

ARTICLES

THE MAKING OF PRESIDENTIAL ADMINISTRATION

Ashraf Ahmed, Lev Menand & Noah A. Rosenblum

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THE MAKING OF PRESIDENTIAL ADMINISTRATION

Ashraf Ahmed,* Lev Menand** & Noah A. Rosenblum***

Today, the idea that the President possesses at least some constitutional authority to direct administrative action is accepted by the courts, Congress, and the legal academy. But it was not always so. For most of American history — indeed until relatively recently — Presidents derived their authority over the administrative state largely from statute. Any role for the White House in agency rulemaking or adjudication had to be legally specified. Scholars mostly agree about when this change occurred. But the dominant shared narrative — exemplified by then-Professor Elena Kagan’s seminal article Presidential Administration — is Whig history. It offers a depoliticized interpretation that presents White House primacy as the product of steady progress toward greater administrative rationality.

This Article offers a historical corrective. It explains how “administration under law” was lost and replaced with a new constitutional baseline, “presidential administration.” It is both an account of constitutional change — how one understanding of constitutional text and structure gave way to a different one — as well as a history of the regulatory state and how, beginning in the 1980s, federal officials reworked the relationship between the President, Congress, and administrative agencies in order to expand the role of market actors in governing economic activity. The Article draws attention to the intense political conflict that accompanied the advent of presidential administration. What is today bipartisan was originally nothing of the sort. It also reveals how a new interpretation of Article II took hold without any fundamental doctrinal or statutory change or shift in formal law. It highlights the emergence of a neoliberal consensus around aspects of economic regulation that incentivized and buttressed presidential administration as an approach to administrative governance. And it reveals the relative novelty of originalist arguments about the “Unitary Executive.”

* Associate Professor of Law at Columbia Law School.

** Associate Professor of Law at Columbia Law School.

*** Assistant Professor of Law at New York University School of Law. For comments and conversation, thanks to Kate Andrias, Yochai Benkler, Jessica Bulman-Pozen, Daniel Carpenter, Josh Chafetz, Isaac Cui, John Dearborn, John Ferejohn, Kellen Funk, Rick Hills, Amanda Hollis-Brusky, Olati Johnson, Sanjay Jolly, Andrea Scoseria Katz, Jeremy Kessler, Lewis Kornhauser, Gary Lawson, Daryl Levinson, Jane Mannes, Henry Monaghan, Jennifer Nou, Rick Pildes, David Pozen, Miriam Seifter, Peter Shane, Jed Shugerman, Karen Tani, Jim Tozzi, Adam White, and participants at workshops and conferences including the Boston University School of Law Clark Legal History Series, the Harvard Law & Political Economy Workshop, the NYU Law Colloquium on Law, Economics, and Politics, the Administrative Law New Scholarship Roundtable, the C. Boyden Gray Center for the Study of the Administrative State Public Policy Conference on Presidential Administration in a Polarized Era, and the National Conference of Constitutional Law Scholars. For invaluable research assistance, thanks to Nathaniel Berman, Isaac Buck, Anisha Dangoria, Ben Healy, Miranda Litwak, Sami Stafford, Nathaniel Thompson, and Isabelle Wechsler. Special thanks to the staff of the *Harvard Law Review* for superlative editing. Research for this article was supported in part by the Abraham M. Bushman Fellowship for Administrative Law at Columbia Law School and the C. Boyden Gray Center for the Study of the Administrative State at George Mason University.

INTRODUCTION

Contemporary American governance is the product of a recent constitutional transformation. Previously, we may have had “Congressional Government,”¹ “a state of courts and parties,”² or “a Regime of Separated Powers.”³ But now we live in an era of presidential primacy.⁴ Control of the White House is so central to our governance that the transition from one President to another amounts to “regime change.”⁵

The dominant narrative of how this shift occurred is incomplete. It overlooks the legal bases of presidential power over administrative agencies and how they were forged. As a result, it does not grapple enough with the legal nature of presidential administration, its political economic stakes, or the range of possible alternatives.

This Article offers a historical corrective. It reconstructs how the law was reshaped to make presidential dominance of the administrative state possible. It shows that the administrative presidency began as a collaborative project of Congress and the President to enhance government efficacy and accountability. It then traces how this tradition, consistent with what we term “administration under law,” was eclipsed in the second half of the twentieth century, as Presidents sought grounds for unilateral action. Starting with President Ronald Reagan, Presidents began to assert claims to direct administrative action drawn from the Constitution, relying on the Opinions Clause and the Take Care Clause to claim the authority to direct administrative action.⁶ These moves developed into the theory of the “Unitary Executive,”⁷ the Supreme Court’s neo-formalist separation of powers jurisprudence, and the presidentialist government we have today.⁸

At first, Reagan’s power grab was politically explosive. The new “presidential administration” was explicitly deregulatory.⁹ Congress fought back, but was thwarted, in part due to Supreme Court

¹ WOODROW WILSON, CONGRESSIONAL GOVERNMENT 1 (Houghton, Mifflin & Co. 15th ed. 1901) (1885); *see also id.* at 11, 57.

² STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920, at 24 (1982); *see also id.* at 24–31.

³ Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REGUL. 549, 549 (2018); *see also id.* at 559–62.

⁴ Ashraf Ahmed & Karen M. Tani, *Presidential Primacy Amidst Democratic Decline*, 135 HARV. L. REV. F. 39, 52–57 (2021).

⁵ Cristina M. Rodríguez, *The Supreme Court, 2020 Term — Foreword: Regime Change*, 135 HARV. L. REV. 1, 7 (2021).

⁶ *See infra* section II.A, pp. 2153–59.

⁷ STEPHEN SKOWRONEK, JOHN A. DEARBORN & DESMOND KING, PHANTOMS OF A BELEAGUERED REPUBLIC: THE DEEP STATE AND THE UNITARY EXECUTIVE 24 (2021).

⁸ *See id.* at 29–30; Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 3 (2020).

⁹ *See infra* section II.A, pp. 2153–59.

intervention and in part due to the election of President Bill Clinton, whose administration embraced Reagan's legal innovations and aspects of his policy agenda.¹⁰ Subsequently, the tradition of administration under law, which Congress had defended, was repressed and then largely forgotten.

Today, we live in the world the presidentialists made. Even as scholars and critics rethink the power of an overweening Executive, they do so within the presidentialists' legal frame. We no longer question whether the President has the power to direct agencies; we ask how far that power extends. Whether it is the power to remove agency heads or the unitariness of the Executive, our current debates are fundamentally about the outer limits of presidential primacy. A different balance of power between the branches involving other tools — such as congressional oversight or agency self-monitoring — is rarely considered.

Our narrowed imagination is in part a result of our historical misremembering. The standard account of the rise of presidential administration offers a sanitized, motivated, Whig history. According to its terms, presidential control of the administrative state is perhaps inevitable and certainly welcome. For instance, one scholar praised Clinton's emphasis on executive review as a step toward "the restoration of two central principles of the original Constitution — tricameralism . . . and federalism."¹¹ Similarly, another professor, reflecting on his "personal perspective," concluded that "presidential regulatory review . . . is warranted on policy grounds."¹² Even critics of the new presidentialism recount the history of the growth of presidential administrative power in primarily theoretical terms. For example, in an important article, Professor Thomas Merrill described the shift to presidential administration as a misguided attempt to replace an American "positivist tradition," with its emphasis on statutory authority, with a "process tradition" and norms of reasonableness,¹³ reprising the dominant scholarly approach to this history as a story of bloodless, independent ideas, succeeding each other in neat progression.

No scholar has been more influential in framing the standard account or better exemplifies its shortfalls than then-Professor Elena Kagan. In a 141-page article in the *Harvard Law Review*, Kagan reconstructed the development of presidential administrative primacy, portraying presidential administration as the logical culmination of an

¹⁰ See *infra* section IV.A, pp. 2201–10.

¹¹ John O. McGinnis, *Presidential Review as Constitutional Restoration*, 51 DUKE L.J. 901, 901 (2001) (footnote omitted).

¹² James F. Blumstein, Essay, *Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues*, 51 DUKE L.J. 851, 855–56 (2001).

¹³ Thomas W. Merrill, Essay, *Presidential Administration and the Traditions of Administrative Law*, 115 COLUM. L. REV. 1953, 1957 (2015).

evolutionary process.¹⁴ Her article, *Presidential Administration*, was at once a meditation on the path of American administrative governance and a defense of presidential superintendence.¹⁵ While scholarly attention in subsequent years has understandably focused on the normative merits of presidential administration,¹⁶ Kagan's historical account — which was generally reflected in the work of her contemporaries¹⁷ — has gone mostly unexamined.¹⁸

Yet her history is flawed. It represses conflict and contingency and, oddly for legal history, overlooks changes in legal doctrine. Kagan's partisanship comes across most clearly in her stadial account of the growth of presidential administrative power. *Presidential Administration* presents the development of the administrative state as a passage from one form of governance to another, with congressional primacy giving way to agency self-rule before culminating in presidential administration.¹⁹ This Hegelian development is driven by the search for greater rationality in the regulatory state. On her account, each of the prior stages of administrative management suffered from flaws that endangered the state's effectiveness or legitimacy.²⁰ Only the emergence of presidential administration resolved these contradictions and put the

¹⁴ See generally Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

¹⁵ *Id.* Kagan's normative defense of presidential administration rested on two arguments. First, it revived the Hamiltonian claim that the President was the most "dynamic" constitutional actor and thus best positioned to infuse sclerotic agencies with energy and efficiency. *Id.* at 2341–45. Second, it invoked the neo-Progressive claim that Presidents, by virtue of their national constituency, make for more accountable chief administrators. *Id.* at 2333–37; see also Andrea Scoseria Katz & Noah A. Rosenblum, *Becoming the Administrator-in-Chief: Myers and the Progressive Presidency*, 123 COLUM. L. REV. 2153, 2233–35 (2023) (describing the emergence of a "national representative" defense of presidential primacy, *id.* at 2233).

¹⁶ See, e.g., Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339, 1362–70 (2012) (chronicling the use of executive directives to advance racial equality).

¹⁷ Even scholars who take a more critical view of the historical trajectory that resulted in presidential administration present this arc in more intellectual rather than historical terms. See, e.g., Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 469–91 (2003) (explaining the shift to presidential review as displacing policing arbitrariness with ensuring accountability).

¹⁸ See Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 685 (2016); Daniel A. Farber, *Presidential Administration Under Trump 2* (Aug. 8, 2017) (unpublished manuscript), <https://ssrn.com/abstract=3015591> [<https://perma.cc/X4HZ-WHAP>]. See generally JEREMI SURI, *THE IMPOSSIBLE PRESIDENCY: THE RISE AND FALL OF AMERICA'S HIGHEST OFFICE* (2017); ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010); PETER M. SHANE, *MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* (2009).

¹⁹ Kagan is careful to note that the history of the administrative state is "more complicated" than any stadial theory and that historians "readily acknowledge" that the "discrete chapters . . . in fact bleed into each other." Kagan, *supra* note 14, at 2254. Despite those caveats, she embraces a stylized version of the "standard account." *Id.* Her narrative has important antecedents; in some respects, it extends the work of Professor Richard Stewart, who recognized structural problems in the administrative state in the mid-1970s. See generally Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

²⁰ See Kagan, *supra* note 14, at 2252.

administrative state on firm democratic and practical footing.²¹ The story is presented as uncontroversial and fundamentally progressive. For Kagan, the Clinton Administration becomes something like the end of history for administrative law.²²

This narrative generates two blind spots. First, it obscures the risks posed by constitutionalized presidentialism. As Merrill warned, “[t]he long-term prospects of an administrative law based solely on process norms are cause for concern[,] [u]nless process norms are themselves embodied in and enforced as positive law.”²³ Second, it submerges the substantive political agenda that drove the rise of presidential administration as well as the legal revolution that rise produced. Virtually absent from Kagan’s account are the institutional politics, legal innovations, and ideological conditions that made the shift to presidential administration possible. By offering a selective and irenic history of presidential administration, the standard account deprives us of tools to assess its internal dangers, as well as the concepts to push back against its excesses.

* * *

This Article offers a new history of the rise of presidential administration. Instead of presenting, as the standard account often does, the recent past of presidential administration as a smooth working out of a particular notion of administrative governance, we turn our attention to the political, intellectual, and legal battles in which it was forged.²⁴ We show how the passage to presidential administration was deeply contested, both institutionally and intellectually, during the period from

²¹ *Id.* at 2331–46.

²² See *id.* at 2383–85 (observing that “President Clinton . . . has completed writing the next” chapter in the history of presidential administration, *id.* at 2383, and, while there may continue to be developments, “something significant has occurred: an era of presidential administration has arrived,” *id.* at 2385).

²³ Merrill, *supra* note 13, at 1959.

²⁴ In doing so, we build on recent scholarship including Jessica Bulman-Pozen, *Administrative States: Beyond Presidential Administration*, 98 TEX. L. REV. 265 (2019) (complicating our understanding of the merits of presidential administration by centering states); Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006) (rejecting implicit presidential directive authority over agencies); Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2006) (showing how White House influence on agencies extends beyond U.S. Office of Management and Budget (OMB) review to lobbying by White House staff); Edward Rubin, *The Myth of Accountability and the Anti-administrative Impulse*, 103 MICH. L. REV. 2073 (2005) (contesting the view that administrative accountability is ensured solely or principally through the presidency); Peter L. Strauss, *Foreword: Overseer, or “The Decider”? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007) (constraining presidential authority to oversight over agencies rather than directive authority); Merrill, *supra* note 13; Karen M. Tani, *Liberalism’s Last Rights: Disability Inclusion and the Rise of the Cost-Benefit State*, in MASTERY AND DRIFT: PROFESSIONAL-CLASS LIBERALS SINCE THE 1960S (Brent Cebul & Lily Geismer eds., forthcoming 2025) (examining the complicated and contested legacy of White House–driven cost-benefit analysis) (on file with the Harvard Law School Library).

1975 to 2000, with special emphasis on the Reagan Administration. We argue that presidential administration's triumph required the demise of a prior form of governance where Congress played a larger role and that presidential administration's entrenchment was the product of a bipartisan consensus about the dangers of government interventions in markets and an ever-expanding regulatory state.

Our account unfolds in four parts. Part I examines the 1970s and its antecedents. During that time, administration under law prevailed. Presidents recognized the nineteenth-century "primacy of Congress's statutes."²⁵ Accordingly, Congress and the executive branch worked together to build out "the managerial presidency."²⁶ Their goal was to make government efficacious and accountable through statutory enactments that granted the President specific powers.

This regime simultaneously empowered and constrained the presidency. It empowered the Executive, since Congress regularly enacted new laws that gave the President additional authority over administrative agencies. But it kept the Executive bounded, since statutory grants were often temporary, conditioned on a legislative veto, or otherwise limited. Congress, for its part, continued to use legislation and oversight to carefully influence administrative agencies and check the President's administrative powers.

Part II turns to the Reagan years. Reagan's immediate predecessors chafed against legislative constraints. Administration under law prevented the President from taking aggressive administrative action without congressional cooperation. This limited the President's ability to implement deregulatory policies, as Congress proved more hostile to deregulation (and more committed to the New Deal order) than the White House.

Reagan changed the managerial presidency from a collaborative executive-legislative statutory project into a White House prerogative. The key break came early, when Reagan issued Executive Order 12,291²⁷ (E.O. 12,291), invoking the Constitution to justify executive direction of certain aspects of agency rulemaking. Reagan's lawyers claimed that Article II empowered the President not only to request information from agencies but also to prevent them from promulgating significant rules without White House sign-off.²⁸

To contemporaries in Congress and in the legal academy, Reagan's arguments were baseless. Congressional witnesses and scholars catalog-

²⁵ See Katz & Rosenblum, *supra* note 15, at 2246; see also *infra* Part I, pp. 2143–53.

²⁶ See Katz & Rosenblum, *supra* note 15, at 2225, 2233; JOHN A. DEARBORN, POWER SHIFTS: CONGRESS AND PRESIDENTIAL REPRESENTATION 4 (2021). See generally PERI E. ARNOLD, MAKING THE MANAGERIAL PRESIDENCY: COMPREHENSIVE REORGANIZATION PLANNING, 1905–1996 (2d ed. 1998).

²⁷ Exec. Order No. 12,291, 3 C.F.R. 127 (1982) (revoked by Exec. Order No. 12,866 § 11, 3 C.F.R. 638, 649 (1994), *reprinted as amended in* 5 U.S.C. § 601).

²⁸ See *infra* notes 181–93 and accompanying text.

ued the many problems: Reagan had usurped legislative authority in violation of the separation of powers; amended the Administrative Procedure Act²⁹ (APA) without an Act of Congress; and presumed to edit, by mere executive decree, the enabling acts of every nonindependent agency in the federal government.³⁰

The outcry proved in vain. Part III tells the story of how the opposition was quieted and how a new constitutional baseline was constructed. In part, legislative resistance to Reagan's assertions was undercut by the Supreme Court. In a series of decisions, including *INS v. Chadha*³¹ and *Bowsher v. Synar*,³² the Justices added new constitutional limits to Congress's ability to direct administrative lawmaking, indirectly bolstering the President's case for control.

Meanwhile, legal academics developed more expansive visions of executive power. Building on Justice Antonin Scalia's jurisprudence, especially his dissents in two executive power cases, *Morrison v. Olson*³³ and *Mistretta v. United States*,³⁴ a cohort of law professors turned the Reagan Administration's skeletal constitutional claims into a robust theory of presidential power. Professors Steven Calabresi and Saikrishna Prakash became the most prominent members of a group of originalist academics who championed strong claims of executive control.³⁵ In an ironic twist, they appropriated the separation of powers arguments wielded by the defenders of administration under law to justify their competing vision of the presidency. And they revived dicta from *Myers v. United States*³⁶ that had been largely left for dead following the Court's unanimous opinion in *Humphrey's Executor v. United States*.³⁷

²⁹ 5 U.S.C. §§ 551–559, 701–706.

³⁰ See *infra* notes 196–229 and accompanying text; see also Philip Shabecoff, *Reagan Order on Cost-Benefit Analysis Stirs Economic and Political Debate*, N.Y. TIMES (Nov. 7, 1981), <https://www.nytimes.com/1981/11/07/us/reagan-order-on-cost-benefit-analysis-stirs-economic-and-political-debate.html> [<https://perma.cc/G8ZB-CKT5>]; Morton Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291*, 80 MICH. L. REV. 193, 246 (1981).

³¹ 462 U.S. 919 (1983) (holding that the legislative veto over administrative agency action violates the Presentment Clauses of the Constitution, *id.* at 959).

³² 478 U.S. 714 (1986) (holding that Congress cannot delegate powers over budget sequestration calculations to an official who is not removable by the President but by the legislature for cause, *id.* at 736).

³³ 487 U.S. 654 (1988) (holding that the Independent Counsel Act, creating an independent office within the Department of Justice, was constitutional because it did not increase the power of the legislative or judicial branch at the expense of the President, *id.* at 696–97).

³⁴ 488 U.S. 361 (1989) (holding that that the Sentencing Commission, which Congress empowered to establish binding sentence guidelines, did not violate the separation of powers because the Constitution does not prevent Congress from obtaining assistance from coordinate branches, *id.* at 412).

³⁵ See *infra* notes 561–65 and accompanying text.

³⁶ 272 U.S. 52 (1926).

³⁷ 295 U.S. 602 (1935).

To the extent that the originalists' most prominent liberal opponents contested the Unitary Executive, they did so less on substance than on method, rejecting originalism for functionalism.³⁸ By the mid-1990s, the scholarly imagination on presidential control over the administrative state had shifted; administration under law had faded³⁹ and the relevant alternatives became presidential administration (an Article II power in the President to superintend agencies in the absence of limits set by statute) and the Unitary Executive (a power in the President to superintend agencies not subject to legislative constraint).

Part IV describes the consolidation of presidential administration in theory and practice. It recounts the ideological and political context in which Clinton entrenched presidential administration as a mode of governance. And it explores how Kagan and her peers legitimated it intellectually. When Reagan announced his executive order in 1981, Democratic party elites resisted what they saw as a Republican power grab. But by the 1990s, the Reagan Revolution had reoriented the Democratic party itself.⁴⁰ Bill Clinton won the White House in 1992 not by repudiating Reagan but by promising a kind of continuity. The self-proclaimed New Democrats would adopt Reaganite tools — principally Executive Order 12,866⁴¹ (E.O. 12,866) — and a Reaganite orientation toward the regulatory state, reducing its scope and ambition. For an observer at the start of the 2000s, presidential administration appeared intellectually triumphant and politically secure.

* * *

By reconstructing the making of presidential administration, this Article aims to liberate legal thinking from the constraints of a misleading historical narrative. In this vein, it offers five scholarly interventions.

First, it recenters law and politics. The received story on presidential administration paints the shifts from one form of governance to another as largely changes in styles of thought. Missing is a sense of the political, legal, and ideological battles that fueled and indeed smoothed the way for presidential administration. By doing so, the standard account casts our current institutional arrangements as a *fait accompli*. But a fuller account reveals historical specificity and contingency. Presidential administration was not an idea working itself pure in real time. It had to be made. It was the result of localized interventions in concrete political and legal fights. It occurred during a generational shift in attitudes to-

³⁸ See *infra* notes 566–74 and accompanying text.

³⁹ But see Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 9–10 (1993) (recovering the limits of presidential authority in altering private rights absent congressional authorization).

⁴⁰ See *infra* notes 604–21 and accompanying text.

⁴¹ Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 (1994).

ward regulation and the role of the state. And it was first challenged and legitimated by legal scholars and enabled by judges.

Restoring our understanding of presidential administration's origins is especially important given recent trends in administrative law and scholarship.⁴² The move from statutory to constitutional foundations for presidential oversight of administrative agencies has limited positive law's place in constraining Presidents and led to a greater reliance on norms and internal executive branch practices. For many scholars, the Trump Administration highlighted the risks of this mode of governance.⁴³ Over the past forty years, executive power over the administrative state has become increasingly deformed. As the limits on presidential administration shifted from enacted law and congressional and judicial oversight to the Constitution and nonjusticiable internal norms, the President became difficult to subject to traditional legal controls. Rule of law in the executive branch has been replaced with the rule of conventions and the good-faith actions of executive branch lawyers. For contemporary critics of presidential administration, those institutions have turned out to be more malleable than many had expected. Their flexibility is a function of their susceptibility to epistemic drift. As the legal academy and appellate bar shift their views, the meaning of executive branch conventions change.⁴⁴ The history shows how Reagan's and Kagan's theories unsettled the administrative state — and how powerless Congress has been to reverse them. It suggests, in turn, that the kinds of reforms critics propose to bring a presidentially directed administrative state back under the rule of law may require a more thoroughgoing change in our thinking than has been heretofore appreciated.

Second, and relatedly, this Article's history contributes to our understanding of the relationship between constitutional norms and structure. During the two decades in which presidential administration emerged

⁴² See generally Gillian E. Metzger, *The Supreme Court, 2016 Term — Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017) (indexing and critiquing anti-administrativism in American public law); Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 YALE L.J. 1769 (2023) (exploring tensions in recent administrative law doctrine of adjudication).

⁴³ Cf. SHANE, *supra* note 18, at vii (describing the dangers of unconstrained presidential authority); Blake Emerson & Jon D. Michaels, *Abandoning Presidential Administration: A Civic Governance Agenda to Promote Democratic Equality and Guard Against Creeping Authoritarianism*, 68 UCLA L. REV. DISCOURSE 418, 429–30 (2021); Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 594 (2021); Ahmed & Tani, *supra* note 4, at 64 (criticizing Executive-led governance for eroding political processes, including the peaceful transition of power, as January 6, 2021 exemplified).

⁴⁴ Cf. Jack M. Balkin, *Constitutional Hardball and Constitutional Crises*, 26 QUINNIPIAC L. REV. 579, 579 (2008) (coining “constitutional historicism” to explain “the idea that the conventions that determine what makes an argument about the Constitution good or bad . . . change over time in response to changing political, social, and historical conditions”).

and consolidated, little changed in judge-made doctrine or statutory law. Insofar as the Supreme Court played a role in building presidential administration, it was indirect: it stripped Congress of tools to resist executive overreach and, through Justice Scalia's dissents, provided intellectual resources for making unitary executive arguments.⁴⁵ The driving forces behind presidential administration were executive orders and institutional acquiescence. The baseline prior to presidential administration — administration under law — required the President to seek specific congressional authorization for directing or restructuring agency action. E.O. 12,291 upended that norm by introducing a presidentialist default rule: where Congress did not legislate, the President had residual administrative powers.⁴⁶ Despite its inchoate constitutional grounds, neither a Democratic Congress nor the courts decisively rejected executive oversight. This history is thus an example of how constitutional structure often depends on and dramatically changes in response to norm erosion and reinvention.⁴⁷

Third, the narrative underlines the importance of ideology in shaping constitutional structure. According to a leading account, contemporary separation of powers depends on partisan conflict.⁴⁸ Interbranch conflict follows divided government. This model builds on the assumption that parties are ideologically opposed. This Article and the history it explores show what happens in periods of ideological consensus: Opposed parties and divided government can nevertheless enable tectonic shifts in constitutional structure. In this case, hostility toward an expansive administrative state among elites in both parties helped entrench presidential primacy, as it offered an efficient way to reverse it.⁴⁹

Fourth, our history of presidential administration reveals the relative novelty of originalist arguments about the role of the President in the

⁴⁵ See, e.g., *Morrison v. Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting) (arguing that a statutory scheme that insulates an agency head from presidential removal violates Article II of the Constitution).

⁴⁶ See Exec. Order No. 12,921, 3 C.F.R. 127 (1982).

⁴⁷ See, e.g., Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2206–42 (2018) (providing a taxonomy of executive branch norms); Ashraf Ahmed, *A Theory of Constitutional Norms*, 120 MICH. L. REV. 1361, 1365 (2022) (developing a general account of constitutional norms).

⁴⁸ Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2315 (2006).

⁴⁹ To be clear, this Article does not argue that presidential administration is inherently deregulatory. Proving such a claim would require a different kind of evidence. Rather, we surface the historical fact that presidential administration emerged under conditions of an ideological consensus favoring more limited government intervention. Identifying the content of that consensus is important, both as a matter of intellectual and political history. See sources cited *infra* note 588. To the extent that this Article bears on current attempts at progressive presidential administration, it suggests taking a broader view of the institutional and legal constraints on regulation. See, e.g., Courtney Bublé, *Biden's Regulatory Update is Finally Here*, GOV'T EXEC. (Apr. 6, 2023), <https://www.govexec.com/management/2023/04/bidens-regulatory-update-finally-here/384909> [https://perma.cc/S9JR-2DZU] (describing OIRA's relaxation of cost-benefit analysis requirements).

administrative state. Unitarianism turns out to be so new that its core arguments were largely missing or ignored forty years ago, including by Reagan Administration lawyers. To use Professor Jack Balkin's language: the idea that the President has a constitutional power to remove any official outside the Article III judiciary would have struck people in 1981 as "off the wall."⁵⁰ It took a new generation of law professors, practitioners, and ultimately judges in the 1990s and 2000s to put these arguments on the wall and bring them within the bounds of legitimate legal disagreement. In making this point, we do not mean to invoke a scholarly version of the antinovelty canon.⁵¹ Rather, we mean to point out that the unitary executive theory rests its claims to legitimacy in part on its being a long-accepted, widely shared theory of constitutional interpretation. But the history reveals otherwise and therefore gives us a reason to read unitarian claims differently. Rather than timeless arguments about constitutional interpretation and the structure of government, unitary executive arguments flourished in the wake of extensive economic deregulation.⁵² Law followed politics.

Finally, this Article highlights an important connection between the separation of powers and political economy. Presidential administration is not, and has never been, merely a matter of institutional design. It has always been about creating a certain kind of government designed to accomplish certain kinds of ends. For most of the last forty years, these ends were generally "neoliberal." In other words, Reaganite-Clintonite presidential administration was a type of rule by elite lawyers and technocrats that sought, where possible, to free market actors and subordinate legislative politics.⁵³ The resulting shift in administrative law since 1981 parallels neoliberal turns in the law of networks, platforms, and utilities,⁵⁴ antitrust law,⁵⁵ and the law of money and bank-

⁵⁰ See Jack M. Balkin, *From off the Wall to on the Wall: How the Mandate Challenge Went Mainstream*, THE ATLANTIC (June 4, 2012), <https://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040> [https://perma.cc/AMM8-BP53].

⁵¹ Cf. Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1422–27 (2017).

⁵² See Ganesh Sitaraman, *The Supreme Court, 2019 Term — Comment: The Political Economy of the Removal Power*, 134 HARV. L. REV. 352, 401–04 (2020).

⁵³ See HERBERT CROLY, THE PROMISE OF AMERICAN LIFE 133 (1909) ("The whole business of American government is so entangled in a network of legal conditions that a training in the law is the best education which an American public man can receive. . . . When [statesmen] talk about a government by law, they really mean government by lawyers . . ."); see also Seymour D. Thompson, *Government by Lawyers*, 30 AM. L. REV. 672, 681–82 (1896).

⁵⁴ See Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1328 (1998). See generally MORGAN RICKS ET AL., NETWORKS, PLATFORMS & UTILITIES: LAW & POLICY (2022).

⁵⁵ See Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 980–81 (2019); Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655, 1677–78 (2020) (reviewing TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018)); WU, *supra*, at 17–18.

ing.⁵⁶ Each transformation has contributed to central state atrophy, political polarization, and democratic decline. In the broader project of analyzing neoliberal administrative law and understanding how it leads to structural deregulation,⁵⁷ the rise of presidential administration deserves significant attention.

As a policy matter, this Article's history suggests caution about historical triumphalism and the costs of unintended consequences. Kagan and her contemporaries carefully staked out a position that they believed would satisfy both regulatory conservatives and progressives alike. They failed, however, to account for the dynamic effects of carving out space for presidential control between the lines of statutory text. The presidential lawmaking they endorsed lacked traditional legal safeguards.⁵⁸ And the arguments they raised left the administrative state open to existential critique. Presidential administration's legitimators mistakenly assumed that the Supreme Court's longstanding jurisprudence on executive power would serve as a bulwark against an imperial presidency — that changing executive interpretations of Article II might lead to changing judicial ones as well. As it happened, in the years that followed *Presidential Administration*, the judicial branch further hobbled Congress and aggrandized the presidency.⁵⁹

Today, the specter of a nonmajoritarian, plebiscitary president lurks in the *U.S. Reports*, ready to co-opt what is left of administration under law. The history in this Article offers resources for understanding the recent constitutionalization of a “disfigured” democracy.⁶⁰ Denaturalizing presidential primacy in administration is the first step toward imagining a different world.

I. THE MANAGERIAL PRESIDENCY BEFORE REAGAN

In 1974, former Supreme Court Justice Abe Fortas summed up the view of the presidency that had prevailed more or less since the Founding and which we have called administration under law: “The

⁵⁶ See Lev Menand, *Too Big to Supervise: The Rise of Financial Conglomerates and the Decline of Discretionary Oversight in Banking*, 103 CORNELL L. REV. 1527, 1557–58 (2018); Lev Menand, *Why Supervise Banks? The Foundations of the American Monetary Settlement*, 74 VAND. L. REV. 951, 951–52 (2021).

⁵⁷ See Freeman & Jacobs, *supra* note 43, at 587–89.

⁵⁸ Cf. Ahmed, *supra* note 47, at 1380–81 (discussing the need for a theory of constitutional norms — such as the norm against abrogation of judicial independence or against presidential overreach — that takes those norms seriously).

⁵⁹ See Noah A. Rosenblum, *Doctrine and Democratic Deconsolidation: On David Driesen's Specter of Dictatorship*, 72 SYRACUSE L. REV. 1433, 1447–53 (2022) (book review).

⁶⁰ See NADIA URBINATI, *DEMOCRACY DISFIGURED: OPINION, TRUTH & THE PEOPLE* 1–2 (2014). In the past few decades, constitutional law scholars have warned about executive overreach, often emphasizing realms beyond just administration. See, e.g., BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 4 (2010); SHANE, *supra* note 18, at 175. For a recent treatment of the risk executive power — especially as a Unitary Executive — poses to the administrative state, see SKOWRONEK ET AL., *supra* note 7, at 33.

President is a *part* of the government; he is not *the* government.”⁶¹ The Framers designed “a modest Presidency.”⁶² “[T]he ultimate power to make the rules, to legislate, is not the President’s; it is the Legislature’s.”⁶³ This understanding persisted into the administration of President Richard Nixon, who asserted unprecedentedly broad executive authority.⁶⁴ It even survived his presidency.⁶⁵ This Part recovers that constitutional baseline, which characterized the relationship between Congress, the President, and administrative agencies for most of American history. It starts, in section A, with efforts by legislators and Presidents to enhance the President’s role in administration. Section B examines the Nixon presidency and the ways in which the Nixon White House still adhered to administration under law even as officials tried to check the power of administrative agencies. Section C looks at President Jimmy Carter and how his even fiercer push to downsize the administrative state and reform the New Deal order nonetheless respected administration under law by recognizing statutory limits and congressional primacy.

A. *The Progressive Era*

Since at least the Progressive Era, American Presidents have sought to enhance their power to guide and control administrative action.⁶⁶ Early scholars of public administration argued that executive centralization promoted efficiency and accountability.⁶⁷ Drawing on their ideas, Presidents, their advisors, and outside experts developed plans to give the Executive more administrative power.

This project, which Professor Peri Arnold dubbed “the managerial presidency,”⁶⁸ was not championed or implemented merely by Presidents.⁶⁹ It was a collaboration between Congress and the White House.⁷⁰ For this reason, we call it administration under law. Presidents generally did not claim constitutional authority to direct the government, control the administrative state, or reorganize administrative decisionmaking on their own.⁷¹ Rather, they relied on statutory

⁶¹ Abe Fortas, *The Constitution and the Presidency*, 49 WASH. L. REV. 987, 992 (1974).

⁶² *Id.* at 988.

⁶³ *Id.* at 992.

⁶⁴ See SKOWRONEK ET AL., *supra* note 7, at 49–51 (describing some of the development of the Unitary Executive as “prefigured in the Nixon presidency,” *id.* at 50, and cataloging Nixon’s radical changes to the administrative state).

⁶⁵ See Fortas, *supra* note 61, at 994.

⁶⁶ See generally ARNOLD, *supra* note 26. See also Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration*, 122 COLUM. L. REV. 1 (2022). Some scholars have traced the tendency back even farther. See generally STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON* (1993).

⁶⁷ See Rosenblum, *supra* note 59, at 1445–47; Rosenblum, *supra* note 66, at 44–46.

⁶⁸ See generally ARNOLD, *supra* note 26.

⁶⁹ See *id.* at 19.

⁷⁰ See DEARBORN, *supra* note 26, at 4.

⁷¹ See *id.*

enactments.⁷² They therefore worked with Congress to build out the government and redefine their powers as necessary to make administration work.⁷³

Reforms in the era of administration under law followed a kind of script. In their ideal typical form, the President asked Congress to authorize a special commission to review government inefficiencies.⁷⁴ Congress then appropriated money, which was typically designated for limited purposes.⁷⁵ The commission, staffed by a mix of government servants, politicians, and academics, would return a report recommending reforms.⁷⁶ These proposed changes would generally empower the Executive. The commissioners or their allies would memorialize their recommendations in draft bills. And Congress would then consider the proposed legislation in the ordinary course, amending and revising it through extensive negotiations.

Presidents followed a version of this script even when the reforms concerned their constitutional obligations. Consider, in this respect, the work of the President's Committee on Administrative Management. This New Deal-era body, the most significant of the many twentieth-century reform commissions, helped create the modern Executive.⁷⁷ Famously, it grounded many of its recommendations in the need to give the President more authority to fulfill his constitutional obligations.⁷⁸ But the Committee did not claim administrative power for the President directly under the Constitution.⁷⁹ Nor did it believe that the President could use the claim of constitutional responsibility to expand his administrative control over the government on his own say so.⁸⁰ Rather, the Committee's recommendations were packaged in specific bills and presented to Congress, which eventually enacted some of them into law.⁸¹ To fulfill his constitutional duties, the President depended on Congress.

When Presidents tried to avoid working with Congress, they courted controversy. President Theodore Roosevelt's misadventures are illustrative. Pressing an aggressive theory of presidential unilateralism,⁸² Roosevelt sought to establish various reform commissions made up of

⁷² See *id.*

⁷³ See *id.*

⁷⁴ See, e.g., ARNOLD, *supra* note 26, at 24–25, 29–30.

⁷⁵ See, e.g., *id.*

⁷⁶ See, e.g., *id.* at 25–26.

⁷⁷ See Rosenblum, *supra* note 59, at 1446.

⁷⁸ See Rosenblum, *supra* note 66, at 39.

⁷⁹ See *id.* at 4 (“While the Supreme Court has sought to ground administrative presidentialism in the vision of the Founders, most scholars have recognized its institutional origins in the work of the New Deal-era President’s Committee on Administrative Management [PCAM] . . .”).

⁸⁰ See *id.* at 67–70 (observing PCAM’s firm stance against the unitary executive theory).

⁸¹ See *id.* at 14.

⁸² See Katz & Rosenblum, *supra* note 15, at 2213–14.

unpaid volunteers, without involving Congress.⁸³ His direct “assertions of Executive authority over the administration” offended the legislature, since that “authority [had] previously [been its] exclusive and unchallenged domain.”⁸⁴ Congress’s reaction was swift and uncompromising.⁸⁵ It defunded President Roosevelt’s commissions,⁸⁶ ignored their recommendations,⁸⁷ and eventually passed a law that banned the use of any federal money on any commission unless explicitly authorized by Congress.⁸⁸

President Roosevelt’s successors learned from his mistakes. President William Taft sought congressional buy-in for his reform efforts.⁸⁹ And executive reorganization remained a collaborative process from the Taft Commission on Economy and Efficiency through the two Hoover Commissions of the postwar years.⁹⁰

B. *The Nixon Administration*

President Nixon’s expansive assertions of executive power, sometimes recognized as an inflection point in histories of presidential power, highlight just how durable the old model of executive/legislative collaboration remained.⁹¹ By the time Nixon took office, the administrative state was composed of a complex and expansive set of institutions. Nixon’s predecessors had often joked that the administrative state had a mind of its own and resisted their involvement.⁹² But for Nixon, this was not something to laugh about. A conservative elected to the head

⁸³ Oscar Kraines, *The President Versus Congress: The Keep Commission, 1905–1909 First Comprehensive Presidential Inquiry into Administration*, 23 W. POL. Q. 5, 5 (1970).

⁸⁴ *Id.* at 6.

⁸⁵ *See id.* at 37 (“Congress and President Theodore Roosevelt clashed from the onset of his term of office.”).

⁸⁶ *See, e.g., id.* at 38 (describing Congress’s grant of \$5,000 for committee experts despite President Roosevelt requesting five times that amount).

⁸⁷ *Id.* at 50.

⁸⁸ *Id.* at 39. For the law in question, the Tawney Amendment to the Sundry Civil Expenses Appropriations Bill of March 4, 1909, see Act of March 4, 1909, ch. 299, § 9, 35 Stat. 1027 (codified as amended at 31 U.S.C. § 1346). Note that the law also forbade paying salaries of any government servants detailed to unauthorized commissions. *See id.* (prohibiting, regardless of compensation, all “employ[ment] by detail . . . in connection with any such commission”).

⁸⁹ *See* ARNOLD, *supra* note 26, at 27–29.

⁹⁰ *See id.* at 40–41, 151–54, 190–91; JOANNA L. GRISINGER, *THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL* 153–94, 208–26 (2012).

⁹¹ On Nixon as a break, see generally Stephen Skowronek, Essay, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070 (2009).

⁹² RICHARD P. NATHAN, *THE ADMINISTRATIVE PRESIDENCY* 1 (1983) (“When he was president, John F. Kennedy reportedly told a caller, ‘I agree with you, but I don’t know if the government will.’”); *id.* at 2 (“Harry Truman is reported to have complained, ‘I thought I was the president, but when it comes to these bureaucrats, I can’t do a damn thing.’”).

of a government that, he believed, had mostly voted against him,⁹³ he worried that the government's bureaucracy would be at cross purposes with itself and in opposition to him.⁹⁴ He set out to seize control.⁹⁵

Yet, to get a grip on the federal bureaucracy, Nixon followed the old script. He sought to establish special commissions to assess executive branch inefficiencies, and he suggested statutory reforms to Congress.⁹⁶

Even where Nixon led, he followed the practices of administration under law. So, for example, in 1970, Nixon relied on statutory authority to propose transforming the Bureau of the Budget into the Office of Management and Budget (OMB)⁹⁷ and reorganizing several departments, creating the EPA.⁹⁸ This change, he thought, would make the government more efficient and give the President greater control over administration.⁹⁹ But Nixon did not claim a constitutional right to create the OMB or EPA by fiat. Rather, he sought to collaborate with Congress, even though it was controlled by those he considered his political enemies, pitching his reforms in reorganization plans subject to congressional approval.¹⁰⁰ As it happened, Congress approved both reorganization plans.¹⁰¹ The departments still exist to this day.

Nixon's reelection emboldened him to take further executive action.¹⁰² And while historical commentators recognize this as a shift,¹⁰³ it, too, revealed the durability of the old, collaborative model of executive administration. Even as Nixon sought to use the President's powers in new ways, he remained dependent on statutory authorizations.¹⁰⁴ He neither sought nor successfully established new, more expansive foundations for executive control over administrative action.

⁹³ See George Szamuely, *Richard Nixon and the Ruling Elite*, NAT'L INTEREST, Summer 1990, at 96–97 (“Nixon saw himself at odds not only with the Establishment, but even with Henry Kissinger.”).

⁹⁴ RICHARD P. NATHAN, *THE PLOT THAT FAILED: NIXON AND THE ADMINISTRATIVE PRESIDENCY* 8–9 (1975). White House staff referred to “the White House surrounded.” *Id.* at 82.

⁹⁵ See *id.* at 82–83.

⁹⁶ See Robert B. Reich, *Solving Social Crises by Commissions*, 3 YALE REV. L. & SOC. ACTION 254, 255 (1973).

⁹⁷ See Reorganization Plan No. 2 of 1970, 35 Fed. Reg. 7959, 7959 (May 23, 1970) (“The Bureau of the Budget in the Executive Office of the President is hereby designated as the Office of Management and Budget.”).

⁹⁸ PETER M. SHANE, *DEMOCRACY'S CHIEF EXECUTIVE: INTERPRETING THE CONSTITUTION AND DEFINING THE FUTURE OF THE PRESIDENCY* 81 (2022); see Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15623, 15623 (Oct. 6, 1970) (“There is hereby established the Environmental Protection Agency . . .”).

⁹⁹ See NATHAN, *supra* note 92, at 7–10.

¹⁰⁰ Jack Lewis, *The Birth of EPA*, 11 EPA J., Nov. 1985, at 6, 8; *Congress Accepts Two Executive Reorganization Plans*, CQ ALMANAC (1973), <https://library.cqpress.com/cqalmanac.cqal73-1227520> [<https://perma.cc/EA6N-Z8QJ>].

¹⁰¹ *Congress Accepts Two Executive Reorganization Plans*, *supra* note 100.

¹⁰² See NATHAN, *supra* note 94, at 63–65; ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 239 (1973) (“[E]xhilarated by the margin of his re-election in 1972, he saw the Presidency as the judge of last resort.”).

¹⁰³ NATHAN, *supra* note 94, at 63.

¹⁰⁴ See, e.g., *id.* at 75.

Nixon's plans sprang from political necessity. The 1972 election had put him in a difficult position. It returned a Democratic Congress,¹⁰⁵ which Nixon knew would be hostile to his substantive political goals.¹⁰⁶ But Nixon himself had won in a landslide¹⁰⁷ and claimed a mandate for implementing his policy vision.¹⁰⁸ Hoping to skirt congressional opposition, Nixon thought to use the administrative state to realize his agenda. He was no longer merely interested in improving administration as an abstract matter. He wanted to see whether he could use the control past Presidents had won to put into effect plans he was having trouble getting through Congress. In a 1975 monograph, *The Plot That Failed: Nixon and the Administrative Presidency*, Professor Richard Nathan, a political scientist and alumnus of the Nixon Administration, called Nixon's second-term strategy "the Administrative Presidency."¹⁰⁹ To Nathan (and to Nixon), an "administrative presidency" was a second-best outcome. It was the option to fall back on when your opponents had Congress and your actual policy agenda was unlikely to garner their support.

The cornerstone of Nixon's second-term approach relied on the aggressive use of powers already granted by Congress. Nathan identified four prongs to Nixon's strategy: (1) appointing loyalists, (2) drawing on little-used powers Congress had already delegated to impound appropriations, (3) using already-enacted statutes to rework reporting lines to give loyalists more control over agency actions, and (4) substituting regulation for adjudication by promulgating new notice-and-comment rules that constrained how front-line government officials enforced discretionary standards.¹¹⁰ None of these efforts relied on Article II or violated existing statutory provisions. They were creative attempts to do more with what the President already had.

The closest the Nixon White House came to executive lawmaking was in its efforts to temper environmental regulations burdening

¹⁰⁵ See Tom Wicker, *After the Landslide*, N.Y. TIMES, Nov. 9, 1972, at 47 (noting "Mr. Nixon failed to bring in a Republican Congress on his coattails").

¹⁰⁶ Cf. CONRAD BLACK, RICHARD M. NIXON: A LIFE IN FULL 370 (2007) (retelling Nixon's belief that a "Democratic congressional sweep" in an earlier election "would produce a cataract of horrors from left-liberals and the southern segregationists").

¹⁰⁷ Wicker, *supra* note 105, at 47.

¹⁰⁸ See SCHLESINGER, *supra* note 102, at 255 ("Certainly after his re-election [Nixon] began what can be profitably seen as an attempt to establish a quasi-Gaullist regime in the United States. Instead of conciliating the defeated minority, he was cold and unforgiving. Instead of placating Congress, he confronted it with executive faits accomplis taken without explanation.").

¹⁰⁹ NATHAN, *supra* note 94, at 73. Nathan later published a book of a similar name, adapted from his earlier book on Nixon. NATHAN, *supra* note 92, at vii.

¹¹⁰ See NATHAN, *supra* note 94, at 73-75. This began a major shift in U.S. administration that accelerated over the next fifty years. Nixon's goal was explicitly deregulatory: he sought to check the perceived proregulatory tendencies of career public servants by writing bright-line rules. See, e.g., Menand, *supra* note 56, at 1563-64 (examining the rise of rulemaking in banking).

business. Lacking support in Congress,¹¹¹ Nixon could not request new legislation to grant the White House more direct control over the rule-making process.¹¹² Instead, he planned to undercut environmental law by forcing the EPA to take account of the perspectives of other parts of the administrative state, notably the business-friendly Commerce Department.¹¹³

To do this, Nixon's administration relied on the newly created OMB. Nixon and his OMB Director pressed the EPA to engage with other agencies before promulgating rules that would have a "significant impact on . . . other agencies" or "[i]mpose significant costs" on the economy.¹¹⁴ They launched an initiative called a "Quality of Life" review¹¹⁵ to solicit feedback from non-EPA agencies on proposed regulations and guidelines related to environmental quality, consumer protection, and occupational health and safety.¹¹⁶ Under the initiative, all agencies were to submit proposed rules to OMB at least thirty days prior to their scheduled announcement, along with a summary description indicating, among other things, a comparison of the expected benefits and the costs associated with the alternatives considered.¹¹⁷ OMB would then distribute the draft rules to other departments and agencies, collect comments, and provide them to the agency proposing the regulation "for its information."¹¹⁸ As Professor Robert Percival later put it, the idea was not to "dictate the substance of agency decisions," but to "change the decisionmaking process" in ways that favored business and tended to result in weaker environmental regulations.¹¹⁹

Although President Gerald Ford abandoned Nixon's "Administrative Presidency" strategy, he did not reverse this use of OMB.¹²⁰ In fact,

¹¹¹ See Wicker, *supra* note 105, at 47.

¹¹² See SHANE, *supra* note 98, at 80–81.

¹¹³ Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 LAW & CONTEMP. PROBS. 127, 132–33 (1991) ("Alarmed by the potential cost of [regulations implementing the Clean Air Act], the Commerce Department and [OMB] sought a mechanism to restrain EPA's regulatory impulses.").

¹¹⁴ Memorandum from George P. Shultz, Dir., Off. of Mgmt. & Budget, to the Heads of Departments and Agencies (Oct. 5, 1971), <https://theoce.com/ombpapers/QualityofLife1.htm> [<https://perma.cc/7AXF-D4J4>]. The language of "major legislative proposals, regulations, and rules" began with President Ford's 1974 Executive Order 11,821. See 3 C.F.R. 926 (1974).

¹¹⁵ See SHANE, *supra* note 98, at 81; Robert V. Percival, *Who's In Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2497 (2011).

¹¹⁶ Memorandum from George P. Shultz, Dir., Off. of Mgmt. & Budget, to the Heads of Departments and Agencies, *supra* note 114.

¹¹⁷ See *id.*

¹¹⁸ *Id.* In July 1972, OMB promulgated Circular A-19, which required agencies to submit advance copies of any testimony or reports to OMB prior to sending them to Congress. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, CIRCULAR NO. A-19: LEGISLATIVE COORDINATION AND CLEARANCE (1979), https://obamawhitehouse.archives.gov/omb/circulars_a019 [<https://perma.cc/PEW2-6P27>] (Circular A-19 was revised on September 20, 1979).

¹¹⁹ Percival, *supra* note 113, at 134.

¹²⁰ See *id.* at 138–39.

he extended its reach.¹²¹ Ford continued to employ OMB to exert deregulatory pressure in the health, safety, and environmental spheres by shaping how decisions were made.¹²² And with inflation reaching all-time highs,¹²³ Ford expanded the Quality of Life program to include “[i]nflation [i]mpact [s]tatements” from agencies considering “[m]ajor proposals.”¹²⁴

Ford’s Executive Order 11,821, memorializing the rule, was, like Nixon’s orders, a facially neutral measure with a deregulatory impact. It did not formally change the rulemaking process.¹²⁵ But, by inserting analysis of the inflationary effects of a new health or safety rule into the administrative record, it tended to raise the burden for taking administrative action.¹²⁶ As the EPA’s Administrator explained, it “made our job more difficult.”¹²⁷

Compared to modern forms of presidential administration, Nixon and Ford’s actions may seem bland. But they proved controversial. It was not lost on Congress, the press, or agency administrators that a new bureaucracy in the Executive Office of the President now weighed in on the shape and scope of administrative regulations. The person at OMB charged with overseeing the EPA, Jim Tozzi, was described by environmentalists as “the single most influential person in the U.S. in shaping environmental policy nationally.”¹²⁸ And unlike the EPA Administrator, who had to be confirmed by the Senate to administer the environmental laws,¹²⁹ Tozzi was at that time not confirmed to any post and served at the pleasure of the President.¹³⁰ Congressional leaders were not pleased.

C. President Carter’s Turn

Given the partisan ambitions of the new OMB “counter-bureaucracy,”¹³¹ many expected it would die with a Democratic president.¹³² It came as a surprise, then, when Carter, President Ford’s successor, a

¹²¹ See *id.*

¹²² See *id.* at 139.

¹²³ See Thomas E. Mullaney, *The Economic Impact of the Ford Years*, N.Y. TIMES, July 25, 1976, at 77 (noting the Ford Administration was “confronted with excessively high unemployment, inflation and interest rates”).

¹²⁴ Exec. Order No. 11,821, 3 C.F.R. 926 (1974).

¹²⁵ See *id.*

¹²⁶ Susan E. Dudley, *The Office of Information and Regulatory Affairs and the Durability of Regulatory Oversight in the United States*, 16 REGUL. & GOVERNANCE 243, 245 (2022).

¹²⁷ Percival, *supra* note 113, at 141 (quoting *Hearing on the Status of the Programs and Pol’ys of the EPA Before the Subcomm. on Env’t Pollution of the S. Comm. on Pub. Works*, 95th Cong. 45 (1977) (statement of Russell E. Train, EPA Adm’r)).

¹²⁸ *Profile — OMB’s Jim Joseph Tozzi*, ENV’T F., May 1982, at 11.

¹²⁹ *EPA’s Administrators*, EPA (Apr. 23, 2024), <https://www.epa.gov/history/epas-administrators> [<https://perma.cc/7L7D-B698>].

¹³⁰ See *Profile — OMB’s Jim Joseph Tozzi*, *supra* note 128.

¹³¹ See Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 13 (1995); Kagan, *supra* note 14, at 2276.

¹³² See Percival, *supra* note 113, at 142.

Democrat, continued Nixon and Ford's regulatory initiatives.¹³³ Carter promoted Tozzi from his perch supervising the EPA to Assistant Director of OMB.¹³⁴ And he added his own refinements to Nixon and Ford's rulemaking orders, expanding "Quality of Life"-style review more broadly throughout the agency rulemaking process. Carter's Executive Order 12,044 (E.O. 12,044) required "each Executive Agency," not just those related to health, safety, and the environment, to submit a "regulatory analysis" to OMB of regulations with an annual economic impact of greater than \$100 million.¹³⁵

Yet even as Carter continued Nixon and Ford's innovations, he ratified their understanding of the President's limited administrative powers. Carter's order, like Nixon and Ford's before him, pushed the envelope on presidential involvement in agency rulemaking and took advantage of already delegated power and congressionally chartered institutions in ways Congress did not intend.¹³⁶ But ultimately, Carter, like Nixon and Ford, limited his efforts to information forcing. Carter's order did not attempt to alter the rulemaking process any more than Nixon's or Ford's did.¹³⁷ It did not include enforcement measures.¹³⁸ It did not purport to change the criteria by which agencies might issue rules.¹³⁹ And while the facial neutrality of Carter's order, like Nixon's and Ford's before him, belied its deregulatory aim, it exerted real (if indirect) pressure. As a formal constitutional matter, all three Presidents' orders arguably fit within the Opinions Clause, authorizing the President to request the written opinions of department heads.¹⁴⁰ Carter's actions had hints of the sorts of changes to administrative procedure that reformers had assumed would require an act of Congress.¹⁴¹ But the traditional understanding still held.

We see the durability of administration under law most clearly where Carter sought to take administrative reform furthest. As his term wound down, and neoliberal reverence for markets strengthened, Carter

¹³³ *Id.*

¹³⁴ Dan Davidson, *Jim Tozzi: Nixon's "Nerd" Turns Regulations Watchdog*, FED. TIMES (Nov. 11, 2002), https://www.thecre.com/pdf/20021111_fedtimes-tozzi.pdf [<https://perma.cc/53D2-JWQB>].

¹³⁵ Exec. Order No. 12,044, 3 C.F.R. 152, 152, 154 (1978).

¹³⁶ See *id.*; Jim Tozzi, *OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding*, 63 ADMIN. L. REV. 37, 52, 57 (2011) (noting that E.O. 12,044 was the "first executive order to identify OMB in a regulatory oversight role," *id.* at 52).

¹³⁷ See Exec. Order No. 12,044, 3 C.F.R. at 152; *Role of OMB in Regulation: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Com.*, 97th Cong. 46 (1981) (statement of James C. Miller III, Administrator, OIRA) [hereinafter *Role of OMB in Regulation*].

¹³⁸ Exec. Order No. 12,044, 3 C.F.R. at 152.

¹³⁹ *Id.*

¹⁴⁰ See U.S. CONST. art. II, § 2, cl. 1; Kagan, *supra* note 14, at 2324–25.

¹⁴¹ See, e.g., Rosenberg, *supra* note 30, at 216–17; Christopher C. DeMuth, *Constraining Regulatory Costs — Part I: The White House Review Programs*, REGUL., Jan.–Feb. 1980, at 13, 15–18.

became more convinced of the need for broad-scale deregulation.¹⁴² Counseled by the growing OMB bureaucracy, he supported a legislative push that culminated in the Paperwork Reduction Act of 1980,¹⁴³ which proponents claimed would streamline and simplify administrative management, but in practice also created powerful new tools for executive oversight of administrative action.¹⁴⁴ Most importantly, the Act established within OMB a new nerve center for federal administration: the Office of Information and Regulatory Affairs (OIRA).¹⁴⁵ And it required all agencies to assess the costs of regulations imposing reporting or paperwork requirements on the public.¹⁴⁶

The Act aroused significant opposition. It passed only after Carter lost reelection.¹⁴⁷ According to Tozzi, Carter's entire Cabinet recommended he veto the bill.¹⁴⁸ Amazingly, he signed it anyway.¹⁴⁹

In hindsight, more striking than the content of the Act is the simple fact that it took the form of a statute. This was a statutory expansion of the regulatory review process that Carter, Ford, and Nixon had pioneered. Members of Congress thought that to take these reforms further and to institutionalize them required a formal, congressionally enacted law.¹⁵⁰ That an act of Congress was believed to be necessary highlights the distinctive character of pre-Reagan executive reform efforts. As the administrative state grew, Presidents sought greater control over its actions. But they recognized limits on their authority. Even Nixon hewed more or less to this longstanding traditional framework of administration under law.¹⁵¹ Before 1980, to get administrative powers beyond

¹⁴² See DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 22 (2005); Gary Gerstle, *The Rise and Fall(?) of America's Neoliberal Order*, 28 TRANSACTIONS ROYAL HIST. SOC'Y 241, 252 (2018).

¹⁴³ Pub. L. No. 96-511, 94 Stat. 2812 (codified as amended at 44 U.S.C. §§ 3501–3521).

¹⁴⁴ In testimony before Congress, Tozzi and an OMB Associate Director for Management and Regulation described as "statutory loopholes" the fact that eighty-one percent of federal paperwork requirements were then promulgated by agencies without OMB review. *Paperwork Reduction Act of 1980: Hearings Before a Subcomm. of the H. Comm. on Gov't Operations*, 96th Cong. 89 (1980) (statement of Wayne G. Granquist, Assoc. Dir. for Mgmt. & Regul. Pol'y, Off. of Mgmt. & Budget; accompanied by Jim. J. Tozzi, Assistant Dir. for Regul. & Info. Pol'y, Off. of Mgmt. & Budget). Accordingly, they asked for Congress to "clearly establish a single organization, OMB, to provide overall coordination and direction in the development of Federal information policies and procedures." *Id.* at 93.

¹⁴⁵ Paperwork Reduction Act of 1980, 94 Stat. at 2814 (codified as amended at 44 U.S.C. § 3503(a)).

¹⁴⁶ *Id.* at 2819 (codified as amended at 44 U.S.C. § 3506) ("Each agency shall . . . develop procedures for assessing the paperwork and reporting burden of proposed legislation affecting such agency . . .").

¹⁴⁷ Davidson, *supra* note 134.

¹⁴⁸ *Id.* ("His entire Cabinet was then recommending a veto, but he signed it.")

¹⁴⁹ See *id.*

¹⁵⁰ See Abe Ribicoff, *For Effectiveness and Efficiency: S. 262*, REGUL., May–June 1979, at 17, 17; Clarence J. Brown, *A More Demanding Standard: The Brown-Bentsen Bills*, REGUL., May–June 1979, at 20, 20–21; Cf. DeMuth, *supra* note 141, at 24–26.

¹⁵¹ See *supra* section I.B, pp. 2146–50.

mere information forcing, Presidents needed, and so sought, congressional buy-in.

II. PRESIDENT REAGAN'S GAMBIT

Reagan's election changed the development of the President's administrative capacity. Almost immediately after he took office, he vaulted President Nixon's presidentialist project further, bypassing Congress and upending the tradition of administration under law. It was a shock, and it occasioned major resistance. This Part reconstructs the forgotten battle over executive lawmaking that followed. It begins by exploring how Reagan's version of presidential administration departed from administration under law. Section A examines how Reagan's effort to deregulate on the basis of a new theory of executive power sidelined Congress, breaking with prior practice. Section B turns to Congress's response, showing how the legislature reacted to Reagan's bold claims. Section C analyzes the academic backlash to incipient presidential administration.

A. "Hot Wiring" the Administrative State: E.O. 12,291 and OIRA

President Reagan's inauguration in January 1981 was a watershed. Earlier efforts to centralize control over the administrative process in the White House focused on drafting and passing legislation.¹⁵² Reagan, by contrast, engaged in "self-help."¹⁵³ Building off legislative successes achieved by his predecessors, including the Paperwork Reduction Act and Reorganization Plan No. 2, which created OMB, Reagan made "law" on his own.

His goal, like President Nixon's, was to pursue a deregulatory agenda by imposing his will on administrative agencies. Even more than Nixon, Reagan had been elected on a promise to lessen the regulatory burden of government on American business.¹⁵⁴ He was bothered by the expansion of the administrative state, particularly the developments of the 1970s, which, he lamented, had led to a quadrupling in agency expenditures and a tripling in the size of the *Federal Register*.¹⁵⁵ He wanted to "roll [this] back."¹⁵⁶

¹⁵² See, e.g., *supra* notes 72–77 and accompanying text.

¹⁵³ See David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 4 (2014).

¹⁵⁴ See, e.g., Ronald Reagan, Election Eve Address: A Vision for America (Nov. 3, 1980), <https://www.presidency.ucsb.edu/node/285591> [<https://perma.cc/F556-Z9Q3>]; ROBERT M. COLLINS, TRANSFORMING AMERICA: POLITICS AND CULTURE DURING THE REAGAN YEARS 81 (2007); Michael R. Adamson, *Reagan and the Economy: Business and Labor, Deregulation and Regulation*, in A COMPANION TO RONALD REAGAN 149, 151 (Andrew L. Johns ed., 2015).

¹⁵⁵ President Ronald Reagan, Address Before a Joint Session of the Congress on the Program for Economic Recovery (Feb. 18, 1981), <https://www.presidency.ucsb.edu/node/246567> [<https://perma.cc/Y9CR-A4FR>].

¹⁵⁶ Percival, *supra* note 113, at 147.

How to tackle the “virtual explosion” of federal administration was not obvious, though.¹⁵⁷ If the growth in regulation had been merely the result of liberal political ideology, the Republican landslide that brought him to power might have been enough to reverse it on its own. But regulation had expanded under Democratic and Republican Presidents alike, despite the efforts of Presidents Nixon, Ford, and Carter to encourage agencies to pare back.¹⁵⁸ To Reagan and his advisors, the issue was deeper than partisan politics.

The problem was structural. According to an influential line of thinking, elaborated by scholars over the course of the previous decade and embraced by the new administration, the underlying flaw lay in institutional design.¹⁵⁹ Agencies, left to their own devices, remained narrowly concentrated on their own specific goals.¹⁶⁰ They did not worry about the aggregate effect of their programs on the American economy, or whether, considered as a whole and in light of all other existing regulations, the new rules they proposed or enforcement actions they undertook were efficient and genuinely in the public interest.¹⁶¹

This should have been expected. It was never part of the job of a given agency to think about regulation writ large. Individual agencies were chartered by Congress to solve specific problems. And to do that, they had to concentrate on the congressional oversight committees to which they reported and the small group of special interests that were directly affected by their decisions.¹⁶² The rest of the government and the economy as a whole rarely needed to enter the picture. Reagan’s advisors thought that agencies constructed to narrowly focus on a limited policy bailiwick necessarily overregulated in their policy space compared to what might be socially optimal.¹⁶³

¹⁵⁷ Reagan, *supra* note 155.

¹⁵⁸ See Paul L. Joskow & Roger G. Noll, *Deregulation and Regulatory Reform During the 1980s*, in *AMERICAN ECONOMIC POLICY IN THE 1980S* 367, 368 (Martin Feldstein ed., 1994).

¹⁵⁹ See Christopher C. DeMuth & Douglas H. Ginsburg, Commentary, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1080–81 (1986); Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1263–64 (2006); see also Cass R. Sunstein, *Cost-Benefit Analysis and the Separation of Powers*, 23 ARIZ. L. REV. 1267, 1269–70 (1981) (canvassing then-contemporary theories of regulatory failure); Michael Fix & George C. Eads, *The Prospects for Regulatory Reform: The Legacy of Reagan’s First Term*, 2 YALE J. ON REGUL. 293, 294–97 (1985) (same).

¹⁶⁰ See Sunstein, *supra* note 159, at 1269.

¹⁶¹ See DeMuth & Ginsburg, *supra* note 159, at 1081.

¹⁶² This three-sided relationship between Congress, agencies, and regulated interests was so difficult to disrupt it became known as the “iron triangle.” For a short but compelling review of the influence of this line of thought around the time of Reagan’s election, see, for example, Arthur S. Miller, *Myth and Reality in American Constitutionalism*, 63 TEX. L. REV. 181, 190–91 (1984) (reviewing DON PRICE, *AMERICA’S UNWRITTEN CONSTITUTION: SCIENCE, RELIGION & POLITICAL RESPONSIBILITY* (1983) and HERBERT MCCLOSKEY & ALIDA BRILL, *DIMENSIONS OF TOLERANCE: WHAT AMERICANS BELIEVE ABOUT CIVIL LIBERTIES* (1983)).

¹⁶³ See Joskow & Noll, *supra* note 158, at 368; Fix & Eads, *supra* note 159, at 297–98.

Since the problem was structural, the solution would have to be structural too. Design would counter design. If agencies produced too much regulation because they were dispersed across policy areas and concentrated narrowly on their own specific problems, what was needed was a unifying, integrating force with a broad view of the whole, to provide a counterbalance.¹⁶⁴ The state needed a central command deck.

Nixon's OMB was the natural choice, but it would need to be retooled. Before Reagan's election, it was still mostly an information-forcing office. If it was to effectively coordinate regulatory policy, it would need the power to review and revise regulations before they took effect. This was substantially more authority than the Nixon-Ford-Carter E.O.s had given it, or than even OMB bureaucrats had won in the final days of the Carter presidency through the Paperwork Reduction Act. Generating opinions was one thing; exercising control was something else entirely. But it seemed unlikely that Congress would be willing to give the President this sort of power over the administrative agencies it had established and that its various special committees had long overseen.

Reagan's team decided to avoid the issue by taking matters into their own hands. On February 17, 1981, shortly after taking office, Reagan issued E.O. 12,291, purporting to grant OMB the necessary powers by executive fiat.¹⁶⁵

The order substantially reworked the rulemaking process. "[T]o reduce the burdens of existing and future regulations, increase agency accountability for regulatory actions, provide for presidential oversight of the regulatory process, [and] minimize duplication and conflict,"¹⁶⁶ E.O. 12,291 required covered agencies¹⁶⁷ to prepare and publish "[r]egulatory [i]mpact [a]nalyzes" reviewing the costs and benefits of their regulations and assessing alternative approaches that could substantially achieve the same regulatory goals at lower cost.¹⁶⁸ The order also required that agencies, prior to promulgating "major" rules,¹⁶⁹ prepare and publish

¹⁶⁴ See *Deregulation HQ: An Interview on the New Executive Order with Murray L. Weidenbaum and James C. Miller III*, REGUL., Mar.-Apr. 1981, at 14, 22; see also Blumstein, *supra* note 12, at 855-56.

¹⁶⁵ See generally Exec. Order No. 12,291, 3 C.F.R. 127 (1982). Unusually, the order was drafted outside of the regular executive order process and kept from agencies until it was already signed. See SHANE, *supra* note 98, at 52-53, 83. In this way, Reagan's claims to greater presidential power began with an act of exceptional presidential unilateralism. See *id.* at 83.

¹⁶⁶ Exec. Order No. 12,291, 3 C.F.R. at 127. Reagan made no mention of more effectively carrying out the statutory purposes for which the various agencies were established by Congress. See *id.* at 127-34.

¹⁶⁷ The E.O. covered "any authority of the United States that is an 'agency' under 44 U.S.C. 3502(1), excluding those agencies specified in 44 U.S.C. 3502(10)." *Id.* § 1(d), 3 C.F.R. at 128.

¹⁶⁸ *Id.* § 3, 3 C.F.R. at 128-30.

¹⁶⁹ The E.O. defined major rules to include, inter alia, any rule likely to result in an annual effect on the economy of \$100 million or more. *Id.* § 1(b)(1), 3 C.F.R. at 127. The E.O. also authorized the OMB Director to designate any proposed or existing rule as a "major rule." *Id.* § 6(a)(1), 3 C.F.R. at 131.

memoranda of law explaining how their proposed regulations were “clearly” within their authority and consistent with congressional intent.¹⁷⁰

Although bolder and more creative than Presidents Nixon, Ford, and Carter’s orders, none of these requirements were different in kind. E.O. 12,291’s real bite lay in the enhanced role it carved out for the OMB Director and a newly created, nonstatutory “Presidential Task Force on Regulatory Relief.”¹⁷¹ Under Reagan’s scheme, it would no longer be enough for agencies to prepare additional reports and solicit other agency views before promulgating rules. Agencies would also have to wait for OMB to review their rules and reports before proceeding with the rulemaking process and incorporate OMB’s views into the administrative record.¹⁷² Functionally, this was something close to giving OMB veto power.¹⁷³

To further reduce regulatory burdens, the order also empowered OMB and the Task Force to intervene with respect to existing rules. It authorized the Director, subject to the direction of the Task Force, to require agencies to reconsider major rules that had already been issued but that were not yet effective;¹⁷⁴ to “[i]dentify duplicative, overlapping[,] and conflicting rules”;¹⁷⁵ to “require appropriate interagency consultation to minimize or eliminate such duplication, overlap, or conflict;”¹⁷⁶ and to require agencies to “obtain and evaluate” specific data.¹⁷⁷ The order also required agencies to file twice-yearly agendas of proposed regulations and empowered the Director, subject to the direction of the Task Force, to require agencies to add more information about their plans and publish the agendas “in any form.”¹⁷⁸

These changes represented a revolution in rulemaking. E.O. 12,291 interposed a new set of officials in the White House, most unconfirmed, to control rulemaking across the government. It made OMB a super-agency. Under E.O. 12,291, the EPA Administrator would no longer

¹⁷⁰ *Id.* § 4(a), 3 C.F.R. at 130. In a bit of “[l]aw and macroeconomics,” see YAIR LISTOKIN, LAW AND MACROECONOMICS: LEGAL REMEDIES TO RECESSIONS 6 (2019), the E.O. also required agencies to take into account “the condition of the national economy” when setting regulatory priorities, Exec. Order No. 12,291 § 2(e), 3 C.F.R. at 128.

¹⁷¹ See Exec. Order No. 12,291, 3 C.F.R. at 127–34. This Task Force was composed of officials, not all of whom were Senate confirmed, selected by the President and chaired by the Vice President. C. Boyden Gray served as counsel to the Task Force. *Role of OMB in Regulation*, *supra* note 137, at 42.

¹⁷² Exec. Order No. 12,291 § 3(f), 3 C.F.R. at 129–30.

¹⁷³ In 1986, “the OMB director could cite only six instances in which agencies had issued rules over OMB’s objections”: four pursuant to judicial order and two after the agency successfully appealed to the White House to override OMB’s decision. Kagan, *supra* note 14, at 2279.

¹⁷⁴ Exec. Order No. 12,291 § 7(c), 3 C.F.R. at 132.

¹⁷⁵ *Id.* § 6(a)(5), 3 C.F.R. at 131.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* § 6(a)(3), 3 C.F.R. at 131.

¹⁷⁸ *Id.* § 5, 3 C.F.R. at 130–31.

have the final word on what rules to make under statutes like the Clean Water Act. On the most important questions, mid-level White House bureaucrats like Jim Tozzi would play a potentially decisive role.

Remarkably, Reagan did all this on the basis of what was then seen as a highly dubious legal argument.¹⁷⁹ No law gave Reagan the authority to authorize the OMB Director — subject to the direction of a Task Force Reagan himself created out of thin air — to “require” agencies to reconsider their rules or prevent agencies from publishing new rules.¹⁸⁰ Reagan functionally added 3,000 words to the APA.

Seen from this perspective, the core innovation of E.O. 12,291 is its novel legal foundation. According to the Office of Legal Counsel (OLC), Reagan could lawfully promulgate E.O. 12,291 because it was “generally within the President’s constitutional authority” and did not “displace functions vested by law in particular agencies.”¹⁸¹ To ground its claim, the OLC leaned on a stretched reading of a single clause of Article II, namely the Take Care Clause.¹⁸² Famously, the clause requires the President to “take Care that the Laws be faithfully executed.”¹⁸³ On its face, it grants the President no powers, but simply imposes a duty.¹⁸⁴ It requires the President to execute the law. The OLC turned it into a grant of new authority by reviving then-discredited dicta from 1926 written by Chief Justice William Taft in *Myers v. United*

¹⁷⁹ See, e.g., Morton Rosenberg, *Presidential Control of Agency Rulemaking: An Analysis of Constitutional Issues that May Be Raised by Executive Order 12,291*, 23 ARIZ. L. REV. 1199, 1200 (1981); Erik D. Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT. RES. L. 1, 12 (1984).

¹⁸⁰ See Rosenberg, *supra* note 179, at 1199–200.

¹⁸¹ Proposed Exec. Ord. Entitled “Fed. Regul.,” 5 Op. O.L.C. 59, 59 (1981) [hereinafter OLC Memo].

¹⁸² See *id.* at 60. The OLC’s argument appears to come wholesale from a law review article written two years earlier by then-Professor Harold H. Bruff, who by the time of the memo was an OLC lawyer. See Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 462 (1979). Bruff argued that the “underlying legal authority for presidential involvement in regulation may be found in Article II of the Constitution, which charges the President to ‘take Care that the Laws be faithfully executed.’” *Id.* (quoting U.S. CONST. art. II, § 3). According to Bruff, the President has the “unique responsibility to superintend the execution of many statutes at once.” *Id.* The OLC Memo mimics Bruff almost word for word: “The President’s authority to issue the proposed executive order derives from his constitutional power to ‘take Care that the Laws be faithfully executed.’” OLC Memo, *supra* note 181, at 60. According to the OLC, the President’s “supervisory authority . . . is based on the distinctive constitutional role of the President. The ‘take care’ clause charges the President with the function of coordinating the execution of many statutes simultaneously.” *Id.* The President “is uniquely situated to design and execute a uniform method for undertaking regulatory initiatives that responds to the will of the public as a whole.” *Id.* at 60–61.

¹⁸³ U.S. CONST. art. II, § 3.

¹⁸⁴ See Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2113 (2019).

States,¹⁸⁵ a case about whether the President could fire a postmaster without the advice and consent of the Senate, as required by statute.¹⁸⁶

Myers on its own was a weak foundation for the OLC's claim.¹⁸⁷ After all, *Myers* was not a rulemaking case and its dicta about Article II had been cabined by a unanimous Court nine years later in *Humphrey's Executor*.¹⁸⁸ But it was the best the OLC had. After invoking it, the President's lawyers quickly slipped into prudential arguments about the need for executive coordination¹⁸⁹ and the distinctive status of the President among federal officials.¹⁹⁰

The final product was awfully thin, and it skirted several important questions. For example, the memo seemed to make the Opinions Clause¹⁹¹ mere surplusage, as it would be unnecessary for the Constitution to give the President the power to request opinions of department heads if the President had inherent authority to subject agency action to an extrastatutory review process. Similarly, the memo did not explain why Carter (and all the many presidents that had preceded him) had felt the need to go to Congress for changes to agency reporting and paperwork requirements, rather than promulgating them by executive order. Most troublingly, the OLC opinion paid little attention to the purpose of Senate confirmation of principal officers, since its interpretation of Article II permitted the President to authorize unconfirmed OMB staff to limit principal officers' ability to carry out their duties.

Aware that its interpretation of the Take Care Clause was bold, the OLC conceded that where Congress had legislated, the President was constrained¹⁹² and that there were limits to how far the President could

¹⁸⁵ OLC Memo, *supra* note 181, at 60 (quoting *Myers v. United States*, 272 U.S. 52, 135 (1926)). The OLC's arguments, which it drew from Chief Justice Taft's dicta, have a long lineage as a fringe interpretation of Article II. The two most significant precursors were Attorney General John J. Crittenden's legal opinion authorizing President Fillmore's decision to (unlawfully) remove Aaron Goodrich, a territorial judge confirmed by the Senate to a four-year term, *see* Exec. Auth. to Remove the Chief Just. of Minn., 5 Op. Att'ys Gen. 288, 288–91 (1851), and Attorney General Roger B. Taney's opinion that President Andrew Jackson could have lawfully directed the federal attorney in New York to discontinue the prosecution of an action to condemn stolen jewels, *The Jewels of the Princess of Orange*, 2 Op. Att'ys Gen. 482, 486–87 (1831). *See generally* Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1 (2021) (examining the history of for-cause removal provisions).

¹⁸⁶ *Myers*, 272 U.S. at 158.

¹⁸⁷ *See* Katz & Rosenblum, *supra* note 15, at 2159.

¹⁸⁸ *Humphrey's Ex'r v. United States*, 295 U.S. 602, 626 (1935).

¹⁸⁹ OLC Memo, *supra* note 181, at 61 ("If no such guidance were permitted, confusion and inconsistency could result as agencies interpreted open-ended statutes in differing ways.")

¹⁹⁰ *Id.* at 60.

¹⁹¹ U.S. CONST. art. II, § 2, cl. 1 (authorizing the President to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices").

¹⁹² OLC Memo, *supra* note 181, at 61 ("[I]t is clear that the President's exercise of supervisory powers must conform to legislation enacted by Congress.")

go in superintending agency action.¹⁹³ For the OLC in 1981, presidential administration was a new default rule. It could not overcome contrary congressional enactments.

Of course, in making these concessions, the OLC flipped what had been the presumption of administration under law. As Justice Fortas had noted, in the American system, Congress designs the government, and the President carries out Congress's design.¹⁹⁴ Reagan's OLC stopped short of cutting Congress out of the process completely. But in one fell swoop, E.O. 12,291 created a new "tell me I can't" theory of the separation of powers. In so doing, it inaugurated the era of "presidential administration."¹⁹⁵

B. Congress Has a Cow: "A Nation of Laws and Not of Men"

The OLC's caveats were not enough to keep President Reagan's order from controversy. From its inception, E.O. 12,291 sparked fierce resistance. Congressional Democrats responded aggressively to what they viewed as an unconstitutional power grab and bid to neuter regulatory statutes. In hearings and investigations, Democrats countered Reagan's lawyers' broad claims of presidential authority.

The key actor was John D. Dingell, then Chairman of the House Subcommittee on Oversight and Investigations. He was unimpressed by the fig leaf the OLC had draped over E.O. 12,291.¹⁹⁶ Seeing the order as "of paramount historical importance," Dingell asked the American Law Division of the Congressional Research Service (CRS) to "prepare a detailed and exhaustive study and analysis of the constitutional issues."¹⁹⁷ The Division submitted its report, entitled *Presidential Control of Agency Rulemaking*, on June 15, 1981.¹⁹⁸

Three days later, the House called James C. Miller III, the OIRA Administrator, and C. Boyden Gray, counsel to the Presidential Task Force on Regulatory Relief, to testify.¹⁹⁹ According to Dingell, the hearings were necessary because the President had "exceeded his authority

¹⁹³ *Id.* (citing *Myers v. United States*, 272 U.S. 52, 135 (1926)) ("[W]holesale displacement might be held inconsistent with the statute vesting authority in the relevant official.").

¹⁹⁴ Fortas, *supra* note 61, at 997.

¹⁹⁵ Rosenblum, *supra* note 66, at 1.

¹⁹⁶ STAFF OF H. COMM. ON ENERGY & COM., 97TH CONG., PRESIDENTIAL CONTROL OF AGENCY RULEMAKING: AN ANALYSIS OF CONSTITUTIONAL ISSUES THAT MAY BE RAISED BY EXECUTIVE ORDER 12,291, at vi (Comm. Print 1981) [hereinafter PRESIDENTIAL CONTROL OF AGENCY RULEMAKING] ("The Justice Department memorandum . . . rel[ies] almost exclusively on the President's constitutional duty to 'take care that the laws be faithfully executed,' and the interpretation given that clause by Chief Justice Taft in *Myers v. United States* . . . on a reading of the order to the effect that none of its procedural or substantive requirements would wholly displace a discretionary function placed in a subordinate executive officer by the Congress. Quite frankly, I find the . . . memorandum to be . . . shallow.").

¹⁹⁷ *Id.* at vii.

¹⁹⁸ *Id.* at i.

¹⁹⁹ *Role of OMB in Regulation*, *supra* note 137, at i, 43.

in issuing [E.O. 12,291]" and "the order deprives interested persons of their constitutional right to due process of law."²⁰⁰ Then-Representative and future-Vice President Al Gore called it "the most significant hearing we have had this year."²⁰¹ To Dingell, at stake was nothing less than the vitality of our constitutional republic. "We are, after all," he told the witnesses in his opening remarks, "a nation of laws and not of men."²⁰² In other words, Dingell defended administration under law. The President was just a man. Only the legislature could rework the structure of government.

During the hearing, Congressman Marc L. Marks anticipated Administrator Miller and Gray's testimony by emphasizing the order's continuity with previous presidential actions. "[B]oth Presidents Ford and Carter," Marks explained, "used Executive orders in their attempts to get a handle on this problem."²⁰³ Reagan was merely "trying to build upon and to improve upon the foundations laid by the previous administration[s]."²⁰⁴ According to OMB, E.O. 12,291 did not trample on agency authority since it left discretion delegated to agency officers intact.

But the Democrats were unconvinced. The CRS analysis highlighted five problems with Reagan's order: (1) "Article II d[id] not grant a general management power to the President to control the administrative decisionmaking process"; (2) "[c]ontemporary case law ha[d] not altered the original conception of the constraints on the exercise of presidential power over administration" — administration under law; (3) there was no evidence in "Congressional practice with respect to central management . . . and administrative procedure . . . [of] ced[ing] control over informal rulemaking to the President in the manner . . . contemplated by Executive Order 12,291"; (4) the order was "a substantive amendment of the [APA] and [was] therefore an unconstitutional arrogation of legislative power by the President"; and (5) the order denied the public the ability to participate on an even footing in the rule-making process violating the Fifth Amendment's guarantee of due process.²⁰⁵

In their statements during the hearing, some Members embraced all five arguments. Reagan's executive lawmaking was not how "real

²⁰⁰ *Id.* at 1.

²⁰¹ *Id.* at 4.

²⁰² *Id.* at 2.

²⁰³ *Id.* at 3.

²⁰⁴ *Id.* E.O. 12,291 was necessary because "[u]nfortunately, [Ford and Carter] were unsuccessful because they were just not aggressive enough in their approaches to tame the regulatory monster." *Id.*

²⁰⁵ PRESIDENTIAL CONTROL OF AGENCY RULEMAKING, *supra* note 196, at iii (capitalization altered).

regulatory reform” that “benefit[s] all the people” was done.²⁰⁶ “When a President of the United States acts on his own to manipulate the work of the Congress, he is circumventing the democratic process.”²⁰⁷ As Nixon had impounded appropriations, Reagan was “impound[ing] the intent of Congress” by interfering with the rulemaking process set up by the legislature.²⁰⁸

Representative Gore captured the tenor and thrust of Democrats’ worries. As he explained, “the major issue” was “[w]ho makes the decision to allocate resources in this society by regulation?”²⁰⁹ The Supreme Court decided in *Youngstown*²¹⁰ that “the executive branch has such power only when it is given to the executive branch in the Constitution or when it is explicitly given to the executive branch by the Congress.”²¹¹ Yes, Congress decided to “delegate the power to regulate to the executive agencies,” but it “did so in a fairly explicit way,” adopting “procedural safeguards, many of them contained in the [APA].”²¹² According to Gore, if the President “comes up with a new tricky device to circumvent all of those procedures, and in the process arrogates unto [himself] the power to make those decisions without reference to the safeguards attached to the original delegation of power by the Congress, then something has gone wrong.”²¹³

As far as Gore was concerned, OMB’s defense was unpersuasive. “[A] lot of these things like cost-benefit analyses,” which OMB claimed were useful for good management, Gore went on, “are usually a sham and serve merely to bring the decision back on the OMB side of the line and let them actually make the decision.”²¹⁴ Also a “sham”: the “ping-pong game of just interminably delaying regulations that [OMB and the White House] do not like or that some industry that has contacted them does not like.”²¹⁵ While there “may be a temporarily seductive appeal to [have the White House and OMB] . . . take over [the administrative] process and hot-wire it . . . in the long run, the potential for abuse is very real and we may run into very serious problems if we allow this to go unchallenged.”²¹⁶

One of those serious problems was the order’s distributive consequences. For Gore and his colleagues in 1981, the political economy of

²⁰⁶ *Role of OMB in Regulation*, *supra* note 137, at 7 (statement of Rep. Mike Synar, Member, H. Comm. on Energy & Com.).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 36 (statement of Rep. Albert Gore, Jr., Member, H. Comm. on Energy & Com.).

²¹⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

²¹¹ *Role of OMB in Regulation*, *supra* note 137, at 36 (statement of Rep. Albert Gore, Jr., Member, H. Comm. on Energy & Com.).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at 38.

²¹⁵ *Id.*

²¹⁶ *Id.* at 37–38.

E.O. 12,291 was clear. It encouraged regulated industries to circumvent the regulatory process and skewed government intervention in favor of management. As he explained, “[i]f you are going to have OMB making the final decision on a regulation,” then “an industry affected by the regulation can call up [OMB] on the telephone and bend the guy’s ear.”²¹⁷ But the workers in that industry and the consumers affected by it would have no such access. “[T]he cotton mill workers” would not even have an “opportunity to . . . present evidence to the person really making the decision.”²¹⁸ This was not simply unfair. It was also a straightforward violation of the law, since “Congress never intended to delegate its power, given to it by the Constitution, to the executive branch in such a manner.”²¹⁹

Gore’s worry was not merely hypothetical. The deregulation Task Force realized his very fears. “[I]t appears that the task force serves as a direct appeal body for any business community group or public sector group that wants to appeal.”²²⁰ Gore put into the record a document produced by the White House listing all of the contacts between the Task Force and the public since its inception and the purpose of the engagement.²²¹ It was made up entirely of large corporations and industry lobby groups.²²² “It does not look like my mom and dad are getting in there,” Congressman Mike Synar quipped.²²³

The hearing reached its climax as Congress pressed to understand the Administration’s legal basis for setting up this appeal structure.²²⁴ After some back and forth, Gore became firm: “The question is, what source of legal authority can you cite for serving as an appeal for business groups to come directly to you if they are dissatisfied with the progress or results of regulatory proceedings . . . ?”²²⁵

The witnesses fell back on Article II. According to Gray, the Constitution “vests in the President and his designees the authority to see that the laws are faithfully executed,” which provided authority

²¹⁷ *Id.* at 41.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 53 (statement of Rep. Mike Synar, Member, H. Comm. on Energy & Com.).

²²¹ *Id.* at 58–60.

²²² *Id.* at 61 (statement of Rep. Albert Gore, Jr., Member, H. Comm. on Energy & Com.) (“The list is the U.S. Chamber of Commerce, General Motors, Atlantic Richfield, Proctor & Gamble, U.S. Chamber of Commerce again, American Productivity Center, Synthetic-Organic Chemical Manufacturers, Greyhound Corp., a group of Congressman Broyhill’s businessmen constituents, Sun Oil Co., General Motors, the National Association of Manufacturers, the U.S. Chamber of Commerce again, Ford Motor Co. a couple of times, the Chemical Manufacturers Associations, and so forth.”).

²²³ *Id.* (statement of Rep. Mike Synar, Member, H. Comm. on Energy & Com.).

²²⁴ *Id.* at 53 (statements of Rep. Mike Synar, Member, H. Comm. on Energy & Com. and James C. Miller III, Administrator, OIRA).

²²⁵ *Id.* at 55 (statement of Rep. Albert Gore, Jr., Member, H. Comm. on Energy & Com.).

enough for Reagan's order.²²⁶ Gore was exasperated. Gray had invoked “[p]recisely the source of authority cited by the lawyer who argued the case for President Truman in . . . *Youngstown Steel and Tube*,” he shot back, “and that [argument] was rejected by the Supreme Court.”²²⁷

The hearing ended in unresolved division. “That is your characterization of what is going on,” Reagan’s OIRA Administrator responded to Gore.²²⁸ “We think that the appropriate characterization of what is going on is that the President is seeing to it that the laws are faithfully executed.”²²⁹

C. *The Academy Strikes Back*

Scholarly debate was equally intense and further underlined the disagreement over the Reagan Administration’s legal claims. Academics were no more persuaded than congressional Democrats that E.O. 12,291 was legal. Indeed, even presidentialists expressed serious concerns about its justifications and sought to cabin it to resolve the constitutional uncertainty.

Controversy focused on the second and third sections of the order, which set out the broad outlines of cost-benefit analysis and required agencies to conduct “[r]egulatory [i]mpact [a]nalysis” (RIAs) for every “major rule” and submit them to the Director of OMB for final approval.²³⁰ Academics worried that these sections, taken together, upended the administrative process without adequate legal foundation.

As a threshold matter, E.O. 12,291 departed from prior practice in a way that seemed to conflict with statutory law. While Presidents Ford and Carter required agencies to assess the costs of regulation, agencies were left to balance this information with their own regulatory goals.²³¹ E.O. 12,291, by contrast, “st[ood] alone in commanding that cost-benefit principles, rather than an agency’s perception of its statutory mission, should guide administrative policy-making.”²³² This was especially pernicious when statutes were silent about cost or listed it as only one among several factors an agency had to consider when developing rules.²³³ The E.O., as one observer put it, made cost “first among equals” and the “determinative factor” when implementing laws with other goals.²³⁴

²²⁶ *Id.* (statement of C. Boyden Gray, Counsel, Presidential Task Force on Regulatory Relief).

²²⁷ *Id.* (statement of Rep. Albert Gore, Jr., Member, H. Comm. on Energy & Com.).

²²⁸ *Id.* at 56 (statement of James C. Miller III, Administrator, OIRA).

²²⁹ *Id.*

²³⁰ Exec. Order No. 12,291 §§ 2–3, 3 C.F.R. 127, 128–30 (1982).

²³¹ Rosenberg, *supra* note 30, at 217–18.

²³² *Id.* at 218.

²³³ Peter Raven-Hansen, *Making Agencies Follow Orders: Judicial Review of Agency Violations of Executive Order 12,291*, 1983 DUKE L.J. 285, 293–94.

²³⁴ *Id.* at 294.

The order also rerouted final authority away from agencies to the President, again potentially in tension with the underlying statutes. Although section 3(f)(3) provided that “[n]othing in this subsection shall be construed as displacing the agencies’ responsibilities delegated by law,”²³⁵ contemporaries saw how the order transformed the relationship between agencies and the White House. Regulation was now centrally coordinated by an agency, OMB, directly answerable to the President.²³⁶ Moreover, critics maintained, E.O. 12,291’s formality was superficial. Because the order left the details of cost-benefit analysis to be determined by OMB, the Director enjoyed wide discretion over how RIAs would be constructed.²³⁷

As a result, even those aspects of the order that seemed specific — for instance, the description of one of the definitions of a major rule as a regulation with an “annual effect on the economy of \$100 million or more”²³⁸ — were subject to presidential, or at least OMB, construction. An OMB “authorized . . . to prepare standards for the identification of major rules”²³⁹ was an OMB that could decide which rules counted as major. This authority reached future rules and past ones alike. Under the new regime, a Director committed to rolling back regulation could “designate any existing rule or related set of rules as major” and subject them “to cost-benefit review and analysis on a schedule set by him.”²⁴⁰

Just as troubling was OMB’s newly established control over the timing of rule development. Agencies now had to submit RIAs well before the publication of a major rule.²⁴¹ In some cases, an agency was on the hook for two RIAs.²⁴² Moreover, an agency’s RIA was only the beginning of the process. The Director was “authorized to review any preliminary or final [RIA], notice of proposed rulemaking, or final rule.”²⁴³ If the Director had questions about an RIA, an agency could not publish the rule “until [it] ha[d] responded to the Director’s views, and incorporated those views and the agency’s response in the rulemaking file.”²⁴⁴

²³⁵ Exec. Order No. 12,291 § 3(f)(3), 3 C.F.R. at 130.

²³⁶ Rosenberg, *supra* note 179, at 1203. One commentator explained that the order, in practice, bolstered presidential power. Heads of executive agencies were already subject to the threat of removal. That threat would likely lead agency leaders to comply with requests from OMB to alter agency rules. Kenneth Culp Davis, *Presidential Control of Rulemaking*, 56 TUL. L. REV. 849, 852–53 (1982).

²³⁷ See J. Lon Carlson, John B. Braden & David W. Martin, *Implications of Executive Order 12,291 for Discretion in Environmental Regulation*, 12 B.C. ENV’T AFFS. L. REV. 313, 339 (1985).

²³⁸ Exec. Order No. 12,291 § 1(b)(1), 3 C.F.R. at 127.

²³⁹ Raven-Hansen, *supra* note 233, at 294; see also Rosenberg, *supra* note 179, at 1204 (“The method to be utilized in the preparation . . . is to be defined by the Director.”).

²⁴⁰ Rosenberg, *supra* note 179, at 1204.

²⁴¹ See Exec. Order No. 12,291 §§ 3(c)(1)–(2), 3 C.F.R. at 128–29.

²⁴² *Id.* § 3(c)(2), 3 C.F.R. at 129 (requiring both a preliminary and final RIA for certain rules).

²⁴³ *Id.* § 3(e)(1), 3 C.F.R. at 129.

²⁴⁴ *Id.* § 3(f)(2), 3 C.F.R. at 130.

Nothing in the Executive Order set limits on how long a conversation between OMB and an agency could last.²⁴⁵

The order's opponents grasped that the power to delay meant the power to destroy. While nothing in E.O. 12,291 prevented an agency from ignoring OMB's "recommendations" and publishing a contested rule, it rarely happened in practice.²⁴⁶ Christopher DeMuth, OIRA Administrator and President Reagan's "deregulation czar,"²⁴⁷ conceded as much in congressional hearings when he was unable to come up with a single example of an agency publishing a rule without OMB's blessing.²⁴⁸ "OMB's power to 'return' rules" thus amounted to "de facto veto power" over major rulemaking.²⁴⁹ Nor did OMB have to use its "veto" for it to be effective. Critics insisted that the mere threat of more process, especially under an administration hostile to regulation, had a chilling effect on agencies.²⁵⁰ Faced with RIAs and OMB review, embattled agencies would decide to scale back or even abandon proposed rules altogether.²⁵¹

Finally, opponents were concerned by the lack of participation and transparency at OMB. At the same time E.O. 12,291 threw light on agency process, it left OMB's own decisionmaking curiously inaccessible and opaque.²⁵² The possibility of public participation and judicial review ended the moment a rule left an agency for OMB.²⁵³

For the venerable Professor Kenneth Culp Davis, one of the deans of American administrative law,²⁵⁴ E.O. 12,291 thus represented an attack on the very foundations of the field. The APA established a system, Davis argued, on two principles: (1) the ability of affected parties to influence rulemaking and (2) rationality review by courts.²⁵⁵ By creating a new terminal point for rulemaking, the order threatened both of those principles.²⁵⁶ OMB officials could change final rules without considering or even thinking to consider written comments and could hide new

²⁴⁵ Section 8 exempts emergency rules and rules with statutory or judicial deadlines from the RIA procedures. *Id.* § 8(a), 3 C.F.R. at 133.

²⁴⁶ Olson, *supra* note 179, at 43–44.

²⁴⁷ Gregg Easterbrook, "Ideas Move Nations": How Conservative Think Tanks Have Helped to Transform the Terms of Political Debate, *THE ATLANTIC* (Jan. 1986), <https://www.theatlantic.com/magazine/archive/1986/01/ideas-move-nations/551621> [<https://perma.cc/L2UD-U2KT>].

²⁴⁸ *Office of Management and Budget Control of OSHA Rulemaking: Hearing Before the Subcomm. on Manpower & Hous. of the H. Comm. on Gov't Operations*, 97th Cong. 350 (1982).

²⁴⁹ Olson, *supra* note 179, at 43, 45.

²⁵⁰ See Raven-Hansen, *supra* note 233, at 295.

²⁵¹ *Id.*; see also Olson, *supra* note 179, at 45 (describing the order's effect on EPA policymaking).

²⁵² Davis, *supra* note 236, at 855–56.

²⁵³ See *id.*

²⁵⁴ Kenneth C. Davis, 94; *Legal Scholar, Pioneer on Administrative Law*, *L.A. TIMES* (Sept. 23, 2003, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2003-sep-23-me-davis23-story.html> [<https://perma.cc/8HBQ-7VNP>].

²⁵⁵ Davis, *supra* note 236, at 854.

²⁵⁶ See *id.*

facts and influences from the public.²⁵⁷ This distorted the rulemaking process and incentivized lobbying over reasoned argument.²⁵⁸ Davis worried that the order portended “a return, to some extent, to autocratic government.”²⁵⁹ Moreover, the lack of transparency doctored judicial review, since the rule might be grounded in one set of considerations but the record before the court contain “an entirely different set of facts and ideas.”²⁶⁰

In hindsight, defenses of the order are remarkable for their question-begging. They answered critics’ legal worries with generic arguments about administrative governance. They tried to avoid making legal arguments at all, never mind constitutional ones.

Consider the view of Lloyd Cutler, a longtime Democratic champion of executive administration. In 1975, he had made the case for presidential control but, in keeping with the tradition of administration under law, thought it would require a new statute; his law review article even proposed one.²⁶¹ But when Reagan instituted control through executive fiat, Cutler overlooked his constitutional scruples and praised E.O. 12,291. Cutler’s important 1982 law review article in defense of such presidential control of rulemaking — even by an executive order like the one issued by Reagan — rehearsed the functionalist arguments he had made in 1975; the few constitutional claims he made in 1982 hewed closely to the OLC memo’s reading of *Myers*.²⁶² His ideological opponent, the Republican C. Boyden Gray, was even more sparse. In his academic work justifying E.O. 12,291, Gray avoided constitutional debates, mentioning neither the “separation of powers” nor the Vesting Clause.²⁶³

Cutler and Gray were representative. Well into the decade, and even as novel and aggressive claims of presidential authority were emerging,²⁶⁴ those closest to and responsible for carrying out E.O. 12,291 relied on underdeveloped and thin constitutional arguments.²⁶⁵ Sometimes, they tried to avoid law completely. Christopher DeMuth and

²⁵⁷ *Id.* at 855.

²⁵⁸ *See id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 856.

²⁶¹ *See* Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1414–16 (1975).

²⁶² *See* Lloyd N. Cutler, *The Case for Presidential Intervention in Regulatory Rulemaking by the Executive Branch*, 56 TUL. L. REV. 830, 835–38, 840–43, 848 (1982).

²⁶³ *See generally* C. Boyden Gray, *Presidential Involvement in Informal Rulemaking*, 56 TUL. L. REV. 863 (1982).

²⁶⁴ *See, e.g.*, Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 44 (1987).

²⁶⁵ *See, e.g.*, DeMuth & Ginsburg, *supra* note 159, at 1083 (maintaining that the “Constitution itself” could not “resolve[]” the “tension between an agency head’s statutory responsibilities and his accountability to the president,” which could only be worked out “through the tension and balance between the president and Congress — that is, the political branches — in overseeing the work of the agencies”).

former OMB Administrator Douglas Ginsburg, for instance, were blunt: “[I]nteresting general questions presented by White House review of agency rulemaking [were] not questions of law, but rather those of politics and of policy.”²⁶⁶

This was profoundly unsatisfying to many scholars, who were convinced that the order violated the Constitution’s separation of powers. Morton Rosenberg, the author of the Congressional Research Service report for Chairman Dingell,²⁶⁷ led the charge. In a pair of articles published shortly after E.O. 12,291 was issued, Rosenberg challenged the order’s legality, rehearsing, in a more academic key, the arguments Dingell and other Democrats had made on the House floor.²⁶⁸

Rosenberg began by challenging the Reagan Administration’s reliance on *Myers*. *Myers* was a removal case.²⁶⁹ It concerned only one dimension of presidential power over agencies.²⁷⁰ The OLC memo misread the law when it extracted from *Myers* a “conception-to-enactment influence over administrative rulemaking.”²⁷¹ There was a meaningful difference between the “indirect power of removal” and the power to “direct the outcome of all decisions specifically committed by statute to a subordinate.”²⁷² *Myers*, Rosenberg argued, simply could not justify the latter power.²⁷³

Second, the OLC memo ignored precedent. “Whatever potential for the broad expansion of Executive control *Myers* appeared to give,” Rosenberg observed, “ha[d] been effectively negated in two subsequent removal cases,”²⁷⁴ *Humphrey’s Executor v. United States*²⁷⁵ and *Wiener v. United States*.²⁷⁶ In each of those cases, the Court “underlined the special nature of the rulemaking and adjudicatory functions and the ability of Congress to insulate the decisionmaker from removal *as well as* from interference with the performance” of their statutory duties.²⁷⁷ Rosenberg found further support for congressional authority²⁷⁸ in

²⁶⁶ *Id.* (emphasis omitted).

²⁶⁷ PRESIDENTIAL CONTROL OF AGENCY RULEMAKING, *supra* note 196, at viii.

²⁶⁸ To wit: (1) Article II did not grant “[g]eneral [m]anagerial [p]ower to the President” over the administrative process; (2) precedent had not changed the historical baseline that the President needs congressional consent to direct agency decisionmaking; (3) congressional practice did not support the idea that Congress had ceded control over rulemaking to the President; (4) E.O. 12,291 substantively amended the APA and unconstitutionally arrogated legislative power to the Executive; and (5) the order denied the public due process of law in rulemaking. Rosenberg, *supra* note 179, at 1205–06; *see also* Rosenberg, *supra* note 30, at 246–47.

²⁶⁹ Rosenberg, *supra* note 30, at 206 (citing *Myers v. United States*, 272 U.S. 52, 135 (1926)).

²⁷⁰ *Id.* at 207.

²⁷¹ *Id.* at 206–07.

²⁷² *Id.* at 207.

²⁷³ *Id.* at 206–07.

²⁷⁴ Rosenberg, *supra* note 179, at 1211.

²⁷⁵ 295 U.S. 602 (1935).

²⁷⁶ 357 U.S. 349 (1958).

²⁷⁷ Rosenberg, *supra* note 179, at 1211.

²⁷⁸ *Id.* at 1215.

United States ex rel. Accardi v. Shaughnessy,²⁷⁹ in which the Court held that superior officers could not direct federal officers legally vested with discretionary authority.²⁸⁰ *Accardi* thus “confirmed the ability of Congress to protect the discretion of subordinate officers from Presidential interference.”²⁸¹ All of these cases were conspicuously absent from the OLC memo.

Nor had Congress, on Rosenberg’s account, ever relinquished its control over agencies. During the early Republic, he observed, “the President did not see department budget estimates before the Treasury Department transferred them to Congress” and the Treasury Secretary would even directly recommend tax policy.²⁸² Well after the expansion of the administrative state, Congress continued to assert its primacy. The vitality of the legislative veto was “[p]erhaps the clearest and most eagerly pursued congressional indication of its desire to maintain control over administrative decision-making in general and agency rulemaking in particular.”²⁸³ He emphasized that the majority of statutes with legislative veto provisions were passed since 1970, including “seventeen acts containing thirty-eight veto provisions” in 1980 alone.²⁸⁴

This background underlined the constitutional infirmities of E.O. 12,291. It subverted the constitutional baseline “[b]y imposing a substantive cost-benefit requirement” on agencies and “displace[d] the discretion of agency officials to formulate domestic policy.”²⁸⁵ The order “thus significantly interfere[d] with a function over which the Constitution gives Congress primary, if not exclusive control.”²⁸⁶ Institutional practice had made clear “for more than a century” that the “President’s role . . . was that of a managerial agent for the legislature.”²⁸⁷ He was “authorized to coordinate and supervise” but had “no inherent authority to control executive agencies executing essentially legislative duties delegated” to them by Congress.²⁸⁸

Others shared Rosenberg’s position. Alan Morrison, the Director of Public Citizen Litigation Group, saw “few if any constitutional limitations on the power of Congress to circumscribe the role of the President in informal rulemaking” and believed the order flew in the face of enacted statute.²⁸⁹ Professor Peter Raven-Hansen agreed. As Congress

²⁷⁹ 347 U.S. 260 (1954).

²⁸⁰ *Id.* at 266–67.

²⁸¹ Rosenberg, *supra* note 179, at 1215.

²⁸² *Id.* at 1207.

²⁸³ Rosenberg, *supra* note 30, at 225. On the importance of the legislative veto, see *infra* section III.A, pp. 2173–86.

²⁸⁴ Rosenberg, *supra* note 30, at 225.

²⁸⁵ *Id.* at 246.

²⁸⁶ *Id.*

²⁸⁷ Rosenberg, *supra* note 179, at 1209.

²⁸⁸ Rosenberg, *supra* note 30, at 246.

²⁸⁹ See Alan B. Morrison, *Presidential Intervention in Informal Rulemaking: Striking the Proper Balance*, 56 TUL. L. REV. 879, 879, 888 (1982).

had not passed laws granting the President the necessary rulemaking power, and the Take Care Clause could not sustain the President's claimed authority, E.O. 12,291 simply could not bind agencies "as 'law.'"²⁹⁰ Erik Olson, former general counsel at the EPA, added his voice to the chorus, opining that courts would have to read E.O. 12,291 to "avoid a constitutional question."²⁹¹

Constitutional rejoinders were tentative. Professors Peter Shane and Cass Sunstein, then new members of the legal academy, were the two most prominent defenders of the order to try to answer critics' constitutional objections. Importantly, both had been executive branch lawyers when E.O. 12,291 was promulgated.²⁹² But their defenses are notable mostly for what they conceded to their opponents.

Shane's response was more vigorous. He agreed with critics that the key question with E.O. 12,291's managerial and substantive requirements on rulemaking was "whether they impinge[d] to an unlawful degree on . . . [agency] discretion."²⁹³ Answering this question required squaring the order with the law on the books. Since presidential power existed in Justice Robert Jackson's "twilight zone," Shane argued, it needed an independent basis and had to be reconciled with "the expressed will of Congress."²⁹⁴

As a first cut, Shane identified three goals underlying the order: coordinating agency action to reduce regulatory costs; "enhanc[ing] administrative rationality and accountability"; and "minimiz[ing] the duplication and conflict of regulations."²⁹⁵ "[E]ach of these goals," Shane ventured, was "facially commensurate" with congressional policy goals in legislation such as the Paperwork Reduction Act.²⁹⁶

This still left the question of independent presidential authority, however. E.O. 12,291 might be in line with Congress's intentions. But did the President have the constitutional power to issue it?

Both Shane and his critics agreed on one major point: *Myers* alone would not do. As Shane put it: "By any reasonable measure . . . the legal leap from the power actually upheld in *Myers* — the power to remove postmasters at will — and the assertion of power embodied in Executive Order No. 12,291 is a considerable one."²⁹⁷ Shane went

²⁹⁰ Raven-Hansen, *supra* note 233, at 311.

²⁹¹ Olson, *supra* note 179, at 25.

²⁹² Peter M. Shane, *Presidential Regulatory Oversight and the Separation of Powers: The Constitutionality of Executive Order No. 12,291*, 23 ARIZ. L. REV. 1235, 1235 n.* (1981); Sunstein, *supra* note 159, at 1267 n.**.

²⁹³ Shane, *supra* note 292, at 1243.

²⁹⁴ *Id.* at 1244.

²⁹⁵ *Id.* at 1245.

²⁹⁶ *Id.* Here, Shane squarely disagreed with his opponents. Where they saw a statute concerned with "government paper flow," "information collection," and "budgetary process," Raven-Hansen, *supra* note 233, at 298, he spotted congressional will to rein in regulation, *see* Shane, *supra* note 292, at 1245.

²⁹⁷ Shane, *supra* note 292, at 1247.

further. Unlike his counterparts at OLC, he acknowledged the importance of *Humphrey's Executor*.²⁹⁸ “In any event,” he concluded, justifying E.O. 12,291’s “comprehensive management scheme . . . based solely on the general sort of inference of Presidential supervisory power exemplified by a 1926 analysis of proper government administration seems conspicuously elliptical.”²⁹⁹ The presidential authority underlying E.O. 12,291 had to be found elsewhere.

The argument Shane ultimately settled on was almost entirely functional. He likened his “form of analysis” to the “reasoning of *McCulloch v. Maryland*”³⁰⁰ and compared it favorably to an earlier defense of presidential oversight from 1979 by Professor Harold Bruff.³⁰¹ A functional analysis revealed the importance of *Myers*, “less for [its] characterization of the President’s supervisory powers than because of the Court’s mode of reasoning.”³⁰² Chief Justice Taft had claimed that the President was the only official with the capacity and national constituency to faithfully execute the laws.³⁰³ Shane took this to mean that the Take Care Clause granted the President “a power of interstitial administrative coordination.”³⁰⁴ This power allowed the President to “rationaliz[e] the execution of a variety of statutes so that, within congressionally set limits, the President [could] require regulators to adapt each agency’s decisionmaking to the exigencies of the national economy” and reconcile “each agency’s statutory responsibilities” without “jeopardiz[ing]” those of others.³⁰⁵ For Shane, this vision of presidential power best satisfied contemporary necessity while vindicating the Framers’ commitment to an energetic and effective President.³⁰⁶

For all the sweep of Shane’s presidentialist argument, however, he still envisioned a robust role for Congress. “Presidential oversight” did not “preclude congressional action” or the “priority of the legislative

²⁹⁸ See *id.*

²⁹⁹ *Id.*

³⁰⁰ 17 U.S. (4 Wheat.) 316 (1819).

³⁰¹ Shane, *supra* note 292, at 1248 n.72. Functional analysis continued to underpin defenses of presidential control throughout the 1980s. See, e.g., Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 471 (1985) (“[I]ncreased Presidential control of agency policy making is the only response to the problem of broad agency discretion that is consistent with constitutional and political theory.”); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 662–66 (1984) (making a general case for presidential oversight of rulemaking (including independent agencies)); Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 188–90 (1986) (outlining a “powerful theoretical case” drawn from the 1979 ABA Commission on regulatory reform for “greater presidential control over the regulatory process”).

³⁰² Shane, *supra* note 292, at 1249.

³⁰³ See *Myers v. United States*, 272 U.S. 52, 163–64 (1926); Shane, *supra* note 292, at 1249–50.

³⁰⁴ Shane, *supra* note 292, at 1250.

³⁰⁵ *Id.*

³⁰⁶ *Id.*

branch.”³⁰⁷ Legislative primacy meant that even “in the abstract” it is unlikely that “Presidential oversight” would “be dysfunctional [sic] for the regulatory process.”³⁰⁸ Accordingly, he noted that the terms of the order prevented use of RIA delays to usurp agency authority.³⁰⁹ Instead, the interstitial power was a reservoir of presidential discretion that was “concededly limited by Congress’ assertion of its own policymaking powers.”³¹⁰ Residual discretion, Shane insisted, was entirely consistent with a distinction between the Executive coordinating policy goals and enhancing efficiency on the one hand and the legislature’s “power of fundamental policy choice” on the other.³¹¹

His intellectual fellow traveler, Cass Sunstein, was less optimistic that inherent presidential discretion could coexist with regulatory statutes. For one thing, Sunstein acknowledged that E.O. 12,291 represented a “potentially revolutionary step in the control and supervision of agency action.”³¹² “[N]o other President,” after all, had made regulatory action conditional on “benefits exceed[ing] the costs.”³¹³ And no prior executive order had “accorded . . . such wide-ranging supervisory power over the basic decision whether regulatory action should . . . take[]” place.³¹⁴ The sheer ambition of the order raised a fundamental constitutional question: “[W]hether, in the absence of congressional authorization, the executive branch may properly make the outcome of regulatory decisions dependent on application” of cost-benefit analysis.³¹⁵

To save the order, Sunstein cabined it dramatically. He conceded that on its own terms, E.O. 12,291 seemingly empowered the government to ignore congressional statutes: “Under the order, cost-benefit analysis operates as a ‘trump.’ Regulatory action is barred if it redistributes social wealth without affecting its total amount.”³¹⁶ Of course, the order included the proviso that cost-benefit analysis applied only “to the extent permitted by law.”³¹⁷ This still left open the “critical question . . . of scope: How broadly [could] Executive Order 12,291 be applied if it [was] not to be inconsistent with law?”³¹⁸ After surveying the various types of legislation, Sunstein had an answer: not very broadly at all.³¹⁹

³⁰⁷ *Id.* at 1252.

³⁰⁸ *Id.*

³⁰⁹ *Id.* at 1256.

³¹⁰ *Id.* at 1251.

³¹¹ *See id.*

³¹² Sunstein, *supra* note 159, at 1268.

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.* at 1269.

³¹⁶ *Id.* at 1272 (footnote omitted).

³¹⁷ Exec. Order No. 12,291 § 3(a), 3 C.F.R. 127, 128 (1982).

³¹⁸ Sunstein, *supra* note 159, at 1273.

³¹⁹ *See id.* at 1281.

The issue was that most regulatory statutes simply did not prioritize efficiency.³²⁰ Congress faced “predominantly distributional” issues and when it legislated, it typically aimed to redistribute wealth, not maximize it.³²¹ While certain types of legislation, such as antitrust statutes, could be “reasonably understood as intended[] to promote efficiency,”³²² others, such as civil rights statutes or antipollution laws, could not.³²³

Moreover, the order’s “rhetoric of costs and benefits” was undefined.³²⁴ As it was written, it did not promote efficiency so much as “assur[e] that regulatory decisions [were] controlled by the President” or sympathetic officials.³²⁵ Sunstein thus echoed the order’s critics who blasted its “indeterminacy.”³²⁶ Where Sunstein parted ways with the order’s opponents was prescription. E.O. 12,291, he believed, was simply not specific enough: it needed to take a more “conventional economic approach,” maximizing wealth, instead of reading as “an injunction” to “do the right thing.”³²⁷

Sunstein accordingly read E.O. 12,291 narrowly, since applying RIAs “in an across-the-board fashion . . . raise[d] serious questions of separation of powers.”³²⁸ On Sunstein’s account, the “to the extent permitted by law” proviso was arguably the order’s most important clause, because it “operate[d] severely to restrict the scope of that aspect of the order.”³²⁹ However enlightened attempts to impose economic rationality on the administrative state might be, if Congress wanted to go to regulatory hell, the President had to help. It was his job.

* * *

We see, then, the deep controversy presidential administration occasioned. Even E.O. 12,291’s most serious intellectual defenders worried about its legality. Moreover, they agreed with their opponents about the constitutional and statutory problems the order raised. Presidential administration, as developed by Reagan and his advisors, risked undercutting statutory law without adequate legal authority. This, of course, was precisely the argument members of Congress had made in their hearings.

Recovering the controversy over E.O. 12,291 sharpens our understanding of the break Reagan’s presidential administration constituted

³²⁰ See *id.* at 1273–74.

³²¹ See *id.* at 1274.

³²² *Id.*

³²³ *Id.* at 1274–75.

³²⁴ See *id.* at 1276.

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ See *id.*

³²⁸ *Id.* at 1281.

³²⁹ *Id.*

and highlights the durability of the older paradigm of administration under law. The very resistance to Reagan's order shows us how conscious actors at the time were to the ways it departed from prior practice. And their arguments underline how unpersuasive they found its rationales. Reaganite apostles of presidential administration could only advance tentative and restrained defenses of its constitutionality, and these were not widely persuasive. It would take a transformation in American legal and political culture to normalize Reagan's revolution.

III. MOVING THE GOALPOSTS: FROM PRESIDENTIAL ADMINISTRATION TO THE UNITARY EXECUTIVE

When E.O. 12,291 was first issued, it ignited scandal. Members of Congress, law professors, and even lawyers sympathetic to executive control challenged President Reagan's bold new vision. But despite the outcry, Reagan's order stuck. Surprisingly, within a few years, the American legal establishment even embraced Reagan's legal arguments and made peace with the mode of governance it inaugurated.

This Part tells the story of presidential administration's next stage: acceptance. We highlight two factors that contributed to this outcome. The first was the Supreme Court. The 1980s featured a series of decisions that, when taken together, undermined administration under law by impairing Congress's ability to structure the administrative state. In this way, the Court offered indirect support to presidency-centered administrative governance. The second factor involved the fourth branch of American government: the legal academy. A group of young law professors drew on two important dissents by Justice Scalia to respond to the criticism launched against E.O. 12,291 and sketch robust constitutional foundations for Reagan's new approach to administration. Their new "Unitary Theory" claimed for the President expansive, exclusive authority over huge swaths of government action. By contrast with this approach, Reagan's presidential administration seemed tame, even rule-bound. Moreover, their liberal opponents did not reject their substantive conclusions so much as their methods. By the mid-1990s, legal imagination had changed decisively. Administration under law was absent and the only serious choice was between presidential administration and Unitarianism.

A. *Judicial Attrition of Congressional Power*

In the Reagan-era fight between the President and Congress for control of the administrative state, the Supreme Court was at first quiet. From its perspective, the matter had been long settled in favor of Congress. As both the critics of E.O. 12,291 and its scholarly defenders had observed, the Court's two leading precedents undercut the Reagan Administration's (already weak) constitutional arguments. *Humphrey's Executor*, from 1935, saw a Court deeply divided between supporters

and opponents of President Franklin Delano Roosevelt's New Deal unite to issue a unanimous ruling recognizing Congress's ability to structure administrative agencies and limit the President's removal power.³³⁰ Twenty years later, the Justices reaffirmed and extended that holding in *Wiener*, again unanimously.³³¹ Congressional supremacy in administration was thus firmly established in doctrine when President Reagan promulgated E.O. 12,291.

Yet, when related cases did finally reach the Supreme Court, it executed an unexpected about-face.³³² While the Justices would never rule on E.O. 12,291 directly, the Court would reverse itself on key questions of separation of powers law in ways that abandoned the consensus of *Humphrey's* and *Wiener* and supported the Reaganite approach to presidential administration. The change did not come right away; it took years for the upheavals of deregulatory neoliberalism to ramify sufficiently. But when its shockwaves reached First Street, they dislodged old doctrine and upended settled arrangements. In the 1980s, in what would turn out to be the last years of Chief Justice Warren Burger's tenure, the Court effected a stunning reversal, moving firmly against Congress's ability to regulate the Executive and implicitly siding with Reagan and the presidency against Chairman Dingell, Congress, and the bulk of the legal academy.

³³⁰ *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935).

³³¹ *Wiener v. United States*, 357 U.S. 349, 356 (1958).

³³² This reversal has been overlooked by some of the standard accounts in the legal literature. The Burger Court years are usually considered "the Counter-Revolution That Wasn't." See generally THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (Vincent Blasi ed., 1983); see also ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 343 (Sanford Levinson ed., 6th ed. 2016). But see generally MICHAEL J. GRAETZ & LINDA GREENHOUSE, THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT (2016) (disagreeing). Famously, the Warren Court's pathbreaking rulings in criminal justice and due process occasioned a political backlash. But President Nixon's replacement of the liberal Chief Justice Earl Warren with the conservative Warren Earl Burger changed less than critics hoped. See MCCLOSKEY, *supra*, at 343. Despite Chief Justice Warren Burger's explicit intent to reverse the direction of the Court's jurisprudence, "no important Warren Court decision was overruled" during his tenure. Bernard Schwartz, *The Burger Court in Action*, in THE BURGER COURT: COUNTER-REVOLUTION OR CONFIRMATION? 263 (Bernard Schwartz ed., 1998). In some areas of the law, the Burger Court even went beyond its predecessor, consolidating its rulings and building on them. See *id.* at 263-64. Yet the focus on rights (at the expense of structure) and chief justiceships (at the expense of broader social, political, or economic factors) obscures the changes in separation of powers law, which were less salient in the popular press and did not follow a neat periodization by Chief Justice. An important scholarly exception is John J. Gibbons, *The Legacy of the Burger Court*, in THE BURGER COURT: COUNTER-REVOLUTION OR CONFIRMATION?, *supra*, at 305, who correctly observes that in "its treatment of the respective roles of the Congress and the President in controlling the rulemaking authority of federal administrative agencies," the Burger Court left a "significant" legacy. *Id.* at 306.

The first tremor came in 1983, two years after E.O. 12,291, with the Court's decision in *INS v. Chadha*.³³³ The case concerned a central tool of congressional power over the administrative state: the legislative veto.³³⁴ This statutory device gave Congress a say over executive action. When included in a law, the provision required that the President or an agency submit proposed actions to Congress before they took effect.³³⁵ If Congress voted a formal disapproval, the actions would be blocked.³³⁶ Only in the face of congressional silence would they go into effect.

The legislative veto was invaluable because it helped resolve a basic governance problem in a regime of separated powers. Congress recognized that presidential initiative could be useful for effective government, especially in areas where the President might have specialized knowledge or responsibility. But it worried about giving the President too much power. The legislative veto overcame this impasse through a kind of "reverse legislation."³³⁷ Under the veto's scheme, government action still needed to receive approval from Congress and the President to take effect. But the order of approval could be reversed. As a result, legal presumptions and initiatives flipped. With the legislative veto, instead of delegating to the President *ex ante*, Congress could audit him *ex post*.

By 1983, Congress had been including legislative vetoes in laws for over fifty years.³³⁸ The device had become a cornerstone of the modern administrative state.³³⁹ The legislative veto gave Congress the security that it could grant additional statutory powers to the Executive without sacrificing accountability. Relying on that security, Congress had delegated increasingly important responsibilities to the President and the executive branch more broadly, counting on the legislative veto to

³³³ 462 U.S. 919 (1983). On the shocking nature of the decision, see E. Donald Elliott, *INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 126 (1984).

³³⁴ See generally BARBARA HINKSON CRAIG, *THE LEGISLATIVE VETO: CONGRESSIONAL CONTROL OF REGULATION* (1983).

³³⁵ *Id.* at 8.

³³⁶ *Id.*

³³⁷ See BARBARA HINKSON CRAIG, *CHADHA: THE STORY OF AN EPIC CONSTITUTIONAL STRUGGLE* 82 (1988) (quoting a speech by then-Assistant Attorney General William Rehnquist).

³³⁸ John D. Millett & Lindsay Rogers, *The Legislative Veto and the Reorganization Act of 1939*, 1 PUB. ADMIN. REV. 176, 178 (1941). The first legislative veto dates to 1932, when Congress included it in a law granting President Herbert Hoover authority to reorganize the executive branch. *Id.* The device proved its worth even then. Pursuant to the law, the President eventually advanced several reorganization proposals to Congress. But by the time he did so, he had lost his bid for reelection. Had Congress delegated reorganization power to Hoover through a traditional statute, it would have given a defeated President and party leader the chance to shape the government of his successor and rival — an unfortunate state of affairs, ill-suited to good or accountable government. Thanks to the legislative veto, Congress was able to head this off. It voted resolutions disapproving of Hoover's plans and prevented them from taking effect. *Id.*

³³⁹ See Adam Littlestone-Luria, *The Legislative Veto and the Failure of the People's Constitution* 38–39 (unpublished manuscript) (on file with the Harvard Law School Library).

ensure that it would retain power to check improper or disagreeable action.

Presidents and executive branch lawyers raised concerns about the constitutionality of the legislative veto.³⁴⁰ But the tool was too useful to give up, even for Presidents. On some important matters, Congress would agree to delegate to the executive branch only if it could include a legislative veto to make sure the power it granted was not unbounded.³⁴¹ Forced to choose between additional, checked powers, and no delegated power at all, Presidents accepted the condition and acquiesced. On at least one occasion, the President even suggested including a legislative veto in a statute himself and had his Attorney General write a memo defending its use.³⁴²

Reflecting this interbranch consensus, challenges to the legislative veto before the 1980s were few and ineffectual. There had been debate in Congress around its constitutionality since 1939,³⁴³ and Presidents periodically expressed their own concerns as well.³⁴⁴ But no court case settled the matter;³⁴⁵ Congress continued to incorporate the veto into legislation;³⁴⁶ and Presidents usually acquiesced after stating their objections.³⁴⁷ For decades, conflict subsided. Occasional articles appeared rehashing concerns,³⁴⁸ but they were largely without effect.³⁴⁹

Things only began to shift in the 1970s.³⁵⁰ The proximate cause was an explosion of new laws incorporating the legislative veto, which raised its salience.³⁵¹ The unraveling of Nixon's presidency catalyzed a loss of faith in executive power and led to the election of new representatives committed to the muscular use of Congress's authority.³⁵² At the same

³⁴⁰ *Id.* at 47.

³⁴¹ *Id.* at 57.

³⁴² See CRAIG, *supra* note 337, at 80–83 (discussing how President Carter, at the start of his term, incorporated a legislative veto into his Administration's proposed bill granting him reorganization authority and requested that his Attorney General prepare an opinion affirming the constitutionality of the one-house veto in the reorganization context). For a possible second occasion, see Joseph Cooper & Ann Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467, 472 (1962) (discussing President Kennedy's proposal to "extend[] [the legislative veto] to the area of farm policy").

³⁴³ See Cooper & Cooper, *supra* note 342, at 469 & n.9; Millett & Rogers, *supra* note 338, at 180.

³⁴⁴ See Cooper & Cooper, *supra* note 342, at 470 n.11.

³⁴⁵ See *id.* at 469 n.9.

³⁴⁶ *Id.* at 471.

³⁴⁷ See *id.* at 470 n.11.

³⁴⁸ See generally, e.g., Robert W. Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953).

³⁴⁹ See Cooper & Cooper, *supra* note 342, at 472 (observing that, whatever the theoretical difficulties, "[t]he [legislative] veto . . . is here to stay").

³⁵⁰ See DEARBORN, *supra* note 26, at 151–52 (detailing the ways Congress in the 1970s sought to shift power back from the executive branch in response to expanded presidential authority).

³⁵¹ See CRAIG, *supra* note 337, at 36–37.

³⁵² See *id.* at 36, 38. Craig also identifies the presidentially led war in Vietnam, the Watergate scandal, excessive use of presidential impoundments, and government divided between a Democratic Congress and a Republican presidency as additional contributing factors. See *id.* at 36.

time, attitudes about government were changing.³⁵³ The growth of administrative agencies during the New Deal and Great Society had created large, entrenched bureaucracies, which could be inflexible and inefficient. By the 1970s, advocates on the left and right were suspicious of what they derisively called “big government” and sought to check the continued growth of the state.³⁵⁴ The new representatives brought that attitude with them to Washington. They sought tools to tame the spread of regulation and bring the bureaucracy back under Congress’s control.

To realize these aims, Congress doubled down on the legislative veto. According to one count, only nineteen laws included a legislative veto in the 1940s, thirty-four in the 1950s, and forty-nine in the 1960s.³⁵⁵ But the first five years of the 1970s alone saw eighty-nine laws incorporate the device.³⁵⁶ In 1975, Southern Democratic Representative Elliot Levitas made waves when he introduced a bill to create a “generic veto” giving Congress a legislative veto over all regulatory activity.³⁵⁷ His aim was explicitly deregulatory: in the hearings on his bill, he testified from a witness table piled theatrically high with volumes of the Federal Register.³⁵⁸ The generic veto, he believed, would give Congress a tool to cut back on red tape and control the bureaucracy.³⁵⁹ His message resonated. Levitas’s bill attracted over 150 cosponsors and became the subject of significant news coverage.³⁶⁰ While it worked its way through committee, Levitas urged amendments to pending legislation, adding legislative vetoes to new bills.³⁶¹

This reinvigoration of the legislative veto spurred renewed legal debate. Antonin Scalia, then the Assistant Attorney General leading the OLC, testified against the device during hearings on Levitas’s bill, but Congress ignored his counsel.³⁶² Law reviews soon jumped into the fray, publishing articles analyzing the veto’s function and constitutionality.³⁶³

The Supreme Court tried to stay out. In 1975, the Court heard arguments in *Buckley v. Valeo*³⁶⁴ on the constitutionality of recent

³⁵³ See Gerstle, *supra* note 142, at 249–50.

³⁵⁴ See PAUL SABIN, PUBLIC CITIZENS: THE ATTACK ON BIG GOVERNMENT AND THE REMAKING OF AMERICAN LIBERALISM, at xiii–xv (2021).

³⁵⁵ See James Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L.J. 323, 324 (1977).

³⁵⁶ *Id.*; see also CRAIG, *supra* note 337, at 36.

³⁵⁷ See CRAIG, *supra* note 337, at 46.

³⁵⁸ See *id.* at 39–41.

³⁵⁹ See *id.* at 44–46.

³⁶⁰ See *id.* at 46–47.

³⁶¹ See *id.* at 46.

³⁶² See *id.* at 53–56.

³⁶³ See generally, e.g., H. Lee Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983, 1049–87 (1975); Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977); Abourezk, *supra* note 355.

³⁶⁴ 424 U.S. 1 (1976) (per curiam).

amendments to the Federal Election Campaign Act,³⁶⁵ which had created a new Federal Election Commission (FEC) whose rulemaking powers were subject to a legislative veto.³⁶⁶ The appellants, counseled by an attorney from the ACLU, two future Reagan Administration lawyers, and a future Reagan judicial appointee, used the case to attack the device, relying in part on Scalia's testimony.³⁶⁷ The Court demurred, however, ruling on Appointments Clause grounds and avoiding the issue.³⁶⁸ Congress reenacted an amended version of the law the same year, which retained the veto and included provisions for fast-track judicial review.³⁶⁹ But a follow-up case, *Clark v. Valeo*,³⁷⁰ litigated this time by the Ralph Nader-affiliated lawyer Alan Morrison, was dismissed at the Court of Appeals as unripe.³⁷¹

Nader-adjacent Progressive advocacy groups and future Reagan Administration legal elites appear as strange bedfellows in hindsight. At the time, though, they shared a common goal: resisting congressional attempts to exert greater control over the executive branch. Indeed, the liberal Morrison had testified in agreement with the conservative Scalia against Levitas's proposed generic veto.³⁷² They had different reasons for their opposition. Scalia sought to protect the presidency, while Morrison worried about the way congressional involvement in the regulatory process would open the door to more industry lobbying.³⁷³ But at root both were firm against a greater role for Congress.

Chadha gave them the chance to turn their convictions into law. In 1975, Congress had exercised its legislative veto to overrule the Attorney General's suspension of the deportation of Jagdish Rai Chadha, a student who had overstayed his visa.³⁷⁴ Chadha's lawyer, in a desperate attempt to keep his client in the United States, argued that the veto was unconstitutional.³⁷⁵ The case had been working its way through the court system while the high-profile fights over the FEC played out.

³⁶⁵ Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended in scattered sections of the U.S. Code); *Buckley*, 424 U.S. at 6.

³⁶⁶ Federal Election Campaign Act Amendments § 310, 88 Stat. at 1280-82 (codified as amended at 52 U.S.C. § 30106); *id.* § 209(c), 88 Stat. at 1287-88, *invalidated by* INS v. Chadha, 462 U.S. 919 (1983).

³⁶⁷ See Brief of the Appellants at 208 n.9, 224, *Buckley*, 424 U.S. 1 (Nos. 75-436 & 75-437).

³⁶⁸ See *Buckley*, 424 U.S. at 140 n.176.

³⁶⁹ See Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (codified in scattered sections of the U.S. Code); CRAIG, *supra* note 337, at 69-70.

³⁷⁰ 559 F.2d 642 (D.C. Cir. 1977).

³⁷¹ *Id.* at 643, 650.

³⁷² See CRAIG, *supra* note 337, at 61.

³⁷³ Compare *id.* at 54-55, with *id.* at 65-66.

³⁷⁴ *Id.* at 8-10, 21-22.

³⁷⁵ *Id.* at 31-32. The lawyer was in part inspired by arguments made in the previous case of Jenny Lee, who was also called before the INS and was granted a suspension of deportation like Chadha. In her case, the threat of a constitutional challenge to the legislative veto had led the Administration to lobby Congress to overturn its exercise of the veto, with success. See *id.* at 30-31.

Morrison learned of the matter soon after losing his follow-up challenge in *Clark* and immediately dove into the litigation.³⁷⁶

Meanwhile, political changes brought the executive branch into the fight. After defending the FEC in *Buckley*,³⁷⁷ the Department of Justice had intervened to support Morrison in *Clark* but ultimately accepted the Court of Appeals loss and declined to pursue an appeal.³⁷⁸ Those decisions were made under President Ford or in the very first days of the Carter Administration, though. Ford had no electoral mandate and may have worried about presidential overreach. His successor, President Carter, had fewer such anxieties. After winning reorganization authority with his backing of the one-house veto, he soured on Congress and chafed at its resistance to his agenda.³⁷⁹ By August 1977, his Administration had embraced active opposition to the veto and was affirmatively seeking out opportunities to invalidate it.³⁸⁰

Importantly, Carter's fight with Congress was in part about tactics. Both White House advisors and key legislators were committed to deregulation. They simply disagreed over how to do it. In an important message to Congress in 1978, Carter explained that the legislative veto frustrated efficacious agency action and increased opportunities for bad rulemaking.³⁸¹ He stated he would not treat legislative vetoes as binding.³⁸² Even legislators who supported deregulation were incensed. They saw Congress as the apex deregulator, uniquely empowered to curb improper lawmaking by "overzealous," "nonelected bureaucrats."³⁸³ Congress thus ignored Carter's warning, revived consideration of Levitas's generic veto, and added veto provisions to new bills, including all Federal Trade Commission rulemaking provisions.³⁸⁴

Against this political backdrop, the *Chadha* case was providential. Carter's administration had recognized that a decisive legal ruling could permanently cabin Congress and settle the matter.³⁸⁵ It entered a brief contesting the veto's constitutionality even as it sought out other judicial vehicles in case *Chadha* fell through.³⁸⁶

³⁷⁶ *Id.* at 88–89.

³⁷⁷ See generally Brief for the Attorney General as Appellee and for the United States as Amicus Curiae, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436 & 75-437).

³⁷⁸ See CRAIG, *supra* note 337, at 86–87.

³⁷⁹ See *id.* at 88.

³⁸⁰ See *id.* at 106.

³⁸¹ Legislative Vetoes: Message to the Congress, 14 WEEKLY COMP. PRES. DOC. 1146, 1148 (June 21, 1978).

³⁸² *Id.* at 1149.

³⁸³ See CRAIG, *supra* note 337, at 123 (quoting Martin Tolchin, *President Asserts He Won't Feel Bound by Congress Vetoes; Sends a Warning to Capitol*, N.Y. TIMES, June 22, 1978, at A16) (reproducing a quote by House Majority Leader James Wright).

³⁸⁴ See *id.* at 123, 129, 134.

³⁸⁵ See *id.* at 106.

³⁸⁶ See *id.* at 108.

Carter lost reelection before *Chadha* reached a final resolution, but his successor, Reagan, continued the fight. This was not foreordained, as Professor Barbara Craig documents in arresting detail.³⁸⁷ As a candidate, Reagan had been more committed to deregulation than to executive power. In fact, he supported the legislative veto as a tool to rein in regulation, and after the election his transition team signaled he would support the generic veto as President.³⁸⁸ But executive branch lawyers lobbied him to change policy. Larry Simms, an OLC lawyer who had served under Ford and Carter, wrote a memorandum for the new Administration arguing against the constitutionality of the legislative veto, which covered and transmitted an earlier document that Justice Scalia had written when he was head of OLC, making the same point.³⁸⁹ For added safety, Simms tried to tie the new Administration's hands with last-minute court filings against the legislative veto.³⁹⁰ In any event, the new head of OLC, Theodore Olson, shared Simms and Scalia's judgment, and Simms stayed on to work for the Reagan Administration.³⁹¹ Republican Party elites clashed over how best to advance Reagan's deregulatory goals, with prominent senators of his own party championing the veto and Reagan's political advisors searching for a compromise.³⁹² But, after a showdown involving a direct appeal by the Attorney General to the President, the Department of Justice won the chance to keep contesting the legislative veto in court, including in *Chadha*.³⁹³

The *Chadha* argument was momentous. On one side, counsel for the House and Senate; on the other, the conservative Reagan Administration and the progressive Alan Morrison.³⁹⁴ The House's lawyer observed that it was "an historic occasion": the first time that "the two Houses of Congress [had] been forced to intervene as litigating parties before th[e Supreme] Court."³⁹⁵ The Court entertained several amici briefs, including one from Scalia on behalf of the American Bar Association.³⁹⁶ Argument lasted ninety minutes. At the same time, the fight outside the Supreme Court intensified as Congress deadlocked over a regulatory reform bill that would have expanded the legislative veto further³⁹⁷ and new legislative veto litigation unfolded in District of

³⁸⁷ Indeed, our account of the relationship between *Chadha*, regulatory reform, and the development of the legislative veto is indebted to her pathbreaking work, which we largely summarize.

³⁸⁸ See CRAIG, *supra* note 337, at 149–50. Support for the legislative veto was even part of the Republican Party platform. *Id.* at 149.

³⁸⁹ See *id.* at 153.

³⁹⁰ See *id.* at 150.

³⁹¹ See *id.* at 158.

³⁹² See *id.* at 165, 169–70.

³⁹³ See *id.* at 170–71.

³⁹⁴ Transcript of Oral Argument at 3, *INS v. Chadha*, 462 U.S. 919 (1983) (No. 80-1832).

³⁹⁵ *Id.* at 4.

³⁹⁶ See *Chadha*, 462 U.S. at 922 n.7.

³⁹⁷ See CRAIG, *supra* note 337, at 215.

Columbia courts.³⁹⁸ The question of the legislative veto seemed headed for a decisive resolution.

The decision, when it finally came, was almost an anticlimax. Burger apparently grasped the full significance of the case only at the end of the term; rather than rule, he set it for reargument to give himself more time and control the writing.³⁹⁹ On June 23, 1983, his opinion finally came down.⁴⁰⁰ The Court ruled by a vote of 7–2 that the legislative veto was unconstitutional in all its forms.⁴⁰¹

Burger’s opinion echoed Scalia and Morrison’s skepticism about Congress. He acknowledged that some thought the veto “a useful ‘political invention,’” but he found that “arguable.”⁴⁰² At a minimum, he went on, the Founders wanted a divided legislature in part out of “fear that special interests could be favored at the expense of public needs.”⁴⁰³ Their “profound conviction” was “that the powers conferred on Congress were the powers to be most carefully circumscribed.”⁴⁰⁴ For that reason, they had given the President an essential role in lawmaking, that there might be a truly national perspective in framing legislation.⁴⁰⁵

In any case, “that a given law or procedure is . . . useful . . . will not save it if it is contrary to the Constitution.”⁴⁰⁶ Burger then relied on a formalistic separation of powers analysis to strike the legislative veto down.⁴⁰⁷ The House’s veto of the Attorney General’s deportation order was a legislative act.⁴⁰⁸ But the Constitution specified that legislation needed to go through bicameralism and presentment.⁴⁰⁹ The veto did not do this. Congress’s veto was therefore unconstitutional.⁴¹⁰

Burger recognized that his decision would make life harder for Congress, especially as vetoes were then becoming more frequent.⁴¹¹ He saw this as perhaps a virtue. At most, it was a necessary sacrifice in the service of nobler goals. As he noted, with some flair: “With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in

³⁹⁸ *Consumer Energy Council of Am. v. Fed. Energy Regul. Comm’n*, 673 F.2d 425, 434 (D.C. Cir. 1982), *aff’d sub nom. Process Gas Consumers Grp. v. Consumer Energy Council of Am.*, 463 U.S. 1216 (1983); *Consumers Union of U.S., Inc. v. FTC*, 691 F.2d 575, 577–78 (D.C. Cir. 1982), *aff’d sub nom. Process Gas Consumers Grp.*, 463 U.S. 1216.

³⁹⁹ See CRAIG, *supra* note 337, at 222.

⁴⁰⁰ *Chadha*, 462 U.S. at 919.

⁴⁰¹ See *id.* at 919, 959.

⁴⁰² *Id.* at 945 (quoting *id.* at 972 (White, J., dissenting)).

⁴⁰³ *Id.* at 950.

⁴⁰⁴ *Id.* at 947.

⁴⁰⁵ See *id.* at 948 (citing *Myers v. United States*, 272 U.S. 52, 123 (1926)).

⁴⁰⁶ *Id.* at 944.

⁴⁰⁷ See *id.* at 946, 959.

⁴⁰⁸ See *id.* at 952.

⁴⁰⁹ See *id.* at 946.

⁴¹⁰ See *id.* at 959.

⁴¹¹ See *id.* at 944.

the Constitution.”⁴¹² Delivered in the midst of the Cold War, his message was clear: however much it might constrain Congress, the Court’s ruling was intended to protect liberty itself.⁴¹³ Besides, Burger thought Congress had other tools at its disposal to discipline an errant Executive.⁴¹⁴

Members of Congress, predictably, were furious. The House promptly held a special session for members to express their frustration.⁴¹⁵ One mooted a constitutional amendment.⁴¹⁶ That fall, Representative Claude Pepper, Chairman of the House Rules Committee, convened hearings to decide how to respond. He opened by comparing “*Chadha*[’s] historical importance with respect to congressional authority to that of Chief Justice John Marshall’s decision in *McCulloch v. Maryland*.”⁴¹⁷ Representative Pepper hoped that the holding would soon be “whittled down” to restore congressional prerogative.⁴¹⁸ His colleagues proposed other responses, from greater use of sunset provisions to increased oversight.⁴¹⁹

The basic problem, though, was delegation. Representative John Dingell, who thought too much was being made of *Chadha* by his colleagues, nevertheless acknowledged that the legislative veto had made certain kinds of delegation to the Executive possible.⁴²⁰ Without it, Congress would never have gone along with building out the managerial presidency. If the veto no longer worked, why not reclaim that power? Dingell speculated that, without the device, Congress would grow stronger and give less away to the Executive.⁴²¹ Louis Fisher, then an expert with the Congressional Research Service, argued along similar lines as he urged Congress to reconsider delegations wholesale.⁴²²

In the age of administration, abandoning delegation was hard. Congress continued to enact legislative vetoes, if only to put pressure on

⁴¹² *Id.* at 959.

⁴¹³ *See id.* at 957 (observing that constitutional separation of powers was “intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power”).

⁴¹⁴ *See id.* at 955 n.19 (referencing Congress’s “other means of control, such as durational limits on authorizations and formal reporting requirements”).

⁴¹⁵ *See* CRAIG, *supra* note 337, at 233.

⁴¹⁶ *Id.* at 234.

⁴¹⁷ *Legislative Veto After Chadha: Hearings Before the H. Comm. on Rules*, 98th Cong. 1 (1984) (opening statement of Rep. Claude Pepper, Chairman, H. Comm. on Rules).

⁴¹⁸ *Id.* at 3.

⁴¹⁹ *See, e.g., id.* at 6 (statement of Rep. John D. Dingell); *see also* Frederick M. Kaiser, *Congressional Action to Overturn Agency Rules: Alternatives to the “Legislative Veto,”* 32 ADMIN. L. REV. 667, 668–69 (1980).

⁴²⁰ *See Legislative Veto After Chadha: Hearings Before the H. Comm. on Rules*, 98th Cong. 6 (1984) (statement of Rep. John D. Dingell). Note that Representative Dingell recognized and worried that his colleagues saw *Chadha* as bound up with regulatory reform, and feared they would use the Court’s decision as an excuse to advance regulatory reform through other means. *See id.* at 9.

⁴²¹ *Id.* at 10.

⁴²² *See id.* at 228–29 (statement of Louis Fisher, Expert, Congressional Research Service).

agencies.⁴²³ And it relied increasingly on informal mechanisms of control, including threats to tie the executive branch's hands if it did not follow congressional instructions.⁴²⁴ But there were limits to how far Congress could rein in an Executive without recourse to legal binds.

In 1985, in what would turn out to be Burger's last opinion, the Court limited Congress's legal tools further. The case, *Bowsher v. Synar*, was a replay of *Chadha*. On one side, again, Morrison and the Reagan Department of Justice; on the other, counsel for the House and Senate.⁴²⁵ The question this time was the constitutionality of the Gramm-Rudman-Hollings Act.⁴²⁶

The law had been born in desperation. Reagan's attempts to shrink the federal government foundered as Congress increased defense spending and opposed Reagan's proposed cutbacks.⁴²⁷ The budget deficit ballooned. Unable to restrict outflows, conservative legislators attached a provision to a must-pass debt-ceiling bill mandating sequestration.⁴²⁸ The law set target limits for spending and, in the event Congress exceeded those targets, ordered the Comptroller General to recommend cuts, defined by a statutory formula, which the President would be obligated to implement.⁴²⁹ Congressmen lamented the Act even as they voted for it.⁴³⁰ With the law, they hoped to tie themselves to the neoliberal mast.

Many legislators recognized that the Act included a novel enforcement mechanism that might raise constitutional questions.⁴³¹ For this reason, the statute included a fallback provision, in case parts of it were struck down.⁴³² As expected, legal challenges came right away: the President objected to taking orders from the Comptroller General; employees who might face spending cuts objected to the proposed reductions; and several Congressmen, led by Representative Synar,

⁴²³ See Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273, 288 (1993).

⁴²⁴ See JESSICA KORN, THE POWER OF SEPARATION 37 (1996); JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 72–73 (2017) (discussing congressional control of the bureaucracy in the aftermath of *Chadha*).

⁴²⁵ See *Bowsher v. Synar*, 478 U.S. 714, 714 n.*, 716 (1986).

⁴²⁶ Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038 (codified as amended at 2 U.S.C. §§ 900–922).

⁴²⁷ See Darrell M. West, *Gramm-Rudman-Hollings and the Politics of Deficit Reduction*, 499 ANNALS AM. ACAD. POL. & SOC. SCI. 90, 93–94 (1988); G. William Hoagland & Loren Adler, *Origins of the Sequester*, BIPARTISAN POL'Y CTR. (Feb. 27, 2013), <https://bipartisanpolicy.org/blog/origins-sequester> [https://perma.cc/8X6S-V8HN].

⁴²⁸ Hoagland & Adler, *supra* note 427.

⁴²⁹ *Bowsher*, 478 U.S. at 717–18. Congress would have an opportunity to make the cuts before the President's order went into effect. *Id.* at 718.

⁴³⁰ See Brief of Appellees Mike Synar, Member of Congress, et al. at 5–6, *Bowsher*, 478 U.S. 714 (Nos. 85-1377, 85-1378 & 85-1379) [hereinafter Brief of Appellees].

⁴³¹ See *Bowsher*, 478 U.S. at 718.

⁴³² *Id.*

objected to what they saw as an unconstitutional delegation of congressional lawmaking.⁴³³ The fight against greater congressional supervision of the executive branch again made strange bedfellows, as the liberal Morrison and the conservative Solicitor General Charles Fried filed briefs on the same side.⁴³⁴

The Court made short work of the case, relying on the same formalist analysis it had elaborated in *Chadha*. Burger again wrote the majority opinion for a 7–2 Court.⁴³⁵ His writing was, if anything, even more formalistic. The Constitution divided the government into “three defined categories,” Burger remarked, quoting his *Chadha* opinion.⁴³⁶ It “does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts.”⁴³⁷ The Gramm-Rudman-Hollings Act empowered the Comptroller General to play a role in executing the laws.⁴³⁸ But the Comptroller General was a congressional agent.⁴³⁹ This was not allowed, since “[t]o permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws,” or “in essence, . . . permit a congressional veto.”⁴⁴⁰

As in *Chadha*, Burger again linked his reading to the fundamental fight for freedom. “The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.”⁴⁴¹ Perhaps a system of formalistically separated powers made it harder for Congress to legislate. “[B]ut [the federal state] was deliberately so structured to assure full, vigorous, and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power.”⁴⁴² The vision of the Framers and the demands of freedom put strong limits on what Congress could do. “[A]s *Chadha* makes clear,” Burger concluded, “once Congress makes its choice in enacting legislation, its participation ends.”⁴⁴³

As commentators observed at the time, *Bowsher* constituted a decisive step toward overturning the separation of powers regime that

⁴³³ *Id.* at 719 & n.1.

⁴³⁴ See Brief of Appellees, *supra* note 430, at 49; Brief for the United States at 61, *Bowsher*, 478 U.S. 714 (Nos. 85-1377, 85-1378 & 85-1379).

⁴³⁵ *Bowsher*, 478 U.S. at 716. Note that Burger’s majority counted five Justices; Justices Marshall and Stevens concurred in the judgment. *Id.*

⁴³⁶ *Id.* at 721 (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)).

⁴³⁷ *Id.* at 722.

⁴³⁸ See *id.* at 733.

⁴³⁹ See *id.* at 727.

⁴⁴⁰ *Id.* at 726.

⁴⁴¹ *Id.* at 730.

⁴⁴² *Id.* at 722.

⁴⁴³ *Id.* at 733.

had enabled the New Deal state.⁴⁴⁴ Under Burger's new formalism, Congress was limited in its ability to legislate how its laws would be implemented and to constrain the executive branch.

While Burger never endorsed the specific legal reasoning justifying E.O. 12,291, his opinions bolstered its conceptual foundations and undercut Congress's ability to push back.⁴⁴⁵ Like the OLC memo defending the executive order, *Chadha* and *Bowsher* embraced a capacious (if ill-defined) understanding of executive power. The opinions similarly shared a casual disregard for the long history of interbranch accommodation that had built out the administrative state. And, most importantly, they found directly in the Constitution a source of administrative authority lodged outside of Article I and exclusively under Article II,⁴⁴⁶ giving judicial imprimatur to the Reagan Administration's audacious legal gamble.

Indeed, in some ways Burger went beyond the OLC memo. For all its reliance on the Take Care Clause, E.O. 12,291 nevertheless recognized Congress's authority to legislate the structure of administration and the President's duty to observe Congress's enactments.⁴⁴⁷ OLC had used the Constitution to create a presumption of presidential administrative authority in the face of congressional silence, but it did not seek to invalidate any of Congress's laws. Burger went further. He found in the structure of the Constitution a core of executive branch administrative authority that Congress could not touch. And he used that to strike down congressional enactments, cabining the legislature to create a space of exclusively executive administration.

The summer after his *Bowsher* opinion, with its paean to formalist constitutionalism, Burger resigned from the Court to focus on his work as Chairman of the Commission on the Bicentennial of the Constitution.⁴⁴⁸ Reagan's pick for the eventual vacancy had something poetic to it, ratifying the revolution Burger had presided over.⁴⁴⁹ Scalia had already shaped the Court's new conception of separation of powers, testifying against the legislative veto in Congress,⁴⁵⁰ filing briefs against

⁴⁴⁴ See, e.g., David P. Currie, *The Distribution of Powers After Bowsher*, 1986 SUP. CT. REV. 19, 20–21, 40 (1987).

⁴⁴⁵ Compare text accompanying notes 27–28, with text accompanying notes 435–43.

⁴⁴⁶ See, e.g., *Bowsher*, 478 U.S. at 722.

⁴⁴⁷ See text accompanying notes 182–93.

⁴⁴⁸ Ronald Reagan, *Remarks on the Resignation of Supreme Court Chief Justice Warren E. Burger and the Nominations of William H. Rehnquist to Be Chief Justice and Antonin Scalia to Be an Associate Justice*, AM. PRESIDENCY PROJECT (June 17, 1986), <https://www.presidency.ucsb.edu/documents/remarks-the-resignation-supreme-court-chief-justice-warren-e-burger-and-the-nominations> [https://perma.cc/5FQS-G5E3].

⁴⁴⁹ Note that Reagan elevated William Rehnquist, already a sitting Justice, to Chief Justice Burger's position as Chief, creating a new vacancy for an Associate Justice. It was to this vacancy that he nominated then-Judge Scalia. *Id.*

⁴⁵⁰ See *Nomination of Judge Antonin Scalia, to Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 99th Cong. 63–64 (1986) (statement of then-Judge Scalia).

Congress's ability to limit the Executive in *Chadha*,⁴⁵¹ and, as an appellate judge when *Bowsher* was heard, sitting on the court below, striking Gramm-Rudman-Hollings down on the same grounds Burger would subsequently affirm.⁴⁵² He was a fitting choice to join the transformed Court. But his opinions would soon point beyond where even the Burger Court had dared to go.

B. *Imagining the Unitary Executive*

As the Burger Court curtailed the scope of congressional authority in *Chadha* and *Bowsher*, academic interpretations of the President's control over agencies grew only incrementally and narrowly. Far from imagining an all-encompassing Unitary Executive with the administrative state under his command, scholars in the second half of the 1980s continued to envision a much more modest presidency. While the executive branch had certain institutional features that justified greater involvement with agencies, Congress remained firmly in the picture. And the most assertive arguments still hewed closely to the question of removal.⁴⁵³ As the 1980s drew to a close, the legal academy's view of the presidency had moved only a short distance from where it was when the decade began.

Scholarly arguments for an expanded presidential role during this period were largely functionalist. The work of Professor Peter Strauss was exemplary. In sharp contrast to the formalism of the Burger Court's *Chadha* and *Bowsher* opinions, Strauss focused on the institutional realities of the administrative state. The relationship between the three branches, Strauss argued, could be conceived in at least three different ways: "separation of powers," "separation of functions," and "checks and balances."⁴⁵⁴ "Separation of powers" envisioned a hard and fast allocation of powers between the Congress, the President, and the courts. On this view, "the safety of the citizenry from tyrannous government" required that legislation, enforcement, and adjudication "be kept in distinct places."⁴⁵⁵ Such a vision, of course, informed the Court's opinions in *Chadha* and *Bowsher*.⁴⁵⁶ Strauss, however, insisted that the Constitution and the administrative state required "abandon[ing]" formalism "in favor of analysis in terms of separation of functions and checks and balances."⁴⁵⁷ "Separation of functions" entailed comfort with the fact

⁴⁵¹ See *INS v. Chadha*, 462 U.S. 919, 922 n.† (1983) ("Antonin Scalia, Richard B. Smith, and David Ryrie Brink filed a brief for the American Bar Association as amicus curiae urging affirmance.").

⁴⁵² See *Synar v. United States*, 626 F. Supp. 1374, 1377, 1403 (D.D.C. 1986).

⁴⁵³ See *infra* text accompanying notes 467–70.

⁴⁵⁴ Strauss, *supra* note 301, at 577–78.

⁴⁵⁵ *Id.* at 577.

⁴⁵⁶ See, e.g., *id.* at 633–34.

⁴⁵⁷ *Id.* at 578.

that agencies could often “exercise all three of the characteristic governmental powers,” and “checks and balances” required “continuous struggle” between the various branches, but at the level of particular “relationships and interconnections.”⁴⁵⁸

Strauss’s granular view of the relationship between structural constitutional law and administrative law allowed him to place agencies outside of any particular branch, instead viewing them as “subordinate bodies subject to the control of all three.”⁴⁵⁹ This meant disaggregating presidential control and expanding it in some contexts while continuing to constrain it in others. For instance, Strauss understood the Take Care Clause to “impl[y] that congressional structuring must in some sense admit” presidential oversight over agency action, yet still allow Congress to “place the responsibility for decision in a department rather than the President.”⁴⁶⁰ Similarly, Strauss saw no constitutional problems with independent agencies, so long as Congress and the President enjoyed “parity in . . . political oversight.”⁴⁶¹ Most importantly, however, Strauss saw a structural argument for the President’s exercise of residual discretion afforded by statutes.⁴⁶² This followed from the presidency’s political accountability and its capacity to coordinate interagency action.⁴⁶³ Under Strauss’s vision, the President enjoyed “wide but informal directory power”⁴⁶⁴ alongside “a continuing (and desirable) process of aggressive congressional oversight.”⁴⁶⁵ It was this very commitment to interbranch parity and functional analysis that allowed Strauss to both embrace the Court’s conclusion in *Bowsher* and reject its formalist trappings.⁴⁶⁶

If Strauss represented the mainstream position on presidential authority by the late 1980s, the most assertive arguments narrowly focused on expanding the President’s authority to remove agency officials. For one commentator, the “incorporation of independent agencies into the executive branch”⁴⁶⁷ simply meant giving the President the ability to “remov[e] at will . . . now-independent officers.”⁴⁶⁸ In perhaps the most

⁴⁵⁸ *Id.* at 577–78.

⁴⁵⁹ *Id.* at 640.

⁴⁶⁰ *Id.* at 649.

⁴⁶¹ *Id.* at 650; *see also id.* at 650–53.

⁴⁶² *Id.* at 663.

⁴⁶³ *Id.*

⁴⁶⁴ *Id.* at 667.

⁴⁶⁵ Strauss & Sunstein, *supra* note 301, at 188. Strauss shared this position with Sunstein, who had advanced from his early doubts about the scope of E.O. 12,291, *see supra* pp. 2171–72, to embrace greater presidential authority.

⁴⁶⁶ *See* Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions — A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 519–20 (1987) (explaining that *Bowsher* represented a case of functional congressional aggrandizement, transferring the President’s “ordinary controls over the tenure of government officials,” *id.* at 520, to Congress).

⁴⁶⁷ Peter P. Swire, Note, *Incorporation of Independent Agencies into the Executive Branch*, 94 YALE L.J. 1766, 1780 (1985).

⁴⁶⁸ *Id.* at 1785.

sustained critique of the constitutionality of independent agencies of the 1980s, Professor Geoffrey Miller also concentrated on the scope of the President's removal power.⁴⁶⁹ Miller argued that the President retained an inherent power to remove agency officials who "refused an order of the President to take an action within the officer's statutory authority."⁴⁷⁰ His claim depended on what he termed a "neoclassical approach" to the separation of powers, a method he attributed to the Court's decisions in *Chadha* and *Bowsher*.⁴⁷¹ This formalist approach, Miller insisted, "is congenial to the purposes of the Framers," who "took seriously the Newtonian structure of attractive and repulsive political forces."⁴⁷² Despite his invocations of the Framers' aims, Miller was not an originalist. He melded high-level historical claims with functional argument, citing the President's greater "vigor," political accountability, and efficiency.⁴⁷³

Perhaps more important was what Miller excluded: a general directive authority over agency officials. Instead, his radicalism amounted to a strengthened removal power. What the President enjoyed, Miller claimed, was a constitutional power to indirectly channel officials' discretion through the threat of removal.⁴⁷⁴ This power constrained Congress's ability to protect officials who disobeyed presidential orders, but it did not give the President unfettered removal authority either.⁴⁷⁵ For Miller, Congress remained free to prohibit the President "from removing officers for other reasons, such as personal animus or refusing to obey an order to do something outside the officer's statutory authority."⁴⁷⁶ While his argument was by the standards of its time the most assertive argument for executive power over agencies, its picture of the President's removal authority still came with clear and important caveats.⁴⁷⁷

One scholar-cum-jurist, though, was pushing further. In a lonely dissent in *Morrison v. Olson*,⁴⁷⁸ Justice Scalia outlined a sweeping

⁴⁶⁹ Miller, *supra* note 264, at 44. Notably, Miller observed that "[t]he literature on the constitutionality of independent agencies is quite sparse, probably because of the widely shared assumption that the issue was definitively settled in *Humphrey's Executor*." *Id.* n.17.

⁴⁷⁰ *Id.* at 44.

⁴⁷¹ *Id.* at 53 & n.56.

⁴⁷² *Id.* at 54.

⁴⁷³ *Id.* at 56.

⁴⁷⁴ *Id.* at 87.

⁴⁷⁵ *Id.*

⁴⁷⁶ *Id.* at 44.

⁴⁷⁷ Even the most vociferous contemporary defense of congressional authority and response to Miller also remained tethered to the question of removal. A. Michael Fromkin, Note, *In Defense of Administrative Agency Autonomy*, 96 YALE L.J. 787, 787 n.1 (1987) ("The power to hire, and especially to fire, is the essence of control in federal administration.")

⁴⁷⁸ 487 U.S. 654 (1988).

vision of executive authority that would inspire arguments to come.⁴⁷⁹ *Morrison* grew out of another multiyear battle between Congress and the presidency over agency control.⁴⁸⁰ In 1982, House subcommittees had subpoenaed the Reagan Administration's EPA to provide documents related to its enforcement of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980,⁴⁸¹ a statute governing the costs of hazardous waste removal.⁴⁸² The Reagan White House responded by invoking executive privilege and directed the Administrator of the EPA to withhold "enforcement sensitive information."⁴⁸³ The House Judiciary Committee then voted to hold the Administrator in contempt and, in 1983, launched an investigation into the Justice Department's role in the dispute.⁴⁸⁴

After nearly two years of wrangling between Congress and the Reagan Department of Justice over documents, the House Judiciary Committee published its findings, including suggestions that Theodore Olson, the Assistant Attorney General heading OLC, had provided "false and misleading testimony" during the House investigation.⁴⁸⁵ The Chairman of the Judiciary Committee requested the Attorney General to appoint an independent counsel under the Ethics in Government Act of 1978⁴⁸⁶ to further investigate Olson's conduct.⁴⁸⁷ The Attorney General complied, appointing first James C. McKay and then Alexia Morrison to the position.⁴⁸⁸ When Morrison sought to subpoena Olson and two other Justice officials, they moved to quash the subpoena and objected to the very constitutionality of her office.⁴⁸⁹

Olson's challenge was comprehensive, aiming at every aspect of the independent counsel's office. He claimed the Ethics in Government Act violated the Appointments Clause⁴⁹⁰ by vesting the selection of an independent counsel in the Special Division, a court created by the Act.⁴⁹¹ He next argued that the Act violated Article III by imposing nonjudicial functions on the federal judges who comprised the Special Division, specifically "advisory, supervisory, and executive functions."⁴⁹² And, most in line with contemporary scholarly arguments, Olson challenged the independent counsel's for-cause removal protections on Article

⁴⁷⁹ See *id.* at 697–99 (Scalia, J., dissenting).

⁴⁸⁰ See *id.* at 665–68 (majority opinion).

⁴⁸¹ Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended in scattered sections of 26 and 42 U.S.C.).

⁴⁸² *Id.*; *Morrison*, 487 U.S. at 665.

⁴⁸³ *Morrison*, 487 U.S. at 665.

⁴⁸⁴ *Id.*

⁴⁸⁵ *Id.* at 666.

⁴⁸⁶ Pub. L. No. 95-521, § 601, 92 Stat. 1824, 1868 (codified as amended at 28 U.S.C. § 592).

⁴⁸⁷ *Morrison*, 487 U.S. at 666.

⁴⁸⁸ *Id.* at 667.

⁴⁸⁹ *Id.* at 668.

⁴⁹⁰ U.S. CONST. art. II, § 2, cl. 2.

⁴⁹¹ Brief for Appellee at 12, 48, *Morrison*, 487 U.S. 654 (No. 87-1279), 1987 WL 880907, at *12, *48.

⁴⁹² *Id.* at 40–41.

II grounds, claiming they “impermissibly interfere[d] with the President’s exercise of his constitutionally appointed function[]” of law enforcement.⁴⁹³

In his opinion for a nearly unanimous Court, Chief Justice William Rehnquist denied every one of Olson’s claims. He defended the Ethics in Government Act in functionalist terms, rejecting Olson’s emphasis on the labels of “inferior officer” and description of the independent counsel as “purely executive.”⁴⁹⁴ In upholding the Act, the seven-Justice majority protected a cornerstone of the congressional response to Watergate from an early death.

In a now-canonical solo dissent, however, Scalia cast the decision in much starker terms. Where the majority saw the statute as a creative but constitutional exercise of congressional authority, Scalia insisted the Act represented a flagrant threat to the Framers’ conception of the separation of powers.⁴⁹⁵ In order to see why the Act was so dangerous — a “wolf [that] c[ame] as a wolf” — Scalia returned to first principles.⁴⁹⁶ This meant closely inspecting constitutional text and, in particular, Article II’s Vesting Clause.⁴⁹⁷ For Scalia, the Vesting Clause’s meaning was clear. It did “not mean *some* of the executive power, but *all* of the executive power” was placed in the presidency.⁴⁹⁸ Once that premise was in place, the constitutionality of the Act turned on two questions: “(1) Is the conduct of a criminal prosecution . . . the exercise of purely executive power? (2) Does the statute deprive the President of the United States of exclusive control over the exercise of that power?”⁴⁹⁹ His answer to both questions was a resounding yes.⁵⁰⁰ The independent counsel was therefore unconstitutional.⁵⁰¹

Scalia inherited and accentuated the formalism of the Burger Court’s separation of powers decisions, which, as we saw, he had himself helped create. Unlike the functionalist *Morrison* majority, Scalia thought it was “ultimately irrelevant *how much* the statute reduces Presidential control”⁵⁰² or “how much of the purely executive powers of government must be within the full control of the President.”⁵⁰³ The “case [was] over”⁵⁰⁴ once the Court determined there was *any* incursion at all on

⁴⁹³ *Morrison*, 487 U.S. at 685.

⁴⁹⁴ *Id.* at 688–89, 689 n.27.

⁴⁹⁵ *See id.* at 699 (Scalia, J., dissenting) (characterizing the Act as a threat to “[t]he allocation of power among Congress, the President, and the courts in such a fashion as to preserve the equilibrium the Constitution sought to establish”).

⁴⁹⁶ *Id.*

⁴⁹⁷ *Id.* at 705–09; U.S. CONST. art. II, § 1, cl. 1.

⁴⁹⁸ *Morrison*, 487 U.S. at 705 (Scalia, J., dissenting).

⁴⁹⁹ *Id.*

⁵⁰⁰ *See id.* at 708.

⁵⁰¹ *Id.* at 714–15.

⁵⁰² *Id.* at 708.

⁵⁰³ *Id.* at 709.

⁵⁰⁴ *Id.* at 708.

any of the executive powers, since “[t]he Constitution prescribes that they *all* are.”⁵⁰⁵ These powers included not only prosecutorial power but also the Executive’s authority to remove principal officers exercising purely executive powers under *Myers*.

Justice Scalia admonished the Court for its “erroneous conclusion that the independent counsel was an inferior officer,”⁵⁰⁶ but he did not stop there. He extended his critique to *Humphrey’s Executor*, which he observed “was considered by many at the time the product of an activist, anti–New Deal Court bent on reducing the power” of the President.⁵⁰⁷ *Humphrey’s Executor*, Scalia lamented, had allowed for removal protections for “so-called ‘independent regulatory agencies.’”⁵⁰⁸ While he read the *Morrison* majority opinion as blurring the distinction between inferior and principal officers that had emerged from *Myers* and *Humphrey’s Executor*, he wryly added that “[o]ne c[ould] hardly grieve for the shoddy treatment given . . . to *Humphrey’s Executor*,”⁵⁰⁹ an opinion that had “gutt[ed], in six quick pages devoid of textual or historical precedent for the novel principle it set forth, a carefully researched and reasoned 70-page opinion” in *Myers*.⁵¹⁰ In the closing pages of his dissent, Scalia managed a double blow, first against the majority for its lack of fidelity to *Humphrey’s Executor*,⁵¹¹ and second and more importantly, against *Morrison*’s limitations on a “unitary Executive.”⁵¹²

Scalia’s dissent in *Morrison* marked a watershed in the development of what came to be known as unitary executive theory.⁵¹³ While the Burger Court cut back on the outer limits of congressional authority in *Chadha* and *Bowsher* and brought separation of powers formalism into the mainstream, it never advanced a constructive vision of executive power. In fact, the phrase “Unitary Executive” never once appeared in either opinion. Nor did the Burger Court come close to questioning the constitutionality of independent agencies.

Scalia’s dissent, by contrast, directly centered the question of the original design of executive power. Some things were obvious: there was only one Executive and her prosecutorial power was plenary.⁵¹⁴ Others were more suggestive and radical. In particular, Scalia’s critique of the independent counsel’s removal protections was a proxy for more drastic changes in administrative and constitutional law. By emphasizing *Myers* and denigrating *Humphrey’s Executor*, Scalia gestured

⁵⁰⁵ *Id.* at 709.

⁵⁰⁶ *Id.* at 724.

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.* at 724–25.

⁵⁰⁹ *Id.* at 725.

⁵¹⁰ *Id.* at 726.

⁵¹¹ *See id.* at 726–27.

⁵¹² *See id.* at 727.

⁵¹³ *See* Rosenblum, *supra* note 59, at 1440–41.

⁵¹⁴ *Morrison*, 487 U.S. at 723, 724 n.4 (Scalia, J., dissenting).

toward a President with vast authority over an administrative state shorn of independent agencies.

Scalia's dissent anchored the scholarly debate that soon followed, as a set of creative, young originalists took the lineaments of his unitary executive theory and began filling out its substance.⁵¹⁵

The first step in elaborating Scalia's vision was disaggregating unitary executive theory. In a 1992 *Harvard Law Review* article, Professor Steven Calabresi and Kevin Rhodes did just that.⁵¹⁶ They began by noting the relative recency of the unitary executive debate.⁵¹⁷ They emphasized that they were not offering a definition of executive power but rather continuing Scalia's analysis in *Morrison* by focusing on the question of "whether Congress [could] divest the President of powers that are concededly 'executive.'"⁵¹⁸ Preliminaries aside, they then characterized unitary executive theorists as sharing the belief "that the President alone possesses *all* of the executive power and that he therefore can direct, control, and supervise inferior officers or agencies who seek to exercise discretionary executive power."⁵¹⁹ This tenet, they continued, led to a "dramatic" conclusion: it "render[ed] unconstitutional independent agencies and counsels to the extent that they exercise discretionary executive power."⁵²⁰ In setting forth the basic premises of unitary executive theory, Calabresi and Rhodes spelled out the barely implicit conclusions of Scalia's *Morrison* dissent.

They next identified three ideal types of unitary executive theory, "each of which differ[ed] about the specific mechanisms and degrees of presidential control over the executive department."⁵²¹ The first and strongest "mechanism" gave the President the "direct power to supplant any discretionary executive action taken by a subordinate with which he disagrees," even if Congress vested that discretionary power

⁵¹⁵ This is not to say that the unitary executive theory was born fully-formed from Scalia's dissent like Athena from Zeus's head. Arguments like those that would inform Scalia's dissent seem to have circulated inside the second-term Reagan Department of Justice, then led by Attorney General Edwin Meese III, through an informal network that included some of the same young originalists who would go on to develop the theory more fully after their time in government, including Gary Lawson, his housemate Steven Calabresi, Steven Calabresi's friend from college Lee S. Liberman, and their Meese Department of Justice colleague John C. Harrison. See Email from Gary Lawson, Professor of L., Boston Univ. Sch. of L., to Noah Rosenblum, Assistant Professor of L., New York Univ. Sch. of L. (Feb. 5, 2024, 3:32 PM) (on file with the Harvard Law School Library); see also Steven G. Calabresi & Gary Lawson, *The Meese Revolution: The Making of a Constitutional Moment* (2024) (unpublished manuscript) (on file with the Harvard Law School Library).

⁵¹⁶ See Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165 (1992).

⁵¹⁷ See *id.* Their point of comparison was with the long-standing question of Congress's capacity to strip federal courts of their jurisdiction. *Id.*

⁵¹⁸ *Id.* n.52 (citing *Morrison* for their object of inquiry).

⁵¹⁹ *Id.* at 1165 (footnote omitted).

⁵²⁰ *Id.* at 1165–66 (footnote omitted).

⁵²¹ *Id.* at 1158 n.10, 1166.

exclusively in the subordinate.⁵²² This view signified a dramatic expansion of executive power, since it would allow the President, for instance, to “act in the place of . . . the Commissioners of the Federal Trade Commission, without having to fire them.”⁵²³ In such a world, any agency official exercising executive power — and the category was left capacious and undefined — was a mere extension of the President; if the official disagreed with the President, the latter could simply act directly. A second, middle version of the unitary executive theory replaced the directive power with the ability “to nullify or veto their exercises of discretionary executive power.”⁵²⁴ Finally, “[t]he third and weakest model” afforded the President “unlimited power to remove at will any principal officers (and perhaps certain inferior officers) who exercise executive power” but stopped there.⁵²⁵

Calabresi and Rhodes’s framework and sources showed the construction of a new tradition in real time. They cited no historical precedent for the two strongest unitarian views — a general directive power and veto authority.⁵²⁶ Their sole authority was a law review article published the year after *Morrison* by Professor Lee S. Liberman,⁵²⁷ one of Scalia’s first clerks on the Supreme Court and then–Associate Counsel to President George H.W. Bush.⁵²⁸ Liberman’s article similarly drew less on historical authority than logic. She advanced “in syllogism form”⁵²⁹ a reading of the Vesting, Take Care, and Necessary and Proper Clauses that, because the President was unitary and charged with both the executive power and the duty to faithfully execute the laws, the President “must retain the authority to give directives to the officers who assist him.”⁵³⁰

Only when presenting the third and weakest view — wide removal authority — did Calabresi and Rhodes offer something resembling historical evidence and scholarly support. They argued that “[t]wo Supreme Court Justices ha[d] endorsed this last variant of the unitary executive”: Chief Justice Taft in *Myers* and Justice Scalia in dissent in *Morrison*.⁵³¹ And they cited a relatively recent body of scholarship to

⁵²² *Id.* at 1166.

⁵²³ *Id.* The constitutional status of FTC Commissioners, of course, was at the heart of *Humphrey’s Executor v. United States*, 295 U.S. 602, 618 (1935).

⁵²⁴ Calabresi & Rhodes, *supra* note 516, at 1166.

⁵²⁵ *Id.*

⁵²⁶ *See id.*

⁵²⁷ *Id.* nn.54–55 (citing Lee S. Liberman, *Morrison v. Olson: A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313, 313, 316, 347, 353, 354 (1989)).

⁵²⁸ *See* Liberman, *supra* note 527, at 313 n.*; Weekend Edition Sunday, *Scalia’s Colleagues Speak on His Early Term Years*, NPR, at 00:30 (Feb. 14, 2016, 9:07 AM), <https://www.npr.org/2016/02/14/466720691/scalias-colleagues-speak-on-his-early-term-years> [https://perma.cc/F5SR-TM7T].

⁵²⁹ Liberman, *supra* note 527, at 315.

⁵³⁰ *Id.* at 315–16.

⁵³¹ *See* Calabresi & Rhodes, *supra* note 516, at 1166–67.

support expanded removal powers.⁵³² Moreover, by associating the weakest version of the unitary executive thesis with the *Morrison* dissent,⁵³³ Calabresi and Rhodes pushed the boundaries of theory beyond its Scalian origins. Now the unitary executive thesis required as a constitutional floor wide removal authority for the President and the elimination of independent agencies.

What Calabresi and Rhodes did not answer was which version of the unitary executive thesis was right. Nor did they settle on a conclusive method for doing so. They proceeded by analogy in their article, drawing a comparison between doctrinal debates about jurisdiction stripping and the question of a Unitary Executive.⁵³⁴ This involved toggling between constitutional text, precedent, and secondary scholarship.⁵³⁵ Nor did their piece involve an originalist recovery of the meaning of Article II. It would be left for later scholars to take up these open questions of substance and style.

A response came quickly. One year after Calabresi and Rhodes's piece, Saikrishna Prakash published a student note that accepted their framework and began addressing its unresolved puzzles.⁵³⁶ Prakash opened by posing a question: "What would the Framers think of a President who was not responsible for executing major portions of federal law?"⁵³⁷ His query betrayed both his target and method. For Prakash, the existence of independent agencies meant that the President had "limited statutory authority over many officers and agencies,"⁵³⁸ and even for executive departments, "the President's statutory authority hinge[d] on each department's enabling statute."⁵³⁹ All of this, he insisted, was unconstitutional, since "[h]istorical evidence . . . indicate[d] that the Framers attempted to establish an executive who alone is accountable for executing federal law and who has the authority to control its administration."⁵⁴⁰

By yoking his claim to the intentions of the Framers, Prakash committed himself to originalism. Prakash's strategy required gleaning the meaning of various constitutional clauses from Founding-era materials, especially the *Federalist Papers* and the Philadelphia Convention Debates.⁵⁴¹

⁵³² *Id.* at 1166 n.57.

⁵³³ *Id.* at 1166–67.

⁵³⁴ *See generally id.* at 1171–84.

⁵³⁵ *See, e.g., id.* at 1175–77.

⁵³⁶ *See* Saikrishna Bangalore Prakash, Note, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991, 991 n.4, 992 n.5 (1993).

⁵³⁷ *Id.* at 991.

⁵³⁸ *Id.*

⁵³⁹ *Id.*

⁵⁴⁰ *Id.*

⁵⁴¹ *Id.* at 993.

Prakash's strategy prefigured the methodological shape of future conversation. At the time, however, his conclusions were more important. He argued that his theory of the President as the "Chief Administrator" was "akin to what Calabresi and Rhodes label the 'first mechanism' of presidential control."⁵⁴² The first mechanism was, of course, the strongest version of the unitary executive theory, as it transformed any official exercising any executive authority into an extension of the President. Under his chief administrator theory, Prakash continued, "even if a statute grant[ed] discretion to the Secretary of State and explicitly prohibit[ed] presidential intervention,"⁵⁴³ the President could "substitute his own judgment for the Secretary's determination."⁵⁴⁴ Put simply: "Whenever an official is granted statutory discretion, the Constitution endows the President with authority to control that discretion."⁵⁴⁵

In staking out this position, Prakash set himself against the current of scholarly authority that "den[ied] that the President ha[d] such constitutional authority or that the Framers intended to create a Chief Administrator."⁵⁴⁶ This group included familiar names such as Morton Rosenberg and Harold Bruff.⁵⁴⁷ Yet Prakash's arguments and method were both an attempt to flesh out the inchoate constitutional arguments behind E.O. 12,291 a decade earlier and a sign of how far argument had moved since then.

The constitutional argument for the executive order had been tentative and inchoate. It relied on *Myers*⁵⁴⁸ without fully exploring the consequences of doing so. And even during the decade following the order, its defenders had not provided it with more developed constitutional moorings. Prakash, however, tackled the problem head on by making assertive, historical claims about the nature of executive power.⁵⁴⁹ These claims would, of course, be vigorously contested, but they helped shift the terms of conversation. The most prestigious platforms in the American legal academy now devoted center stage to the historical puzzle of whether a Unitary Executive with plenary authority over agencies was in fact the law.

The climax of this debate featured dueling articles: one by Professors Lawrence Lessig and Cass Sunstein; the other by Professor Calabresi

⁵⁴² *Id.* at 992 n.5 (quoting Calabresi & Rhodes, *supra* note 516, at 1166).

⁵⁴³ *Id.* at 992.

⁵⁴⁴ *Id.*

⁵⁴⁵ *Id.* (footnote omitted).

⁵⁴⁶ *Id.* n.7.

⁵⁴⁷ *Id.*

⁵⁴⁸ See OLC Memo, *supra* note 181, at 60, 62 (citing *Myers v. United States*, 272 U.S. 52, 125 (1926)).

⁵⁴⁹ See Prakash, *supra* note 536, at 991.

and now-Professor Prakash.⁵⁵⁰ Their articles, both published in 1994, addressed the very same question: What sort of Unitary Executive did the Constitution create?⁵⁵¹ This was not intrinsically a historical question but, given the methodological direction of their engagement, it turned into a face-off over the original Constitution.

None of the participants “denie[d] that in some sense the framers created a unitary executive; the question is in what sense.”⁵⁵² For Lessig and Sunstein, the question required expanding Calabresi and Rhodes’s framework. The unitary executive thesis, on their view, did not run from full removal authority to full directive authority. Instead, there were two versions of the theory. The “strong version” held that the “President ha[d] plenary or unlimited power over the execution of administrative functions, understood broadly to mean all tasks of law-implementation.”⁵⁵³ This version spanned Calabresi and Rhodes’s entire framework and “constitutionalize[d] a single organizational value — unitariness — at the expense of other possible governmental values — such as disinterestedness or independence.”⁵⁵⁴ And it reduced the constitutionality of “any organizational structure” to one basic test: Does it maintain unitariness?⁵⁵⁵

By contrast, the “weak version” of the unitary executive thesis “offer[ed] a more unruly picture.”⁵⁵⁶ This version assigned some plenary powers to the Executive, but the range of functions the Executive exercised expanded over time.⁵⁵⁷ For these “nonexecutive functions . . . Congress has a wide degree of authority to structure government as it sees fit.”⁵⁵⁸ Under this model, Congress could balance “unitariness” against other values in different institutional arrangements that still qualified as “constitutional.”⁵⁵⁹ Described in this way, the “weak version” roughly tracked a functionalist view of the separation of powers: functions and powers could cut across different branches and constitutionality involved a cluster of normative goals.

The scholarly disagreement turned primarily on which version of the unitary executive thesis was right as a historical matter. Lessig and Sunstein thought the historical evidence clearly supported the “weak version.” For them, “[a]ny faithful reader of history [had to] conclude

⁵⁵⁰ Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994).

⁵⁵¹ Lessig & Sunstein, *supra* note 550, at 8; Calabresi & Prakash, *supra* note 550, at 549.

⁵⁵² Lessig & Sunstein, *supra* note 550, at 8.

⁵⁵³ *Id.*

⁵⁵⁴ *Id.* at 9.

⁵⁵⁵ *See id.*

⁵⁵⁶ *Id.*

⁵⁵⁷ *See id.*

⁵⁵⁸ *Id.*

⁵⁵⁹ *See id.*

that the unitary executive,” as conceived in the strong version, “[was] just myth.”⁵⁶⁰

In their response, Calabresi and Prakash read the sources as equally conclusive for the “strong version.”⁵⁶¹ They thought “the historical evidence taken as a whole demonstrate[d] that the case for” the strong version of the Unitary Executive was “overwhelming.”⁵⁶² Textual exegesis and evidence from both the Philadelphia Convention and state ratification debates proved “[o]ur grade school and high school civics teachers . . . right,” since they showed “[t]he Framers and ratifiers consciously and deliberately chose to put one person in charge of executing *all* federal laws.”⁵⁶³ Any other view — namely the “weak version” — cast the “founding generation as political naifs.”⁵⁶⁴ In short, they charged Lessig and Sunstein with “making the Constitution into something more complex and inscrutable than it really is.”⁵⁶⁵

The acerbic rhetoric masked fundamental agreements. The first agreement was on the use of originalism. Lessig and Sunstein framed their analysis explicitly “on originalist grounds.”⁵⁶⁶ Similarly, Calabresi and Prakash devoted the first part of their analysis to explaining their originalist methodology.⁵⁶⁷ Second, and more importantly, was shared admiration for strong executive authority. Calabresi and Prakash’s position hid their admiration behind their originalist commitments. If the original public meaning of the Constitution required a Unitary Executive, then that was the law. Any other conclusion was illegal. And it was left to the reader to infer their admiration for the original Constitution. Lessig and Sunstein, however, took a different route to the same place. While they thought the strong version of the Unitary Executive could not be supported as originalist, they underlined that “this conclusion d[id] not mean that a strongly unitary conception of the constitutional design [wa]s wrong.”⁵⁶⁸ In fact, Lessig and Sunstein argued that “[h]owever ironic it may [have been], the claims on behalf of the strongly unitary executive . . . [might] be . . . right as a matter of constitutional interpretation.”⁵⁶⁹

Lessig and Sunstein understood the constitutional design of agencies to implicate several values: “[T]he avoidance of factionalism, political accountability, . . . centralization . . . , and expedition in law enforcement.”⁵⁷⁰ The pursuit of these goals, they contended, had

⁵⁶⁰ *Id.* at 4.

⁵⁶¹ Calabresi & Prakash, *supra* note 550, at 549.

⁵⁶² *See id.*

⁵⁶³ *Id.* at 663–64.

⁵⁶⁴ *See id.* at 665.

⁵⁶⁵ *Id.*

⁵⁶⁶ Lessig & Sunstein, *supra* note 550, at 11.

⁵⁶⁷ Calabresi & Prakash, *supra* note 550, at 550–59.

⁵⁶⁸ Lessig & Sunstein, *supra* note 550, at 4.

⁵⁶⁹ *Id.*

⁵⁷⁰ *Id.*

changed in the wake of two post–New Deal developments. First, administrative accountability was “compromised” by the emergence of independent agencies.⁵⁷¹ Second, a lack of centralized authority over independent agencies exacerbated the problem of faction.⁵⁷² Both of these points — by then mainstream functionalist claims⁵⁷³ — led to the conclusion that “most of modern administration” had to “fall under the power of the executive.”⁵⁷⁴

In practice, this had several institutional consequences. First, aside from adjudication, independent agencies fell under the “supervisory authority” of the President, who exercised “broad policymaking” control.⁵⁷⁵ Second, because independent counsels promoted the “structural consideration . . . that no person should be judge in his own cause,” they were constitutional.⁵⁷⁶ Third, Lessig and Sunstein argued that for-cause removal protections could and perhaps should be read to include policy disagreements with the President.⁵⁷⁷ Fourth and finally, Congress generally lacked the power to “immunize” the administrators’ policymaking discretion from presidential control.⁵⁷⁸ In their words, “Congress [was] therefore without [the] power to create a ‘headless Fourth Branch’ of government.”⁵⁷⁹

For all their disagreement over the meaning of historical sources, then, Lessig and Sunstein and Calabresi and Prakash ultimately embraced expanded presidential power over the administrative state. Their differences over questions like the constitutionality of independent counsels and the existence of for-cause removal protections were small compared to their commonalities. Whether through original public meaning or functionalism, legal liberals and conservatives alike could agree that the President enjoyed and should enjoy broad directive and removal powers over agencies as a matter of constitutional law. Barely a decade after E.O. 12,291, the constitutional imagination had narrowed and administration under law had fallen out of the picture. The choice was now between the comparatively modest, original Reaganite presidential administration and this new, more expansive thing, built out from the Burger Court’s formalism and Scalia’s dissent in *Morrison*: the Unitary Executive.

⁵⁷¹ *Id.* at 105.

⁵⁷² *See id.*

⁵⁷³ *See id.* nn.429–30.

⁵⁷⁴ *Id.* at 106.

⁵⁷⁵ *See id.* at 107.

⁵⁷⁶ *Id.* at 109.

⁵⁷⁷ *See id.* at 111.

⁵⁷⁸ *Id.* at 113.

⁵⁷⁹ *Id.* (quoting *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868, 921 (1991) (Scalia, J., concurring in part and concurring in the judgment)).

IV. CONSOLIDATION

Not all fights come to an end. But this one did. If the 1980s had featured fierce contestation over presidential administration in the wake of E.O. 12,291, the 1990s — and the presidency of William Jefferson Clinton, in particular — saw presidential administration's consolidation.

The American political landscape changed dramatically over the course of the decade. Clinton was the first Democratic President elected to more than one term since FDR.⁵⁸⁰ But he was of a very different kind. Meanwhile, the “Republican Revolution,” spearheaded by Representative Newt Gingrich,⁵⁸¹ led to the first fully Republican Congress in forty years.⁵⁸² Together these shifts scrambled the logic of post-war American politics, where Democratic Congresses either enhanced the New Deal order under Democratic Presidents or defended it against the incursions of Republican ones.⁵⁸³

The acrimony of 1990s “culture wars” has obscured a much larger underlying consensus about the relationship between the economy and the state, shared in particular by the leaders of the two major parties.⁵⁸⁴ From deregulating finance⁵⁸⁵ and telecommunications⁵⁸⁶ to imposing

⁵⁸⁰ William J. Clinton: *The 42nd President of the United States*, WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/presidents/william-j-clinton> [<https://perma.cc/MFS4-FTYN>].

⁵⁸¹ Andrew Glass, *Congress Runs into “Republican Revolution” Nov. 8, 1994*, POLITICO (Nov. 8, 2007, 6:00 AM), <https://www.politico.com/story/2007/11/congress-runs-into-republican-revolution-nov-8-1994-006757> [<https://perma.cc/WC4Y-MP7K>].

⁵⁸² See *Party Government Since 1857*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART & ARCHIVES, <https://history.house.gov/Institution/Presidents-Coinciding/Party-Government> [<https://perma.cc/FJ56-XF99>].

⁵⁸³ See generally JULIAN E. ZELIZER, *BURNING DOWN THE HOUSE: NEWT GINGRICH, THE FALL OF A SPEAKER, AND THE RISE OF THE NEW REPUBLICAN PARTY* (2020).

⁵⁸⁴ See, e.g., Gary Gerstle, *Opinion, America's Culture Wars Distract from What's Happening Beneath Them*, THE GUARDIAN (Apr. 5, 2022, 6:15 AM), <https://www.theguardian.com/commentisfree/2022/apr/05/america-politics-culture-wars-republicans-democrats> [<https://perma.cc/473H-7SWK>]; MANFRED B. STEGER & RAVI K. ROY, *NEOLIBERALISM: A VERY SHORT INTRODUCTION* 35–46 (2d ed. 2021) (describing the economic consensus of the Clinton era); Justin H. Vassallo, *How the Democrats Traded the New Deal for Neoliberalism*, JACOBIN (July 1, 2022), <https://jacobin.com/2022/07/democratic-party-neoliberalism-dlc-clinton> [<https://perma.cc/FNJ9-DU4M>].

⁵⁸⁵ See, e.g., LILY GEISMER, *LEFT BEHIND: THE DEMOCRATS' FAILED ATTEMPT TO SOLVE INEQUALITY* 4–9 (2022). See generally Jill M. Hendrickson, *The Long and Bumpy Road to Glass-Steagall Reform: A Historical and Evolutionary Analysis of Banking Legislation*, 60 AM. J. ECON. & SOCIO. 849, 864–71 (2001).

⁵⁸⁶ See David McCabe, *Bill Clinton's Telecom Law: Twenty Years Later*, THE HILL (Feb. 7, 2016, 9:00 AM), <https://thehill.com/policy/technology/268459-bill-clintons-telecom-law-twenty-years-later> [<https://perma.cc/MTP5-76YK>]; Paul Starr, *How Neoliberal Policy Shaped the Internet — And What to Do About It*, AM. PROSPECT (Oct. 2, 2019), <https://prospect.org/power/how-neoliberal-policy-shaped-internet-surveillance-monopoly> [<https://perma.cc/7GR3-JKCX>].

stringent work requirements on welfare recipients,⁵⁸⁷ the Clinton White House and Republican Congress often saw eye-to-eye on a particular economic and social vision for the country. Taken together, the achievements of the Clinton presidency represented the triumph of what has come to be known as “neoliberalism.”⁵⁸⁸ In remaking the economy through a commitment to markets and private ordering and limiting the scope of government intervention through landmark statutes, President Clinton succeeded where President Reagan had failed.

This skepticism about the state naturally extended beyond legislation to regulation. Under conditions of ideological consensus about the economy, the Clinton White House adopted a posture toward the regulatory state that often mirrored Reagan’s.⁵⁸⁹

Along the way, Clinton entrenched Reagan-style presidential administration. Without a New Deal Congress defending the autonomy of agencies and the prerogatives of the legislature, the Clinton Administration could embrace the Reagan Administration’s approach to executive administrative superintendence wholesale. Continued oversight through OIRA and cost-benefit analysis, embodied in E.O. 12,866, Clinton’s revision to 12,291,⁵⁹⁰ gave the Clinton White House the tools it needed to keep agencies and regulatory output in check,⁵⁹¹ while allowing it to promote certain high-profile pieces of regulation

⁵⁸⁷ See Dylan Matthews, “If the Goal Was to Get Rid of Poverty, We Failed”: The Legacy of the 1996 Welfare Reform, VOX (June 20, 2016, 9:10 AM), <https://www.vox.com/2016/6/20/11789988/clintons-welfare-reform> [<https://perma.cc/F3KE-B75E>]; Amy Zanoni, *Remembering Welfare as We Knew It: Understanding Neoliberalism Through Histories of Welfare*, 35 J. POL’Y HIST. 118, 119 (2023).

⁵⁸⁸ While scholars continue to debate neoliberalism’s exact contours, a good working definition of the term, at least for this Article, is “a mode of governance and legitimation that enforces specific distributions and configurations of ‘market discipline’ that support profits and managerial power over democratically determined social guarantees.” Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1789 n.21 (2020). While presidential administration may not have an inherent economic skew, it consolidated under conditions of ideological consensus, which makes naming that consensus and identifying its substantive commitments important. For now-canonical treatments of neoliberalism, see generally WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM’S STEALTH REVOLUTION (2015); HARVEY, *supra* note 142. For historiographical accounts, see generally, for example, GARY GERSTLE, THE RISE AND FALL OF THE NEOLIBERAL ORDER: AMERICA AND THE WORLD IN THE FREE MARKET ERA 88–106 (2022) (proposing three varieties of American neoliberalism in the mid- to late-twentieth century); Kim Phillips-Fein, *The History of Neoliberalism*, in SHAPED BY THE STATE: TOWARD A NEW POLITICAL HISTORY OF THE TWENTIETH CENTURY 347 (Brent Cebul, Lily Geismer & Mason B. Williams eds., 2019). For analyses focused on the relationship between law and neoliberalism, see generally Corinne Blalock, *Neoliberalism and the Crisis of Legal Theory*, 77 LAW & CONTEMP. PROBS. 71 (2014); David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS. 1 (2014).

⁵⁸⁹ See Thomas O. McGarity, *The Expanded Debate over the Future of the Regulatory State*, 63 U. CHI. L. REV. 1463, 1479–80 (1996).

⁵⁹⁰ See Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted in* 5 U.S.C. § 601 (1994).

⁵⁹¹ See Bagley & Revesz, *supra* note 159, at 1267.

when convenient.⁵⁹² At the same time that the legal academy was pushing the outer bounds of the administrative presidency toward the Unitary Executive in theory, Clinton fixed presidential administration in practice.

A. *President Clinton & American “Perestroika”*

Writing in 1990, Cass Sunstein captured something of the spirit of the age when he called reform of the administrative state “a small but firm step in the direction of an American-style perestroika.”⁵⁹³ In the decade since his time in the Reagan OLC, Sunstein had cast off his doubts about the constitutionality of executive oversight of administration.⁵⁹⁴ Echoing the language of public choice theory and welfare economics, Sunstein now identified a sclerotic New Deal bureaucracy, beset by “agency capture and factionalism.”⁵⁹⁵ These problems, Sunstein insisted, were not accidental. They reflected the basic “inadequacy of . . . the constitutional vision embraced by the New Deal.”⁵⁹⁶

Sunstein’s view of the administrative state — sclerotic, flabby, and in need of reform — was shared by both Presidents Bush and Clinton. As Professor Phillip J. Cooper puts it, “[w]hile [Bush] did not . . . create anything as dramatic as EO 12291 of the Reagan Era, [he] was fully prepared to commission his own ‘generals’ in the war on regulation and take action in his own way.”⁵⁹⁷

The “war” took on a familiar shape with familiar faces. Like President Reagan, Bush created his own presidential commission on regulation — the Council on Competitiveness — headed by his Vice President Dan Quayle.⁵⁹⁸ The “Quayle Commission” understood its mandate expansively, with the Vice President frequently backchanneling with agency heads and secretaries, much to the ire of Democrats in the House.⁵⁹⁹ The White House sometimes took an even stronger deregulatory line. In one instance, C. Boyden Gray — then–White House Counsel — rejected an agreement between OMB and the House Government Operations Committee that would have imposed greater disclosure requirements on OIRA communications.⁶⁰⁰ More famously,

⁵⁹² Two examples include tobacco regulation and paid family leave through unemployment insurance. See Kagan, *supra* note 14, at 2283–84 (citing these as examples of the Clinton White House’s highly visible use of executive power).

⁵⁹³ Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407, 441 (1990).

⁵⁹⁴ See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 454–55 (1987).

⁵⁹⁵ *Id.* at 421.

⁵⁹⁶ *Id.* at 422.

⁵⁹⁷ PHILLIP J. COOPER, *THE WAR AGAINST REGULATION: FROM JIMMY CARTER TO GEORGE W. BUSH* 48–49 (2009) (quoting Remarks on Regulatory Reform, 28 WEEKLY COMP. PRES. DOC. 726 (Apr. 29, 1992)).

⁵⁹⁸ See *id.* at 49.

⁵⁹⁹ See *id.* at 51.

⁶⁰⁰ See *id.* at 53.

Bush imposed a ninety-day moratorium on any new regulations in his 1992 State of the Union.⁶⁰¹ He later extended it another 120 days in April, opening his announcement with a “salute [to] the three generals in the war for regulatory reform: our Vice President, Dan Quayle, Boyden Gray, and Dr. Michael Boskin.”⁶⁰²

A Republican President carrying on an attack on the regulatory state should not come as a surprise. The continuities — strategic, ideological, and personal — with the Reagan Administration were clear and predictable. What is historically notable, however, was the way Bush’s Democratic successor, Clinton, entrenched the transformation of the administrative state that Reagan had begun. Within a decade, the Democratic Party had shifted from defending the prerogatives of Congress over a robust administrative state to adopting nearly Reaganite language and fully Reaganite strategies in asserting executive control and trimming bureaucratic reach.⁶⁰³

This was partly the result of a transformation of the Democratic Party, which Clinton both embodied and helped effectuate. His rise to the presidency represented the triumph of the “New Democrats,” with a basically different approach to government than that which had marked the party in the previous decades.⁶⁰⁴

For more than thirty years, the Democratic Party had relied on a coalition of organized labor, minority voters, and Southerners for its electoral dominance.⁶⁰⁵ Its broad ideology assumed “a class compromise between capital and labor, and a hegemonic belief in the value of government constraining markets.”⁶⁰⁶ The administrative state played a crucial role in this arrangement, mediating between the interests of business and labor with a proregulatory bent.⁶⁰⁷

By the 1970s, though, this orientation had come under internal and external pressure. From within the Democratic Party, consumer protection and environmental groups challenged the détente between capital

⁶⁰¹ President George H.W. Bush, State of the Union Address (Jan. 28, 1992), in 138 CONG. REC. 735, 737 (1992).

⁶⁰² *Remarks on Regulatory Reform*, 1 PUB. PAPERS 663, 663–64 (Apr. 29, 1992). Michael Boskin served as the Chair of Bush’s Council of Economic Advisers for the entirety of the latter’s term. Michael J. Boskin, STAN. UNIV.: DEP’T OF ECON., <https://economics.stanford.edu/people/michael-j-boskin> [<https://perma.cc/7EKF-7NN2>].

⁶⁰³ See Kagan, *supra* note 14, at 2285; Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 827–28 (2003) (highlighting the similarities between the two E.O.s).

⁶⁰⁴ See Jon F. Hale, *The Making of the New Democrats*, 110 POL. SCI. Q. 207, 228 (1995).

⁶⁰⁵ See William E. Leuchtenburg, *Franklin D. Roosevelt: The American Franchise*, MILLER CTR., <https://millercenter.org/president/fdroosevelt/the-american-franchise> [<https://perma.cc/BWW9-DYX5>].

⁶⁰⁶ GERSTLE, *supra* note 588, at 25.

⁶⁰⁷ See Mark Tushnet, *Introduction: The Past & Futures of the Administrative State*, 150 DAEDALUS 5, 7 (2021). See generally Stewart, *supra* note 19 (offering a general account and critique of the interest-group model of administration).

and labor, casting a skeptical eye on “bigness” regardless of its political alignment.⁶⁰⁸ This internal critique was accompanied by an even more aggressive attack by big-business conservatives emboldened by economic stagnation.⁶⁰⁹ The New Deal coalition and its orientation toward regulation buckled under the political onslaught and shattered after Reagan’s election.

The New Democrats traced their roots to Reagan’s triumph. Reagan’s resounding electoral victories in 1980 and 1984 had prompted soul searching in a reeling Democratic Party. The New Deal coalition and its governing philosophy no longer seemed to offer a winning presidential formula. The Democratic Leadership Council (DLC) was founded in the mid-eighties to reconsider the future of the party.⁶¹⁰ And the New Democrats emerged in turn from the DLC.⁶¹¹

This internal reform movement offered a seemingly exciting alternative. The New Democrats gave a different diagnosis of the party’s problems and urged a reorientation of its electoral strategy and stance on government.⁶¹² This first involved dispelling “myths” about the causes of Democratic decline, namely the notion that the party had strayed too far from its big government liberalism and failed to mobilize liberal voters.⁶¹³ Instead, the DLC sought party revival partly through economic moderation and an embrace of markets, especially in finance and the growing technology sector.⁶¹⁴

⁶⁰⁸ See GERSTLE, *supra* note 588, at 98–100 (describing left neoliberalism’s antipathy toward a state that overregulated American life). See generally SABIN, *supra* note 354 (describing role of consumer protection and environmental groups in opposing big government).

⁶⁰⁹ See J. Craig Jenkins & Craig M. Eckert, *The Right Turn in Economic Policy: Business Elites and the New Conservative Economics*, 15 SOCIO. F. 307, 308, 312–13 (2000).

⁶¹⁰ See generally MICHAEL KAZIN, *WHAT IT TOOK TO WIN: A HISTORY OF THE DEMOCRATIC PARTY* (2022). While the DLC proved to be the most durable and important institution in the rise of third way liberalism, it had important antecedents. For instance, Democratic Caucus Chair Gillis Long, in partnership with a group of young Democrats, founded the House Democratic Caucus Committee on Party Effectiveness after Reagan’s landslide win in 1980. See Hale, *supra* note 604, at 210. Similarly, well before Reagan’s victory confirmed their concerns, a generation of young liberals — the “Atari Democrats” — were persuaded by the economic malaise of the 1970s that entrepreneurial-based growth, especially in Silicon Valley, was the path forward, rather than the corporatist large-scale Keynesianism of the New Deal. This group included some of the most prominent names in Democratic politics over the subsequent two decades, including Senator Gary Hart, Senator Paul Tsongas, and Robert Reich. See GEISMER, *supra* note 585, at 26–34; Karl Gerard Brandt, *The Ideological Origins of the New Democrat Movement*, 48 LA. HIST. 273, 287–88 (2007).

⁶¹¹ See GEISMER, *supra* note 585, at 4.

⁶¹² *Id.*

⁶¹³ WILLIAM GALSTON & ELAINE CIULLA KAMARCK, PROGRESSIVE POL’Y INST., *THE POLITICS OF EVASION: DEMOCRATS AND THE PRESIDENCY* 3, 7–8 (1989), https://www.progressivepolicy.org/wp-content/uploads/2010/01/Politics_of_Evasion.pdf [<https://perma.cc/YK8G-NUKX>]. The Progressive Policy Institute grew directly out of the DLC. Ben Smith, *The End of the DLC Era*, POLITICO (Feb. 7, 2011, 9:53 PM), <https://www.politico.com/story/2011/02/the-end-of-the-dlc-era-049041> [<https://perma.cc/9D8N-ZJVG>].

⁶¹⁴ See GERSTLE, *supra* note 588, at 159–60.

The party, New Democrats argued, also needed a new approach to the role of the state.⁶¹⁵ Their platform urged “more flexible government . . . procedures” and “reinventing government to make it more responsive and less bureaucratic.”⁶¹⁶ They dubbed this vision a “more dynamic, democratic capitalism” attuned to the “new realities of a post-industrial, global economy.”⁶¹⁷ “The Democratic Party’s fundamental mission” under this new order was “to expand opportunity, not government.”⁶¹⁸ The New Democrats circulated these ideas in party policy circles throughout the Bush presidency while biding their time to put them into action.⁶¹⁹

They did not have to wait long. In 1992, former DLC Chairman Bill Clinton⁶²⁰ broke the Republican hold on the White House and quickly began implementing the New Democrats’ vision.⁶²¹ For our purposes, what mattered most were the legislative and administrative strategies of the Clinton White House. Some of these moves deregulated entire sectors of the economy; others helped consolidate presidential administration as the de facto baseline for the regulatory state.

Deregulation by legislation during the Clinton era, only possible with the cooperation of a Republican Congress, is by now well known. As Professor Joseph Stiglitz, the former Chair of Clinton’s Council of Economic Advisers, observed about his time in the Clinton White House: “[W]e were all deregulators.”⁶²² One important example was the Telecommunications Act of 1996,⁶²³ which removed barriers between various sectors, easing the way for today’s omnibus media companies.⁶²⁴ Another was the repeal of the Glass-Steagall Act’s⁶²⁵ separation of commercial banks and broker-dealers.⁶²⁶ Elsewhere, the Clinton Administration further deregulated the trucking industry⁶²⁷ and “signed

⁶¹⁵ See *id.* at 159.

⁶¹⁶ Hale, *supra* note 604, at 223.

⁶¹⁷ Luke Phillips, *RePost: The Manifesto of the Third Way Democrats — The New Orleans Declaration*, ABIASEDPERSPECTIVE (Apr. 7, 2015), <https://abiasedperspective.wordpress.com/2015/04/07/repost-the-manifesto-of-the-third-way-democrats-the-new-orleans-declaration> [<https://perma.cc/39NE-2DCR>].

⁶¹⁸ President William J. Clinton, *DLC Speech*, CLINTON DIGIT. LIBR. (Dec. 6, 1994), <https://clinton.presidentiallibraries.us/items/show/34909> [<https://perma.cc/UWL7-B9E8>].

⁶¹⁹ See Hale, *supra* note 604, at 222–23.

⁶²⁰ *Id.* at 225.

⁶²¹ In a speech to the DLC two years into his first term, Clinton described the event as “feel[ing] like a homecoming.” Clinton, *supra* note 618.

⁶²² JOSEPH E. STIGLITZ, *THE ROARING NINETIES* 91 (2003).

⁶²³ Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

⁶²⁴ See GERSTLE, *supra* note 588, at 168; STIGLITZ, *supra* note 622, at 91–101.

⁶²⁵ Banking Act of 1933, ch. 89, 48 Stat. 162, *repealed by* Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified as amended in scattered sections of 12 and 15 U.S.C.).

⁶²⁶ Joseph E. Stiglitz, *Capitalist Fools*, VANITY FAIR (Dec. 9, 2008), <https://www.vanityfair.com/news/2009/01/stiglitz200901-2> [<https://perma.cc/M48R-G9CU>].

⁶²⁷ Statement on Signing the Federal Aviation Administration Authorization Act of 1994, 30 WEEKLY COMP. PRES. DOC. 1703, 1704 (Aug. 23, 1994).

the [Interstate Commerce] [C]ommission's death warrant."⁶²⁸ In 1995, in a clear legislative continuity with the 1980s, Congress passed and Clinton signed a renewed Paperwork Reduction Act.⁶²⁹ The Act's reauthorization meant that agencies would still require OMB approval for information collection.⁶³⁰

Meanwhile, executive action made presidential administration the new normal. The Clinton White House closely hewed to Reagan's playbook. Like Reagan and Bush, Clinton also began his presidency with a promise to trim the federal government and entrusted that project to his Vice President, Al Gore.⁶³¹ Entitled the National Performance Review (NPR), the initiative was the Clinton White House's attempt to create a government that "works better, costs less, and gets results Americans care about."⁶³² The NPR spearheaded Clinton's vow to "reinvent government," a phrase he borrowed directly from David Osborne and Ted Gaebler's managerial bestseller *Reinventing Government*.⁶³³

Osborne and Gaebler did more than give Clinton a title; they offered him a new vision of the state.⁶³⁴ Osborne called this alternative "[e]ntrepreneurial government[.]"⁶³⁵ The New Deal state, Osborne argued, was "doing business in an outmoded way."⁶³⁶ That model involved inefficient "bureaucratic monopolies" that offered standardized services at a mass scale.⁶³⁷ Entrepreneurial government, however, was leaner, cheaper, and more nimble than its predecessor. It did not respond to every problem by creating a new agency staffed by civil servants.⁶³⁸ Instead, "entrepreneurial government" would "inject[] competition and

⁶²⁸ David E. Sanger, *A U.S. Agency, Once Powerful, Is Dead at 108*, N.Y. TIMES (Jan. 1, 1996), <https://www.nytimes.com/1996/01/01/us/a-us-agency-once-powerful-is-dead-at-108.html> [https://perma.cc/T2PT-2AHE].

⁶²⁹ Remarks on Signing the Paperwork Reduction Act of 1995, 31 WEEKLY COMP. PRES. DOC. 884, 884–86 (May 22, 1995).

⁶³⁰ *Paperwork Reduction Act (PRA)*, BUREAU JUST. ASSISTANCE, <https://bja.ojp.gov/program/it/privacy-civil-liberties/authorities/statutes/1289> [https://perma.cc/VSV4-Q3TG]. The PRA's substantive effects depend on specific contexts. For instance, under the Biden Administration, OMB released new guidance in an effort to increase individuals' access to the administrative state. Sabeel Rahman, *OMB Announces New Action to Improve Government Services*, WHITE HOUSE (Apr. 13, 2022), <https://www.whitehouse.gov/omb/briefing-room/2022/04/13/omb-announces-new-action-to-improve-government-services> [https://perma.cc/U7Q2-LVBR].

⁶³¹ John Kamensky, *A Brief History*, NAT'L P'SHIP FOR REINVENTING GOV'T (Jan. 1999), <https://govinfo.library.unt.edu/npr/whowere/history2.html> [https://perma.cc/Z9A7-9Z24].

⁶³² *Id.*

⁶³³ Elaine Kamarck, *House Testimony: Lessons for the Future of Government Reform*, BROOKINGS INST. (June 18, 2013), <https://www.brookings.edu/testimonies/lessons-for-the-future-of-government-reform> [https://perma.cc/49GK-3F5C].

⁶³⁴ See Reuel Schiller, *Regulation and the Collapse of the New Deal Order, Or How I Learned to Stop Worrying and Love the Market*, in BEYOND THE NEW DEAL ORDER 168 (Gary Gerstle, Nelson Lichtenstein & Alice O'Connor eds., 2019).

⁶³⁵ David Osborne, *Reinventing Government*, 16 PUB. PRODUCTIVITY & MGMT. REV. 349, 354 (1993).

⁶³⁶ *Id.* at 350.

⁶³⁷ *Id.* at 350–51.

⁶³⁸ See *id.* at 351–52.

other market principles into the public sector . . . and redefine[] citizens as customers.”⁶³⁹ Yet the book — given its genre as a managerial how-to guide — operated at a high level, spelling out general principles for state reform without specific proposals.

Lasting nearly both terms of the Clinton Administration, the NPR’s program unfolded in several phases. In its first stage, from 1992 to 1994, the commission did an agency-by-agency performance review and presented nearly four hundred recommendations in a report, *Creating a Government that Works Better & Costs Less*.⁶⁴⁰ The NPR’s proposals ranged from developing customer service standards for agencies to devolving more authority to state agencies.⁶⁴¹ Most important, however, was a plan to substantially reduce the federal workforce through direct payroll cuts and bonuses for employees who left government voluntarily.⁶⁴² During this first phase, as Deputy Director of the NPR John Kamensky put it, the commission focused on “administrative changes” that could be accomplished without Congress and on cutting “overhead costs,” rather than on the “organizational structure[] of agencies.”⁶⁴³ Indeed, over forty percent of the NPR’s projected \$108 billion in savings would come from “[s]treamlining the [b]ureaucracy.”⁶⁴⁴

Phase II — 1994–1996 — and further reforms during Clinton’s second term featured much of the same. As Kamensky put it, the Clinton Administration “[r]ecogniz[ed] the election of a new Congress . . . as an opportunity to further governmental reform.”⁶⁴⁵ This phase targeted the volume of regulation, much the way the Reagan and Bush commissions did, by promising to cut “16,000 pages of regulations.”⁶⁴⁶ And as the Clinton Administration neared balancing the budget in its second term, the Administration continued its efforts to reduce the federal workforce.⁶⁴⁷ All told, the Clinton White House managed to cut 377,000 federal jobs and reduced the federal government to “the smallest it ha[d] been since President Eisenhower.”⁶⁴⁸ Clinton himself put it best when

⁶³⁹ GEISMER, *supra* note 585, at 116–17.

⁶⁴⁰ See VICE PRESIDENT AL GORE, OFF. OF THE VICE PRESIDENT, *CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS: STATUS REPORT: REPORT OF THE NATIONAL PERFORMANCE REVIEW 9–14* (1994).

⁶⁴¹ Kamensky, *supra* note 631; see GORE, *supra* note 640, at 10, 51.

⁶⁴² Kamensky, *supra* note 631.

⁶⁴³ *Id.*

⁶⁴⁴ GORE, *supra* note 640, at 114.

⁶⁴⁵ Kamensky, *supra* note 631.

⁶⁴⁶ *Id.*

⁶⁴⁷ *Id.*

⁶⁴⁸ *Reinventing Government*, CLINTON WHITE HOUSE ARCHIVES, https://clintonwhitehouse4.archives.gov/WH/EOP/OVP/initiatives/reinventing_government.html [<https://perma.cc/UAV9-7373>]. Aside from cutting the number of government employees, the Clinton Administration was also key in shifting government hiring toward contractors. Rachel Augustine Potter, *Privatizing Personnel: Bureaucratic Outsourcing & the Administrative Presidency* 8 (May 28, 2023)

he reflected on his Administration's accomplishments in 1994: "If I were a Republican president . . . all these people would be running me for sainthood. . . . They'd be saying, 'Let's build this guy a statue.'"⁶⁴⁹

Alongside cutting the scope of the administrative state, Clinton reinforced presidential administration. Within nine months of taking office, Clinton issued E.O. 12,866.⁶⁵⁰ The order formally revoked⁶⁵¹ Reagan's E.O.s 12,291 and 12,498⁶⁵² while maintaining their substance and structure.⁶⁵³ Its preamble is worth quoting at length:

The American people deserve a regulatory system that works for them, not against them: a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society; regulatory policies that recognize that the private sector and private markets are the best engine for economic growth; regulatory approaches that respect the role of State, local, and tribal governments; and regulations that are effective, consistent, sensible, and understandable. We do not have such a regulatory system today.⁶⁵⁴

The language and aims of the order — efficiency, faith in private ordering, and frustration with the existing regulatory state — all sounded in a Reaganite key. These goals, after all, were central to the Reagan White House's case for executive oversight. Clinton's adoption of this register underlined the degree of consensus, at least among elites in both parties, about the need for a smaller administrative state.

Procedurally, the order kept the core of the Reagan framework in place. Agencies would still have to submit RIAs for every "significant regulatory action," which was kept at the Reagan-era threshold of \$100 million or more.⁶⁵⁵ Second, the executive order made clear that OIRA would funnel any planned regulatory actions that might "be inconsistent with the President's priorities" straight to the Vice President, who in turn could "request further consideration or inter-agency coordination."⁶⁵⁶

(unpublished manuscript) (on file with the Harvard Law School Library), <https://www.dannyhayes.org/uploads/6/9/8/5/69858539/rap.privatizingpersonnel.2023spring.pdf> [<https://perma.cc/9VPE-5L5Z>]. This trend was continuous with the Clinton Administration's preference for private ordering over state power.

⁶⁴⁹ COOPER, *supra* note 597, at 67 (quoting Dennis B. Roddy, *A GOP President with My Job Record Would Get a Statue, Clinton Tells Press*, PITTSBURGH POST-GAZETTE, Nov. 1, 1994, at A1).

⁶⁵⁰ Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted in* 5 U.S.C. § 601 (1994).

⁶⁵¹ *Id.* at 649.

⁶⁵² Exec. Order No. 12,498, 3 C.F.R. 323 (1986).

⁶⁵³ *See generally* 3 C.F.R. 638 (1994).

⁶⁵⁴ *Id.* at 638.

⁶⁵⁵ *Id.* at 641–42. The E.O. continued the Reagan-era exemption of independent agencies from RIAs. *Id.* at 641. The OLC during the Trump Administration explicitly rejected this exemption, reading Article II to extend executive oversight to independent agencies. Extending Regulatory Review Under Executive Order 12866 to Independent Regulatory Agencies, slip op. at 1 (O.L.C. Oct. 8, 2019).

⁶⁵⁶ 3 C.F.R. 638, 643.

Third, the order expanded the scope of presidential control over independent agencies, subjecting them to OMB's regulatory planning process.⁶⁵⁷ Fourth and finally, the order required agencies to continue culling any regulations on the books that had "become unjustified or unnecessary as a result of changed circumstances" or were "duplicative or inappropriately burdensome in the aggregate."⁶⁵⁸

There were, of course, differences with the Reagan order, including deadlines for OIRA to return a decision on RIAs — which remained subject to "further consideration" by OIRA⁶⁵⁹ — and the inclusion of "qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider" in cost-benefit analysis.⁶⁶⁰ Contemporary observers of the change often focused their energy on these differences, sometimes obscuring the deeper continuities with the Reagan Administration. For instance, the possible inclusion of qualitative benefits in cost-benefit analysis triggered intense debate between those who maintained that cost-benefit analysis could coherently incorporate qualitative judgments like distribution and those who insisted otherwise.⁶⁶¹

These disagreements, however, were fundamentally intramural. They took place in a regulatory landscape that had changed, seemingly irrevocably. Even as late as 1991, the administrative law scholar Professor Thomas McGarity could write: "Regulatory analysis is currently in a state of awkward adolescence. It has emerged from its infancy, but it has not yet matured."⁶⁶² And center-left supporters of cost-benefit analysis, such as Cass Sunstein and Richard Pildes, remained shaped by the recency of Reagan's controversial orders and thus found E.O. 12,866 "a dramatic and . . . quite surprising step" for a Democratic President since it "maintain[ed] the basic process inaugurated by President Reagan."⁶⁶³

Political time and intellectual time had different paces in different spaces. While unitary executive theorists had already begun imagining the outer bounds of Article II, well beyond the assumed remits of presidential administration, the Executive in practice and Supreme Court

⁶⁵⁷ *Id.* at 642.

⁶⁵⁸ *Id.* at 644.

⁶⁵⁹ *Id.* at 646–48.

⁶⁶⁰ *Id.* at 639.

⁶⁶¹ See, e.g., Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1865–68 (2016) (describing the debate between Professors Cass Sunstein and Richard Pildes and Matthew Adler and Eric Posner on cost-benefit analysis). Compare Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 782 (1994) (defending a form of valuation pluralism), with Matthew Adler, *Incommensurability and Cost-Benefit Analysis*, 146 U. PA. L. REV. 1371, 1376 (1998) (limiting the analysis to monetized cost-benefit analysis).

⁶⁶² THOMAS O. MCGARITY, *REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY* 303 (1991).

⁶⁶³ Pildes & Sunstein, *supra* note 131, at 6.

doctrine lagged behind. Meanwhile, nonunitarian scholars in the early years of the Clinton White House sometimes still operated as if presidential administration and its implements, like cost-benefit analysis, were new, radical, and insecure under a Democratic President.⁶⁶⁴

The actual conduct of government, however, was becoming sedimented. In practice and often in rhetoric, Clinton officials shared much in common with Reagan officials, at least in their view of the administrative state and their approach toward reigning it in.⁶⁶⁵ Of course, the Clinton Administration operated differently in certain realms of regulation — the environment being a prominent example.⁶⁶⁶ It also sometimes deployed executive power in the service of racial and economic justice, providing a foundation for further work by future Presidents.⁶⁶⁷ Nevertheless, the Clinton Administration's progressive economic policy occurred under a globally jaundiced view of the administrative state.⁶⁶⁸ Both in word and deed, the Clinton White House successfully scaled down federal government, while securing presidential administration for decades to come.⁶⁶⁹

⁶⁶⁴ *Id.* at 7.

⁶⁶⁵ *See id.* at 6.

⁶⁶⁶ *See* Martin A. Nie, "It's the Environment, Stupid!" *Clinton and the Environment*, 27 PRESIDENTIAL STUD. Q. 39, 40–43 (1997) (describing the Clinton Administration as embracing market-based environmental regulation that it argued reconciled economic growth with conservation).

⁶⁶⁷ Examples include a 1994 executive order requiring seventeen different agencies to incorporate the disparate environmental impact of federal programs on minority and low-income communities into their regulatory analysis, *see* Exec. Order No. 12,898, 3 C.F.R. 859 (1995), *reprinted as amended in* 42 U.S.C. § 4321, and a 2000 executive order directing federal agencies to affirmatively expand language access to federal programs, *see* Exec. Order No. 13,166, 3 C.F.R. 289 (2001). Elsewhere the Clinton Administration issued guidance on Title VIII's provision requiring that agencies "affirmatively further" fair housing. *See* OFF. OF FAIR HOUS. & EQUAL OPPORTUNITY, U.S. DEP'T OF HOUS. & URB. DEV., 1 FAIR HOUSING PLANNING GUIDE 1-5 (1996), <https://www.hud.gov/sites/documents/FHPG.PDF> [<https://perma.cc/5KM9-AAUP>] (providing an overview of fair housing planning requirements for state and local grantees). Professor Olatunde Johnson has described these exercises of executive power alongside further implementation by the Bush and Obama Administrations as examples of "equality directives" in American public law. *See* Johnson, *supra* note 16, at 1363–70. These federal actions are examples of presidential administration enlisted for progressive economic ends and prefigure the progressive impulses of the Biden Administration. Nevertheless, these actions must be assessed alongside the broader antipathy toward an expansive regulatory state, the strong preference for market ordering, and the continued insistence on efficiency as a cardinal virtue of regulation by Clinton officials. In these respects, the Clinton White House, like its Republican predecessors, continued a decades-long embrace of what Professor Elizabeth Popp Berman calls the "economic style" of reasoning. *See* ELIZABETH POPP BERMAN, THINKING LIKE AN ECONOMIST: HOW EFFICIENCY REPLACED EQUALITY IN U.S. PUBLIC POLICY 198–200 (2022). Moreover, as Johnson herself notes, Clinton's executive action was often preliminary, setting forth goals that civil rights groups mobilized for and later administrations implemented. *See* Johnson, *supra* note 16, at 1381–89. Nonetheless, third way liberalism did not reject racial justice in favor of economic liberalism; indeed, as historians have observed, Clinton officials believed that empowering private enterprise and shrinking the role of the state in certain markets would advance historically disadvantaged minorities. *See, e.g.,* GEISMER, *supra* note 585, at 8 (describing the New Democrats' economic philosophy as "doing well by doing good").

⁶⁶⁸ Pildes & Sunstein, *supra* note 131, at 15.

⁶⁶⁹ *See id.*

This time there was no backlash. In the legislative arena, there was enough consensus over the economy to pass landmark deregulation. And in the administrative realm, the Clinton White House maintained presidential administration. This method of governance made it easy for it to continue the now bipartisan task of cutting the administrative state down to size. As a matter of regulatory politics, presidential administration had won. Its intellectual legitimacy, however, was still to be fully secured.

B. Kagan's Irenicism

As the Clinton presidency came to a close, observers of the administrative state began reflecting on the significance of his time in office. Some, for instance, focused on the spread of cost-benefit analysis.⁶⁷⁰ Others contended that the drive for efficiency had not gone far enough.⁶⁷¹ Those whose opinions proved most consequential took a wider view. For this last group, the defining feature of the Clinton White House was a fundamental change in the structure of government. President Clinton had not only changed administrative technique but also ensured presidential primacy over agencies. As then-Professor Kagan announced, with the end of the Clinton Administration, “we live[d] . . . in an era of presidential administration.”⁶⁷²

Kagan was neither the first nor the only one to mark the structural transformation of the regulatory sphere. As this Article has detailed, scholars had been making arguments for presidential primacy over agencies since at least the late 1970s.⁶⁷³ And Kagan's contemporaries shared her assessment that the Clinton presidency firmly placed the White House at the apex of the regulatory state. Professor James Blumstein, who had been Republican President Bush's nominee to lead OIRA,⁶⁷⁴ was among the earliest to note the new consensus.⁶⁷⁵ He, perhaps even more clearly than Kagan, tracked presidential administration's journey “[f]rom controversial fringe to mainstream in twenty years.”⁶⁷⁶ And like Kagan, he too felt comfortable declaring that on

⁶⁷⁰ See, e.g., Cass R. Sunstein, *The Cost-Benefit State 2* (Coase-Sandor Inst. for L. & Econ., Working Paper No. 39, 1996), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1497&context=law_and_economics [<https://perma.cc/8S4L-J7LT>]; Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165, 167 (1999) (“Government agencies now routinely use [cost-benefit analysis]. This was not always the case.”).

⁶⁷¹ See C. Boyden Gray, *Regulatory Reform: Past and Future*, 12 NAT'L RES. & ENV'T 155, 156–57 (1998) (suggesting that the Clinton Administration's drive for efficiency could have gone further).

⁶⁷² Kagan, *supra* note 14, at 2246.

⁶⁷³ See *supra* Part I, pp. 2143–53.

⁶⁷⁴ *Bush Names OMB Choice*, L.A. TIMES (Apr. 25, 1990, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1990-04-25-mn-34-story.html> [<https://perma.cc/NJV5-D8Q4>].

⁶⁷⁵ Blumstein, *supra* note 12, at 854.

⁶⁷⁶ *Id.*

presidential power, “we are all (or nearly all) Unitarians now.”⁶⁷⁷ Others joined them in marking this shift.⁶⁷⁸

Kagan’s influential article, *Presidential Administration*, nevertheless warrants special historical attention. In breadth and ambition, Kagan’s article was unique. In a single piece, she offered both a history and a defense of presidential administration.⁶⁷⁹ This was something she was particularly well positioned to do, being both a Democrat — and so able to give the Democrats’ view of what had previously been a Republican project — and having spent four years in the Clinton White House.⁶⁸⁰ Unsurprisingly, Kagan’s article quickly became the leading account of presidential administration.⁶⁸¹

Reading Kagan’s article in context — coming as it did at the end of the Clinton Administration — clarifies the ideological foundations of the new institutional consensus. As Thomas Merrill wrote of executive oversight at the end of the Obama Administration, “it represent[ed] a highly discordant feature within the American administrative process . . . rest[ing] on a series of executive orders, not on legislation enacted by Congress delegating authority to the President.”⁶⁸² At the turn of the century, although presidential administration was a political triumph, it still required further legal and academic legitimation.

Kagan’s article sought to provide that legitimation in two steps. The first was to retell the history of the administrative state as a serial progression toward presidential administration.⁶⁸³ The second was a separate normative argument for the practice.⁶⁸⁴ But the two parts of this account were related. Kagan’s history was not solely or even primarily

⁶⁷⁷ *Id.* at 852 (footnotes omitted). What Blumstein meant by “Unitarian” closely tracks what we today would identify as presidential administration, namely the “exercise by the Executive Office of the President of either authority over or substantive, policy-based influence on discretionary conduct . . . of executive branch officials other than those in independent agencies.” *Id.* n.4. Of course, those we would recognize as “Unitarians” today reject carveouts for independent agencies and did so as early as the 1990s. See *supra* Part III, pp. 2173–98. Blumstein’s big-tent definition of “Unitarian” emphasized, just as Kagan’s article did, the commonalities between presidential administration and unitary executive theory over their differences.

⁶⁷⁸ The 2001 Administrative Law issue of the *Duke Law Journal*, gathering the proceedings of the *Journal’s* Administrative Law Conference from March, 2001, included several articles on the “presidential management of the administrative state,” see generally, e.g., Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963 (2001), as did the 2003 *New York University Law Review*, see, e.g., Bressman, *supra* note 17, at 463.

⁶⁷⁹ See Kagan, *supra* note 14, at 2272–319 (discussing history); *id.* at 2319–63 (making the case for presidential administration).

⁶⁸⁰ See Elena Kagan, CLINTON DIGIT. LIBR., <https://clinton.presidentiallibraries.us/collections/show/34> [<https://perma.cc/34QJ-TF83>].

⁶⁸¹ By 2012, a decade after publication, it had been cited 371 times and was the most cited law review article published in 2001. See Fred R. Shapiro & Michelle Pearse, Essay, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1495 (2012); see also Merrill, *supra* note 13, at 1971 (noting the “legitimiz[ing]” role played by Kagan’s “major article”).

⁶⁸² Merrill, *supra* note 13, at 1971.

⁶⁸³ See Kagan, *supra* note 14, at 2272–319.

⁶⁸⁴ *Id.* at 2319–63.

a descriptive endeavor, for Kagan was telling a particular kind of story, a Whig history of the administrative state.⁶⁸⁵ On her account, presidential administration emerged as the culmination of a half-century process in which the administrative state gradually became more rational and legitimate.⁶⁸⁶ And its triumph represented a bipartisan recognition of that fact.⁶⁸⁷ The normative case for presidential administration was suggested by the history that led to its adoption and, in turn, carried by the way it resolved the problems previous forms of administrative organization created or left unaddressed.

This is not to say Kagan lacked an appreciation for complexity. She set her narrative as an extension and complication of “[a] by now standard history of the practice and theory of [the] administrative process.”⁶⁸⁸ She noted that reality was far “more complicated” since the “supposedly discrete chapters in the standard account in fact bleed into each other,” with each “surviv[ing] in some form today, well past its purported demise.”⁶⁸⁹ Kagan was careful to recognize that hers was a story of inter-currence, not supersession.⁶⁹⁰

Nevertheless, the structure and motive forces of Kagan’s historical recounting left no doubt of its goal or normative agenda. Kagan adopted and reworked the dominant account to make presidential administration appear, if not inevitable, at least logical and providential — the obvious solution to the problems generated by the whole history of American administration. In that sequence, Clintonian presidentialism had a special place: as the riddle of history solved, resolving the problems that President Reagan’s near-solution had generated.

Kagan began by building on Richard Stewart’s classic *The Reformation of American Administrative Law*.⁶⁹¹ “The standard account” until 1980, she explained, had three stages.⁶⁹² In each of these stages, a different branch exerted primary control over the adminis-

⁶⁸⁵ Whig histories present historical arcs as “progressive,” moving from primitive pasts to enlightened presents. See HERBERT BUTTERFIELD, *THE WHIG INTERPRETATION OF HISTORY* 4–5 (1931).

⁶⁸⁶ See Kagan, *supra* note 14, at 2250 (“By the close of the Clinton Presidency, a distinctive form of administration and administrative control — call it ‘presidential administration’ — had emerged, at the least augmenting, and in significant respects subordinating, other modes of bureaucratic governance.”).

⁶⁸⁷ See *id.* at 2317.

⁶⁸⁸ *Id.* at 2253.

⁶⁸⁹ *Id.* at 2254.

⁶⁹⁰ See *id.*; KAREN ORREN & STEPHEN SKOWRONEK, *THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT* 113–18 (2004) (defining inter-currence as “the historical construction of politics in the simultaneous operation of older and newer instruments of governance, in controls asserted through multiple orderings of authority whose coordination with one another cannot be assumed and whose outward reach and impingements, including on one another, are inherently problematic,” *id.* at 113).

⁶⁹¹ See Kagan, *supra* note 14, at 2253–54 (citing Stewart, *supra* note 19, at 1675, 1813).

⁶⁹² *Id.*

trative state — Congress, agencies themselves, and then interest groups.⁶⁹³ But each of these forms of administrative primacy was flawed.

Congressional control ceded too much power to agencies.⁶⁹⁴ And even when legislators did exercise authority through oversight, they were “re-active” and corrupted by “special interest[s].”⁶⁹⁵ The second stage, agency “self-control,”⁶⁹⁶ fared no better.⁶⁹⁷ Critics questioned the value neutrality of expertise and the “inertia and torpor” of bureaucracies.⁶⁹⁸ The last and final model before the move to presidential administration was interest-group pluralism.⁶⁹⁹ There, skeptics inverted a prior critique: whereas agency self-control erased the politics of administration, interest-group pluralism crowded out the expertise of administrative decisionmakers.⁷⁰⁰ The interest-group model, critics continued, also could not blunt inequalities in power and ultimately led to an “ossifi[ed]” and costly regulatory state.⁷⁰¹ The failures of each of these models, Kagan argued, left room for the emergence of a better system.⁷⁰²

From thesis and antithesis came the synthesis of presidential administration. As Kagan wrote, the “[standard] narrative ends sometime around 1980, conveniently enough when mine begins.”⁷⁰³ Presidential administration stepped into the breach left open by the failures of previous models of administrative management to solve the problems those models created or could not address.⁷⁰⁴

The prehistory of presidential administration, on Kagan’s account, stretched long but thin. Since President Franklin Delano Roosevelt, Presidents had tried to exercise greater control over agencies with little success.⁷⁰⁵ “The sea change began [only] with Ronald Reagan’s inauguration.”⁷⁰⁶ And while the Reagan Administration’s attempt to exercise greater control over agencies was slightly contested, its wisdom was undeniable. In a span of about three pages,⁷⁰⁷ Kagan described how

⁶⁹³ *Id.* at 2253.

⁶⁹⁴ *See id.* at 2255.

⁶⁹⁵ *Id.* at 2259–60.

⁶⁹⁶ *Id.* at 2260.

⁶⁹⁷ *See id.* at 2263–64.

⁶⁹⁸ *Id.* at 2263. Interestingly, some of the sources Kagan cited as representative critiques were law review articles from the mid-1990s whose targets were more credibly cost-benefit analyses. *See id.* n.55. As we have seen, the prominence of cost-benefit analysis was largely coeval with two other developments: a sharp bipartisan turn toward deregulation and the rise of presidential administration. *See supra* pp. 2209–10.

⁶⁹⁹ *Id.* at 2264; *see id.* at 2264–65.

⁷⁰⁰ *See id.* at 2266.

⁷⁰¹ *Id.*

⁷⁰² *Id.* at 2254.

⁷⁰³ *Id.* at 2253.

⁷⁰⁴ *Id.* at 2254.

⁷⁰⁵ *Id.* at 2274–77.

⁷⁰⁶ *Id.* at 2277.

⁷⁰⁷ *Id.* at 2277–80.

Reagan's executive orders "effectively gave OMB a form of substantive control over [agency] rulemaking"⁷⁰⁸ and condensed the considerable political and intellectual controversies of the era to a lone paragraph.⁷⁰⁹ There, Kagan characterized the "sharp criticism" of "[t]he Reagan oversight program" as "related to perceptions of the scheme's antiregulatory bias."⁷¹⁰ Kagan described arguments "that the Reagan executive orders violated the separation of powers" as "[t]he most fundamental, though least commonly accepted, objection" of the period.⁷¹¹ But she suggested that even these concerns "derived most of [their] power from" their connection with Reagan's deregulatory goals.⁷¹²

In casting such legal criticisms of presidential administration as marginal, Kagan seriously downplayed nearly a decade of vociferous dissent. Her footnotes show only a few examples of critics from the era.⁷¹³ Dissenting voices from Congress and elsewhere in the legal academy are largely absent. Notably, Sunstein's explicit constitutional doubts about cost-benefit analysis⁷¹⁴ — concerns sounding in separation of powers — are nowhere to be found. Instead, Kagan's depiction of the 1980s is brisk and largely devoid of conflict. The implication is that the legal foundations of presidential administration were not seriously contested, thus both accepted and acceptable.

This history suited her agenda. An antiseptic story about the 1980s smoothed the way to a longer discussion of the Clinton Administration as the unexpected but welcome resolution to the remaining problems of administrative management. For Kagan, the Clinton Administration represented at the same time surprise, continuity, and expansion. It was a surprise insofar as "observers might have predicted that when a Democratic President assumed office in 1993, a radical curtailment of presidential supervision of administrative action would follow."⁷¹⁵ It was continuous to the extent that Clinton preserved the basic structure and pattern of executive oversight.⁷¹⁶ And it was an expansion of presidential administration because "Clinton treated the sphere of regulation as his own . . . in a way no other modern President had done."⁷¹⁷

Clinton kept Reagan's framework but improved upon it by giving it his personal touch. Reagan's "sea change" had addressed many of the

⁷⁰⁸ *Id.* at 2278.

⁷⁰⁹ *Id.* at 2279–80.

⁷¹⁰ *Id.* at 2279.

⁷¹¹ *Id.*

⁷¹² *Id.* at 2280.

⁷¹³ Morton Rosenberg is held up as the sole citation to a separation of powers skeptic. *See id.* n.137.

⁷¹⁴ Sunstein, *supra* note 159, at 1269.

⁷¹⁵ *See* Kagan, *supra* note 14, at 2281.

⁷¹⁶ *Id.* at 2282 ("But to a considerable extent, Clinton built on the legacy Reagan had left him . . .").

⁷¹⁷ *Id.* at 2281.

problems with the three models of administration: it restored political control to a political actor, it broke through bureaucratic torpor, and it allowed for democratic responsiveness and accountability.⁷¹⁸ But even for Kagan it had problems. Reagan was deregulatory and nontransparent.⁷¹⁹ Yet these failures were contingent. Clinton, Kagan believed, had shown that presidential administration could overcome these deficiencies by being proregulatory and public.⁷²⁰ The Clinton Administration deployed “strategies of public relations”⁷²¹ in taking ownership of specific regulations and expanded presidential authority through greater use of directives to influence agency policy.⁷²² This improved on Reagan’s model.

The result was nearly the best of all possible worlds. Clintonian presidential administration “represents the best accommodation of democratic and efficiency values,”⁷²³ and “may well generate the optimal form of political oversight over administrative action, measured in terms of both accountability and effectiveness.”⁷²⁴ At a minimum, “presidential control of administration . . . possesses advantages over any alternative control device in advancing these core democratic values.”⁷²⁵ Indeed, it could allow the state to act even in times of divided government.⁷²⁶ And with some doctrinal reforms that Kagan proposed, it could be made better still.

The appeal of Kagan’s argument is easy to understand, particularly in a time of endemic divided government. Kagan’s defense of presidential administration on this score has likely grown more popular over time as a polarized Congress has made legislating difficult.⁷²⁷ At one point in her article, Kagan suggested that Clinton’s turn to presidential administration derived from this political reality.⁷²⁸ Once he faced divided government, he turned to administrative action because it was the “single most available”⁷²⁹ means at the time.⁷³⁰

Yet on this score, Kagan’s story is more prospectively attractive than historically plausible. In fact, as already detailed, the Clinton Administration had passed a great deal of meaningful legislation with

⁷¹⁸ See *id.* at 2277.

⁷¹⁹ *Id.* at 2279–80.

⁷²⁰ *Id.* at 2337.

⁷²¹ *Id.* at 2301.

⁷²² See *id.* at 2296–301.

⁷²³ *Id.* at 2341.

⁷²⁴ *Id.* at 2348.

⁷²⁵ *Id.* at 2332.

⁷²⁶ *Id.* at 2346–47.

⁷²⁷ See *id.* at 2311–14 (arguing that presidential administration is especially useful in times of divided government).

⁷²⁸ *Id.* at 2312.

⁷²⁹ *Id.* at 2282.

⁷³⁰ *Id.* at 2281–82.

the cooperation of a Republican Congress.⁷³¹ Administrative action was not the single most available means for Clinton in general. On many sectors of the economy, ranging from welfare reform to technology and banking, Clinton Democrats and Republicans shared a common vision.⁷³² This was true even of the Clinton White House's approach to regulation itself: it accepted the Reaganite posture toward the administrative state, consistently bemoaning its bloat, inefficiency, and antiquity.⁷³³ And it used executive power to slash its size.⁷³⁴

The same is true of Kagan's hopes for a proregulatory form of presidential administration. So far as the Clinton Administration was concerned, progressive presidential administration was more possibility than reality. Of course, as Kagan noted, the Clinton White House did use presidential control to advance some regulatory initiatives.⁷³⁵ But with the benefit of hindsight, it is clear that the dominant tendency of the Clinton years remained deregulatory. Among neoliberal policymakers, Clintonians may have been more open to regulation than Reaganites.⁷³⁶ But presidential control of the administrative state remained for Clinton, as for Reagan, largely a tool for cabining administration.

Yet the work Kagan's article did to distinguish the Clinton White House from the Reagan presidency was not without consequence. By yoking them into a single, continuous development, in which Clinton built on and improved Reagan's model, she suggested that Clinton had addressed the problems Reagan had created.⁷³⁷ In the process, she legitimated their shared commitments for her scholarly audience.

The legal work here was subtle and unstated, more a matter of shared assumptions than direct argument. For Kagan, debates about the borders of Article II were less important than the administrative management it made possible. While scholars and executive branch lawyers could agree — some less happily than others — that the existing Executive was “not strongly unitary,” they “failed to register, much less to comment on, the recent trend toward presidential control over administration generally.”⁷³⁸ In lieu of more constitutional theory, Kagan offered an irenic vision of the administrative state based in practice. It happened that she was “highly sympathetic to the view that the

⁷³¹ See *supra* pp. 2199–200.

⁷³² See *supra* pp. 2199–200.

⁷³³ See *supra* pp. 2201, 2205–07.

⁷³⁴ See *supra* pp. 2205–07.

⁷³⁵ Kagan, *supra* note 14, at 2292.

⁷³⁶ Although there is room for debate here. Much of the deregulation attributed to President Reagan was in fact begun under Reagan's predecessor and Clinton's Democratic predecessor, President Carter. See Alfred E. Kahn, *Deregulation: Looking Backward and Looking Forward*, 7 *YALE J. ON REGUL.* 325, 325–26, 326 n.3 (1990).

⁷³⁷ See Kagan, *supra* note 14, at 2317.

⁷³⁸ *Id.* at 2247.

President should have broad control over administrative activity.”⁷³⁹ But what really mattered was the fact that he did. We could draw lessons from that reality and let it guide our sense of what the law should be.

In this way, Kagan reprised the legal logic of E.O. 12,291 itself: Where there was silence, why not read the law in the way best suited to realize presidential administration?⁷⁴⁰ Congressional power over removal authority and the existence of independent agencies might have to be maintained as a matter of extant law, but Kagan saw no reason to extend that vision of administration.⁷⁴¹ After all, it was inferior, a false totality superseded by the better synthesis of presidential administration.⁷⁴² In the same vein, since Kagan found no explicit legal prohibitions on presidential control of the administrative state, she rejected the view that the President “lacks all power to direct administrative officials as to the exercise of their delegated discretion.”⁷⁴³

In these ways, Kagan expressed the shift in constitutional norms that presidential administration represented. Administration under law presumed that exercises of presidential control over agencies required specific authorization by Congress.⁷⁴⁴ This, we have argued, was the constitutional baseline for much of the twentieth century. Yet beginning with Reagan and continuing through Clinton, a different norm of constitutional interpretation governed. As Kagan put it, expressing both her view and that of the Reagan-Clinton governing logic: “If Congress . . . has stated its intent with respect to presidential involvement, then that is the end of the matter. But if Congress, as it usually does, simply has assigned discretionary authority to an agency official, without in any way commenting on the President’s role in the delegation,”⁷⁴⁵ and that “delegation runs to an executive branch official,” then the President’s directive authority should be assumed.⁷⁴⁶

The Clinton Administration made this presumption bipartisan through its use of directive authority. As Kagan observed, what had originally begun as a legislative proposal by Lloyd Cutler in the Carter Administration — Congress granting the President directive authority over agencies⁷⁴⁷ — became reality under Clinton, without authorizing legislation: “Clinton’s principal innovation in the effort to influence

⁷³⁹ *Id.* at 2326.

⁷⁴⁰ See Bagley & Revesz, *supra* note 159, at 1263.

⁷⁴¹ Kagan, *supra* note 14, at 2326. Even here, Kagan shows a strong respect for precedent, including *Humphrey’s Executor v. United States*. *Id.* at 2322, 2326.

⁷⁴² See *id.* at 2326.

⁷⁴³ See *id.*

⁷⁴⁴ See *supra* Part I, pp. 2143–53. Merrill’s perspective that executive review is “a highly discordant feature” of current administrative practice suggests a view of his baseline as something like administration under law. See Merrill, *supra* note 13, at 1971.

⁷⁴⁵ Kagan, *supra* note 14, at 2326.

⁷⁴⁶ *Id.* at 2327–28.

⁷⁴⁷ *Id.* at 2290–91.

administrative action lay in initiating a regular practice, despite these outstanding questions, of issuing formal directives to executive branch officials regarding the exercise of their statutory discretion . . . without the authorizing legislation [Cutler and the American Bar Association] had recommended.”⁷⁴⁸ Setting independent agencies aside, Kagan’s article was an olive branch to Unitarians and non-Unitarians alike. Presidential administration was a new normal that Kagan believed all sides could rally around.⁷⁴⁹ Administration under law was now barely legible. Kagan’s history and its audience thus helped legitimate the new baseline.

As a theoretical matter, this illustrates an important reality about constitutional baselines: they are in part a product of ideological consensus. As Professors Daryl Levinson and Richard Pildes famously observed, the Madisonian view of the separation of powers with its emphasis on interbranch rivalry became hopelessly outdated with the advent of political parties.⁷⁵⁰ Once parties became ideologically coherent and distinct, branches controlled by the same party were unlikely to check each other.⁷⁵¹ The fulcrum for this model is shared ideology. In an ideological era, structural constitutional law is inextricable from ideological analysis.

The case of presidential administration illustrates how in periods of ideological consensus across parties — at least around particular issues — interbranch checks are weaker.⁷⁵² In the 1980s, when the New Deal Democrats still occupied Congress, Reagan’s executive orders provoked a firestorm partly because of their deregulatory bent.⁷⁵³ As the Democratic Party transformed ideologically and began to resemble the Republican Party on questions of regulation and the economy, it preserved presidential administration.⁷⁵⁴

Practice in turn drove doctrine. Aside from separation of powers decisions in the 1980s that stripped Congress of potential tools for restraining the Executive, the courts are largely absent in this story of constitutional change.⁷⁵⁵ Indeed, their greatest influence is through dissents that provided intellectual materials for Unitarians.⁷⁵⁶ The spectrum of possible power sharing between Congress and the Executive over agencies shifted decisively in the latter’s favor as a result of changes in practice and their intellectual legitimation. The presidency flexed

⁷⁴⁸ *Id.* at 2293. Moreover, it is dubious that Congress legislated on such an understanding of presidential authority.

⁷⁴⁹ *See id.* at 2341.

⁷⁵⁰ Levinson & Pildes, *supra* note 48, at 2315.

⁷⁵¹ *See id.* at 2347.

⁷⁵² *See id.* at 2344.

⁷⁵³ *See* Kagan, *supra* note 14, at 2279.

⁷⁵⁴ *See supra* pp. 2203–05.

⁷⁵⁵ *See supra* pp. 2138, 2184–85.

⁷⁵⁶ *See supra* pp. 2138, 2188–89.

institutional muscles that the legislature either unsuccessfully contested (the electoral failures of the New Deal Democrats)⁷⁵⁷ or acquiesced to (as in the 1990s).⁷⁵⁸ The triumph of presidential administration is thus an example of change in constitutional norms rather than law. Its success rested on clear political foundations.

Kagan ended her article by recognizing that while there might be continued developments in presidential administration, “something significant ha[d] occurred: an era of presidential administration ha[d] arrived.”⁷⁵⁹ This Article has argued that Kagan presumed the teleology her conclusion depended on. Kagan has, of course, proved correct. But, just as Kagan’s own developmental story had more contingency and conflict than she had acknowledged, the stability of the baseline she helped cement depended on factors and events many could not have foreseen at the time. The continued persistence of presidential administration, in law and practice, is a puzzle, not an answer.

CONCLUSION: THE FUTURE OF PRESIDENTIAL ADMINISTRATION

Presidential administration is now more than four decades old. As this Article has shown, its formative years were contentious and its legal foundations radical. When norm entrepreneurs in the executive branch pushed novel interpretations of presidential power, they were initially met with stiff resistance from legislators and academics. Once it became clear, however, that Republican electoral success was durable and that the party’s political agenda was widely popular, a transformative Democrat in the White House gave presidential administration a bipartisan blessing. The rise of presidential administration, then, is a story of a decisive shift in constitutional norms made possible by constitutional self-help, gradual institutional acquiescence, and an emergent ideological consensus about the dangers of an expansive regulatory state.

The future of presidential administration is uncertain. Internal and external pressures have raised concerns about the risks and limits of presidential administration that its exponents either did not or could not foresee. Internally, doubts have emerged about the practice of presidential administration — whether it threatens legality, undermines expertise, or erodes policy coherence.⁷⁶⁰ Some of these concerns were apparent even to presidential administration’s staunchest defenders. Kagan, for instance, envisioned judicial review as a check on Presidents who trespassed their legal authority or failed to live up to statutory requirements.⁷⁶¹ And as presidential control deepened under Presidents

⁷⁵⁷ See Hale, *supra* note 604, at 208.

⁷⁵⁸ See Kagan, *supra* note 14, at 2314.

⁷⁵⁹ *Id.* at 2385.

⁷⁶⁰ See Emerson & Michaels, *supra* note 43, at 425–29.

⁷⁶¹ Kagan, *supra* note 14, at 2347.

George W. Bush and Barack Obama, sympathetic analysts like Professor Kathryn Watts urged courts to update administrative law doctrines to ensure statutory fidelity, enhance transparency, and protect notice-and-comment rulemaking.⁷⁶²

These concerns heightened significantly during the Trump Administration. For some observers, his presidency represented “clear continuities with his predecessors, in method if not necessar[ily] in policy.”⁷⁶³ For others, the Trump presidency was proof that presidential administration was intrinsically “brittle”⁷⁶⁴ and “downright dangerous.”⁷⁶⁵ Professors Blake Emerson and Jon Michaels warn that “presidential administration sometimes walks perilously close to a kind of plebiscitary dictatorship.”⁷⁶⁶ While concerns vary in their intensity,⁷⁶⁷ they indicate collective anxiety about presidential administration’s capacity for self-restraint given the absence of serious external checks.⁷⁶⁸ These internal critics worry that presidential administration either stands in need of serious reform to ensure the rule of law or that it is doomed to fail.⁷⁶⁹

Externally, changes in judicial doctrine have dimmed presidential administration’s progressive promise. Presidential administration triumphed, as this Article has argued, largely without the involvement of judges. It therefore represented an expansion of executive power that — its supporters contended — could be leveraged for proregulatory ends. Yet recent doctrinal developments have called this into question as well. The possible revival of the nondelegation doctrine is one specter haunting a progressive presidency.⁷⁷⁰ Another is a new “major questions doctrine” that reduces the need to formally revive nondelegation.⁷⁷¹ Already, the Court has used this doctrine to constrain administrative actions in areas ranging from eviction moratoriums to carbon

⁷⁶² Watts, *supra* note 18, at 687.

⁷⁶³ Farber, *supra* note 18, at 4.

⁷⁶⁴ Emerson & Michaels, *supra* note 43, at 428.

⁷⁶⁵ *Id.* at 429.

⁷⁶⁶ *Id.*

⁷⁶⁷ For other prominent critics of an expansive view of presidential administration, see generally, for example, Percival, *supra* note 115; Stack, *supra* note 24; Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539 (2005); Bressman & Vandenberg, *supra* note 24; Strauss, *supra* note 24; Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836 (2015).

⁷⁶⁸ See Emerson & Michaels, *supra* note 43, at 430–31.

⁷⁶⁹ See *id.* at 447.

⁷⁷⁰ Three Justices, including Chief Justice Roberts, dissented in *Gundy v. United States*, 139 S. Ct. 2116 (2019) (plurality opinion), finding the statute at issue failed the intelligible principle test, *id.* at 2141, 2143–44 (Gorsuch, J., dissenting). Justice Alito expressed interest in revisiting nondelegation in his concurrence. *Id.* at 2131 (Alito, J., concurring).

⁷⁷¹ Mila Sohoni, *The Supreme Court, 2021 Term — Comment: The Major Questions Quartet*, 136 HARV. L. REV. 262, 265–66 (2022).

emissions.⁷⁷² Finally, as Professors Jody Freeman and Sharon Jacobs argue, “[t]he Supreme Court has enabled structural deregulation by simultaneously countenancing a strong presidency” — through an aggressive view of the President’s removal power — “while expressing skepticism about the legitimacy of administrative power.”⁷⁷³ Such rulings point to a one-way ratchet for presidential administration: executive power can be used to discipline agency leadership and deregulate, but imaginative and aggressive assertions of statutory authority to regulate will be curtailed.

These developments have sometimes come over objections from now-Justice Kagan.⁷⁷⁴ They certainly would have surprised then-Professor Kagan. But, as this Article has shown, they are of a piece with the history of the making of presidential administration, in which presidential control of the administrative state was a key tool for realizing a deregulatory agenda.

The owl of Minerva flies at dusk? Presidential administration is now facing a moment of reckoning. Instead of sharing the optimism that accompanied its rise, we have returned to the uncertainty and conflict of its birth. While we do still live in the age of presidential administration, how long the age might last and what political possibilities it promises are open to question. What we made one way, we can make another. History is not over for administrative law.

⁷⁷² See, e.g., *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam); *West Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022); see also *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 142 S. Ct. 661, 665 (2022) (per curiam) (granting a stay of an OSHA rule because it exceeded the agency’s regulatory authority); *Biden v. Nebraska*, 143 S. Ct. 2355, 2375 (2023) (striking down the Biden Administration’s student debt relief program under the HEROES Act as unlawful).

⁷⁷³ Freeman & Jacobs, *supra* note 43, at 587 & n.2; see also Metzger, *supra* note 8, at 3.

⁷⁷⁴ See, e.g., *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2224 (2020) (Kagan, J., concurring in the judgment in part and dissenting in part); *Collins v. Yellen*, 141 S. Ct. 1761, 1799 (2021) (Kagan, J., concurring in part and concurring in the judgment in part); *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 670 (Breyer, Sotomayor & Kagan, JJ., dissenting); *West Virginia v. EPA*, 142 S. Ct. at 2626 (Kagan, J., dissenting); *Gundy*, 139 S. Ct. at 2129.