THE FABLE OF THE NATIONALIST PRESIDENT AND THE PAROCHIAL CONGRESS

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One of the most widespread contemporary assumptions in the discourse of separation of powers is that while the president tends to have preferences that are more national and stable in nature, Congress is perpetually prone to parochial concerns. This deeply ingrained assumption not only pervades legal scholarly treatment of the administrative state, but it is also used to frame debates about the division of foreign relations powers and the proper scope of judicial review of executive branch agency regulations. This Article examines the three explanations commonly given for the president's more national outlook and introduces institutional considerations that reveal them to be more myth than fact: (1) The president has a broader geographic and population constituency than members of Congress; (2) the fact that members of Congress are elected frequently means that they are more susceptible to special interest or parochial legislation than the president; and (3) the president tends to care more about the overall health of the national economy than Congress does. This Article shows that under the winner-take-all system of our electoral college, the president will often have an incentive to cater to a narrower geographic and population constituency than that of the median member of Congress. Furthermore, this Article also contends that while the preferences of individual members of Congress may often be shortsighted and parochial, the collective wisdom of these parochial members of Congress will often produce policy outcomes that are more national and public-regarding than those produced by any single elected official. Finally, this Article critically analyzes the implications of debunking the fable in three areas of public law where it has been particularly pervasive: the unitary presidency model, judicial deference to executive branch agency decisions, and the allocation of international trade authority.

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INTRODUCTION

One of the most widespread contemporary assumptions in the discourse about the separation of powers is that while the president tends to have preferences that are more national and stable in nature, Congress is perpetually prone to parochial concerns. As the argument normally goes, because the president has a national constituency, he will often prefer policies that will suit the aggregate interests of the national audience rather than those that only benefit parochial interest groups.[1] Congress, on the other hand, is portrayed as subject to parochial interests because its members represent geographically discrete constituencies and must stand for frequent reelections.[2] Thus, in the modern era, the president is increasingly trusted as

1. *See infra* text accompanying Part I.B.
2. *See infra* Part I.B.

the true representative of the American people while Congress is normally considered an obstacle to sound and effective public policy.

This notion of a myopic Congress and an outwardly looking president also dominates much of the current legal thinking about the administrative state and judicial review of agency decisions. Thus, legal discussions about the propriety of legislative delegation of authority to the president often emphasize that the president is better suited to oversee administrative agencies than legislators who lack a national vision.[3] When it comes to foreign affairs, suspicions of Congress's relative competence on national issues are even more pervasive and deep-rooted. In international trade policy, for instance, the conventional wisdom is that the president both preaches and practices the gospel of free trade, while Congress often plays the role of the unrepentant sinner.[4] In war powers, commentators often argue that military effectiveness will be enhanced by strategies that further White House control over national security policy, especially at the expense of Congress's institutional prerogatives.[5]

This was not always so. Although the framers might have envisioned a national figure in the president,[6] the notion that the president embodies the popular will is almost entirely an artifact of twentieth-century political and legal thought. In the founding debates over the design of the Constitution, for instance, *The Federalist* No. 70 did argue for an energetic executive who would serve as a bastion "against the enterprises and assaults of ambition, of faction, and of anarchy."[7] But the framers did not necessarily think that Congress would be less attuned to the preferences of a national majority than the president; they simply assumed that Congress would serve more of a deliberative role whereas the president would act when quick dispatch and secrecy were important.[8] Far from presuming that the president would be a

3. *See infra* Part V.A.

4. *See infra* Part V.C.

5. *See, e.g.*, L. Gordon Crovitz, *Micromanaging Foreign Policy*, 100 PUB. INT. 102 (1990).

6. *See* JAMES W. CEASER, PRESIDENTIAL SELECTION: THEORY AND DEVELOPMENT 47, 64 (1979) (describing the framers' vision of executive power as lending energy to the nation's goals without trying to cater to public opinion).

7. THE FEDERALIST NO. 70, at 436 (Alexander Hamilton) (Henry Cabot Lodge ed., 1888). All further citations to *The Federalist* are to the Henry Cabot Lodge edition.

8. *See id.* at 440 ("The differences of opinion, and the jarrings of parties in [the legislature] . . . often promote deliberation and circumspection, and serve to check excesses in the majority."); *id.* at 437 ("Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished."); *see also* Loving v. United States, 517 U.S. 748, 757–58 (1996) ("Article I's precise rules of representation, member qualifications, bicameralism, and voting procedure make Congress the branch most capable of responsive and deliberative lawmaking.").

plebiscitary figure that embodied majoritarian preferences, the framers implemented the opposite presumption—the national interest would be achieved by the institutional clashing of interests.[9] Indeed, to the extent that the framers compared the features of the political branches at all, they appeared to assume that Congress would be more accountable to the people than the president.[10] Moreover, their unwillingness to accept proposals that would give the president an absolute veto power over legislation supports the notion that the framers did not view an unconstrained president any less dangerously than an unconstrained Congress.[11]

In any event, the framers' more balanced vision of the political branches eventually gave way to the much more jaundiced view of congressional preferences that holds sway today. Woodrow Wilson probably first gave voice to that view in the late nineteenth century when he lamented Congress's "meddlesome and inefficient" character, which he compared to the "first parliaments of William and Mary."[12] In contrast, Wilson lauded the president as "the only national voice in affairs" who is "representative of no constituency, but of the whole people."[13] Since then, scores of political scientists and legal scholars have parroted this claim elsewhere in the literature.

Curiously, concrete evidence to support this modern view of the institutional preferences of the political branches is quite scanty. Much of the evidence of Congress's purported parochial outlook often involves scattered anecdotes of local or "interest group" legislation that Congress has passed at the expense of the greater public good. Not much of this evidence speaks, however, to the question of whether Congress's institutional preferences are systematically more parochial than those of the president. Indeed, the most important piece of evidence available for comparing

9. Hamilton or Madison described this institutional dynamic as one in which "[a]mbition must be made to counteract ambition." THE FEDERALIST NO. 51, at 323 (Alexander Hamilton or James Madison).

10. THE FEDERALIST NO. 52, at 329 (Alexander Hamilton or James Madison) ("[I]t is particularly essential that the [House of Representatives] should have an immediate dependence on, and an intimate sympathy with, the people.").

11. *See* THE FEDERALIST NO. 73, at 461 (Alexander Hamilton) ("A direct and categorical negative has something in the appearance of it more harsh, and more apt to irritate, than the mere suggestion of argumentative objection, to be approved or disapproved by those to whom they are addressed."); *see also* John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 774 (2002) ("The Framers rejected an absolute veto, because most feared that it would give the President too much power.") (citations omitted).

12. WOODROW WILSON, CONGRESSIONAL GOVERNMENT 205 (Johns Hopkins ed. 1981) (1885).

13. WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 68 (Columbia Univ. Press 1961) (1908).

political branch preferences for parochial policies—the New Deal spending programs—suggests that presidential variables are more important than congressional ones.[14]

This Article critically examines whether there is any basis for assuming that the president has preferences that are predictably more national (or less parochial) than those of Congress. Arguments that stress Congress's parochial character often rely on the fact that individual members of Congress have incentives to cater to the narrow needs of their constituencies. But such arguments suffer from the fundamental fallacy of composition: The fact that individual legislators may have parochial and unstable preferences does not necessarily imply that the *collective* preferences of Congress will also be parochial and unstable. On the contrary, one could surmise that in a dynamic institutional context, the narrow and parochial interests of individual legislators are likely to cancel each other out and produce a political outcome that is much more representative of the national interest than that of any single political actor. In any event, by focusing on the incentives of individual legislators, the proponents of the nationalist presidency have ignored the relevant basis for comparing the preferences of the two political branches.

Rather than emphasize the preferences of individual legislators, the proper unit of analysis for the collective will of Congress is the median legislator. But when we turn to this median legislator, much of the foundation underlying the assumption of the nationalist president starts to crumble. In our bicameral system of government, the median member of Congress will represent some accommodation of the preferences of the median member of the House of Representatives and the median senator. Thus, the policies favored by the median member of Congress will not only have to represent the interests of half the states (twenty-five states), but will also have to represent the interests of at least half of the voters in half of the districts (25 percent of the national electorate). The dynamics of the electoral college make it possible, however, for the president not only to win a national election with just more than half of the voters from more than half of the districts (25 percent of the national electorate), but even by focusing only on voters from the eleven most populous states. In other words, on both the geographic and population dimensions, the median member of Congress is in many circumstances going to represent an electoral constituency that is both broader and deeper than that of the president.

14. As discussed in more detail below, these studies of New Deal spending found that political factors trumped economic ones in deciding where to allocate funds. *See infra* Part II.A.4.

The central argument of this Article does not stop with the assertion that the median legislator could sometimes represent a more national electorate than the president. The claim of this Article is much broader: While I concede that the preferences of individual legislators may often be short-sighted and parochial, I argue that the collective wisdom of these parochial legislators will often produce policy outcomes that are more national and public-regarding than those produced by any single elected official.

But how, one might ask, does this transformation occur? The answer lies in the fact that in a dynamic legislative framework in which heterogeneous interest groups compete for political favors from legislators, the chances are that legislators receive better information and arguments regarding the national implications of any specific public policy proposal. As a collective institution, Congress is subject to a wider range of pluralist voices and interest groups than any other political actor (including the president), which means that Congress is likely to receive better information regarding the relative costs and benefits of competing policy proposals.[15] This dynamic, in turn, tends to increase the chance (but not always) that beneficial public-regarding legislation will be enacted and that the most pernicious forms of parochial legislation will be avoided. Finally, and more importantly, interest groups competing for legislative attention also have an incentive to invest the necessary resources to make public-regarding policies sustainable when they favor such policies.

In sum, the chief antidote to parochial legislation often lies in more rather than less interest group competition; not in obstructing the role of interest groups but in marshalling those interest groups to provide the legislative process with the necessary political capital to make public-regarding legislation sustainable. And when it comes to devising an effective counter-parochial system that mobilizes certain interest groups in favor of public-regarding policies, Congress often enjoys a decisive advantage over the president.

The purpose of this Article is not to contend that the president systematically evinces more parochial preferences than Congress. Rather, this Article seeks to extend a large body of public law scholarship about political branch preferences by critically examining some of the assumptions that underpin much of that scholarship. More specifically, this Article is simply an attempt to challenge the almost uncritical manner in which much of the scholarship and contemporary jurisprudence has embraced the notion that the president has a broader or more national mandate than that of Congress.

15. *See infra* text accompanying Part IV.A.1–2.

This Article proceeds as follows. Part I clarifies the framers' vision of the nationalist president, compares it to the contemporary "plebiscitary" vision, and then suggests that we need a coherent theory of congressional preferences against which to compare the preferences of the "plebiscitary president." It then suggests that the proper referent for congressional preferences is the accommodating median legislator from both the U.S. Senate and the House of Representatives. Part II then explores some of the conventional assumptions that motivate the claim that the president has less parochial preferences than Congress and introduces institutional considerations that reveal them to be more myth than fact: (1) The president has a broader geographic and population constituency than members of Congress; (2) the fact that members of Congress are elected frequently means that they are more susceptible to special interest legislation than the president; and (3) the president tends to care more about the overall health of the national economy than does Congress. More specifically, this part demonstrates that, in many circumstances, the median accommodating legislator will represent a broader geographic and population constituency than the president. Part III suggests that the one institutional advantage that the president has over Congress is not motivated by the president's national orientation; rather, the president's unitary nature gives him a transaction cost advantage over Congress in implementing both national and parochial policy goals. Part IV lays out the argument that constituent and interest-group-driven politics may sometimes encourage Congress as a collective institution to adopt policies that are nationalist even if individual members of Congress have parochial preferences.

Part V explores some of the normative implications of debunking the fable in public law discourse. More specifically, this part examines critically three areas of public law where the fable of the nationalist president and parochial Congress has been particularly pervasive: the unitary presidency model, judicial deference to agency decisions, and international trade policy. The findings from these three areas show that much of the contemporary debate on political branch preferences tends to overstate the extent to which the president fights for policies that benefit the national interest while Congress remains captive to parochial interests.

I. TWO VISIONS OF THE NATIONALIST PRESIDENT

A. The Early Federalist Vision

The institutions that shape the modern preferences of the political branches appear radically different from those embraced by the founding fathers. The framers envisioned the president as a statesmanlike figure who would detest, or at least be largely indifferent to, the trappings of majoritarian politics. As the first president, George Washington exemplified the ideal of the devoted, yet distant political figure. Before he became president, he once complained that only an "absolute conviction of duty could ever have brought me upon the scenes of public life again."[16] He avoided parties, disliked shaking hands, and constantly reminded his contemporaries that he would gladly leave public office and retire to his private estate at Mount Vernon.[17] In many respects, the framers wrestled with how to design a structure that would select individuals of Washington's caliber: individuals who would be more enamored by the prospects of fame and honor than the seductions of the "popular arts."[18]

The framers' antipathy toward "populist" executives was exemplified by their decision to reject a presidential selection process that relied directly on the people. A select body of electors that was independently elected by the people, the framers assumed, would be most capable of understanding the proper characteristics and qualities of a chief magistrate who could direct a good administration.[19] In this picture, the constitutionally sanctioned electoral college would serve as a filter for sorting out true statesmen from potential demagogues. Moreover, the framers believed that insulating the electoral process from direct popular participation would also reduce the likelihood of factional conflict during national elections. "The choice of *several*, to form an intermediate body of electors," Hamilton wrote, "will be much less apt to convulse the community with any extraordinary or violent movements . . . ."[20]

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16. 4 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 552 (Dorothy Twohig ed., 1993).

17. *Id.* at 526.

18. *See* CEASER, *supra* note 6, at 63 n.33 ("Washington was the perfect example of the 'best' in power, and the Founders no doubt looked to him as a model for a republican executive.").

19. THE FEDERALIST NO. 68, at 424 (Alexander Hamilton). Hamilton states:

> It was equally desirable, that the immediate election should be made by men most capable of analyzing the qualities adapted to the station, and acting under circumstances favorable to deliberation . . . . A small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to such complicated investigations.

Id.

20. *Id.*

If the framers perceived that the president's singular characteristic would be his aloofness, they anticipated that both houses of Congress would better represent the preferences of the national majority.[21] The Senate was expected, however, to be more of a deliberative institution than the House of Representatives. Staggered and longer terms of office as well as larger constituencies would presumably make the senators less susceptible than members of the House to the whims of the passionate majority.[22] Moreover, the framers also believed that selection of senators by state legislatures—as was the norm before the adoption of the Seventeenth Amendment—would ensure that the Senate would be made up individuals who would be "distinguished by their abilities and virtue."[23] In contrast, the House of Representatives was by design supposed to be more responsive to fluctuations in public opinion.[24] Indeed, Madison considered the House to be the most national of all the political branches because it alone "derive[d] its powers from the people of America."[25]

With the benefit of hindsight, it now seems clear that some of the framers' predictions about the political branches were either shortsighted or self-fulfilling. For better or worse, ever since the presidency of Andrew Jackson, presidential elections have often come to signify national contests for popular affection—institutionalizing the very practice of the "popular arts" the framers so deliberately tried to avoid. As many commentators have observed, the framers simply failed to anticipate many of the extraconstitutional factors that have combined to shape modern presidential and legislative preferences, including political parties, modern presidential campaigns, and the role of the mainstream media.[26] So while the framers did envision a president who would embody the national interest, to suggest that they believed in the modern understanding of the nationalist president obscures the fact that the framers rebuffed the most essential feature of the modern understanding: the idea that the president's electoral mandate makes him particularly solicitous of the views of the passionate majority. With these considerations in place, I turn now to the modern conception of the nationalist or plebiscitary president.

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21. *See supra* note 10.

22. THE FEDERALIST NO. 63, at 393 (Alexander Hamilton or James Madison) ("The proper remedy for this defect must be an additional body in the legislative department, which, having sufficient permanency to provide for such objects as require a continued attention, and a train of measures, may be justly and effectually answerable for the attainment of those objects.").

23. THE FEDERALIST NO. 64, at 401 (John Jay).

24. *See supra* note 10.

25. THE FEDERALIST NO. 39, at 237 (James Madison).

26. *See* CEASER, *supra* note 6, at 86 ("In reacting against popular leadership, the Founders may have arrived at a conception of the presidency and presidential selection that was too detached and elevated."); RICHARD P. MCCORMICK, THE PRESIDENTIAL GAME 16 (1982) (chronicling the decline of the original constitutional conception of the presidency).

B. The Modern "Plebiscitary" Vision

Against the framers' antipopulist vision of the nationalist president is a more nuanced contemporary understanding of the president's national orientation that focuses on the incentive effects of electoral rules. Thus, instead of emphasizing those institutional features that encourage the selection of a certain kind of elected official, the contemporary understanding asks whether a specific institutional feature will encourage an elected official to promote the preferences of a majority of the people.[27] In this picture, the president's national outlook stems not from his predicted statesmanlike disposition, but from the claim that his broader electoral constituency will make him more responsive to majoritarian preferences than Congress.[28] Ironically, it is this very populist or majoritarian cast to presidential politics that the framers sought to avoid in designing a selection system that was removed from the direct influence of the electorate.

Ever since the last decades of the nineteenth century, this contemporary understanding—referred to herein as the "plebiscitary president" vision[29]—has come to reflect the conventional wisdom among legal scholars, political scientists, and judges. The leading proponents of the plebiscitary presidential vision in the legal academy—Steven Calabresi,[30] Elena Kagan,[31] Jerry Mashaw,[32] and Cass Sunstein[33]—often justify the appeal to the president's nationalist

27. For an incisive analysis of the distinction between selection and incentive effects in constitutional law, see Adrian Vermeule, *Selection Effects in Constitutional Law*, 91 VA. L. REV. 953 (2005).

28. *See* THEODORE J. LOWI, THE PERSONAL PRESIDENT 103, 112, 117 (1985) (suggesting that the plebiscitary president has changed the original constitutional conception of the presidency); JEFFREY K. TULIS, THE RHETORICAL PRESIDENCY 118 (1987) (same) .

29. *See* LOWI, *supra* note 28, at 97 (discussing "[t]he Plebiscitary Presidency"); TULIS, *supra* note 28, at 175 n.2 (citing "Lowi's important study of plebiscitary presidential leadership").

30. *See* Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 35 (1995) ("Representing as he does a national electoral college majority, the President at least has an incentive to steer national resources toward the 51% of the nation that last supported him (and that might support him again), thereby mitigating the bad distributional incentives faced by members of Congress.").

31. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2335 (2001) ("[B]ecause the President has a national constituency, he is likely to consider, in setting the direction of administrative policy on an ongoing basis, the preferences of the general public, rather than merely parochial interests.").

32. *See* JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE 152 (1997) ("[T]he voter chooses a representative for that representative's effectiveness in supplying governmental goods to the local district . . . . The president has no particular constituency to which he or she has special responsibility to deliver benefits.").

33. *See* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 105–06 (1994) ("[B]ecause the President has a national constituency—unlike relevant members of Congress, who oversee independent agencies with often parochial agendas—it appears to operate as an important counterweight to factional influence over administration.").

outlook with a simple but seductive proposition: Because the president is elected by a national electorate while Congress is not, the president ought to be considered more politically accountable to the national public than Congress. On this premise, whenever there is conflict between the president's policy preferences and those of Congress, the president should be presumed to represent the preferences of a majority of the American voters.

Building on the majoritarian assumption, the proponents of the plebiscitary president have constructed a whole range of normative claims that underpin some of the most important debates in public law scholarship. A few illustrations suffice to demonstrate the scope and power of this assumption. First, Bruce Ackerman has argued that President Roosevelt's majoritarian mandate during the New Deal served as a constitutional moment that conferred higher-law status on programs and statutes under his presidency.[34] Second, the plebiscitary president has played a key role in a growing scholarly movement in administrative law, the so called "Unitarian School," which stresses that the president should have complete and exclusive oversight over all federal agencies because he has a more national mandate than Congress.[35] Third, the plebiscitary president has played a key role in justifications for the *Chevron* doctrine in administrative law, with scholars such as Elena Kagan arguing that courts ought not to accord any deference to an administrative agency decision unless it has had significant presidential input.[36] Fourth, Jerry Mashaw has invoked the president's democratic pedigree as grounds for rejecting the nondelegation doctrine in administrative law because the president presumably has a greater electoral constituency than Congress.[37] Fifth, political scientists and lawyers have stressed the president's

34. *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 268 (1991) ("[T]he decisive constitutional signal is issued by a President claiming a mandate from the People. If Congress supports this claim by enacting transformative statutes that challenge the fundamentals of the preexisting regime, these statutes are treated as the functional equivalent of a proposal for constitutional amendment.").

35. *See* Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 875–76 (1997) (observing that the president's plebiscitary connection to the median voter has been used to justify control over administrative agencies); Michael A. Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L. REV. 827, 833–34 (1996) (describing the plebiscitary president literature); Calabresi, *supra* note 30, at 58 (advocating the unitary presidency model).

36. Kagan, *supra* note 31, at 2333–35; *see also* Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 585 (2005) (arguing for judicial deference under *Chevron* for a president's assertion of statutory authority).

37. MASHAW, *supra* note 32, at 152; Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95 (1985).

superior mandate over Congress as a justification for Congress's decision to delegate more international trade power to the president.[38]

Beyond the academic debates, courts also seem to have embraced the idea that the president has a stronger claim than Congress to a national mandate. Take, for instance, the U.S. Supreme Court's elaborate justification of the Presentment Clause in *INS v. Chadha*.[39] Initially, the Court tried to justify the president's veto power in terms of the framers' concerns about guarding against the excesses of factions and passionate majorities in the legislature.[40] For the *Chadha* Court, however, the sound admonitions of Publius would not suffice; the Court found it necessary to invoke an independent plebiscitary justification: "[T]he Presentment Clauses," the Court concluded, "serve the important purpose of assuring that a 'national' perspective is grafted on the legislative process."[41] The Court then quoted generously from *Myers v. United States*[42]—yet another case that exemplifies the contemporary "plebiscitary" approach:

> The President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide.[43]

In numerous other ways, the federal judiciary has contributed—either deliberately or not—to the notion that the president is more responsive than Congress to national or majoritarian preferences. For instance, courts have routinely upheld extensive delegations of powers to the president,[44] have often

38. *See* KENNETH W. DAM, THE RULES OF THE GLOBAL GAME 37–39 (2001); DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS 224 (1999); DOUGLAS A. IRWIN, FREE TRADE UNDER FIRE 155–57 (2002). For a more recent analysis of congressional and presidential preferences on international trade, see Rachel Brewster, *Rule-Based Dispute Resolution in International Trade Law*, 92 VA. L. REV. 251 (2006).

39. 462 U.S. 919 (1983).

40. *Id.* at 948 (quoting THE FEDERALIST NO. 73, at 458 (Alexander Hamilton)).

41. *Id.*

42. 272 U.S. 52 (1926).

43. *Chadha*, 462 U.S. at 948 (quoting *Myers*, 272 U.S. at 123).

44. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 474 (2001). The Court observed:

> In the history of the Court we have found the requisite "intelligible principle" [for delegation] lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring "fair competition."

Id. (citing Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)).

acquiesced to the expansion of the president's foreign affairs powers,[45] and have generally deferred to the president's interpretation of statutes under the *Chevron* doctrine.[46]

Both the academic and judicial commentary presuppose that the president's preferences will closely match those of a hypothetical median voter in the national electorate while Congress's preferences will not. As a theoretical matter, however, any attempt to compare presidential and congressional preferences is incomprehensible without figuring out first how to discern the preferences of a multimember body like Congress. The importance of such a theoretical framework may seem obvious enough, but until recently internal legislative rules and preference-aggregation mechanisms have been widely ignored in the legal academy's analysis of the plebiscitary president.[47] Nonetheless, there is a robust literature in political science that explores how various nonconstitutional mechanisms help to transform the multidimensional space of legislative preferences into a single dimension.

The strand of the political science literature that would be most sympathetic to the parochial congress vision would be the committee control approach. One particular variant of this approach, associated with Barry Weingast and William Marshall, assumes that Congress sets up committees as a mechanism to empower members to maximize the distribution of pork barrel benefits to their constituents.[48] Because only the committee with specific jurisdiction over an issue can introduce legislation to the floor, any proposed piece of legislation will likely reflect the preferences of the median member of that committee. Given the benefits of the committee structure, legislators will have an incentive to serve on committees that best serve their constituents' interests.[49] The committee control approach, then, suggests that legislative preferences are driven by the preferences of the self-selected members of such committees. Given this structure, strategic voting by legislators,

45. *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654, 683–84 (1981).

46. *See* Adler, *supra* note 35, at 877 (observing that *Chevron* "clearly invokes the President's majoritarian cast in justifying its doctrine of judicial deference to agencies on matters of statutory constitutional interpretation"); *see also* Eric R. Claeys, *Progressive Political Theory and Separation of Powers on the Burger and Rehnquist Courts*, 21 CONST. COMMENT. 405, 438 (2004) (noting that with the possible exceptions of Justices Scalia and Thomas, "all [the justices] accept that agencies are generally better off when not directly supervised by members of Congress, who are more parochial and political and less cognizant of the national interest than the President").

47. *See* Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 363 (2004) ("Legal scholarship with honorable exceptions, has largely neglected internal legislative rules.") (citations omitted).

48. Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132, 151–52 (1988).

49. *See id.*

which includes logrolling across various jurisdictional issues, is thus likely to produce legislative outcomes that are the result of a series of parochial bargains.

In contrast to the committee control approach is the party control approach, commonly associated with Gary Cox and Matthew McCubbins, which assumes that legislative preferences are driven by the preferences of the median member of the majority party.[50] This approach assumes that party membership confers some kind of valuable brand quality that is enjoyed by legislators.[51] In return for the benefits of party branding, party leaders expect legislative members to vote in line with the party's platform.

Finally, there is an alternative to both the committee control and party control models that assumes that legislative preferences simply reflect the preferences of the median member in each chamber. This approach, referred to herein as the "median legislator model," is commonly associated with Keith Krehbiel.[52] Krehbiel has supplied strong evidence that suggests that neither parties nor committees play a significant role in structuring legislative preferences.[53] Indeed, according to this model, once one controls for legislative preferences, the majority party seems to have little or no effect on legislative outcomes.

In any event, the focus of this paper is not to join the extensive political science debates regarding the source of legislative preferences. The bigger puzzle is why much of the legal literature that compares legislative and presidential preferences has not even engaged this debate at all. But while the views of the proponents of the plebiscitary president might be closer to the committee control model, there is no reason why either the party control or median legislator models might not also be useful proxies of legislative preferences.

For the purposes of this Article, I have decided to analyze Congress's preferences by using the median legislator approach. Many features of the median legislator model make it particularly appropriate for testing the thesis that Congress is more parochial than the president. First, the median legislator model is normatively superior to either the committee or party control model because if either the committee or party member's view ultimately is rejected by the median legislator, then the median legislator's view would control, while the contrary is not true. Second, it is easier to map the position of the median member of any chamber of Congress against the national electorate,

50. GARY W. COX & MATTHEW D. MCCUBBINS, LEGISLATIVE LEVIATHAN 111 (1993).

51. *See id.* at 125 (analyzing the role that party leaders play in shaping legislative preferences).

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

53. *See id.* at 193.

while it is very difficult if not impossible to do so with the median legislative member of the majority party or the median member of any particular committee. Third, using the median legislator as a proxy of Congress's preferences is commonplace in much of the legal literature that attempts to analyze legislative motivation.[54] Finally, an account that treats the preference of the median member of a majority rule body as the preference of that entire body is consistent with the usage of the median voter model in other contexts as well.[55]

II. THE WEAKNESS OF THE PLEBISCITARY PRESIDENT MODEL

The key to understanding the pervasiveness of the nationalist president and parochial Congress assumption are three common myths perpetuated about the political branches in our separation of powers discourse: (1) the national constituency myth; (2) the electoral myth; and (3) the concern about the national economy myth. This part attempts to debunk these myths by focusing on the electoral incentives that each branch faces, especially those emanating from the winner-take-all aspect of the electoral college. I show that this latter feature alone, even without considering other institutional dynamics, will often generate an incentive for the president to choose more parochial policies than the median member of Congress.

A. The National Constituency Myth

Most discussions about the political branches and national policy often emphasize that the president is elected from a national constituency while members of Congress are elected from narrow geographic constituencies.[56]

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54. *See, e.g.*, William N. Eskridge, Jr. & John Ferejohn, *The Article 1, Section 7 Game*, 80 GEO. L.J. 523, 528 (1992) (arguing that a constitutional model for enacting statutes is "a bicameral presidential one in which statutes simply reflect some accommodation of the preferences of the median legislator in two different chambers and of the President"); Richard L. Revesz, *Congressional Influence on Judicial Behavior? An Empirical Examination of Challenges to Agency Action in the D.C. Circuit*, 76 N.Y.U. L. REV. 1100, 1131 (2001) (analyzing whether Congress's preferences are close to that of an administrative agency by reference to the median legislator).

55. *See, e.g.*, Lee Epstein et. al., *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1 (2005) (applying median justice model to U.S. Supreme Court decisionmaking in order to discern the Court's preferences).

56. *See supra* notes 30–33 and accompanying text. Calabresi has suggested that there is a majoritarian bias in our electoral college structure. *See* Calabresi, *supra* note 30, at 35 ("[M]ost modern presidents probably see their potential electoral base as comprehending up to 60% of all voters and perhaps as many as 90% of all state Electoral College votes."). But other commentators have observed that the dynamics of the electoral college can skew the president toward parochial concerns. *See* Cynthia R. Farina, *Faith, Hope, and Rationality or Public Choice and the Perils of Occam's Razor*, 28 FLA. ST. U. L. REV. 109, 128–29 (2000).

This observation seems to resonate strongly with commentators who have misgivings about the wisdom of the geographically discrete constituencies who elect members of Congress. Because these constituencies will only care about what goes on in their local districts, it is argued, members of Congress will have very few reasons to develop any expertise or knowledge about national issues.[57] On the other hand, because the president has to seek his electoral mandate from a national audience, he has incentives to understand those issues that affect the nation as a whole.[58]

No one will quibble with the claim that individual members of Congress may often place their constituency's interest before the national interest. Yet the preoccupation with the geographically limited constituency of each legislator is besides the point. As Kenneth Shepsle argued more than ten years ago, Congress is a "they," not an "it."[59] Thus, it does not make sense to attribute the preferences of individual members of Congress to those of Congress as a collective institution. Once one goes beyond the individual legislator to the collective legislature, however, the argument that the president necessarily represents a more nationalist audience than Congress does not hold water, at least not in all—or even most—circumstances.

Once we reduce the preferences of the multimember Congress to one dimension, the true representative of Congress's collective will is the median legislator—the legislator who represents the minimum winning coalition for the passage of any piece of legislation.[60] In our bicameral system of government, any successful piece of legislation usually reflects an accommodation of the preferences of median legislators in both the Senate and the House of Representatives, as well as those of the president. Thus, rather than ask whether the president represents a broader electoral audience than any random legislator, the better inquiry is whether the president necessarily represents a broader electoral audience than the accommodating median legislator from both the Senate and the House of Representatives.

The answer to this question will depend on the dynamics of the electoral college—the system we use to select the president. As discussed in more detail below, those dynamics suggest that the president's electoral mandate will

57. *See* DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 52–61 (1974) (discussing how credit claiming creates incentives for legislators to pander to narrow geographic constituencies).

58. *See* Kagan, *supra* note 31, at 2335. *See generally* MASHAW, *supra* note 32, at 152.

59. Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

60. For reasons why I choose the median member of the entire chamber as the representative of Congress's will, rather than the median member of the majority party or the median member of a particular committee, see *supra* pp. 1230–31.

sometimes be narrower than that of the median legislator in either house. More importantly, however, I show that the president's minimum winning coalition can never be broader on both geographic and population dimensions than that of the accommodating median legislator from both the Senate and the House of Representatives. Finally, I show that, in many circumstances, the dominant electoral strategy for a presidential candidate is just to promise benefits to 25 percent of the electorate, even if such benefits do not exceed the losses incurred by the general electorate.

But first, the use of the median legislator in this Article raises an important point that requires elaboration. By a policy that satisfies the "median legislator," I mean a policy issue on a single dimension that satisfies the preferences of just over half the members of Congress, not the multidimensional policy preferences of a fictional legislator who occupies the median position. Thus, in comparing the preferences of the president and the median member of Congress on a steel tariff, for instance, the focus is on comparing the tariff policy that will satisfy the preferences of the electoral coalition that elects just half the members of Congress with the preferences of the electoral coalition that elects the president.

1. The Electoral Incentives of the Political Branches

As every student of American government knows, the president is elected through the mechanism of the electoral college, a quirky institution that requires American voters not to vote directly for the president of their choice but instead to vote for slates of the position of elector.[61] These electors then vote for the president. The winner of the presidential election is the candidate who receives a majority of votes from the 538 electors. According to the Constitution, each state is allowed a number of electors, which corresponds "to the whole number of Senators and Representatives to which the State may be entitled in the Congress."[62] Although states have designed a variety of electoral mechanisms since the founding, the current dominant model is a statewide winner-take-all system in which the winner of a plurality in a state gets all of the electoral votes from the state. The two exceptions are Maine and Nebraska, which allow each district's electoral vote to be decided by a popular vote, with the two remaining votes going to the majority or plurality winner in the state.

61. For a detailed description of the electoral college process, see NEAL R. PEIRCE, THE PEOPLE'S PRESIDENT (1981).

62. U.S. CONST. art. II, § 1, cl. 2.

The dominant winner-take-all system creates an incentive for a presidential candidate to focus on a fairly narrow band of voters. In a winner-take-all model, a successful candidate need only win more than 50 percent of the votes in those states that make up 50 percent of the electoral college votes. In other words, a candidate can win an election by targeting only 25 percent of the national electorate—50 percent of the voters in states with 50 percent of the electoral votes.

Of course, if we assume that the median member of the House of Representative represents the median voter in the population (the voter at the fiftieth percentile of the entire population), then the median member will obviously represent a broader electoral audience than the president in the example sketched above. Yet this assumption represents a gross over-simplification of the legislative electoral process. Because members of Congress are themselves elected from districts, what matters to each member of Congress is the median voter in each of their respective districts. Thus, like the president, the median member of the House of Representative may also represent just more than 50 percent of the voters in more than 50 percent of the districts—or 25 percent of the nation.

The median legislator analysis does not end with the median member of the House of Representatives, however. In our bicameral legislative system, we also have to factor in the preferences of the median senator. Once we include the median senator in the picture, the constituency of the median legislator will always be broader than that of the president's minimum winning coalition if we consider both the population and geographic dimensions. Because the median senator represents the interest of the twenty-fifth state, the median legislator's preference will not only represent the interest of at least 25 percent of the population (the median representative), but also the preferences of at least twenty-five states (the median senator). On the other hand, the president can win a national election by just winning more than 50 percent of the votes in the eleven most populous states of the Union (25 percent of the national electorate in about 10 percent of the states). Thus, although the president's minimum winning coalition and that of the median representative can be the same on the population dimension (25 percent of the electorate), the president's coalition will not be as geographically broad as that of the median senator (eleven states versus twenty-five states).

2. The Parochial Bias of the Electoral College

A highly stylized description of the dynamics of the electoral college highlights the depth of the parochial problem in presidential elections. In the example that follows, I assume that reelection is the primary motive driving both congressional and presidential behavior. Of course, in the real political world there are often a myriad of other factors that motivate elected officials, including the desire to advance independent notions of the public good. Nonetheless, to the extent that reelection plays a key role in explaining the behavior of elected officials, it is worthwhile to explore how institutional factors affect the electoral incentives of the president and the median legislator.

Let us imagine a hypothetical nation made up of three states that subscribes to the winner-take-all system of the electoral college. Let us imagine further that the breakdown of the electoral votes in this hypothetical nation is as follows: states A (21), B (11), and C (9). In this example, a presidential candidate has to win state A to win the national election but can win the election by only winning state A since state A has more than 50 percent of the electoral votes. To win state A, the candidate only has to obtain more than 50 percent of the votes in that state or 25 percent of the national vote (the winner-take-all feature). As shown below, in many circumstances the dominant winning strategy for a presidential candidate is to promise a parochial good to only 25 percent of the voters (50 percent of the voters in state A) rather than a public good for the whole nation. More importantly, under the dominant strategy, the presidential candidate can win without securing a majority of voters in hypothetically more than half of the states (he can win the election by carrying only one state) or more than half of the congressional districts (he can win the election by carrying only six congressional districts).[63]

Assume that, during the campaign, a presidential candidate has decided to promise a national or public good that will provide a net benefit to all the citizens of the nation, to the tune of N per citizen. To provide this national good, let us also assume that the candidate will have to tax each citizen a certain amount of money to obtain fixed revenues of R. This candidate has to worry that his opponent will now promise to take all of R and provide a benefit greater than N to 25 percent of the voters (50 percent of the voters in

63. Six is the minimum number of electoral districts that the president will have to carry in order to win the national election in the three-state model. In this model, state A will have nineteen congressional districts if we subtract the two senators from the twenty-one electoral votes. Because state A will be carved up into equal congressional districts, the president will have to win all of the votes in *just more than* one quarter of the congressional districts in order to get more than half of the votes in state A.

state A) while promising nothing to the rest. Even worse, his opponent may promise 25 percent of the voters benefits greater than *N* while promising to tax only the rest. In this picture, his opponent's parochial strategy will win the election because he will obtain the requisite twenty-one electoral votes from state A. So the dominant strategy for both candidates is to promise to provide parochial benefits to only 50 percent of the voters in state A (25 percent of the national electorate) while providing nothing to the rest. Apart from a redistributive effect, such a parochial promise will obviously produce inefficiencies, as there will be a resultant dead-weight loss made up of the difference between the taxes collected and the value of the parochial goods delivered to only 25 percent of the population.

Now let us apply the insights of this model to the reality of the U.S. electoral college system. To be sure, the electoral college—with 538 electors that span fifty states and the District of Columbia—offers incentives that are much more complex than the three-state model described above. In the three-state model, for instance, the presidential candidates have perfect information regarding the location and size of the minimum winning coalition in a national presidential election. In other words, the candidates in the three-state model know that there is simply one dominant electoral strategy—to win a plurality or majority of the votes in state A. In the United States, however, a presidential candidate can pursue multiple strategies to obtain the relevant 25 percent winning electoral bloc because various combinations of states can constitute a winning coalition.[64] Thus, it will often be difficult for candidates to decide with certainty what 25 percent of the national electorate they should target. Although the presidential candidates can focus their energies and resources on swing states, it may still often be very difficult to know in advance all of the states at play in a national election.

This veil of ignorance generated by the electoral college model might appear to produce a somewhat benign effect on the electoral strategy of presidential candidates.[65] In other words, because presidential candidates know

64. Nonetheless, certain states still tend to be more critical than others in national presidential elections. *See* George Rabinowitz & Stuart Elaine MacDonald, *The Power of States in U.S. Presidential Elections*, 80 AM. POL. SCI. REV. 65, 80 (1986) (demonstrating that states like California, Illinois, Ohio, and Texas tend to be substantially more important actors in modern presidential elections than one would think, and that Massachusetts and Rhode Island tend to be less important); *see also* Robert W. Bennett, *Should Parents Be Given Extra Votes on Account of Their Children: Toward a Conversational Understanding of American Democracy*, 94 NW. U. L. REV. 503, 547 (2000) ("Most states award their votes as a unit, and that greatly increases the importance of the popular vote in states with large electoral-college weighting.").

65. For a discussion of veil of ignorance effects, see Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 YALE L.J. 399 (2001).

in advance that they have to win a critical coalition of states but are uncertain about the identity of those states, they might have an incentive to promise benefits to a broader coalition of voters in order to hedge their bets. The problem with this analysis is that it can cut both ways. The electoral college might also generate pathologies that do not exist in the three-state model. Indeed, under the U.S. electoral model presidential candidates might often have incentives to make commitments that are both economically and politically inefficient.

Assume, for instance, that an incumbent president believes that Ohio and Pennsylvania are both swing states in his forthcoming reelection campaign, but he subsequently turns out to be mistaken about Pennsylvania. Nonetheless, because he erroneously believes that both states are at play, he diverts a significant amount of resources from the rest of the country to the two states. The resources diverted to Pennsylvania would not only be economically inefficient, they would also be politically inefficient because that state was never really part of the electorally relevant coalition for the incumbent. However, if the incumbent knew in advance with complete certainty that Ohio but not Pennsylvania was at play, he could target resources more selectively and presumably more efficiently to the relevant voters in Ohio. In sum, increased uncertainty about the electorally relevant coalition in a presidential election might actually exacerbate the parochial bias of the electoral college.

In any event, although different orderings of states can produce a victory in the electoral college, not all states are at play in a national presidential election. In theory, the most politically important states in the electoral college should be those states with the largest populations because they have the largest number of electoral votes. But those states that tend to have politically predictable outcomes are usually going to be less influential from a political perspective regardless of how many electoral votes they have. To understand this, let us assume a hypothetical large state with ten million voters and fifty electoral votes. Let us assume further that six million of these voters in this hypothetical state are staunch Republicans who will only vote for their party's nominee, two million are staunch Democrats, and the other two million voters are undecided. None of the presidential candidates will have incentives to devote any resources to this hypothetical state because they cannot change the electoral outcome in the state. Indeed, this hypothetical state bears a close resemblance to states B and C in the three-state model because it can safely be written off as a politically inconsequential state in a national presidential election.

The disparate political competitiveness of states under the electoral college model means that voters in some states will be more influential than voters in others. Indeed, based upon a composite of the political competitiveness and the size of certain states, George Rabinowitz and Stuart Elaine MacDonald show that a California voter is more than twenty times more politically influential than a voter in Rhode Island, and a Texas voter is 13.4 times more important than a Massachusetts voter.[66] The least politically powerful "state" in the country is Washington, D.C., which with three electoral votes almost always votes for the Democratic nominee in presidential elections.[67]

Consistent with what the model would predict, the evidence indicates that presidential candidates usually write off certain states before an election and focus their resources and energies on perceived battleground or swing states. More importantly, presidential candidates sometimes focus on the bare minimum coalition necessary to win a majority in the electoral college. Daron Shaw observes, for instance, that the Dukakis 1988 campaign focused on an eighteen-state strategy, which would have provided a slim electoral college victory of 273 votes.[68] During the 1996 presidential elections, the Dole campaign also developed a narrow strategy that focused on four battleground states that would have also produced a bare electoral majority of 273 votes.[69]

3. The Electoral College Versus the Median Legislator

The median legislator's incentives to provide a national good under the three-state framework will be different. In other words, although the median legislator may also have an incentive to promise a parochial good in this picture, it will not be as parochial as that promised by the president. Thus, the parochial good redistributed by the median legislator will generally reach a broader audience than that redistributed by the president.

To illustrate, let us look at the incentives of the median member of the House of Representatives. For any piece of legislation to meet the preferences of a median member of the House, it will have to satisfy the preferences of all the members to her right or left. In other words, the median representative will have to represent a median of all the districts, which means that she will have to represent the preferences of eighteen congressional districts in the

66. Rabinowitz & MacDonald, *supra* note 64, at 77.
67. *Id.* at 77–78.
68. *See* Daron R. Shaw, *The Methods Behind the Madness: Presidential Electoral College Strategies, 1988–1996*, 61 J. POL. 893, 898 (1999).
69. *Id.* at 904.

three-state model (just over 50 percent of all the districts).[70] Because the representative of each district needs to win just over 50 percent of the votes in her district, the median representative will represent only 25 percent of the national electorate but, unlike the president, the electorate that she represents can come from states A, B, or C (as long as they add up to eighteen districts).

Once we add in the median senator to this dynamic, however, the picture changes. The median senator is the senator whose preferences will capture those of just over 50 percent of the states, which in the three-state model are two states. Because the median senator will need to represent the preferences of at least two out of the three states, the geographic constituency of the median senator is going to be necessarily broader than that represented by the president. Moreover, if any of the senators comes from state A, then the population constituency will also be necessarily broader than that represented by the president. To win in state A, the senator will have to win half of the votes in state A—exactly the same proportion that the president will have to win in order to win the national election. If one senator comes from state A, however, at least another senator will have to come from another state. In such a situation, the median senator will represent not only more than 50 percent of the voters of state A but also more than 50 percent of the voters in another state because it takes more than 50 percent of the state's vote to elect a senator. If none of the senators used in computing the median senator come from state A, however, it is possible that the population constituency of the median legislator will be as narrow as that of the president (25 percent), but the geographic constituency will be broader (two states instead of one).

The most significant difference between the president and the median legislator, however, is the actual extent to which the electoral college system actually entrenches power in the electorally relevant minority. Under the median legislator framework, for instance, it would be difficult to pass any parochial legislation if the costs imposed on each voter in the majority exceed the benefits that each voter gains in the minority. But under the winner-take-all system of the electoral college, all that matters is whether the benefit distributed to the parochial voters is more valuable than a national good; the extent to which costs are imposed on the rest of the population is irrelevant. Ultimately, under the electoral college system, the votes of the electorally relevant 25 percent of the population actually count more than those of the rest of the population.

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70. Note that the total number of congressional districts in this picture will be thirty-five, which is forty-one less the six electors who represent the two senate seats in each state.

4. Empirical Evidence of the President's Parochial Bias

The account given above of the electoral college dynamic is not purely theoretical; indeed, targeted parochial commitments by presidential candidates during national elections are quite common. During the 1996 presidential elections, for instance, President Clinton strong-armed the Mexican government into agreeing to scale back "voluntarily" on tomato exports to the United States.[71] The Clinton Administration ostensibly extracted this "voluntary" commitment by threatening to shut down U.S. access to Mexican trucks—in violation of the North American Free Trade Agreement—on the basis that such trucks were unsafe and could be used to transport drugs. This arrangement proved to be quite beneficial to tomato growers in Florida, an important swing state that was rich with electoral votes, but it was clearly at the expense of tomato consumers in the rest of the country.[72]

President Bush also increased steel tariffs before the 2004 presidential election, a move that would ostensibly benefit steel interests in swing states like Ohio, Pennsylvania, and West Virginia at the expense of steel consumers in the rest of the country.[73] Similarly, the elder Bush also made tactical distributions to swing states during the 1992 presidential elections by awarding subsidies to farmers in South Dakota and approving sales of fighter aircraft to Saudi Arabia—a sale that would ostensibly save jobs in Missouri, a critical swing state during the 1992 elections.[74]

In all of these examples, the presidents promised to deliver benefits that were tailored to benefit a specific subset of voters at the expense of voters in the rest of the country. More importantly, however, these redistributive schemes could still work as an electoral strategy even if a majority of consumers hurt by the policies voted against these incumbent presidents. In other words, the voters in the various swing states receiving the subsidies were probably more important than voters in the rest of the country.[75] It is not clear, however, that any of these parochial presidential actions would have survived scrutiny under a two-house legislative vote by Congress. Indeed, in the case of President

71. *See* David E. Sanger, *President Wins Tomato Accord for Floridians*, N.Y. TIMES, Oct. 12, 1996, at A1, A8.

72. *Id.*

73. James Toedtman, *Steel, Jobs and Votes*, NEWSDAY, Aug. 8, 2004, at A04, *available at* 2004 WLNR 1110349.

74. Rupert Cornwell, *Bush Travels the Land Bearing Election Gifts*, INDEPENDENT (London), Sept. 3, 1992, at 10, *available at* LEXIS.

75. For an analysis of how certain states are more electorally significant than others, see Rabinowitz & MacDonald, *supra* note 64, at 80.

Bush's steel tariffs, various legislators actively campaigned against the policy arguing that it was unfair to both American consumers and export interests.[76]

Moving beyond the anecdotes, studies of federal government spending during the New Deal substantiate the prevalence of "surgical" or targeted redistributions to battleground states in presidential elections. For instance, studies of regional redistributions during that era found no support for the hypothesis that spending was targeted at poorer states or regions.[77] Indeed, one study showed that economic factors appeared to have no relevance at all in explaining the patterns of New Deal spending.[78] Adjusting for political variables, these studies showed that spending tended to be targeted at regions with higher "political productivity," a term that captured the electoral relevance of the region during the national presidential election.[79]

More importantly, however, some of these studies showed that the importance of regions in presidential elections weighed more heavily than congressional factors in explaining the patterns of New Deal spending.[80] While one study purported to show that congressional elections had some effect,[81] a subsequent study showed that once Nevada was excluded from the sample of states,[82] presidential factors mattered much more than congressional factors in explaining the tactical allocation of funds during the New Deal.[83] Furthermore, President Roosevelt apparently used the presidential

76. *See* Elizabeth Becker, *For Bush, A Janus-Like View of Trade*, N.Y. TIMES, Nov. 12, 2003, at C1 (observing that Senator Lamar Alexander of Tennessee was urging the end of steel tariffs on behalf of export companies); Michael E. Kanell & Mat Quinn, *Faltering Economy Revives Democrats' Hopes for Southern Vote*, ATLANTA J.-CONST., July 6, 2003, at A1 (observing that senatorial Democratic candidate Mary Landrieu "railed against Bush for tariffs on foreign steel that moves through the state's ports, costing Louisiana 'thousands of jobs'"), *available at* http://www.ajc.com/news/content/news/0703/06southdems.html.

77. *See, e.g.*, Leonard Arrington, *The New Deal in the West: A Preliminary Statistical Inquiry*, 38 PAC. HIST. REV. 311 (1969); Don C. Reading, *New Deal Activity and the States, 1933 to 1939*, 33 J. ECON. HIST. 792 (1973); Gavin Wright, *The Political Economy of New Deal Spending: An Econometric Analysis*, 56 REV. ECON. & STAT. 30 (1974).

78. Wright, *supra* note 77, at 34.

79. *See id.* at 32–34.

80. *See id.* at 35–38; *see also* Robert K. Fleck, *Electoral Incentives, Public Policy, and the New Deal Realignment*, 65 S. ECON. J. 377, 383–84 (1999); Joseph J. Wallis, *The Political Economy of New Deal Spending Revisited, Again: With and Without Nevada*, 35 EXPLORATIONS IN ECON. HIST. 140 (1998).

81. *See* Gary M. Anderson & Robert D. Tollison, *Congressional Influence and Patterns of New Deal Spending 1933–1939*, 34 J.L. & ECON. 161 (1991).

82. Nevada actually received a disproportionate amount of New Deal funding. *See* Wallis, *supra* note 80, at 142.

83. *See* Wallis, *supra* note 80, at 150. Wallis also concluded that, while both economic and political factors were important in explaining New Deal spending, political factors were especially important. *Id.* at 167. Furthermore, in considering the political factors, Wallis found that presidential variables were more important than congressional variables. *See id.*

bully pulpit to pressure legislators into approving transfers to swing states in the national presidential election.[84]

B. The Electoral Myth

Closely related to the national constituency myth is the electoral myth—the assumption that because members of Congress face frequent elections they are more captive to parochial interests than the president.[85] At first blush, the electoral myth might seem to capture a reasonable picture of legislative motivation, as one could imagine that the frequency of elections increases a political actor's exposure to pressures to deliver benefits promised in previous campaigns. Thus, we might expect members of Congress to pander to constant swings in constituency preferences in a manner that would seem unseemly or even inappropriate for a nationally elected figure like the president.

Yet the emphasis on the frequent election cycles of legislators is misplaced. As a preliminary matter, under our bicameral structure senators are elected every six years while members of the House of Representatives are elected every two years. The average of the election cycles for the two legislative chambers—four years—is the same election cycle for the president.

To be sure, because the president is restricted to a two-term limit, he presumably should have less of an incentive to pander to narrow political constituencies during his second term. Thus, one might argue that the lame duck president has the unique benefit of being unmoored from the pathologies of the reelection cycle that plague members of Congress. Yet such an argument rests on an underestimation of the myriad electoral motivations that face presidents and incumbent members of Congress. First, because a president usually has to factor in the overall electoral interests of his party, even a lame duck president will have an incentive to choose policies that will maximize not only the election chances of his party's future nominee for president but also the reelection chances of his party's congressional members. Second, members of Congress may often be subject to political incentives that transcend pure reelection goals. For instance, certain members may have downstream political desires to run for a broader elective office, such as president or

84. *See* Fleck, *supra* note 80, at 383–84.

85. *See* Erik H. Corwin, *Limits on Legislative Terms: Legal and Policy Implications*, 28 HARV. J. ON LEGIS. 569, 603 (1991) (observing that "[i]n the case of Congress . . . it is often argued that the parochial interests of reelection-oriented members, reflected and institutionalized in the committee system, prevent the development of comprehensive solutions to pressing national concerns"); Farina, *supra* note 56, at 131–34 (summarizing and criticizing the public choice argument that frequent congressional elections increase pork barrel politics).

governor, and may adjust their policy goals to reflect these political preferences. Third, as some commentators have observed, the existence of term limits on politicians does not necessarily decrease the spoils of political office, as politicians will still have an incentive to exploit their political capital in the private sphere after they leave political office.[86]

Even if one concedes that certain legislators, such as members of the House of Representatives, worry more about frequent elections than the president, it is not clear that frequent elections lead necessarily to increased susceptibility to parochial interest group capture. On the contrary, the value of legislative bargains for interest groups often depends on the durability of such bargains.[87] Because interest groups have no guarantee that the bargains they make with today's legislators will be respected by the legislators of tomorrow, they should tend to favor electoral or institutional arrangements that make bargains more durable over the long run. In other words, long-term legislative bargains would tend to be more valuable to interest groups than bargains that are subject to frequent and unpredictable reversals.

C. The National Economy Myth

The third myth that one commonly encounters in the legal literature is that the president cares more than Congress does about the national economy because his electoral fortunes are tied more closely to the state of the national economy than those of members of Congress.[88] Although the state of the national economy does seem to play a role in national presidential elections, the available empirical evidence suggests that such a role may be quite limited.[89] In any event, the national economy claim is simply a variant of the argument

86. *See, e.g.*, Elizabeth Garrett, *Term Limitations and the Myth of the Citizen-Legislator*, 81 CORNELL L. REV. 623 (1996).

87. *See* William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 879 (1975) (arguing that increasing costs of reversing legislation increases interest group lobbying).

88. *See* John O. McGinnis, *Presidential Review as Constitutional Restoration*, 51 DUKE L.J. 901, 922–23 (2001). McGinnis argues:

> The president is the appropriate instrument [for restoring pre–New Deal limitations on government] because he has more interest in it than any other national government actor. The public may be rationally ignorant of most issues, but they care about the economy and hold the president responsible for it. The challenge for the president is to capitalize on the public's interest in economic growth and use it to recreate structures of good governance.

Id.

89. *See* Ray C. Fair, *The Effect of Economic Events on Votes for President*, 60 REV. ECON. & STAT. 159, 171 (1978) (concluding that presidential elections are affected by the economy in the year of an election, but not by other economic variables).

that the president has a broader or more national electoral audience than Congress. Therefore, the same reasons that undermine the national constituency argument also render this claim problematic.

Consider a situation in which the president has to decide whether to adopt a policy that would decrease the national unemployment rate. Suppose that the proposed policy decreases rates uniformly across all congressional districts and states in the country. In this picture, no sensible legislator would object to such a policy given that it also decreases the unemployment rate in her district. But let us change the assumption and suppose that the proposed policy actually increases the net national unemployment rate, but it decreases the unemployment rate in certain regions of the country. In this picture, it is plausible that legislators from the regions that benefit may be able to assemble a strong enough coalition to enact the policy. But the president may also face similar incentives to support this parochial policy. If the relevant portion of the country that benefits from such a parochial policy is the electorally relevant 25 percent under the electoral college, then the president also has an incentive to favor the parochial economic policy even though it makes the entire nation worse off.

The proponents of the nationalist president are likely to argue that members of Congress will still tend to favor more parochial economic policies than the president because of a collective dilemma created by legislative vote-trading or logrolling.[90] In this picture, each legislator will have a parochial preference to deliver benefits to her district at the expense of other districts. Since the measure will hurt other districts, the legislator knows that she is not likely to muster the relevant majority support to make such a policy come true. But because every other legislator is in the same position, the situation creates a gains-from-trade opportunity if legislators can cooperate and pass omnibus legislation with parochial projects for each district. Of course, this could result in runaway logrolling whereby all congressional constituencies become worse off.

The problem with this kind of analysis is that it attempts to prove too much. No one will deny that inefficient logrolling occurs periodically in Congress. But it seems clear that such logrolling involves a pathology of a certain kind of legislative decisionmaking rather than a pathology that plagues Congress as an institution. Congress can restructure its decisionmaking process

90. *See* Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 44 (1982) ("If each program [from a legislative bargain or logroll] is inefficient, then the entire logrolling process, by aggregating these programs, creates a total public-sector expenditure that is even more inefficient.").

to reduce inefficient logrolling by introducing voting protocols—such as fast-track voting—which require legislators to vote up or down on a proposed piece of legislation without making any amendments.[91] Indeed, as I discuss in Part V,[92] Congress took the initiative and adopted institutional innovations such as delegation to address the harmful logrolling that helped contribute to the inefficient Smoot-Hawley Tariff Act of 1930.[93] Thus, whenever such inefficient logrolling occurs and makes all constituencies worse off, members of Congress will have an incentive to take corrective measures to prevent such inefficiencies from occurring in the future.

More importantly, however, the assumption that legislative logrolling will generally result in more parochial or inefficient legislation is suspect. Indeed, according to the conventional public choice approach, legislative logrolling should actually lead to more efficient or public-regarding legislation.[94] For example, in the case where a majority of congressional districts prefer policy A to policy B with just a small utility margin while a minority of congressional districts prefer B to A with a significant utility margin, then the resultant bargain between legislators from the minority and the majority districts would be a Pareto improvement. In other words, although there are occasional incidents of inefficient vote trading, there may be many reasons to think that the overall effect of legislative logrolling on the political system will be efficiency-enhancing.

For example, in the context of congressional elections, the kind of interest group competition that fosters sustainable public-regarding legislation may be particularly pronounced. Because congressional districts vary considerably in their demographic makeup and characteristics, the relative influence of interest groups will often depend on whether their interests are aligned with those of voters in the district. For instance, it seems reasonable to assume that the interests of the steel industry are more likely to receive support from voters in districts that produce steel. Where there is such similarity between the preferences of voters and those of interest groups in a congressional

91. For a discussion of such fast-track procedures in international trade, see Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT'L L. 143, 152 (1992).

92. *See infra* Part V.C.

93. Smoot-Hawley Tariff Act of 1930, ch. 497, 46 Stat. 590 (codified as amended at 19 U.S.C. §§ 1304-1681b (2000)).

94. *See* Richard L. Hasen, *Vote Buying*, 88 CAL. L. REV. 1323, 1331, 1338 (2000) (discussing examples of inefficient and beneficial logrolling); Daniel Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627, 656 (2001) ("One of the ingenious features of legislative lawmaking—perhaps the most ingenious feature—is that it provides for an efficient sorting of these preferences through the device of logrolling. Legislators can trade with one another votes and other goodies in order to capture for themselves more of what they or their constituents prefer.") (citations omitted).

district, the resultant competition for political influence among such districts may likely result in a strong political coalition that supports public-regarding legislation.

In this picture, if an interest group in district A prefers policies that will redistribute resources from district B, then the politically salient interest group in district B has an incentive to lobby against such policies. The problem of concentrated versus diffuse costs does not apply here because presumably both congressional districts will have rival interest groups that are well organized. If one of the interest groups in these districts prevails in the competition for influence, it may very well be because it has more political support from a greater range of congressional districts that share similar preferences. In other words, such a victory may have less to do with the fact that such an interest group is better organized or has better resources than with the fact that it supports policies that have wider public appeal.

In sum, although some scholars have observed that logrolling may sometimes cause Congress to sacrifice national economic interests for parochial goals, such observations hardly constitute the basis for building an entire cornerstone of conventional wisdom. At most, the various observations about interest group dynamics indicate that one cannot automatically assume that legislative decisionmaking will necessarily favor the interests of the majority.[95] Such observations may simply reflect a basic reality of all institutions of democratic politics—be it Congress, states, or the president. Simply put, smaller, organized interest groups tend to be more politically influential than larger, diffuse ones. Taken at face value, these realities do not support arguments that assume that one institution—such as the president—is necessarily prone to adopt more national economic policies than another.

III. THE REAL PRESIDENTIAL ADVANTAGE OVER CONGRESS: TRANSACTION COSTS

The most distinct aspect of Congress's collective character is that it cannot make decisions as effortlessly as a unitary actor like the president. In other words, as an institution made up of more than 535 members that cut across 435 different congressional districts and fifty states, Congress often faces transaction costs in its decisionmaking process that the president will never face.[96]

95. *See* text accompanying *infra* notes 147–149.

96. *See* Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 146 (1999). They argue:

> [T]ransaction costs of Congressional action are enormous. Not only must coalitions somehow be formed among hundreds of legislators across two houses and a variety of

Whenever a member of Congress wants to pass certain legislation, she has to devote extensive resources to building coalitions and negotiating with dozens (if not hundreds) of other members, each of whom has her own interests, constituencies, and partisan commitments. The president, on the other hand, can make decisions unilaterally without necessarily consulting with other political actors. Thus, the president will often have a decisive advantage over Congress in implementing policy goals.

To be sure, the president's ability to act unilaterally without the same transaction costs as Congress means that he often has the benefit of acting first on many issues and waiting for Congress to respond.[97] Sometimes the president will take advantage of his greater discretion and flexibility to enact national or public-regarding policies. But there is nothing in the president's transaction cost advantage over Congress that would necessarily bias the president's policies toward more national or less parochial objectives. To the contrary, the president's advantage will likely remain the same whether the issues are national or parochial.

Take, for instance, an industry in Ohio that wants special protection against foreign competition. Both the president and the member of Congress who serves the particular district in which the industry is located might have incentives to "compensate" the affected industry by erecting trade barriers against foreign competitors. Such barriers are likely to be inefficient from an economic point of view but will provide concentrated benefits to the industry at the expense of American consumers and exporters. In this picture, all the president has to do to erect the necessary trade barriers is to order the Department of Commerce to impose temporary tariffs under relevant safeguard provisions. Alternatively, he could use his organ of foreign communications powers to pressure foreign trading partners to scale back on their exports to the United States of the import-competing good. For the member of Congress serving the affected district, however, she would have to commit a substantial amount of time and resources in negotiating with other members of Congress to come up with a parochial proposal that would satisfy the median member's preferences. Along the way, there will be negotiation breakdowns, filibusters, miscommunications, problems in sustaining coalitions, and other fundamental

> committees . . . but owing to scarce time and resources, members must also be convinced that the issue at hand is more deserving than the hundreds of other issues competing for their attention.

Id.

97. *See id.* at 145–46 (describing the president's ability to set the policy agenda, including the ability to develop or shift policy unilaterally). For a discussion of the president's ability to shape the war powers agenda, see Jide Nzelibe, *A Positive Theory of the War Powers Constitution*, 91 IOWA L. REV. (forthcoming 2006), *available at* http://ssrn.com/abstract=667382.

disagreements. In the end, the president does not have to face the same kinds of dilemmas that are routine to members of Congress trying to negotiate all kinds of policies.

* * *

To summarize, the prevailing wisdom predicts a greater bias by Congress toward parochial policies than the president because the president is believed to face institutional incentives that make him care more about the national interest. This assumption enjoys a powerful hold on the scholarly imagination of legal commentators and political scientists, even though its empirical record is astonishingly scanty. At bottom, the prevailing wisdom assumes that the president is a majoritarian figure who does not have much of an incentive to cater to parochial interests. Yet, a straightforward comparison of the electoral incentives faced by Congress and the president reveals that this assumption is unwarranted, because the winner-take-all feature of the electoral college shows that it will often be in the president's interests to target benefits at a small group of voters at the expense of the rest of the population. Moreover, in many circumstances, the president has an incentive to exhibit a parochial preference in his policies that exceeds that of the median member of Congress.

Admittedly, the analysis developed in this part does not predict that Congress will always adopt a more national or public-regarding outlook than the president. It simply suggests that, when the political system has to allocate resources among different communities or groups, political realities suggest that those resources will often be allocated on the basis of political bargains that favor certain groups or interests at the expense of others. But the underlying phenomenon—interest group bias or parochialism—may be observed across all political institutions including the Congress and the presidency. Henceforth, the burden of proof should be on those who argue that the president has a more nationalist vision than the median member of Congress.

The rest of this Article argues that the collective nature of Congress's decisionmaking may actually encourage members of Congress to produce policy outcomes that are more nationalist than those produced by any single elected official.

IV. FROM THE PAROCHIAL INDIVIDUAL LEGISLATOR TO THE COLLECTIVE WISDOM OF THE LEGISLATURE

The legal community seems particularly preoccupied with the notion of a pathological capture of the legislative process by parochial interest groups.[98] In large part, such preoccupation is fostered by the tendency to focus on the incentives of the individual legislator, who in all likelihood is worried more about the interests of his constituents (and local interest groups) than those of the nation as a whole. This preoccupation leads, however, to the fallacy of composition: The fact that individual legislators may be primarily concerned with the interests of their constituents does not mean that the collective legislature will also cater to parochial interests.[99]

Contrary to the conventional wisdom, developing national policy goals and allowing increased legislative access to interest groups are not mutually exclusive endeavors. Indeed, when one views the legislature as a collective, competing and counteracting interest groups are likely to play a very instrumental role in informing members of Congress of the wisdom of competing public policy proposals. In the aggregate, these competing and counteracting sources of information may give Congress a comparative advantage over the president in understanding the potential costs and tradeoffs involved in any specific legislation or policy proposal that affects the national welfare. Moreover, such interest groups are likely to provide the political capital necessary to make national policy goals sustainable over the long run. Finally, Congress's involvement in national policies also plays a legitimating function. Given the diverse and eclectic makeup of Congress, any policy approved by that body will likely include a greater range of voices and input than a unilateral decision by the president. If such groups perceive that they have some input in developing a specific policy, then they will likely also have a stake in the policy's success.

98. *See generally* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 36–37, 72 (1991) (stating that the most fundamental concern about interest group politics is that it corrupts the political system); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 48 (1985) (describing interest group theory as encompassing "cases in which interest-group pressures are largely determinative and statutory enactments can be regarded as 'deals' among contending interests").

99. *See also* Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 551 n.3 (2005) (contrasting fallacy of division (that what is good or true for the collective is desirable for the individual) with fallacy of composition (that what is good or true for the individual is desirable for the collective)).

A. Congress and the Role of Interest Groups as Information Entrepreneurs

One of the core concerns among legal and political science commentators studying congressional decisionmaking is the extent to which money from parochial interest groups pervades the legislative process.[100] Over the past two decades, the tone of this debate has become increasingly alarmist as journalists and academic commentators bemoan what is perceived to be an increase in the amount of campaign contributions funneled to legislative coffers by these interest groups.[101] These commentators argue that such increased contributions often result in increased congressional pandering to such groups, which means that more special interest or parochial legislation is being passed at the expense of the public good.

Yet the evidence shows that such outright skepticism (if not cynicism) of the legislative process is largely unjustified. Indeed, much of the contemporary scholarship on campaign contributions from interest groups suggests that the effects of these contributions on the legislative process are often exaggerated.[102] Certain studies show that while these contributions may buy special interest groups access to legislators, they rarely influence the voting patterns of members of Congress.[103] In other words, contributions may afford special interests more extensive audiences with members of Congress, but there is no guarantee that the special interest groups will get their preferred policy outcome.[104]

Rather than simply viewing interest groups as agents that use money crudely to buy legislative outcomes, it is better to view them as information

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100. *See* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 230–33 (1986); *see also* Thomas Stratmann, *What Do Campaign Contributions Buy?: Deciphering Causal Effects of Money and Votes*, 57 S. ECON. J. 606 (1991); Gorden Tullock, *The Purchase of Politicians*, 10 W. ECON. J. 354 (1972).

101. Marty Jezer & Ellen Miller, *Money Politics: Campaign Finance and the Subversion of American Democracy*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 467 (1994) (arguing that growing campaign contributions discredit American democracy); Charles Lewis, *Capital Gains on Capitol Hill, Special Interests Use Campaign Contributions to Purchase Influence in Congress*, DALLAS MORNING NEWS, Oct. 25, 1998, at 1J, *available at* http://www.no-smoking.org/oct98/10-27-98-1.html (last visited May 12, 2006) (observing that Congress has bestowed a privileged status on tobacco companies).

102. *See* Janet M. Grenzke, *PACs and the Congressional Supermarket: The Currency Is Complex*, 33 AM. J. POL. SCI. 1 (1989); John R. Wright, *PACs, Contributions, and Roll Calls: An Organizational Perspective*, 79 AM. POL. SCI. REV. 400 (1985).

103. *See* LARRY J. SABATO, PAC POWER 127 (1984); *see also* BRUCE C. WOLPE, LOBBYING CONGRESS 24 (1990); David Austen-Smith, *Allocating Access for Information and Contributions*, 14 J.L. ECON. & ORG. 277 (1998); David Austen-Smith, *Campaign Contributions and Access*, 89 AM. POL. SCI. REV. 566 (1995).

104. *See* JOHN MARK HANSEN, GAINING ACCESS 5 (1991) ("In exchange for serious considerations of their policy views, [interest groups] provide political intelligence about the preferences of congressional constituents . . . .").

entrepreneurs who are willing to invest significant resources to apprise legislators and voters of the wisdom of their positions.[105] As some political science commentators have observed, interest groups perform a critical function in providing information that reduces the level of uncertainty regarding the possible consequences of legislation.[106] In other words, interest groups have an incentive to provide legislators with important information about policy proposals that might otherwise be costly to obtain from other sources.[107]

The next three sections explore in depth how interest groups interact with three different political actors: (1) the collective Congress, (2) the voting public, and (3) the executive branch. The analysis here concludes that Congress's collective feature makes it more amenable to public-regarding interest group dynamics than any other political actor.

1. The Collective Congress

The most salient effect of the collective nature of the legislature—as opposed to the individual legislator—is that it fosters a more significant competition of interest groups, which in turn tends to enhance the quality of information that these interest groups provide to legislators and the general public. This dynamic of interest group competition is closely analogous to market competition. Just as different parties compete in the marketplace over prices and quality of goods and services, interest groups compete to provide members of Congress with better information about specific policy proposals. In this picture, an interest group has an incentive to provide better information to legislators in order to offset the influence that a competing interest group might have.[108] As

105. *See* David Epstein & Sharyn O'Halloran, *A Theory of Strategic Oversight: Congress, Lobbyists, and the Bureaucracy*, 11 J.L. ECON. & ORG. 227, 227–28 (1995) (observing that "lobbying can reduce the uncertainty surrounding policy outcomes"); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 610–12 (2002) (reporting comments of legislative staffers who described lobbyists as adding value and information to the legislative process, especially given the scarce time and resources of staff members).

106. *See, e.g.*, Scott Ainsworth & Itai Sened, *The Role of Lobbyists: Entrepreneurs With Two Audiences*, 37 AM. J. POL. SCI. 834, 859 (1993 (concluding that a "lobbyist's communication of information about the number of beneficiaries [of a public policy proposal] helps the government by suggesting when a policy is likely to gain electoral support"); HANSEN, *supra* note 104, at 5 ("[I]nterest group access results from congressional strategies for dealing with electoral uncertainty.").

107. *See* Einer Elhauge, *Are Term Limits Undemocratic?*, 64 U. CHI. L. REV. 83, 179 (1997) ("[S]pecial interest groups often face lower information costs. Monitoring is less costly because special interest groups are, by definition, only concerned with monitoring a limited set of issues.").

108. *See* David Austen-Smith & John R. Wright, *Counteractive Lobbying*, 38 AM. J. POL. SCI. 25, 28 (1994).

David Austen-Smith and John Wright argue, "legislators are less likely to receive misleading information when lobbied by groups from both sides of an issue."[109]

One way to illustrate this phenomenon is through the application of the Condorcet Jury Theorem.[110] This theorem suggests that, if individuals have a better than 50 percent chance of being correct and each makes his decision independently, then collectively such individuals have a higher chance of reaching a correct decision than any one individual. Condorcet developed this theory in the context of a jury trying to reach a decision about the guilt of the accused and concluded that if members of the jury were all trying to establish a certain fact about guilt, then the jury as a collective body would do better than one juror acting alone. Various commentators have applied this insight to the analysis of legislative decisionmaking: If legislators act independently with a good chance of being correct over an issue on which they have common preferences, the model predicts that the majority of legislators will make decisions that are superior to that of any single legislator.[111]

To be sure, real-world experience may suggest that the conditions for the Condorcet Jury Theorem do not generally hold true: Legislators are not likely to reach decisions independently and may not have common preferences about policy issues. But these objections, even taken at face value, do not take away the basic insight that individuals acting collectively with bits of information are more likely to reach a correct decision than individuals acting alone. Indeed, in their empirical study of the rationality of public preferences, Benjamin Page and Robert Shapiro show that the collective policy preferences of the American public are stable, coherent, and mutually consistent, even if the preferences of individual citizens are unstable and incoherent.[112]

In the case of legislative decisionmaking, two factors operate in tandem to increase the overall probability that Congress will reach a better decision than any single political actor. The first is that legislators receive input from interest groups that have an incentive to provide credible information.[113] So,

109. *Id.*

110. For an analysis of the Condorcet Jury Theorem and its use in legal analysis, see Paul H. Edelman, *On Legal Interpretations of the Condorcet Jury Theorem*, 31 J. LEGAL STUD. 327, 327 (2002).

111. *See, e.g.*, Dhammika Dharmapala & Richard H. McAdams, *The Condorcet Jury Theorem and the Expressive Function of Law: A Theory of Informative Law*, 5 AM. L. & ECON. REV. 1 (2003).

112. *See* BENJAMIN I. PAGE & ROBERT Y. SHAPIRO, THE RATIONAL PUBLIC 25–26 (1992).

113. Scott Ainsworth shows that interest groups will find it costly to misrepresent the salience of their claims because claims of electoral salience will have little influence unless they are credible. He shows that legislators structure their interaction with lobbyists to increase the credibility of information that lobbyists provide. *See* Scott Ainsworth, *Regulating Lobbyists and Interest Group Influence*, 55 J. POL. 41, 52–53 (1993). John Wright observes that, although misrepresentation is sometimes used by lobbying groups to obtain influence, a more common route is for

even if there is some interaction among legislators (that is, no true independence), the chances are that because the legislators receive information from sources that are generally credible, such interaction is likely to have a benign effect on the quality of the information received. The second factor is that the legislators who receive such input will make their decisions collectively. This latter factor increases the chance that any random variations in the quality of information received by the legislators will be canceled out when the preferences of the legislators are aggregated.

The claims being made here about the wisdom of collective decisionmaking are very general; they will not often depend on whether any specific individual in the collective is wiser or more informed than others. Simply put, empirical observations of the Condorcet Jury Theorem in practice show that collective decisionmaking avoids much of the risk of random errors connected with individual decisionmakers. The result of the Condorcet insight is simply the rule of large numbers, which demonstrates in a rather commonsense way that greater numbers of people operating under a majority framework tend to aggregate information better than any single actor. Thus, even with the benefits of technocratic expertise, there is no guarantee that the president or any other unitary decisionmaker will not be prone to the same kind of random mistakes as other individual decisionmakers.

Admittedly, there might be instances where there will be no significant interest group competition, and one might expect this to reduce the quality of information that legislators receive. According to Mancur Olson's seminal work on collective action, some interest groups will have a decisive advantage in overcoming collective-action problems than others because such groups are small and face concentrated costs or benefits from a specific legislative proposal.[114] Thus, there might be certain circumstances where only one interest group will actively lobby the legislature for a preferred policy outcome. Whether Olson's observations about collective-action problems lead to more one-sided than competitive lobbying is ultimately an empirical issue. The consensus in the interest group literature, however, is that most interest groups have regular competitors for influence in the policymaking sphere.[115]

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interest groups to present truthful information in order to discourage opponents from presenting untruthful information. *See* JOHN R. WRIGHT, INTEREST GROUPS AND CONGRESS 112–13 (1996).

114. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 53–57, 132–34 (1965).

115. *See, e.g.*, Robert H. Salisbury, *Who Works With Whom? Interest Group Alliances and Opposition*, 81 AM. POL. SCI. REV. 1217, 1218–19 (1987). According to Austen-Smith and Wright, initially only the disfavored group whose interest the legislator will vote against in the absence of additional information will have an incentive to lobby. If the disfavored group lobbies, however, then the group that is initially favored has an incentive to lobby to counteract the influence of the disfavored interest group. *See* Austen-Smith & Wright, *supra* note 108, at 28.

But as Austen-Smith and Wright have observed, even if interest groups do not always compete over each legislator's vote, a legislator is more likely to be better informed of the issues when he is lobbied by only one side than when he is not lobbied at all.[116]

2. The Voting Public

Beyond disseminating information to legislators, interest groups also monitor members of Congress and provide valuable information about legislative outcomes to voters.[117] For the normal citizen, extracting information on legislative performance can be a costly exercise, and so she is likely to underinvest in acquiring such information. In other words, the average citizen will tend to be rationally ignorant of many political issues that affect her welfare. For instance, the consumer who does not work in the steel industry will have very little incentive to invest in acquiring knowledge on all the vagaries of the steel industry tariff. In contrast, special interest groups have a strong incentive to be fully informed about those policies in which they have an obvious stake.

When two or more interest groups are competing for influence, they have an incentive to apprise the general public of the performance of legislators on specific policy issues by using cues such as legislative ratings and voting records.[118] Thus, the protectionist groups that want to unseat an incumbent free market legislator have an incentive to disclose information to the public about the incumbent's voting record on tariff issues and outsourcing, especially if they think that this information would be detrimental to the incumbent's electoral chances. In this situation, the interest groups reduce the costs of providing relevant electoral knowledge to the general public.

In many ways, Congress is likely to have an institutional advantage over the president in facilitating the flow of valuable information from interest groups to the public. As some commentators have noted, a voter does not have to be fully informed about a policy issue to make intelligent choices in an

116. *See* David Austen-Smith & John Wright, *Competitive Lobbying for a Legislator's Vote*, 9 SOC. CHOICE & WELFARE 229, 245 (1992).

117. *See* Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus,"* 50 UCLA L. REV. 1141, 1157 (2003) ("[V]oters can derive heuristic cues by looking to which interest groups support and oppose a particular ballot measure. . . . In fact, the positions taken by interest groups are particularly informative and consistent because interest groups adhere to natural policy orientations dictated by the defining interests of their memberships.").

118. *See* Arthur Lupia, *Busy Voters, Agenda Control, and the Power of Information*, 86 AM. POL. SCI. REV. 390, 390–91 (1992).

election.[119] What the voter needs are suitable and available electoral cues, such as suggestions or advice from churches, institutions, or interest groups with which she has similar preferences. To the extent that the heterogeneous makeup of Congress facilitates the existence of a more diverse range of special interest groups, it also increases the breadth and depth of helpful cues available to voters to make coherent and wise electoral decisions.

3. The Executive Branch

But what about the president and the administrative bureaucracy? Do they not enjoy similar "information-dissemination" advantages from competing interest groups? To be sure, interest groups may very well exert considerable influence over administrative agencies that are subject to presidential control. Compared to Congress, however, such administrative agencies face two comparative institutional disadvantages: (1) As unelected officials, bureaucrats will not usually have the same incentive to be as responsive as Congress to the information provided by competing interest groups; and (2) in general, administrative agencies do not have the same collective decisionmaking characteristics as Congress. As for the latter disadvantage, even if we assume that there is some collective decisionmaking in agencies, such as when commissioners at the Federal Trade Commission vote by a majority rule to have policies adopted, the collective nature of such decisionmaking is hardly going to be as broad as that exercised by Congress. In the end, Congress is made up of 535 different political actors who represent a fairly broad spectrum of political life, and no federal administrative agency enjoys a comparable scope of collective decisionmaking.

One practical consequence of this analysis is that it suggests that delegation of legislative authority to agencies does not necessarily reflect congressional concern with interest group capture. To the contrary, a growing literature on congressional power suggests that Congress actually exerts significant authority over agency behavior through a variety of institutional mechanisms.[120] Sometimes Congress even gives certain interest groups a role in an agency's decisionmaking process in order to ensure that agencies comply

119. *See* Kang, *supra* note 117, at 1143 ("Despite their rational ignorance, voters can still make competent political choices. They often can use 'heuristic cues' as shortcuts to roughly the same conclusions that they would have reached had they been well-informed.").

120. *See* Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987) [hereinafter McCubbins et al., *Administrative Procedures*]; Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 434 (1989) [hereinafter McCubbins et al., *Structure and Process*].

with congressional preferences. For instance, in the Trade Act of 1974,[121] Congress explicitly provided a role for private industry advisory groups to advise the president in future international trade negotiations.[122]

In any event, while legislative delegation may be a fact of modern bureaucratic life, it hardly suggests that Congress believes that the president is in a better position to determine national goals. Indeed, the patterns of legislative delegation in our administrative state tend to bear very little resemblance to whether a regulatory framework has a nationalist or a parochial component. If anything, delegation reflects congressional concerns over the technocratic and resource barriers that legislators face in addressing complicated policy issues.[123]

What the information-dissemination model does tell us is that political actors, including legislators and executive branch officials, often have to make decisions in highly uncertain political environments. To the extent that interest groups can provide relevant information that reduces this uncertainty, they contribute a valuable public service. But to take advantage of the information that interest groups provide, political institutions have to be able to filter the good information from the bad. In this context, Congress's collective decisionmaking process gives it some institutional advantages over the president because it reduces Congress's exposure to the decisional errors that often plague individual political actors.

B. Congress's Role in Sustaining Public-Regarding Reforms

Much of the public choice literature on interest groups often focuses on the inimical role that such groups and their legislative cohorts play in developing parochial legislation. In the classical model of interest group behavior, small and narrow groups that face concentrated benefits from a legislative action will find it easier to overcome collective-action problems than the larger public that faces small and dispersed costs.[124] In other words, the classical model emphasizes the fact that political actors will often privilege the interests of organized groups at the expense of the more diffuse and unorganized public.

121. *See* Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975) (codified as amended at 19 U.S.C. §§ 2101–2495 (2000)).

122. *See id.* § 135, 88 Stat. at 1996 (codified as amended at 19 U.S.C. § 2155 (2000)).

123. James F. Blumstein, *Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues*, 51 DUKE L.J. 851, 878 (2001) ("The technocratic claims for centralized presidential regulatory review are now recognized as uncontroversial, at least in principle. These claims focus on 'good government' themes that are compatible with the technocratic vision of agency rulemaking through use of specialized knowledge and expertise.").

124. *See* OLSON, *supra* note 114, at 33–36; *see also* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 38–39 (1991) (explaining the collective-action problems of diffuse groups).

Curiously, these same public choice characteristics also make interest groups a valuable tool for mobilizing political resources in favor of public-regarding legislation. First, because well-organized interest groups are more capable of overcoming collective-action problems, they are more likely than other groups to be willing to invest in public-regarding legislation when such legislation is consistent with their interests. Second, to the extent that any public-regarding legislation may be prone to attack by disfavored interest groups, counteracting interest groups may prove crucial in making such legislation politically sustainable over the long run.

The notion that interest group competition may be the source of political capital for public-regarding legislation is hardly novel. Madison (or Hamilton) essentially espoused such a view when he concluded that the public good will be attained through "opposite and rival interests" that will "supply[ ] . . . the defect of better motives."[125] Contemporary examples of such interest group dynamics abound. For instance, Elizabeth Garrett has pointed out that interest group conflict was very instrumental in providing legislators incentives to disclose reasons for new tax expenditures under the "pay-as-you-go" provisions in the Budget Enforcement Act of 1990.[126] More recently, a burgeoning literature in international trade policy shows that reciprocal trade legislation has pitted export groups against protectionist groups in a manner that makes free trade policies sustainable.[127] This Article examines some of the implications of this latter dynamic in Part V, including Congress's pivotal role in harnessing export groups in favor of free trade.[128]

The peculiar challenge for political actors is how to devise institutional arrangements that foster those interest groups that make public-regarding legislation sustainable. In this case, I suggest that there are three factors that are key to enhancing the durability or sustainability of public-regarding legislation: (1) a competitive dynamic that encourages the participation by a greater range of interest groups (the pluralist factor); (2) institutional innovations that entrench benefits in interest groups that favor public-regarding legislation after such benefits have been identified; and (3) the flexible institutional capacity to adjust and accommodate new policies as preferences for public-regarding legislation change over time.

125. THE FEDERALIST NO. 51, at 323 (Alexander Hamilton or James Madison).

126. *See* Elizabeth Garrett, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. CHI. L. REV. 501, 503–04 (1998) (discussing the Budget Enforcement Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (codified as amended at 2 U.S.C. § 902 (2000))).

127. *See infra* notes 182–191 and accompanying text.

128. *See infra* notes 182–191 and accompanying text.

In the fragmented political structure of the U.S. political system, Congress seems to have a comparative advantage over the other institutions in implementing the factors described above. First, because congressional districts vary considerably in their demographic makeup and characteristics, the depth and breadth of interest groups seeking political influence in Congress are likely to be more representative of the U.S. population than in any other political institution. Moreover, Congress has property rights over a range of constitutional powers that make it particularly fertile for broader interest group dynamics—including the power to spend, monitor, and control regulatory agencies; repeal or modify legislation; or increase costs for private parties. Thus, Congress will often be more susceptible to the attention of a wider and more diffuse range of interest groups than other political institutions, including those interest groups that will be crucial in mobilizing political capital for public-regarding legislation.

Second, Congress has at its disposal a wide range of institutional tools to entrench benefits in groups that seek public-regarding legislation or neutralize groups that oppose such legislation. Some of these tools include reforms of parliamentary procedures, such as those that require more openness in public decisionmaking;[129] voting protocols that require legislators to vote up or down on proposals without any amendments;[130] or budget rules that mandate that new expenditures be offset by raising taxes or cutting other expenditures.[131] In each of the cases, the relevant reform of a parliamentary rule often empowers a group that seeks public-regarding legislation at the expense of one that is against such legislation.

Take, for instance, the requirement that legislators vote up or down on international trade agreements negotiated by the president under the so called "fast-track" procedures. Most of the key free trade agreements concluded over the past thirty years would not have occurred had Congress not adopted procedures such as fast track or broad delegation to the president. But, as the discussion in Part V makes clear, these procedures helped to entrench the interests of export groups that favored more liberal trade at the expense of protectionist groups. By bundling the negotiation of lower foreign tariffs with the reduction of domestic tariffs, Congress invariably pitted export groups against protectionist groups.[132] Similarly, the logic of much heralded public

129. *See, e.g.*, Government in the Sunshine Act § 2, 5 U.S.C. § 552b note (2000) ("It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking process of the Federal Government.").

130. For a discussion of the fast-track voting procedures, see Koh, *supra* note 91, at 152.

131. *See* Garrett, *supra* note 126, at 503–04.

132. *See infra* text accompanying notes 182–191.

reform initiatives such as banking deregulation—which purportedly pitted banking interests against insurance and investment groups—also supports this proposition.[133]

Third, Congress has certain institutional features that enable it to adapt more quickly to changing public preferences about what constitutes public-regarding legislation. In many ways, this point overlaps with the claim made earlier about Congress's information-dissemination advantage.[134] Because interest groups competing for the attention of various legislators have an incentive to disclose relevant information regarding the costs and benefits of policy proposals, Congress will often have access to better information about the changing costs and benefits of relevant policy goals than other institutional actors. Better information means that Congress is in a better position to separate the wheat from the chaff when competing policy proposals are put on the table. As Scott Ainsworth and Itai Sened have argued, interest groups also provide critical information about the number of beneficiaries that a proposal is likely to affect and hence reduce errors where political actors might mistakenly provide parochial goods rather than public ones.[135]

In sum, the adoption of public-regarding legislation does not have to come at the expense of interest group competition. Indeed, many of the most pronounced public-regarding reforms over the past couple of decades have often been sustained by congressional initiatives that mobilized interest groups that had a stake in such reforms. Congress often enjoys the unique ability to structure the political process in a manner that yields the most public-regarding outcome, especially because it has the tools to provide advantages to interest groups that help to sustain such outcomes.

There is one caveat, however: The view espoused here does not require one to endorse the neopluralist argument that competing interest groups tend to balance each other in a manner that achieves an efficient equilibrium.[136] Instead, the claim here is much more basic: Even under the more skeptical public choice view of interest groups, it is preferable to develop institutional mechanisms that channel interest group pressures productively rather than attempt to engage in the futile exercise of eliminating interest group activity altogether. Fundamentally, it is the logic of representative democracy that different groups will enjoy differential access to the political process and thus special interest groups are likely to remain a permanent feature of the

133. *See* Steven P. Croley, *Public Interested Regulation*, 28 FLA. ST. U. L. REV. 7, 17–18 (2000).
134. *See supra* Part IV.A.1.
135. *See* Ainsworth & Sened, *supra* note 106, at 834.
136. *See generally* DONALD A. WITTMAN, THE MYTH OF DEMOCRATIC FAILURE (1995); Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983).

American political landscape. But the most preferable antidote to parochial politics is likely to be greater rather than less interest group competition. As Saul Levmore has put it: "[W]hen interest groups do much more harm than good, our political system encourages competing interest groups to form, and sometimes even encourages political entrepreneurs who can benefit from the affections of numerous voters . . . when sensible policies are pursued."[137]

V. THE NORMATIVE IMPLICATIONS OF DEBUNKING THE NATIONALIST PRESIDENT FABLE ON PUBLIC LAW DISCOURSE

Thus far, this Article has focused on debunking the institutional explanations for a nationalist president and parochial congress. Embedded in this analysis, however, is a distinct vision of the role of the political branches in shaping national policy goals. This part explores in greater detail three areas in which the influence of the fable of the nationalist president has been particularly pervasive: (1) the unitary presidency model; (2) judicial deference to administrative agencies; and (3) international trade.

A. The Unitary Presidency Model

The most pervasive use of the nationalist presidency fable occurs in normative arguments for the unitary executive. A recurring theme in the legal commentary on the administrative state is how to reconcile the expanding authority of administrative agencies with the reality that bureaucrats are not subject to electoral constraints.[138] More specifically, public law scholars often wonder how the decisions of administrative agencies can be constitutionally legitimate if these agencies are not accountable to any single body of elected officials. In response, the proponents of the unitary executive (unitarians) have argued that once Congress relinquishes its legislative powers to agencies, those agencies should become constitutionally subject to the control of the president.[139] Unitarians not only find compelling arguments for plenary presidential control of agencies in originalist accounts of the Constitution,[140] they

137. Saul Levmore, *Property's Uneasy Path and Expanding Future*, 70 U. CHI. L. REV. 181, 194–95 (2003).

138. *See* Fitts, *supra* note 35, at 833–34 (summarizing the unitary presidency literature).

139. *See* Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533 (1989); Calabresi, *supra* note 30; Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 548–50 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992).

140. *See* Calabresi & Rhodes, *supra* note 139, at 1165–68.

also point out that the president's broad national constituency provides strong policy reasons for presidential primacy in the administrative state.[141]

Lurking in the unitary executive argument are two key assumptions. The first is that the president's broad electoral mandate gives him a special edge over Congress in discerning what is in the national interest. Thus, commentators sometimes underscore the president's "plebiscitary" response to national public opinion.[142] The second assumption is that investing focused public accountability for policy actions in a single political actor is essential for achieving public-regarding goals.[143] Both of these assumptions rest on certain conceptions of political branch preferences and interactions that are very questionable.

To start, as I argue earlier in this Article, the notion that the president represents a broader population than Congress is suspect.[144] More importantly, however, the unitarians tend to exaggerate the significance of a president's electoral victory when they suggest that any such victory translates into a mandate. The empirical record of the fifteen presidential elections in the postwar period undercuts any notion of such a mandate. In six of those elections the winner failed to obtain a majority of the popular vote,[145] and in seven the opposition had a majority in at least one house of Congress.[146] Thus, it is rare that any presidential election in the modern era has conveyed the kind of unity of purpose that is often championed by the unitarians. Indeed, far from expressing a single coherent vision, modern electoral outcomes in the United States usually present a blurred and often contradictory picture of electoral preferences. For instance, what do the elections that ushered in a Republican congressional majority in 1994 tell us about the notion of a

141. *See* Calabresi, *supra* note 30, at 58 (observing that presidential control over agencies is appropriate because the president has a national constituency); *see also* MASHAW, *supra* note 32, at 157; Daniel B. Rodriguez, *Management, Control, and the Dilemmas of Presidential Leadership in the Modern Administrative State*, 43 DUKE L.J. 1180, 1193–95 (1994). Even some commentators who do not necessarily subscribe to the constitutional justifications for the unitary presidency agree that the president's national constituency may nonetheless justify presidential control over agencies. *See* Kagan, *supra* note 31, at 2335; Lessig & Sunstein, *supra* note 33, at 10.

142. *See* Adler, *supra* note 35, at 875–76 (observing that the president's plebiscitary connection to the median voter has been used to justify control over administrative agencies).

143. *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 475 (2002) [hereinafter Bressman, *Beyond Accountability*] (observing that public law scholars have been primarily concerned with the accountability of administrative agencies); Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1658–60 (2004) (same) [hereinafter Bressman, *Judicial Review of Agency Inaction*].

144. *See* discussion *supra* Part II.A.

145. The presidential elections of 1948, 1960, 1968, 1992, 1996, and 2000.

146. The presidential elections of 1956, 1968, 1972, 1980, 1984, 1988, and 1996.

mandate? Did those elections signal a sea shift in electoral preferences even though the same electorate had handily elected a Democratic president two years earlier? Or did President Clinton's "mandate" from 1992 trump the Republican congressional "mandate" of 1994?

By design, electoral outcomes in our system of separation of powers tend to resist being pigeonholed as mandates. Unlike the British parliamentary system, in which one party winning a majority of seats guarantees a legislature that is led by the executive, the executive and the legislature often find themselves at loggerheads in the American system, especially during times of divided government. In such circumstances, there are often multiple claims of a mandate by competing political branches. To be sure, the adherent to the unitarian presidency model may still want to lay claim to a special mandate, but the reality is that the kind of mandate where one party dominates all branches of government is a rare occurrence in American government. And insofar as divided government is the norm, the evidence also suggests that divided mandates are the norm. In this picture, Republicans who win a majority of popular votes in elections to Congress are no less privileged than a Democratic president in claiming that they have a popular electoral mandate. Indeed, in advertising the much heralded "Contract with America," the congressional Republicans who swept into victory in 1994 insisted on such a mandate when they vowed to introduce into law all of the proposals contained in the Contract within the first 100 days—a remarkable legislative feat that they eventually managed to accomplish.

For the same reasons that the notion of a presidential mandate seems out of place in the American electoral landscape, the unitarians' narrow focus on strict electoral accountability in the administrative state is also misplaced. Far from a system that focuses responsibility for agency behavior on a single political branch, the empirical reality of the administrative state suggests that the accountability for agency behavior is much more diffuse. As certain commentators have observed, Congress has established a complex network of procedures, including sanctions, rewards, and other incentives to ensure that agency decisions accommodate legislative preferences.[147] Although the extent of congressional influence on administrative agencies is a subject of debate, much of the commentary agrees that Congress does

147. *See* sources cited *supra* note 120.

retain some political control over administrative agencies even after it delegates substantial lawmaking powers to such agencies.[148]

Beyond the practices of the administrative state, the American system of separated powers tends to foster shared accountability as well. In this system, certain factors tend to inhibit the emergence of strict forms of political accountability: overlapping legislative powers between the president and Congress, different terms of office for various federal officers, and term limits for presidential officeholders. Moreover, unlike elections in certain parliamentary structures, American elections are scheduled on normal intervals rather than in response to emerging policy issues. American voters are incapable of holding politicians accountable to specific campaign promises in a timely manner and politicians cannot call special parliamentary elections to vindicate their specific policy agendas. Thus, by design, the American constitutional structure seems to encourage multiple claims of legitimacy and political accountability across a wide range of political actors. Indeed, the shared accountability paradigm has become so pervasive that the Supreme Court has taken an aggressive approach in policing the balance of powers to ensure that control over the administrative state is not vested in one political actor.[149]

The fragmented nature of American political accountability has not escaped the notice of the most active proponents of strong presidential government. Woodrow Wilson, who gave birth to the modern fable of the parochial congress, aptly observed that "[i]t is . . . a manifestly radical defect in our federal system that it parcels out power and confuses responsibility as it does."[150] Wilson's outlook resonates deeply with the modern anxieties of contemporary unitarians. Diffuse accountability, unitarians argue, makes it increasingly difficult, if not impossible, to monitor agency behavior because the public is unable to effectively scrutinize the actions of multiple political actors.[151] But are the unitarians and Wilson correct in suggesting that diffuse accountability always implies a rudderless leadership that fails to deliver on policy goals?

Evidence of legislative productivity during divided governments seems to belie the unitarians' misgivings about shared accountability. During the

148. *See id.*; McCubbins et al., *Administrative Procedures*, *supra* note 120, at 248. But not all scholars accept the thesis that Congress exercises effective control over agencies. *See, e.g.*, M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1403–05 (2004) (arguing that statutory procedures are poor mechanisms for congressional control because agencies can choose their procedural tools).

149. *See, e.g.*, Clinton v. City of New York, 524 U.S. 417 (1998) (invalidating the line-item veto as an unconstitutional shift of power from Congress to the president).

150. WILSON, *supra* note 12, at 187.

151. Calabresi, *supra* note 30, at 42–44.

Clinton era, for instance, a Republican Congress and a Democratic president cooperated on a whole range of key policies and passed a significant amount of reform-minded legislation. Indeed, 1995–1997 was one of the most active legislative periods of the postwar era.[152] Both the Clinton administration and the Republican congressional leadership tried to claim credit for the most successful parts of the legislative agenda and tried to pass blame when there was failure.[153] The end result was not political paralysis and stalemate, but an opportunity to enact bold reform legislation without the risk of one political actor or single party taking the heat for possible political failure. Political commentators have observed that—even beyond the Clinton presidency—legislative productivity has tended to be higher during periods of divided government.

So how does diffuse political accountability foster legitimate democratic governance? One response is that it thwarts some of the pathologies that one might associate with the strictest forms of political accountability. Often, focused political accountability might make political actors reluctant to take on risky political projects where the opportunities to share political blame if the project goes wrong are limited. So, for instance, a president might be wary of engaging in a risky war without prior congressional authorization because he knows that if the war goes wrong other political actors will have an incentive to exploit his political misfortunes.[154] Similarly, diffuse accountability might also discourage political actors from going to the other extreme and making very risky or grandiose commitments under political pressure that are not fiscally feasible over the long run. Because any proposed policy project has to be filtered through various political actors and will often be the subject of complex negotiations and compromise, political actors in a system of fragmented accountability might have an incentive to be cautious about the kinds of promises that they make to the electorate.

To summarize, the unitarians' claim that presidential control over agencies is the antidote to parochial capture is riddled with unsupported assumptions about presidential electoral mandates and strict political accountability. First, the unitarians have produced little evidence that would support the existence of a presidential mandate that exceeds that of Congress. Second, the unitarians' focus on strict accountability in the administrative state is in serious tension with the separated powers system of American governance. Although focused accountability is sometimes a laudable goal, in practice, the American administrative state seldom follows that approach.

152. *See* CHARLES O. JONES, CLINTON AND CONGRESS, 1993–1996, at 165 (1999).
153. *See id.* at 176–77.
154. *See* Nzelibe, *supra* note 97 (manuscript at 5).

Rather, Congress and the president routinely find themselves competing for control over agency decisionmaking. Occasionally, stalemate and gridlock are the end result. Historically, however, the interaction between the political branches has fostered a more creative dynamic where both the president and Congress have agreed to share credit and responsibility for important reform measures in the administrative state—even during periods of divided government.

B. Judicial Deference to Administrative Agencies

Beyond the scholarly commentary, courts have sometimes embraced the idea of the nationalist or majoritarian president in their review of agency decisions. Such an idea seems to figure prominently, if not decisively, in the Supreme Court's deference to executive branch agency decisions under *Chevron*[155] and the reluctance of the courts to expand standing to plaintiffs seeking to challenge agency inaction.[156] Matthew Adler has argued persuasively that a whole range of judicial opinions can be understood as upholding otherwise invalid administrative decisions if they are sufficiently connected to presidential policy decisions.[157] Indeed, one strand of the unitary executive argument suggests that courts should only grant deference when agency decisions have had significant presidential input.[158]

In one respect, *Chevron* deference seems to make sense as a judicial effort to accommodate majoritarian or nationalist preferences in the administrative state.[159] Courts may correctly conclude that presidential input in agency decisionmaking constitutes a good proxy for majoritarianism because the president is in some sense accountable to the people. Moreover, because the president and Congress are elected from a national electorate, the preferences of the president and that of the median member of Congress might often overlap.

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155. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) ("[A]n agency . . . [may] properly rely upon the incumbent administration's views . . . . While agencies are not directly accountable to the people, the Chief Executive is . . . ."); Adler, *supra* note 35, at 877 (observing that *Chevron* "clearly invokes the majoritarian cast in justifying its doctrine of judicial deference to agencies on matters of constitutional interpretation").

156. *See* Bressman, *Judicial Review of Agency Inaction*, *supra* note 143, at 1659 ("The presidential control model explains, in general, the Court's hesitance to create a role for courts in monitoring agency inaction and, in particular, legal doctrines such as nonreviewability and standing.").

157. *See* Adler, *supra* note 35, at 877.

158. *See* Kagan, *supra* note 31, at 2372.

159. Einer Elhauge makes a similar point when he argues that *Chevron* deference makes sense as a current preferences default rule—by which he means that *Chevron* can be understood as an effort by the courts to track the political preferences of the political branches. *See* Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2126–28 (2002).

In any event, where Congress has not expressed its preferences on a specific agency decision, the courts can rely on presidential input in agency decisions as a credible signal of the combined preferences of both political branches.

The problem gets more complicated, however, when presidential and congressional preferences over administrative policy diverge. Which national majority should the courts turn to—the presidential or the congressional one? Many commentators have argued that *Chevron* encourages agencies to be responsive to presidential rather than congressional preferences.[160] For its part, however, the Supreme Court does not appear to embrace the unitarian proposition that the president's electoral mandate trumps that of Congress.[161] In other words, while the Supreme Court has held that courts should defer to presidential endorsement of agency actions,[162] it has not concluded that such endorsement is sufficient, especially if there is evidence of congressional opposition. In *FDA v. Brown & Williamson Tobacco Corp.*,[163] for instance, the Supreme Court explicitly held that that a Food and Drug Administration (FDA) interpretive decision to regulate tobacco—a decision that was explicitly endorsed by the president—was not subject to *Chevron* deference because there were strong indications that a majority in Congress opposed the FDA's decision.[164] Moreover, presidential endorsement of agency action does not seem to be a necessary condition for *Chevron* deference because *Chevron* also applies to independent agency actions that have had no presidential input.[165]

The Court's reluctance to adopt a strong version of presidential majoritarianism under *Chevron* fits the bifurcated mandate paradigm. If one concedes that the president's mandate is essentially on par with that of Congress's, then it makes sense for the courts to balk at deferring to agency actions that are supported by the president but opposed by a majority in Congress. But when there is no explicit indication from Congress as to its preferences, the next best available indicator of majoritarianism in the administrative state is likely to be presidential endorsement of agency behavior. Finally, contrary to the claim of some unitarians,[166] the absence of presidential input does not necessarily

160. *See* William N. Eskridge, Jr. & John Ferejohn, *Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State*, 8 J.L. ECON. & ORG. 165, 187 (1992) (arguing that by "limiting judicial review of agency interpretations of statutes, the Court in *Chevron* . . . shirked its obligation to maintain the constitutional balance among the branches").

161. Indeed, the Court has taken an aggressive approach in policing the balance of powers against presidential usurpation even when Congress seems reluctant to protect its own institutional prerogatives. *See, e.g.*, *supra* note 149.

162. *See* Chevron U.S.A. Inc. v. National Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984).

163. 529 U.S. 120, 125–26 (2000).

164. *See id.* at 137–39.

165. Elena Kagan explicitly criticizes *Chevron* for this reason. *See* Kagan, *supra* note 31, at 2375–76.

166. *See id.* at 2376–77.

entail the absence of majoritarian accountability. Inasmuch as agencies are subject to other forms of political oversight by the political branches—either through removal authority or by budgetary control—it is reasonable to assume that the agencies will respond to majoritarian preferences when they make decisions.[167]

C. International Trade

Hardly anyone trusts Congress on international trade matters. Indeed, for many commentators, international trade exemplifies the worst excesses of legislative pandering to parochial interests.[168] The conventional argument against a legislative role in international trade usually assumes that the costs of protectionism in international trade are spread among many consumers, while the benefits of protectionism are concentrated on a few import-competing industry groups.[169] In this picture, it does not make much sense for consumers to lobby for greater liberalization because the benefit of free trade to each individual consumer is fairly small. In contrast, because the benefits of protectionism are concentrated on a key number of industries that do not face strong collective-action costs, these industries will often be influential in the legislative arena. Therefore, commentators often argue that Congress is ill-suited to implement international trade policies because of its pathological tendency to be captured by parochial interest groups opposed to liberalization.[170]

In contrast to this rather cynical view of Congress, the thrust of much of the literature on the domestic politics of international trade is that the president is more likely to choose liberal trade policies.[171] To many commentators, congressional measures that delegated trade authority to the president—such as the Reciprocal Trade Agreements Act of 1934 (RTAA)[172]—reflected an

167. *See* McCubbins et al., *Structure and Process*, *supra* note 120, at 440–44.

168. *See, e.g.*, I.M. DESTLER, AMERICAN TRADE POLITICS 32, 205–06 (4th ed. 2005); IRWIN, *supra* note 38, at 155–57; E.E. SCHATTSCHNEIDER, POLITICS, PRESSURE, AND THE TARIFF 127–28 (1935).

169. *See* SCHATTSCHNEIDER, *supra* note 168, at 127–28 ("Benefits are concentrated while costs are dispersed.").

170. *See* DESTLER, *supra* note 168, at 30–33.

171. As Douglas Irwin has put it: "[T]he national electoral base of the president is often thought to make the executive more apt to favor policies that benefit the nation as a whole, whereas the narrower geographic representative structure of Congress leads its members to have more parochial interests." IRWIN, *supra* note 38, at 155–56; *see also* DAM, *supra* note 38, at 37 (arguing that presidents have a greater dedication to free trade policies than Congress).

172. Reciprocal Trade Agreements Act of 1934 (RTAA), Pub. L. No. 73-316, § 350(a), 48 Stat. 943 (1934) (codified as amended at 19 U.S.C. § 1351(a) (2000)). The RTAA authorized the president "to enter into foreign trade agreements with foreign governments . . . and . . . [t]o proclaim such modifications of existing duties and other import restrictions . . . to carry out any [such] trade agreement." *Id.* at 943.

effort by Congress to wean itself off interest group pressures in international trade.[173] As the argument goes, Congress chose to delegate because it learned from the experience with the infamous Smoot-Hawley Tariff Act of 1930 that it was simply incapable of passing rational free trade legislation.[174] Although some commentators have questioned this "lessons learned" hypothesis,[175] they have generally accepted the premise that the president's national mandate makes him prefer more liberal trade policies than Congress.[176] Thus, the conventional wisdom assumes that curtailing the congressional role in international trade policy is almost always desirable for trade liberalization.

The conventional wisdom is mistaken. First, there is simply very little evidence to support the notion that presidents have a more systematic liberal trade bias than Congress. As Michael Hiscox has shown, preferences for free trade policies prior to the 1950s often broke down along partisan lines with Republican politicians favoring much more protectionist policies than their Democratic counterparts.[177] In many situations, congressional Democrats who favored free trade found themselves at loggerheads with Republican presidents. Indeed, much to the chagrin of congressional Democrats, after Warren Harding won the presidency in 1920, he set out to roll back some of the trade liberalizing initiatives of the Wilson administration by implementing policies that made the 1916 Tariff Commission more friendly to protectionist policies.[178] Later on, Herbert Hoover, another Republican president, found himself at battle with free trade Democrats in Congress who tried to reverse the delegation of authority to the president under the Tariff Commission Act of 1916 because they suspected Hoover of protectionist tendencies.[179] Indeed,

173. *See* DESTLER, *supra* note 168, at 14 (arguing that members of Congress delegated authority in order to "protect[ ] themselves . . . from the direct, one-sided pressure from producer interests that had led them to make bad trade law").

174. *See id.*

175. *See* MICHAEL J. GILLIGAN, EMPOWERING EXPORTERS 5 (1997); Michael Bailey et al., *The Institutional Roots of American Trade Policy: Politics, Coalitions, and International Trade*, 49 WORLD POL. 309, 313–14 (1997); Karen E. Schnietz, *The Institutional Foundation of U.S. Trade Policy: Revisiting Explanations for the 1934 Reciprocal Trade Agreements Act*, 12 J. POL'Y HIST. 417, 418–19 (2000).

176. *See, e.g.*, Bailey et al., *supra* note 175, at 326–28 (observing that presidents favored low tariffs because the president's constituency is national while that of a member of Congress is local); Schnietz, *supra* note 175, at 429–32 (same).

177. Michael J. Hiscox, *The Magic Bullet? The RTAA, Institutional Reform, and Trade Liberalization*, 53 INT'L ORG. 669, 677 (1999).

178. *Id.* at 677 n.29.

179. *Id.*; *see* ROBERT PASTOR, CONGRESS AND THE POLITICS OF U.S. FOREIGN ECONOMIC POLICY 82–83 (1980).

Hoover did next to nothing to oppose the Smoot-Hawley Tariff Act of 1930, which he claimed had very little to do with the deepening of the depression.[180]

To be sure, much of the modern commentary is replete with anecdotes that show Congress taking a more protectionist stance on international trade policy than the president.[181] But these anecdotes are deceiving. In the modern era, the president gets to set much of the agenda on international trade policy and hence can choose what kinds of political tradeoffs to make in international trade negotiations. Congress usually only has the opportunity to voice its international trade preferences at the time that the president is seeking delegated authority or when an international agreement comes up for ratification. Thus, congressional resistance or hand wringing during international trade negotiations may not necessarily reflect a congressional bias toward protectionism as much as a need to get the president to accommodate legislative preferences as he frames the international trade agenda.

Second, far from curtailing the role of interest groups, legislative innovations such as the RTAA actually expanded interest group activity by mobilizing export groups in favor of liberalization. In the main, the RTAA altered the institutional structure of international trade by making tariff reductions reciprocal rather than unilateral. In other words, by making improved access to foreign markets contingent on improved foreign access to the American market, the RTAA gave export groups an incentive to lobby for lower domestic trade barriers.[182] Moreover, the RTAA also lowered international negotiation costs by allowing trade agreements to be ratified by a simple majority in both houses of Congress rather than a supermajority in the Senate.[183] This latter innovation was so dramatic that is has been labeled a populist amendment to the treaty provisions of Article II of the Constitution.[184]

Many commentators concede that export groups were instrumental in making free trade sustainable after the RTAA.[185] By linking the reduction of foreign tariffs to the reduction of domestic tariffs, these commentators agree that the RTAA created a reciprocal regime that mobilized export groups in favor of domestic liberalization. But these commentators nonetheless argue that the congressional delegation strategy reflects an effort to shift international

180. *See* PASTOR, *supra* note 179, at 84.
181. *See, e.g.*, Brewster, *supra* note 38.
182. *See* GILLIGAN, *supra* note 175, at 8–10; *see also* Bailey et al., *supra* note 175, at 310, 334.
183. *See* Bailey et al., *supra* note 175, at 310, 321; Schnietz, *supra* note 175, at 433.
184. *See generally* Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995).
185. *See* GILLIGAN, *supra* note 175, at 8–10; *see also* Bailey et al., *supra* note 175, at 310; Schnietz, *supra* note 175, at 437–38.

trade policy to a more proliberal actor like the president.[186] One particular variation of this argument claims that the RTAA reflected an effort by congressional Democrats to protect their preferred low-tariff policies against reversal by future Republican congresses.[187]

The problem with the "protection against reversal" hypothesis is that it proves too much. Nothing in the RTAA makes reversals unlikely. For instance, a future Republican Congress beholden to protectionist groups could simply vote to scrap the innovations in the RTAA and reclaim congressional primacy in international trade policy. Indeed, it seems implausible to think that Congress would be able to continuously deceive its protectionist constituency by insisting that its hands are tied because it chose to delegate policy to the president. Furthermore, if the argument is that the RTAA made export groups more politically influential than protectionist groups, it is unclear why legislative devolution of authority to the president would be necessary. In other words, export groups should be able to turn directly to Congress for benefits once they become more politically salient than protectionists.

What then accounts for Congress's decision to delegate international trade authority to the president under the RTAA? The simple answer is that Congress chose to do so because it lacked the institutional tools to provide benefits to export groups without the president's assistance. Unlike the president, Congress does not possess the property right to negotiate the reduction of foreign trade barriers. What Congress possesses is the ability to raise or lower domestic tariffs, which largely implies a power to render benefits exclusively to protectionist groups. Thus, in order to provide benefits to politically salient export groups, Congress had to resort to legislative delegation as a tool to achieve its preferred policy goals. Essentially, Congress delegated because it sought to liberalize but was unable to do so on its own.

The account provided here reflects the reality that enacting policies that favor specific interest groups is not just a function of the resources of such groups but also of the institutional environment in which political bargains take place. Prior to the RTAA, it was very difficult for either Congress or the president to provide benefits to export groups in the same way that they could provide benefits to protectionist groups. In the pre-RTAA era, Congress could

186. *See* Bailey et al., *supra* note 175, at 327; Schnietz, *supra* note 175, at 429, 432–33.

187. *See* Bailey et al., *supra* note 175, at 310, 320–22; Schnietz, *supra* note 175, at 418, 421. Epstein and O'Halloran have argued that Congress delegated to the president to prevent the inefficient logrolling that led to the Smoot-Hawley Tariff Act of 1930. *See* EPSTEIN & O'HALLORAN, *supra* note 38, at 222–23. While that explanation may be partially true, it does not necessarily imply that the president will have more of a free trade inclination than Congress. As discussed in more detail below, Congress might have simply recognized that the president has the tools to negotiate down the level of foreign tariffs.

provide benefits to a protectionist group by simply raising tariffs on goods that such a group produced. On the other hand, the president had little or no role in developing tariff policy.[188] In any event, providing benefits to a broad range of export groups could not be effectively accomplished as long as tariff making policy remained the exclusive province of Congress. The RTAA changed this dynamic by altering the institutional environment and by making it easier for both Congress and the president to negotiate reciprocal reductions in trade barriers with foreign trade partners. In delegating power to the president, however, Congress did not forfeit its powers to influence trade policy. Indeed, Congress continues to employ a variety of tools to monitor and discipline the president's international trade policies, including the use of temporary legislative grants, the establishment of oversight committees, participation of legislators in international trade negotiations, and notification requirements.[189]

Delegating international trade policy to the president thus fulfilled Congress's need to provide benefits to export groups. But it also gave Congress and the president better institutional leverage in extracting political rents from protectionist groups. By pitting export groups against protectionist groups, the political branches were able to create a more competitive market for rent seeking by both groups. For instance, because Congress's devolution of tariff-setting authority to the president almost always sunsets after a certain period (usually three years), Congress can threaten not to renew such authority in order to extract rents from domestic export groups. Alternatively, Congress can threaten to renew such authority in order to extract more generous rents from protectionist groups seeking to preserve their preexisting benefits.[190] In any event, in the absence of competition for political influence prior to the RTAA, protectionist groups had an incentive to contribute fewer political resources because threats by politicians to cut off protectionist benefits would not be credible. Unsurprisingly, after the RTAA, the level of lobbying by protectionist groups actually increased.[191]

In hindsight, the conventional wisdom that protectionist interests are generally concentrated and free trade interests are diffuse paints an incomplete picture of interest group dynamics in international trade. While it may be true that the institutional mechanisms of the pre-RTAA era favored

188. *See* GORDON SILVERSTEIN, IMBALANCE OF POWERS 47–48 (1997) (observing that the president's role in trade policy was largely ministerial).

189. *See generally* Harold Hongju Koh, *Congressional Controls on Presidential Trade Policymaking After* I.N.S. v. Chadha, 18 N.Y.U. J. INT'L L. & POL. 1191 (1986).

190. *See* FRED S. MCCHESNEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION 34–35 (1997).

191. *See* Hiscox, *supra* note 177, at 679.

protectionist groups, the RTAA decreased the mobilization costs of export groups and thus increased societal demands for trade liberalization. Thus, trade liberalization in the post-1934 era became feasible not because Congress curtailed the role of interest groups, but because Congress provided incentives to certain groups to mobilize in favor of free trade.[192]

CONCLUSION

There is an almost idealistic strand of the public law literature that celebrates the president as the one authority in the country who represents the transcendent national interest. In this picture of presidential leadership, little attention is paid to the electoral institutions that actually govern the election of the chief executive. Contrary to the myth of a majoritarian mandate, presidents do not often win elections by projecting nationalist visions. The rampant coddling of swing states that is often the stuff of victory under the winner-take-all system of the electoral college indicates that parochialism is pervasive in presidential decisionmaking. In the same vein, the coalition building and backroom political deals that characterize collective decisionmaking in Congress imply that legislative actions will often include a greater range of voices and constituencies than unilateral presidential actions. Put differently, the median member of Congress may often represent a broader electoral coalition than the president.

To be sure, Congress's involvement in national policymaking does have drawbacks. When it attempts to implement policies, Congress faces higher transaction costs than the president. Congressional inertia and gridlock may prove enormously irritating to those who are trying to achieve time-sensitive policy goals. Moreover, congressional efforts to intervene in national policy may often border on abuse or recklessness, especially when members use delay or filibustering tactics to hold up important decisions for partisan purposes. But these same congressional pathologies will also play out when Congress tries to pass parochial legislation. In other words, the president enjoys a transaction cost advantage over Congress not only on national but also on parochial issues. Thus, there is no reason to believe that giving the president more discretion to act unilaterally will increase the level of public-regarding policies at the expense of parochial ones.

192. Indeed, interest groups continue to play a key role in the regulation of international trade, especially in disputes before the World Trade Organization. *See* GREGORY C. SHAFFER, DEFENDING INTERESTS (2003); Jide Nzelibe, *The Credibility Imperative: The Political Dynamics of Retaliation in the World Trade Organization's Dispute Resolution Mechanism*, 6 THEORETICAL INQUIRIES L. 215 (2005).

Behind the skeptical vision of Congress in the public law literature is the assumption that congressional politics are driven primarily by special interest groups. In many contexts, this assumption may well be true, but it does not imply that Congress is any more (or less) parochial than the president. Political actors in Congress or in the executive branch will often be influenced by a wide array of interest groups. The main problem is not necessarily the ubiquity of interest groups in the political process, but rather, how to prevent the wrong kinds of interest groups from prevailing in that process. As in the international trade context, Congress often plays a key role in mobilizing the right kinds of interest groups against the wrong ones, thus making public-regarding policies politically sustainable. Of course, congressional intervention does not necessarily guarantee that the right kinds of interest group will always come out ahead. But Congress's collective decisionmaking capacity probably gives it a comparative advantage over the president in sorting out the right kinds of policies from the bad ones. In other words, because the collective nature of Congress facilitates greater interest group competition, it means that legislators are likely to receive better information about the relative costs of different policy proposals.

In the end, the framers' decision to structure the policymaking process through competition between the political branches shows that they believed that neither the president nor Congress had a monopoly over the correct vision of national policy. The argument put forth here suggests that the framers were correct or, at the very least, offered a fairly complete understanding of the interaction between the political branches and interest groups. Ultimately, in a democracy, there is often no realistic alternative to cultivating a broad coalition of political actors and institutions in favor of public-regarding policies.

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