflect this under the Criterion D1 refinement (Cho and Kreps 1987). The captured executive's equilibrium payoff is $F(\pi)R$. By deviating, he receives 1. Thus, the disciplining equilibrium exists when $R \geq \frac{1}{F(\pi)}$.

The semi-disciplining equilibrium is between the two pure strategy equilibria, and resembles the mixed equilibrium in Fox and Jordan (2011). Here, the public focused executive

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[2]All proofs in the appendix.

sets $x = p$ and the captured executive mixes so as to be indifferent between $x = p$ and $x = s$, selecting $x = s$ with probability γ. Under these strategies, the voter learns that $p(\tau = p | x = s) = 0 \equiv \mu(s)$, and that $p(\tau = p | x = p) = \frac{\pi}{1 - \gamma(1 - \pi)} \equiv \mu(p)$. This implies that the captured executive finds $\gamma*$ to satisfy $1 = RF(\mu(p))$. A unique solution exists by the fact that $\mu(p)$ is increasing in γ and from intermediate value theorem: if $\gamma = 0$ then $\mu(p) = \pi$, and so long as $R < \frac{1}{F(\pi)}$, then $1 > RF(\mu(p))$; if $\gamma = 1$, then $\mu(p) = 1$, and so long as $R > 1$, then $1 < RF(\mu(p))$. The public focused executive maximizes re-election odds and policy payoffs in his strategies and faces no incentive to deviate; by construction, the captured executive is indifferent between alternatives. Thus, this equilibrium exists when $R \in (1, \frac{1}{F(\pi)})$.

In essence, this structure seems to be the vision of policy administration and accountability that Hamilton has in mind. A unitary executive promotes one of two outcomes: the executive either follows the public literest, here by setting $x = p$, or he does not and faces the sharp consequences of electoral accountability.

Just as clearly, we can see the dangers of pluralism in administration. To illustrate Hamilton's concern, suppose that we have a legislature that moves after the executive and has some tool of influence—say the legislative veto—that has the ability of "corrupting" policy, so that an *executive* choice of $x = p$ becomes $x = s$. The legislature, or more accurately relevant elements within it, prefers $x = s$ to $x = p$, perhaps because members come from smaller electoral districts and therefore have more parochial interests; so let the legislature be of type $\tau = s$. The probability that the legislature successfully corrupts a policy of $x = p$ is q, and suppose initially that the legislature incurs no cost for using this tool. Moreover, and critically, the voters observe the final policy outcome, but not the executive's initial choice or whether the legislature is effective at altering the policy. This aspect of compromised observability is central to Hamilton's notion of plurality "conceal[ing] faults and destroy[ing] responsibility."

Maintaining focus on executive accountability, this leads to the following set of equilibria.

Proposition 2 *If $R \leq \frac{1}{1-F(\frac{q\pi}{1-\pi(1-q)})}$, a soft accountability equilibrium exists in which executive of type τ selects $x = \tau$, the voter updates beliefs, and re-elects the incumbent with probability $F(\frac{q\pi}{1-\pi(1-q)})$ if $x = s$ and with probability 1 if $x = p$. If $R > \frac{1}{1-F(\frac{q\pi}{1-\pi(1-q)})}$, a semi-disciplining equilibrium exists in which the executive of type $\tau = p$ selects $x = p$ and the executive of type $\tau = s$ selects $x = s$ with probability $\gamma*$ and $x = p$ with probability $1 - \gamma*$, where $\gamma*$ satisfies $\frac{1}{R} = F(\frac{\pi}{1-\gamma(1-\pi)}) - F(\frac{\pi q}{\pi q+(1-\pi)(\gamma(1-q)+q)})$.*

Consider the soft accountability equilibrium. Here, the strategies call on the legislature to apply its tool any time that the executive sets $x = p$, and executives set policy according to type. The voter observes the policy outcome, and updates beliefs, such that $p(\tau = p | x = p) = 1$ and $p(\tau = p | x = s) = \frac{\pi q}{1-\pi(1-q)}$. The voter re-elects an incumbent associated with $x = p$ with probability one, and an incumbent associated with $x = s$ with probability $F(\frac{\pi q}{1-\pi(1-q)})$. The type with an incentive to deviate is the captured executive, who caves to electoral pressure when $R > 1 + RF(\frac{\pi q}{1-\pi(1-q)}) \Rightarrow R > \frac{1}{1-F(\frac{\pi q}{1-\pi(1-q)})}$; the equilibrium therefore exists when this is not satisfied. Note also that the legislature faces no incentive to deviate from use of its tool.

The semi-disciplining equilibrium resembles that from proposition 1. Here, the public focused executive sets $x = p$ and the captured executive mixes so as to be indifferent between $x = p$ and $x = s$, selecting $x = s$ with probability γ; the legislature now corrupts a choice of $x = p$ with probability q. Under these strategies, the voters' updated beliefs taking the following form: $p(\tau = p | x = p) = \frac{\pi}{1-\gamma(1-\pi)} \equiv \mu(p)$, and $p(\tau = p | x = s) = \frac{\pi q}{\pi q+(1-\pi)(\gamma+(1-\gamma)q)} \equiv \mu(s)$. This implies that the captured executive finds $\gamma*$ to satisfy $1 + F(\mu(s))R = F(\mu(p))R$. The existence of a solution again follows from the intermediate value theorem: if $\gamma = 0$, then $\mu(p) = 1$ and $\mu(s) = \frac{\pi q}{1-\pi(1-q)}$, and so long as $R > \frac{1}{1-F(\frac{\pi q}{1-\pi(1-q)})}$, then $1 + F(\mu(s))R < F(\mu(p))R$; if $\gamma = 1$, then $\mu(p) = \pi$ and $\mu(s) = \pi$, implying that $1 + F(\mu(s))R > F(\mu(p))R$.

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Thus, so long as $R > \frac{1}{1-F(\frac{\pi q}{1-\pi(1-q)})}$ a $\gamma* \in (0,1)$ solution exists to the captured executive's problem; uniqueness follows from the fact that the quantity $F(\mu(p)) - F(\mu(s))$ is strictly increasing in γ. Again, no other actor faces an incentive to deviate.

The equilibrium level of γ is also higher in the plural system. To see this, note that in proposition 1, the executive finds γ to satisfy $1 = RF(\mu(p))$, and here he finds γ to satisfy $1 + F(\mu(s))R = F(\mu(p))R$, where μ_p is $\frac{\pi}{1-\gamma(1-\pi)}$ in both cases. Because $F(\mu(s)) > 0$, the executive must find a γ that produces a larger $\mu(p)$ in the plural than in the unitary setup. This is accomplished by increasing γ, the rate at which he sets $x = s$.

Notice also that the disciplining equilibrium does not exist in this plural setup. To see this most clearly, suppose that both types pool on $x = p$, and the legislature successfully intervenes with probability q. The strategies do not allow the voter to update beliefs, and the captured executive has an payoff under these strategies of $q + F(\pi)R$. By deviating to $x = s$, the executive receives $1 + F(\pi)R$, which is plainly profitable.

Accountability is unambiguously more difficult with plural administration. First, note that even in this accountability equilibrium, accountability is "soft" and the voter does not necessarily throw the executive out of office when the policy favors special interests. This follows for the straightforward reason that even publicly focused executives sometimes associate with the special interest policy—in particular, when the legislature successfully intervenes. As a result, voters cannot arrive at a clear picture of whether the executive is responsible for the pernicious policy choice.

Second, the semi-disciplining equilibrium is also less favorable to the voter, in two ways. On the accountability side, the voter encounters much the same problem as above, and therefore does not necessarily throw the executive out when he mixes and selects $x = s$. This departs from the accountability structure of the pure unitary setup. This fact feeds into executive performance, as pointed out above. Because he enjoys some chance of re-election when he selects $x = s$, the probability at which the $\tau = s$ executive selects $x = s$, γ, is higher

in this plural setup than in the unitary setup.

Finally, observe that the disciplining equilibrium does not exist in this plural setup. This again follows from the problem of concealed responsibility: under the proposed disciplining strategies, the voter assumes that the legislature corrupted the policy any time the policy outcome is $x = s$. So being, the special interest executive faces no electoral incentive not to deviate and select $x = s$ himself, destroying the disciplining effect of elections.

Together, these results demonstrate Hamilton's core concern: plural administration confuses lines of accountability, making it more difficult for voters to determine who is responsible for bad policies. This results in weakened accountability and diminished executive performance relative to a unitary structure.

Dynamic Pluralism

Now suppose that the legislature can no longer use the tool above, for example due to an adverse judicial decision. The question is whether this invalidation enhances or diminishes the ability of voters to hold the executive accountable for poor policy choices. Unitary theorists tend to assume that the former is obviously the case. Yet this view ignores the possibility that the legislature has numerous other tools it might avail itself of. As I show, the effectiveness and cost structure of these other tools determines whether political accountability is helped or harmed by the invalidation; contrary to the unitarian view, there no general result.

Above we made two assumptions about the tool available to the legislature: that it "corrupted" a policy with probability q and that it was costless for the legislature to use. Suppose that the legislature has a substitute tool — unaffected by the judicial decision— that corrupts policy with probability q' at some cost $k > 0$. The existence of this substitute tool urges us to question whether the legislature will use it, and if so its effects on political accountability.

Claim 1 *If $q' > k$ and $q' > q$ the voter's accountability problem worsens as a result of the judicial decision; if $q' \leq k$ or $q' \leq q$ the voter's accountability problem becomes less severe.*

For the accountability problem to worsen, the legislature must find the tool worth using, that is, $q' > k$, so that the expected value of corrupting a policy from $x = p$ to $x = s$ is greater than the cost of using the tool. If this pre-condition is met, then the only question is whether the substitute tool is more or less effective than the invalidated tool ($q' > q$). In the soft accountability equilibrium, the probability that the voter re-elects an executive who selects a pernicious policy ($x = s$) is $F(\frac{q\pi}{1-\pi(1-q)})$. It is easy to verify that this quantity is increasing in q. It is likewise straightforward to verify that the probability the voters re-elect an the executive associated with $x = s$ in the semi-disciplining equilibrium is increasing in q. As a result, if $q' > q$ (and $q' > k$), removing the initial tool of influence in fact diminishes the ability of voters to hold executives accountable for anti-public policy choices. Of course, if $q' < k$ or $q' < q$, the accountability problem either disappears or lessens. It disappears, and we end up in proposition 1, if $q' < k$, and lessens if $q' > k$ but $q' < q$. But we will often not know the values of these parameters, and in this sense the effect of removing a device of plural control is inherently ambiguous.

There remains the question of why the legislature did not select the substitute tool in the first place if $q' > q$. To see why this might be, notice that the legislature's choice of tools depends not on the effectiveness of the tool, but instead on the difference between the effectiveness and cost of the tool. As such, a legislature may initially opt for a less effective tool because it is less costly, only turning to the more effective, and more costly, tool after the initial tool is invalidated. In particular, the legislature opts for the less effective tool initially when the cost of the more effective tool exceeds the difference in benefits between the tools, that is, when $k > q' - q$.

Thus, even if we adopt the core premise that a unitary executive promotes political accountability, it remains ambiguous whether unitary innovations in fact promote that value;

it may well be that political accountability is hampered as a result of such innovations.

References

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