



Essay by Christopher DeMuth

THE BUCKS START HERE

THE GROWTH OF EXECUTIVE GOVERNMENT and the growth of government debt are both highly worrisome to many people. They are, however, usually thought of as separate problems, arising from separate government functions. On the one hand, the executive branch operates mainly through regulation: agencies issue rules to private parties, telling them how to design their products, keep their books, set their prices, withhold their crops from market, recruit women for their sports teams, manage their trash. Government borrowing, on the other hand, is a method of public finance: treasury departments market bonds to raise funds for spending in excess of tax revenues—because the government is making a long-term investment, because it is facing an emergency, or just because it has overpromised and wants to keep the spigots open. Regulation imposes costs and trouble on particular firms and individuals, and is subject to a large body of law. Borrowing is diffuse and non-justiciable (until sovereign defaults end up in court). Excessive regulation threatens liberty; excessive

debt threatens wealth. A unified field theory seems unlikely.

And yet the two problems are, I believe, deeply related. A clue is their scope and trajectory. The accumulation of wide policy discretion in the executive, and the accumulation of high levels of public debt, are the overarching phenomena of contemporary democracy. There are exceptions—executive regulation has grown apace in Sweden and Canada, but both nations have taken serious steps to control their debts and their fiscal circumstances are relatively tidy. But the sweep of the two developments across the advanced, wealthy democracies is arresting, especially in the United States and Europe, which will be my focus.

Free-for-All

IN AMERICA THE TWO PHENOMENA—THE modern executive state and the normalization of budget deficits—emerged and grew simultaneously. It was in the early 1970s that Congress established numerous

new agencies, such as the Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), and the National Highway Traffic Safety Administration (NHTSA), that exercised essentially legislative power over broad swaths of the economy. These agencies made law in executive rather than legislative fashion: while the earlier, Progressive and New Deal regulatory agencies had adjudicated particular disputes by majority-vote decision of a bipartisan commission (such as the Securities and Exchange Commission), the new agencies issued general rules decided by a single administrator. Measured by number and length of rules and their economic effects, federal regulation grew very rapidly in the 1970s and continued to do so through the next three decades.

Also in the early 1970s—just as it was building these engines of efficient executive lawmaking—Congress was reorganizing itself in ways that greatly weakened the power of the “old bull” committee chairmen who had been zealous gatekeepers of taxing and ap-



propriations. Thereafter, decision-making on spending and budgeting became something of a free-for-all, and Congress became less able to counter the spending ambitions of presidents. In the 1960s, annual deficits averaged 4% of federal spending and 0.8% of GDP, and public debt fell from 45% of GDP (still reflecting World War II debts) to 28%. In the 1970s, deficits doubled to 10% of spending and 2% of GDP and the debt stayed about the same. In the 1980s, deficits grew to 18% of spending and 4% of GDP and overtook economic growth—by 1990, the debt was back to 45% of GDP. For fiscal year 2012, the deficit was 35% of spending and 9% of GDP, and the debt was 77% of GDP.

Among the nations of Europe, executive growth and borrowing growth came a bit later and with greater variation. And, for a time, the simultaneity was masked. The E.U. transferred ample portions of lawmaking from national legislatures to pan-European administrative agencies centered in Brussels, but also seemed to be imposing strict budget discipline on member states—until it emerged that everyone had been fudging their fiscal accounts and that poorer nations had been borrowing extravagantly on the credit of richer nations.

Then, following the financial collapse of 2008, the transatlantic patterns converged. On both continents, practices that had been developing slowly in relatively stable times suddenly—with the stimulus of crisis—fluoresced.

In the United States, the George W. Bush Administration and the nominally independent Federal Reserve Board merged policy-making, appropriated hundreds of billions of dollars without congressional involvement, and stretched statutory authorities as they saw fit in order to rescue some insolvent businesses, but not others. Congress's response to these usurpations, in the Dodd-Frank Act, was to codify and extend the autonomous powers of the executive branch and the Fed beyond anything seen before. Procedures for congressional budgeting were effectively suspended. Annual deficits more than tripled.

In Europe, too, the first responders were the political executives and central bankers. National legislatures became handmaidens to the joint decisions of the European Central Bank and a few heads of government (actually two—those of Germany and France). Insolvent nations as well as banks were bailed out through serial summitry—20 emergency E.U. summit meetings in 2009–2012. At each conclave, heads of government would abandon solemn treaty obligations and adamant pledges, replacing them with new adamant pledges that would, in turn, be

rendered inoperative before or at their subsequent get-together. The German *Bundestag* underwrote the pledges with financial commitments that everyone had thought constitutionally impossible up to the moment they were made.

In America, regulatory insouciance and freewheeling finance have become precedents for normal times. Obamacare, like Dodd-Frank, is essentially an executive empowerment statute. President Obama has gone further, suspending Obamacare's employer health insurance mandate, waiving welfare work requirements, and flouting statutory requirements in other areas far removed from his inherent foreign policy prerogatives. With government debt on a collision course with reality, both political parties are committed to continuing deficit spending at levels that would have been considered out of the question a few decades ago.

Future Burdens

AS GOLDFINGER SAID TO JAMES BOND: "Once is happenstance, twice is coincidence, three times is enemy action." But we have more to go on than that, because debt and regulation, although operational strangers, are political kin. Both are legitimate government functions that have come to be used to elide established norms of public finance and democratic accountability. Broad regulatory delegation permits legislators to vote for clean air, sound banking, and other good things while leaving it to the agencies to navigate the shoals of achieving the statutory goals. The costs of regulatory directives are borne within the private sector—manifested not as taxes but rather as higher prices charged by regulated firms. Borrowing is a complementary means of taxation evasion: elected officials provide constituents with higher levels of spending than of taxes to pay for the spending, leaving the difference to be paid in the future by nonvoting younger and future generations. (The future payments may take the form of higher taxes, lower spending, currency inflation, or bond defaults.)

Now, stoplights were not invented as a means to excuse politicians from imposing taxes to pay drivers to stop at busy intersections. Highway bonds are not devices for pandering to today's electorate. But modern government operates radically beyond those margins. It employs regulation as a substitute for overt taxing and as a means of achieving policies that could not survive legislative roll calls, a current example being EPA's effort to regulate greenhouse gases following Congress's declining to do so after considered

debate. Modern government also borrows far beyond any plausible level of investment spending. The growth of deficit spending since 1970 (federal borrowing is now about 35% of its spending) has been concurrent with the growth of spending on entitlements and other "transfer payments" that are current consumption rather than investment.

Two American developments provide striking evidence that delegation and debt have become coordinate mechanisms of legislative abnegation. The first is delegation of outright taxing authority to the executive—primarily to regulatory agencies. This practice began, right on schedule, in the early 1970s. The Supreme Court resisted when it first considered the matter in 1974, in the context of a statute that clearly authorized fees for services rendered (such as license fees and entrance fees at national parks) but was being used to lay broad taxes unrelated to any immediate service or action. The Court noted that taxation is inherently a legislative matter, and is explicitly assigned by the Constitution to the Congress. But also, and apparently decisively, the Justices assumed that Congress could never have intended to give away the lynchpin of its constitutional power. Yet Congress persisted in doing precisely that, and in 1989 the Supreme Court acquiesced.

Today, several regulatory agencies are funded substantially or entirely by their own discretionary taxes rather than congressional appropriations. These agencies are autonomous special-purpose national governments, and they set and collect taxes in business-like fashion, without legislative fuss and bother. The Federal Communications Commission, whose annual operating expenses of \$347 million are funded by payments from the firms it regulates, also runs a \$9 billion grant program to subsidize certain internet customers, financed by a separate tax on the revenues of telecommunications firms. The commission adjusts the tax rate every three months to keep pace with its spending—for the first three quarters of 2013 the rates were in the range of 15-16% (on sales mind you, not earnings). Our newest regulator of independent means is the Dodd-Frank Act's Financial Consumer Protection Bureau, which receives an automatic share of the annual profits of the Federal Reserve banks—that share is \$450 million for the current year.

The second development is the integration of regulation and debt-financed consumption. Regulatory finance is naturally intratemporal. That is, regulatory mandates can require specified parties to make current expenditures for the benefit of others or the general public—but, unlike deficit spending, mandates cannot



shift the burden of today's benefits to unspecified parties in the future. This seemingly intrinsic limitation was breached in the decade before the financial collapse of 2008. Federal regulators obliged banks to severely degrade traditional mortgage lending requirements, and simultaneously required the government-sponsored mortgage underwriters, Fannie Mae and Freddie Mac, to support and securitize the resulting flood of "nonprime" mortgages. The result was several trillion dollars of very poorly secured mortgage credit, provided to amazed and gratified recipients with all the efficiency and profit-seeking ardor of private markets. The millions of substandard mortgages were vastly beyond what a Washington bureaucracy could have dispensed in non-geologic time, and their underwriting risks were vastly beyond what Congress could have appropriated in the light of day on the government's own credit. The innovation fused the powers of (a) regulatory conscription of private markets, (b) opaque and unconstrained public finance, and (c) unsustainable debt-financed consumption—thereby compounding and accelerating their dangers. The 2008 financial collapse was a sovereign debt crisis in its American origins as well as in its European sequelae.

New Technologies

THESE PATTERNS OF TIMING AND FUNCTION cry out for an animating heuristic, and I have one. I believe that executive government and over-indebted government have arisen simultaneously as a result of rising affluence and technological mastery. These developments, wonderful in themselves, have transformed our politics and government (along with much else) in surprising ways, and we have yet to assimilate them to the proper conduct of public affairs. The explanation applies to all of the rich, advanced democracies, but the American example is most pronounced.

Effective political action requires three basic resources: 1) discretionary time; 2) the ability to acquire, assimilate, and communicate information; and 3) the skills of argument and persuasion. For most of history these resources were scarce and confined to elites. In our wealthy, highly educated, predominantly middle-class societies, however, they have become abundant and widely shared. And they have been powerfully augmented, in the last half-century, by new technologies—of mass communication and rapid transportation; of information gathering, storage, and manipulation now instantly available to every office, home, and pocket-

book in the land; and of endlessly reticulated networks of specialized interpersonal communication that have supercharged the human proclivity for affinity-grouping. Voilà—we find ourselves in a world where the slightest cause or interest can easily organize its own advocacy group, and where the greenest backbench legislator can easily set up shop as a policy entrepreneur. It is a world where the old hierarchies of political party and Congress have been swept aside; where the old civic triumvirate of commerce, labor, and church has been displaced by thousands of particularized interest groups; and where politics has become, in the late James Q. Wilson's term, "atomized."

Alexis de Tocqueville nailed the American character: democratic, individualistic, adept at voluntary association, devoted more to equality than liberty, a devotion that grows more pronounced over time. These attributes probably explain why political atomization has proceeded further in the United States than in Europe, but it is high affluence and instantaneous interconnectedness that have unlocked their potential. The thousands of

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discrete causes that press upon government and public opinion 24/7 would have been simply infeasible 50 years ago. Michael Barone has shown how the nominating convention—the locus of power of traditional political parties—was an artifact of high costs of transportation and communications. As those costs have fallen, deal-making has become continuous and decentralized and the quadrennial presidential conventions have become mere messaging events. Norman Ornstein and Thomas Mann, in their book *The Broken Branch* (2006), lament that members of Congress no longer live in Washington and socialize with one another and their families, and so have lost all sense of institutional solidarity. But 50 years ago only a few legislators from mid-Atlantic states could possibly get home for the weekend. Now they all can, and because they can they must, lest they face an Election Day challenger who promises to stay in closer touch with the voters. As a result, the House and Senate convene in official sessions only three or four days a week.

The individualistic, egalitarian American spirit has certainly played a role in the democratization of Congress's decision structure and the weakening of its seniority system. But, again, the key change was that members were acquiring the means and incentives to advance their careers without needing to inch patiently up the congressional hierarchy. The power structure was standing arbitrarily in their way, and was a bottleneck to the profusion of policy initiatives now clamoring for attention.

As Congress became more porous and responsive to outside importuning, it quickly ran up against the practical limits of legislative action—some of them inherent (decision by committees, representation of diverse and conflicting interests and regions), others added by the U.S. Constitution (bicameralism, power-sharing with an independent president). Indeed, the old leadership hierarchies had been intended to compensate for these limitations—and so, as the hierarchies lost their grip, the limitations became more pronounced. The solution was delegation of lawmaking to specialized agencies that had many fewer internal conflicts and that could be multiplied in number without limit.

The executive was well prepared for the handoff. The hierarchical agency is superior to the legislature at gathering, analyzing, and deploying information; at managing specialized constituencies; and at making high-volume policy decisions and fine-tuning them over time. New communications technologies have amplified those advantages. Go to legislators' websites and you find autobiographies, speeches, spouses' favorite recipes, highly rhetorical policy pronouncements, and Triumphs in Constituent Service. Go to agency websites and you find concrete, usable information—issue analyses, policy explanations, rulemaking proposals, enforcement actions, court decisions, data—usually presented with only a modicum of promotional bombast. Increasingly, rulemaking proceedings are conducted by e-mail, and many important policies are forged through ad hoc networking with no legal proceedings at all.

Atop the confederation of executive agencies sits the chief executive and his immediate staff, who have been the greatest beneficiaries of the new technologies of government. The president (or prime minister) monitors and directs the activities of hundreds of agencies in real time from a single locus of authority. As much as statutes and administrative law, central political direction now sways agency regulation. Important political debates have been transformed and simplified into personal dramas played out on the national airwaves—where the president speaks with



single-minded clarity and purpose while legislative leaders hesitate and equivocate under the watchful eyes of jealous peers. Most of all, technology has magnified the president's ability to act swiftly in response to every new exigency large and small, altering the facts on the ground while others wait to be briefed and to hash out their responses.

The unbounded executive has proven to be an instrument of unbounded debt. Legislators add relatively small pork barrel items to spending bills in the dark of night, and are embarrassed when they are exposed. All the while, right out under the media klieg lights, presidents and prime ministers are the dynamos for heroic exertions with gargantuan price tags—wars and other foreign interventions, new and expanded entitlement programs, stimulus packages, financial bailouts, Marshall Plans for energy independence or cancer eradication, pan-European fiscal union. The collapse of fiscal discipline in the U.S. Congress has opened the way to greater penny-ante hometown spending to be sure—but also to greater executive supremacy over cosmic spending and borrowing. The latest development—the fusion of executive politics and central banking—has made it even easier to undertake expansive new projects without commensurately expansive immediate taxation. President Obama offered a vivid illustration of the executive perspective when he acknowledged that as a senator he had opposed a debt increase because it would unfairly burden our children and grandchildren, but that as president he had come to a larger view of the matter.

More Consumption

Affluence and technology have propelled spending and debt in another way: by making politics not only more democratic but also more consumerist. As societies become prosperous, educated, and middle-class, large numbers of citizens acquire a degree of discretionary income, begetting the taste for higher levels of goods and services and for lifestyle and leisure pursuits. Reflecting these elevated circumstances, politics becomes less about production and more about consumption. The regulatory agencies of the New Deal and Progressive eras were mostly concerned with the organization of production—railroads, airlines, banking, broadcasting. They mainly served to cartelize industries for the benefit of producers at the expense of consumers, through controls over prices and market entry that involved implicit economic transfers and opportunity costs but few outright expenditures. From 1970 onward, the producer

cartels were systematically abolished and supplanted by programs concerned mainly with consumption and personal well-being—health and safety, environmental quality, and “consumer protection” in a variety of fields. In these areas, regulation came to mandate private expenditures of hundreds of millions of dollars, and off-budget, insalient taxation became standard practice. Following the 2008 financial collapse, which had been caused in substantial part by government promotion of incontinent debt-financed consumption, the Obama Administration's flagship regulatory proposal was for yet another consumer protection agency.

Similarly, the composition of direct federal spending has shifted from production to consumption. Until the early 1970s, spending was primarily for defense, infrastructure, agriculture, economic development, and police and courts and other public goods. Thereafter it shifted increasingly to in-kind transfer payments to individuals for health care, retirement income, unemployment support, food and housing, and other largely private goods. The difficulty, from the standpoint of budget discipline, is that spending on production is limited by available opportunities, while spending on consumption is open-ended. At any point in time, there are only so many highways, harbors, battleships, wars, and schools for which a reasonable case can be made. But consumption is subjective and elastic, and the possibilities for increasing the kind, level, quality, and availability of benefits are practically unlimited. That is the ultimate source of today's debt predicament. More borrowing for more consumption has no natural stopping point short of implosion. Eventually, public debt grows high enough to palpably suppress economic performance in the here-and-now. Sustained high unemployment may refocus political attention for a time on the fundamentals of production—but even this seems to be changing, as President Obama, in his first term, successfully devoted himself to expanding health care entitlements in the midst of serious unemployment and plummeting workforce participation. Eventually, additional credit is simply unavailable at affordable interest rates, forcing loan defaults and wrenching fiscal consolidations. Several European governments and American states and cities have now arrived at these endpoints.

Institutional Reform

SEEING EXECUTIVE SUPREMACY AND unsustainable debt as closely connected problems helps us to look for

solutions. For starters, it is a useful corrective to the thesis, advanced by Eric Posner and Adrian Vermeule in *The Executive Unbound: After the Madisonian Republic* (2010) that public opinion, energized by modern communications, is a better check on executive power than the old separation-of-powers scheme ever was. Funding consumption with large-scale borrowing and regulatory taxation confuses popular understanding—therein lies its political potency. The practices convert public opinion into a cheering squad for expansive government and expansive executive discretion. Deficit spending has unquestionably become a serious problem, not just a matter of executive versus legislative prerogatives. As budget experts John F. Cogan, W. Mark Crain, and Timothy J. Muris have shown, U.S. deficits have been systematically lower during periods when Congress was centrally organized and able to play the separation-of-powers game effectively.

These considerations suggest that we focus on institutional reform. Although public opinion undoubtedly shapes political institutions, it is also the case that institutions shape opinion and expectations. That high affluence and high technology have led to unhealthy political practices does not mean that those practices are irremediable. A trend is not a law of nature. Abundance has fostered but does not necessitate heavy government borrowing; information technology has fostered but does not necessitate centralizing government authority in a single individual. We have gradually learned, and are still learning, how to contain the dangers of airplanes, automobiles, television, and the internet while taking full advantage of their benefits. The same process of learning, adaptation, and mastery should be possible in politics. At least it's worth a try—beginning with the reconstruction of a serviceable balance of power within our constitutional structure.

I am a great proponent of increased legal restraints on executive expansionism, such as a judicially enforced cost-benefit test for regulations and a revival of constitutional limits on congressional delegation of legislative and taxing responsibilities. In *The Upside-Down Constitution* (2012), Michael Greve of George Mason University Law School has vouchsafed a brilliant argument for recovering the Constitution's several explicit provisions that assume and enforce real federalism—undiluted policy competition between the state and federal governments and among the states. May the Greve program advance from the law schools to the



courts as successfully as the movements for constitutional originalism and economics-based antitrust.

But there are limits to the ability of courtroom law to constrain a power as agile and protean as executive power has become. For example, last year's Supreme Court decision in the Obamacare case is understood to have limited the federal government's ability to tax citizens (to encourage the purchase of health insurance) and punish states (to encourage the expansion of Medicaid). But, actually, the decision only limited the government's ability to do those things by *statute*. The executive branch has many non-statutory, non-justiciable means of taxing and punishing that are now beyond the formal powers of Congress: the agencies will move—are already moving—into the breach. A constitutional balanced budget requirement would be vulnerable to similar evasive maneuvers by both political branches. The maneuvers have already been perfected in states, such as California and Illinois, that have borrowed their way to insolvency despite constitutional balanced budget requirements, and in European nations that have borrowed far in excess of the formal Maastricht debt and deficit criteria.

Effective institutional reform must therefore go beyond judicial oversight to penetrate

the internal operations of the executive and legislature. Steven Hayward has suggested recasting the modern regulatory agencies such as the EPA into New Deal-style commissions with five members, no more than three of whom are from the president's party. That would provide a degree of insulation from presidential direction and would also, in cases decided by divided votes, produce competing records for judicial review. The House of Representatives at its last session passed a statute that would require major new regulations (those with costs or benefits of more than \$100 million annually) to be approved by Congress in up-or-down floor votes.

Congressional Renewal

THese proposals head in the right direction, but do not go far enough. They address the regulatory problem, which is only one aspect of executive supremacy, and do so by acquiescing in—and attempting to work around—the relative weakness of congressional decision-making. And they do not address deficits and debt at all.

More ambitious would be an effort to fashion Congress as a recentralized, purposive hierarchy of its own—one that could stand up to the executive, moderate its ambitions, and reparochialize our politics. In this structure, the federal government could not spend a dollar, or guarantee a loan, without the consent of the chairmen and majority of the House and Senate appropriations committees, and could not tax or borrow a dollar without the consent of the chairmen and majority of the House Ways and Means Committee and the Senate Finance Committee. Fifty members in the House committees, twenty in the Senate committees: recognized elites, and accountable as such. The abstract discipline of today's budget procedures would be replaced by incarnate discipline.

The purpose of congressional revival would be to imbue national policymaking with the sort of local, practical, everyday considerations that occur naturally to elected representatives of particular constituencies. Presidents, elected by the whole of our immense nation, see policy in national or global terms and are prone to excessive abstraction. They want to change the course of the mighty global climate, bestow democracy on foreign lands, underwrite "systematically important" business firms, leave no child behind, dispense free birth control to everyone paid for by no one, make good things universal and bad things extinct. The legislator wants to know the ways and means and hometown impacts

of such ventures. How much will they cost? Who will pay for them? Who will get the jobs? How will they affect the lives of ordinary citizens between now and the next election? And: couldn't we worry about this some other time?

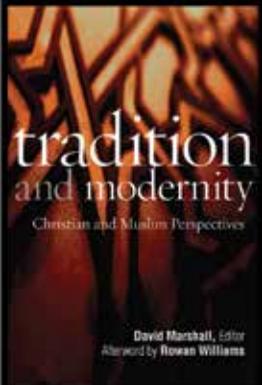
These are tendencies, not absolutes. There are exceptions in both directions, but the tendencies are strong and recognizable. We want, and have, a president who can speak for the nation and act forcefully in emergencies. But we should not want what we have inadvertently acquired: an executive branch that is able to govern unilaterally over a wide range of important matters. We need a better balance of lofty aspiration and pragmatic common sense, with each tendency obliged to recognize the claims of the other.

Daniel Patrick Moynihan, eminent American legislator and public intellectual, propounded the Iron Law of Emulation: organizations in conflict become like one another. Why has Congress ignored this law for decades as the executive assumed progressively more and more of its former powers? Maybe the representative legislature really is a political Dodo in our wired, wealthy, striving world. But perhaps Congress has simply been emulating the wrong executive techniques—public relations rather than internal control—or maybe it is just slow to rouse even where its own interests are concerned.

Capitol Hill's world of desultory collective-action mayhem has proved deeply unsatisfying to many legislators. Incessant personal fundraising unattached to any larger cause is not much of a career. Sleeping on the office couch is not much of a life. Committee chairmen—especially of the taxing and spending committees—are growing openly rebellious against their party leaders, who care only about partisan messaging for or against the president. Many able, influential legislators have been walking away. These circumstances may provide an opening for institutional reconstruction, wherein the interest of the individual politician is reconnected with the constitutional rights of the place. It might begin in a chamber, such as today's House of Representatives, where majority party partisanship against the executive is transformed into solidarity for the chamber itself. Legislators of both parties, however, would ultimately have to vote it in themselves—exchanging a portion of their lonely prerogatives under our broken system for the opportunity to be loyal members of an institution with real constitutional muscle.

Christopher DeMuth is a distinguished fellow at the Hudson Institute. This essay is based on a talk delivered in February 2013 at the annual meeting of the Transatlantic Law Forum.

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