

# The Tragedy of Presidential Administration

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# THE TRAGEDY OF PRESIDENTIAL ADMINISTRATION

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## TABLE OF CONTENTS

- I. Introduction
- II. Prelude: The Managerial Presidency Before Reagan
- III. Act One: The Battle Over Executive Lawmaking
  - A. Deregulating Without Congress: EO 12,291 and OIRA
  - B. Congress Has a Cow
  - C. The Academy Strikes Back
- IV. Act Two: Moving the Goalposts: From Presidential Administration to the Unitary Executive
  - A. The Judicial War on Congressional Government
  - B. The Rise of the Unitary Theory [TK]
    - 1. Scalia and the Seeds of Unitarian Executive Theory
      - a) *Mistretta v. U.S.*
      - b) *Morrison v. Olson*
    - 2. Originalism in Full Bloom
  - C. “An American Perestroika” [TK]
    - 1. Clinton and the Third Way
    - 2. Kagan’s Irenicism
- V. Act Three: Constitutionalizing Presidential Government, 2001-2021 [TK]
  - A. Kagan’s Heirs
    - 1. Internal Separation of Powers
    - 2. Presidential Supervision
    - 3. The Executive Unbound
  - B. The New Separation of Powers
    - 1. Major Questions Doctrine
    - 2. *Free Enterprise, Seila Law, Arthrex, and Collins*
  - C. The Road to Damascus
    - 1. Kagan, J., dissenting
    - 2. Reconstruction
    - 3. Abandonment
- VI. Conclusion [TK]

## INTRODUCTION

Twenty years ago, Elena Kagan announced the end of history for administrative law.<sup>2</sup> In a 141-page article in the *Harvard Law Review*, Kagan described a form of governance that placed the president at the center of the administrative state wherever possible. Her article, *Presidential Administration*, was at once a meditation on the path of American administration and a declaration of its future. Equal parts descriptive and prescriptive, it sought to explain how the administrative state had developed over the course of the twentieth century and suggested doctrinal changes to realize more fully what she termed “Presidential Administration.” But her article was built on selective history. And her position turned out to be highly unstable. Kagan thought she was announcing the dawn of a new age of democratic governance. In fact, she was speeding the arrival of a dangerous form of plebiscitarianism.

In hindsight, her mistake was transmuting optimism into whig history. In order to present presidential administration as the endpoint of progressive developments in American governance, Kagan ignored a powerful, even dominant counter-tradition, what we call simply administration under law. This move helped make her article convincing. But it obscured where presidential administration came from and what it was trying to accomplish. Kagan’s article thus deprived readers of the tools to assess its dangers, as well as the concepts to push back against its excesses.

The result is a classical tragedy. In seeking to “enhanc[e]” the president’s ability to influence administration,<sup>3</sup> Kagan provided cover for the growth of anti-democratic tendencies. Kagan thought she could hold a principled legal line reconciling expansive executive authority with the rule of law. But she misjudged. Instead of realizing her hopes, presidential administration since Kagan has contributed to the decline of republican institutions and undermined the rule of law itself.<sup>4</sup> This Article explains how that happened.

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The history we recover focuses on two consequential shifts. The first concerns the politics of presidential administration; the second, its legality.

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<sup>2</sup> Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

<sup>3</sup> *Id.* at 2363.

<sup>4</sup> Our companion article, “The Crisis of Presidential Administration,” explores these questions in more depth, showing how presidential administration has led to interrelated crises in public administration, democratic theory, and legal doctrine.

We begin by reframing Kagan’s article as part of a broader assault on government regulation. Thirty years before Kagan wrote, presidentialists embraced a project to use the administrative state in service of a deregulatory agenda resisted by Congress. In the 1990s third-way Democrats transformed what had been mainly a Republican endeavor into a bi-partisan approach to ongoing reform. Kagan’s article naturalized this contingent shift. She turned a political fight into a developmental tendency.

The political normalization of presidential administration coincided with a transformation in its legal foundations. In its early years, expanding the administrative presidency was a statutory project, built on collaboration between Congress and the executive branch.<sup>5</sup> Since the 1980s, however, presidential administration has been extra-statutory, relying on executive orders justified through far-reaching constitutional arguments that shifted longstanding norms governing control over the administrative state and enabled by a Supreme Court with a narrow view of congressional power. Kagan’s article indexed these two shifts and helped consolidate them. In the decades that preceded her piece, administration under law became presidential administration. In the twenty years that followed, presidential administration became plebiscitary democracy, something Kagan never wanted, but to which she helped open the door.

Our story unfolds in three acts with a short Prelude. We begin by reconstructing administration under law. For decades prior to Ronald Reagan’s election, we show, Congress and the executive branch worked together to build out “the managerial presidency.”<sup>6</sup> Their goal was to make democracy efficacious and accountable through statutory enactments that granted the President specific and limited powers.

Act One turns to the Reagan years. It was then that the managerial presidency changed from a collaborative executive-legislative statutory project into something else. The key break came with EO 12,291, which justified executive control of administrative action on the basis of inherent constitutional authority. Reagan’s lawyers claimed that Article II empowered the president not only to request information from agencies but also to prevent them from promulgating rules in the absence of White House sign off. By subjecting economically significant regulation to review by the Office of Management and Budget (OMB), the order paved a procedural path to presidential control.

To contemporaries in the academy and Congress, the order was scandalous. Reagan’s arguments were radical, baseless, even lawless.

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<sup>5</sup> See JOHN DEARBORN, *POWER SHIFTS* (2021); PERI ARNOLD, *MANAGERIAL PRESIDENCY*; Rosenblum, *Antifascist Roots*; cf. Katz & Rosenblum, *Progressive Presidentialism*.

<sup>6</sup> Arnold, *supra* note XX.

Congressional testimony and law review articles catalogued the many problems. Commentators argued that Reagan had usurped legislative authority in violation of the separation of powers; amended the Administrative Procedure Act (APA) without an Act of Congress; and presumed to edit, by mere executive decree, the enabling acts of every non-independent agency in the federal government.

The outcry was in vain. Act Two tells the story of its quieting. In part, resistance was undercut by the Supreme Court. In a series of decisions involving disparate aspects of the administrative state, including *INS v. Chadha*<sup>7</sup> and *Bowsher v. Synar*<sup>8</sup> the justices added new constitutional limits to Congress's ability to direct administrative lawmaking. These decisions indirectly bolstered executive adventurism.

Resistance was also undermined in the legal academy. Influenced by Justice Antonin Scalia's jurisprudence, especially a pair of dissents in two executive power cases, *Morrison v. Olson*<sup>9</sup> and *Mistretta v. United States*,<sup>10a</sup> a cohort of law professors turned the Reagan administration's skeletal constitutional claims into a robust academic theory of presidential power over the administrative state. Stephen Calabresi at Northwestern and Sai Prakash at Virginia became the most prominent of a group of "originalist" law professors who championed strong claims of executive control. 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* that had been left for dead following the Court's unanimous opinion in *Humphrey's Executor*.

Finally, political changes defanged what was left of the opposition. Reagan's popularity shifted the partisan lines around presidential power. 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. Bill Clinton won the White House in 1992 not by repudiating Reagan but by promising a kind of continuity. The "New Democrats" would use Reaganite tools for different, if related, ends. Their lawyers subsequently built on the Reagan Administration's claims

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<sup>7</sup> 462 U.S. 919 (1983) (holding that the legislative veto over administrative agency action violates the presentment clause of the Constitution).

<sup>8</sup> 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).

<sup>9</sup> 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).

<sup>10</sup> 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

to elaborate their own version of executive control over the administrative state. By the end of the 1990s “presidential administration” appeared triumphant and secure.

But just when it seemed established, presidential administration began to slide into something else. In hindsight, we can see that Clinton’s compromise was inherently unstable. Act Three tells the story of the remarkable unraveling.

The seeds of change were sown in the 1990s. In building out the doctrinal supports for Scalia’s presidentialist vision, law professors transformed the legal foundations of presidential administration. The logic of EO 12,291 was a presidentialist default rule: where Congress did not legislate, the president had residual administrative powers. But the 1990s arguments were grander. These claims about the president’s Article II powers swept so broadly that, on many issues of institutional design, Congress had no say at all. Their theory of the “unitary executive”—a term these scholars popularized and made meaningful—elaborated vast, exclusive presidential powers that rendered the modern administrative state a tool of plebiscitary governance.<sup>11</sup>

Although in 2001, Kagan recognized the danger budding unitarianism posed to presidential administration, she did not develop tools to guard against it. Drawing on her work, and as the risks posed by unitarianism to Kagan’s more moderate presidential administration metastasized, other legal scholars proposed various strategies to make presidentialism safe for democracy.<sup>12</sup> These included, most prominently, internal separation of powers and norms of executive noninterference in adjudications and enforcement actions. But this Kaganite project was hampered from the start by congressional disinvolvement and the absence of enforceable safeguards—the forgotten hallmarks of administration under law.

Meanwhile, ever more far-reaching forms of presidentialism have become routine, enabled by a credulous Supreme Court. As it did in the 1980s, the Court is again writing presidentialism into constitutional law. Now, though, it subscribes to the unitarian vision of executive unilateralism, as reflected in its decisions in *Free Enterprise v. Public Company Accounting Oversight Board*,<sup>13</sup> *King v. Burwell*,<sup>14</sup> *Gundy v.*

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<sup>11</sup> See Jed Shugerman, *Vesting Clause* STAN. L. REV. (forthcoming).

<sup>12</sup> See, e.g., Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187 (2018) (providing a taxonomy of executive branch conventions); Ashraf Ahmed, *A Theory of Constitutional Norms*, 120 MICH. L. REV. (forthcoming 2022) (developing a general account of constitutional norms).

<sup>13</sup> 561 U.S. 477 (2010).

<sup>14</sup> 576 U.S. 473 (2015).

*United States*,<sup>15</sup> *Seila Law v. CFPB*,<sup>16</sup> and, most recently, *Arthrex* and *Collins*. Through an invigorated “major questions” doctrine, the Court has claimed the power to cut through the entire structure of administrative law when it serves its purposes, ensuring that presidentialism serves as a one-way ratchet.

The Article concludes with a brief survey of recent attempts at salvage. As a Justice, Kagan has fought a rearguard action to slow the Court’s creeping plebiscitarianism. She has been assisted by law professors, whose efforts have gained renewed urgency following the abuses of the Trump years. But the old faith in presidential administration is crumbling. Kagan’s powerful opinions have all been dissents. They have not prevented the shift of administrative governance into plebiscitary democracy. Meanwhile, a new generation of academics is cataloging the limitations of presidential administration, and raising fundamental questions about whether Kagan’s project is even worth rescuing.

We call our story a tragedy to evoke the classical trope.<sup>17</sup> As Kagan acknowledged, presidential administration made sense as a political strategy. Clinton’s choice to accept the Reagan revolution in administrative law, especially following the 1994 midterms, was perhaps prudent. But Kagan went wrong when she attempted to justify expediency as principle. Presidentialism has turned out not to be the progress Kagan expected.<sup>18</sup> And its foundations quickly gave way to a form of presidential supremacy that she neither foresaw nor, as a Justice, accepts.

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We hope that revising Kagan’s narrative can contribute to public law scholarship in four ways.

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<sup>15</sup> 139 S. Ct. 2116 (2018).

<sup>16</sup> 140 S. Ct. 2183 (2020).

<sup>17</sup> See, canonically, ARISTOTLE, *THE POETICS*.

<sup>18</sup> As a threshold matter, presidential administration is not in fact more democratic than administration under law. The president’s democratic legitimacy is contingent on the workings of the Electoral College. And even when the President receives a majority of votes cast by actual voters, the President is not better positioned than the democratically elected legislature to legitimate the decisions of administrative agencies. For another, presidential administration is not necessarily energetic. Not every president is committed to running administrative agencies efficiently. Indeed, the idea of presidential administration was championed by policy makers eager to throw sand in the works of administrative governance. See Jody Freeman & Sharon Jacobs, *Structural Deregulation*, *HARV. L. REV.* (forthcoming). Presidential administration in practice has functioned as intended: as a backdoor way to repeal legislation. We provide a fuller discussion of the “crisis of presidential administration” in a companion Article.

First, our thick history of presidential administration reveals the relative novelty of “originalist” arguments about the role of the president in the administrative state. In fact, unitarianism turns out to be so new that no one even made its core arguments forty years ago, including Reagan administration lawyers. To use 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. 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. This is not a scholarly invocation of the anti-novelty canon.<sup>19</sup> Rather, as a matter of scholarship, Unitary Executive Theory rests its claims to legitimacy in part on being a long accepted, widely shared theory of constitutional interpretation. But the history gives us a reason to read their claims differently. Rather than timeless arguments about constitutional interpretation and the structure of government, they are specific, localized interventions in concrete political and legal fights.

Second, the tragedy of presidential administration underlines the fragility of constitutional government. Over the past forty years, executive power over the administrative state became increasingly deformed. As its foundations shifted from enacted law and congressional and judicial oversight to non-justiciable internal norms, the President became difficult to subject to traditional legal controls. Rule of law in the executive branch was replaced with the rule of conventions and the good-faith actions of executive branch lawyers. Those institutions 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.<sup>20</sup> The history shows how Reagan and Kagan’s theories unsettled the administrative state, and how powerless Congress has been to reverse them.

Third, 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 largely neoliberal in character. In other words, Reaganite-Kaganite presidential administration was a type of rule by lawyers that sought where possible

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<sup>19</sup> Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407 (2017).

<sup>20</sup> Jack M. Balkin, *Constitutional Hardball and Constitutional Crises*, 26 QLR 579 (2008); Jack M. Balkin & Sanford Levinson, *Legal Historicism and Legal Academics: The Roles of Law Professors in the Wake of Bush v. Gore*, 90 GEORGETOWN L. J. 173 (2001).

to free markets and freeze legislative politics.<sup>21</sup> The resulting shift in administrative law since 1981 parallels neoliberal turns in regulated industries law,<sup>22</sup> antitrust law,<sup>23</sup> and the law of money and banking.<sup>24</sup> 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,<sup>25</sup> the presidentialism beginning in the Reagan era deserves significant attention.

Finally, this Article reveals the costs of unintended consequences. Kagan set out to make the best of a bad situation. She carefully staked out a position that would allow the President to operate in a polarized political environment but leave Congress able to rein in executive excess. She failed, however, to account for the dynamic effects of carving out space for presidential control between the lines of statutory text. The presidential lawmaking Kagan endorsed lacked legal safeguards.<sup>26</sup> And the arguments she raised left the administrative state open to existential critique. She 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.

Today, the specter of a non-majoritarian, plebiscitary president lurks in the U.S. Reports, ready to coopt what is left of administration under law. The history in this Article is offered to help take our bearings and motivate a new critique of recent case law as the constitutionalization of a “disfigured” democracy.<sup>27</sup> Denaturalizing

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<sup>21</sup> See HERBERT CROLY, *THE PROMISE OF AMERICAN LIFE* 133 (1914) (“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 (1896).

<sup>22</sup> Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 *COLUM. L. REV.* 1323 (1998).

<sup>23</sup> Lina Khan, *The Separation of Platforms and Commerce*, 119 *Colum. L. Rev.* 973 (2019); Lina Khan, *The End of Antitrust History Revisited*, 133 *Harv. L. Rev.* 1655 (2020).

<sup>24</sup> 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 (2018); Lev Menand, *Why Supervise Banks? The Foundations of the American Monetary Settlement*, 74 *VAND. L. REV.* (2021).

<sup>25</sup> See Jody Freeman & Sharon Jacobs, *Structural Deregulation*, *HARV. L. REV.* (forthcoming).

<sup>26</sup> Cf. Ahmed, *supra* note 15.

<sup>27</sup> See NADIA URBINATI, *DEMOCRACY DISFIGURED* (2014).

presidential primacy within the administrative state is the first step in imagining a world beyond it.

#### PRELUDE: THE MANAGERIAL PRESIDENCY BEFORE REAGAN

Since at least the Progressive Era, American presidents have sought to enhance their power to guide and control administrative action.<sup>28</sup> For a century or more, scholars of public administration have argued that executive centralization promotes efficiency and accountability.<sup>29</sup> Drawing on their ideas, presidents, their advisors, and outside experts regularly developed plans to give the executive more administrative power.

This project, which Peri Arnold dubbed “the managerial presidency,” was never merely executive.<sup>30</sup> It was always a collaboration between Congress and the White House.<sup>31</sup> For this reason, we call it administration under law. Presidents did not claim constitutional authority to direct the government, control the administrative state, or reorganize administrative decision-making on their own. Rather they relied on statutory enactments. They therefore worked with Congress to build out the government and redefine their powers as necessary to make administration work.

Reforms in this period followed a kind of script. In their ideal typical form, the president asked Congress to authorize a special commission to review government inefficiencies. Congress then appropriated monies, which were typically designated for limited purposes. The commission, staffed by a mix of government servants, politicians, and academics, would return a report recommending reforms. These proposed changes would generally empower the executive. The commissioners or their allies would memorialize their recommendations in one or several 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

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<sup>28</sup> See generally PERI ARNOLD, MAKING THE MANAGERIAL PRESIDENCY (2d ed 1998); Rosenblum, Antifascist Roots of Presidential Administration. Some scholars have traced the tendency back even farther. See Skowronek.

<sup>29</sup> See Rosenblum.

<sup>30</sup> ARNOLD, *supra* note 28.

<sup>31</sup> See DEARBORN, POWER SHIFTS.

century reform commissions, helped create the modern executive.<sup>32</sup> Famously, it grounded its recommendations in the need to give the president more authority to fulfill his constitutional obligations.<sup>33</sup> But the Committee did not claim administrative power for the president directly under the Constitution. 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. Rather, the Committee's recommendations were packaged in specific bills, and presented to Congress, which eventually enacted some of them into law.<sup>34</sup> To fulfill his constitutional duties, the president depended on Congress.

When Presidents tried to avoid working with Congress, they courted controversy. Theodore Roosevelt's misadventures are illustrative. Pressing an aggressive theory of presidential unilateralism,<sup>35</sup> Roosevelt sought to stand up various reform commissions made up of unpaid volunteers, without involving Congress.<sup>36</sup> His "direct assertions of Executive authority over the administration" offended the legislature, since that "authority [had] previously [been its] exclusive and unchallenged domain."<sup>37</sup> Congress's reaction was swift and uncompromising. It defunded Roosevelt's commissions, ignored their recommendations, and eventually passed a law that banned the use of any federal money on any commission unless explicitly authorized by Congress.<sup>38</sup>

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

President Richard 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.<sup>39</sup> By the time Nixon took

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<sup>32</sup> Rosenblum.

<sup>33</sup> See Rosenblum; PCAM.

<sup>34</sup> [Examples.]

<sup>35</sup> See Katz & Rosenblum, *Progressive Presidentialism*.

<sup>36</sup> See Oscar Kraines, *The President versus Congress*, 23 *WESTERN POLITICAL QUARTERLY* 5, 5 (1970).

<sup>37</sup> *Id.* at 6.

<sup>38</sup> See *id.* at 39. For the law in question, the Tawney Amendment to the Sundry Civil Expenses Appropriations Bill of March 4, 1909, see 35 Statutes at Large 1027, § 9. Note that the law also forbade paying salaries of any government servants detailed to unauthorized commissions.

<sup>39</sup> On Nixon as a break, see Skowronek, 2098.

office, the administrative state was 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 control.<sup>40</sup> But for Nixon, this was not something to laugh about. A conservative elected to the head of a government that had mostly voted against him, he worried that administration would be at cross purposes with itself and in opposition to him.<sup>41</sup> He set out to seize control.

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.<sup>42</sup> For example, in 1970, Nixon relied on legal authority to propose transforming the Bureau of the Budget into the Office of Management and Budget (OMB) and reorganizing several departments, creating the Environmental Protection Agency (EPA). This, he thought, would make the government more efficient, and give the president greater control over administration.<sup>43</sup>

Importantly, Nixon did not claim a constitutional right to create the OMB or EPA by fiat; rather, he sought to collaborate with Congress, even though controlled by those he considered his political enemies. As it happened, Congress approved both reorganization plans. The departments still exist to this day.

Nixon's reelection emboldened him to take further executive action. And while historical commentators recognize this as a shift, 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. He neither sought nor successfully established new, more expansive foundations for executive control over administrative action.

Nixon's plans sprang from political necessity. The 1972 election had put him in a difficult position. It returned a Democratic Congress, which Nixon knew would be hostile to his substantive political goals. But Nixon himself had won in a landslide and claimed a mandate for implementing his policy vision. Hoping to skirt Congressional

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<sup>40</sup> RICHARD P. NATHAN, *THE ADMINISTRATIVE PRESIDENCY 2* (1975) ("When he was President, John F. Kennedy once told a caller, 'I agree with you but I don't know if the government will.'"); *id.* at 3 ("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.'").

<sup>41</sup> PEARLSTEIN, *NIXONLAND*. NATHAN, *supra* note 40, at \_\_\_. White House staff referred to "the White House surrounded." *Id.* at 82.

<sup>42</sup> Like his predecessors, Nixon set up a commission to examine administration reforms. And like his predecessors, Nixon took those recommendations to Congress. In 1970, he proposed a reorganization of the Bureau of the Budget, creating the Office of Management and Budget. He also proposed a reorganization of several departments, creating the Environmental Protection Agency. Congress approved both of these reorganization plans.

<sup>43</sup> Nathan, *supra* note 40, at \_\_\_.

opposition, Nixon thought to use the administrative state to realize his agenda. Nixon 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*, Richard Nathan, a political scientist and alumnus of the Nixon administration, called Nixon's second term strategy "the Administrative Presidency."<sup>44</sup> 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 was to aggressively use powers already granted the president 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.<sup>45</sup> 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 business. Lacking a majority in Congress, Nixon could not request new legislation to change the rule-making process. 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.<sup>46</sup>

To do this, Nixon's administration relied on its newly created Office of Management and Budget. Nixon and his OMB director pressed the EPA to engage with other agencies before promulgating "major" rules. They launched an initiative called a "Quality of Life" review to

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<sup>44</sup> Nathan, *supra* note 40, at \_\_\_. Nathan later published a book of the same name, adapted from his earlier book on Nixon, see RICHARD NATHAN, *THE ADMINISTRATIVE PRESIDENCY* (1983).

<sup>45</sup> 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 pro-regulatory tendencies of career public servants by writing bright line rules. See [adlaw literature]. See also Lev Menand, *Too Big To Supervise: The Rise of Financial Conglomerates and the Decline of Discretionary Oversight in Banking*, CORNELL L. REV. (2018) (examining the rise of rulemaking in banking).

<sup>46</sup> Percival, *Checks Without Balances*, at 132 ("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.").

solicit feedback from non-EPA agencies on proposed regulations and guidelines related to environmental quality, consumer protection, and occupational health and safety.<sup>47</sup> Under the initiative, all agencies were to submit proposed rules to OMB at least 30 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. 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.”<sup>48</sup> As Professor Robert Percival later put it, the idea was not to “dictate the substance of agency decision,” but to “change the decisionmaking process” in ways that favored business and tended to result in weaker environmental regulations.<sup>49</sup>

Although President Gerald Ford abandoned Nixon’s “Administrative Presidency” strategy, he did not reverse this use of OMB. In fact, quite the opposite: he extended its reach. Ford continued to employ OMB to exert deregulatory pressure in the health, safety, and environmental spheres. And with inflation reaching all-time highs, Ford expanded the Quality of Life program to include “inflation impact statements” from agencies considering “major rules.”<sup>50</sup>

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. 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. As the EPA’s administrator explained, it “made our job more difficult.”

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.”<sup>51</sup> And unlike the EPA administrator, who had to be confirmed by the Senate to administer the environmental laws, Tozzi was at that time not confirmed to any post at

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<sup>47</sup> George P. Shultz, Director, Office of Management and Budget, Memorandum for the Heads of Departments and Agencies, Oct. 5, 1971.

<sup>48</sup> *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.

<sup>49</sup> Percival, *supra* note \_\_, at 134.

<sup>50</sup> See EO 11,821.

<sup>51</sup> Profile—OMB’s Jim Joseph Tozzi, *The Environmental Forum*, May 1981, at 11.

all and served at the pleasure of the President. Congressional leaders were not pleased.

Given the partisan ambitions of the new OMB “counter-bureaucracy,” many expected it would die with a Democratic president. It came as a surprise then, when Jimmy Carter, Ford’s successor, a Democrat, continued Nixon and Ford’s regulatory initiatives. Carter promoted Tozzi from his perch supervising EPA to Assistant Director of OMB.<sup>52</sup> 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 EO 12,044 required all “executive agencies,” 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.

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. 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 or Ford’s did. It did not include enforcement measures. It did not purport to change the criteria by which agencies might issue rules. And while the facial neutrality of Carter’s order, like Nixon and Ford’s before him, belied its deregulatory aim, the pressure it exerted was indirect. As a formal constitutional matter, all three president’s orders arguably fit within the Opinions Clause, authorizing the president to request the written opinions of department heads. Carter’s actions had hints of the sorts of changes to administrative procedure that reformers had assumed would require an act of Congress. 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 became more fully convinced of the need for broad-scale deregulation. Counseled by the growing OMB bureaucracy, he supported a legislative push that culminated in the Paperwork Reduction Act of 1980, which proponents claims would streamline and simplify administrative management, but in practice also created powerful new tools for the

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<sup>52</sup> Dan Davidson, *Jim Tozzi*, Center for Regulatory Effectiveness, November 11, 2002, [https://www.thecre.com/pdf/20021111\\_fedtimes-tozzi.pdf](https://www.thecre.com/pdf/20021111_fedtimes-tozzi.pdf)

executive to oversee administrative action.<sup>53</sup> Most importantly, the act established within OMB a new nerve center for federal administration, the Office of Information and Regulatory Affairs (“OIRA”).<sup>54</sup> And it required all agencies to assess the costs of regulations imposing reporting or paperwork requirements on the public.

The Act aroused significant opposition. It passed only after Carter lost reelection. According to Tozzi, Carter’s entire Cabinet recommended he veto the bill.<sup>55</sup> Amazingly, he signed it anyway.

For our purposes, what matters most is not the content of the Act, but simply the 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. Officials thought that to take these reforms further and to institutionalize them required a formal, congressionally-enacted law. 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 the traditional framework. Before 1980, to get beyond information-forcing, presidents needed, and so sought, Congressional buy-in.

#### ACT ONE: THE BATTLE OVER EXECUTIVE LAWMAKING

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 President is a part of the government; he is not *the* government.”<sup>56</sup> The Framers designed “a modest Presidency.”<sup>57</sup> “[T]he ultimate power to make the rules, to legislate, is not the President’s; it is the Legislature’s.”<sup>58</sup> This understanding persisted into the administration of Richard Nixon, who asserted unprecedentedly broad executive

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<sup>53</sup> Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (codified at 44 U.S.C. §§ 3501–3521). In testimony before Congress, Tozzi and the OMB Director described as “statutory loopholes” the fact that 81 percent of federal paperwork requirements were then promulgated by agencies without OMB review. 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.” Hearings at 93.

<sup>54</sup> 44 U.S.C. §3503(a).

<sup>55</sup> Dan Davidson, *Jim Tozzi*, Center for Regulatory Effectiveness, November 11, 2002, [https://www.thecre.com/pdf/20021111\\_fedtimes-tozzi.pdf](https://www.thecre.com/pdf/20021111_fedtimes-tozzi.pdf) (“His entire Cabinet was then recommending a veto, but he signed it.”)

<sup>56</sup> Abe Fortas, *The Constitution and the Presidency*, 49 WASH. L. REV. 987, 992 (1974).

<sup>57</sup> *Id.* at 988.

<sup>58</sup> *Id.* at 992.

authority. It even survived his presidency.<sup>59</sup> And, then suddenly, it collapsed. Just six years later, Reagan took Nixon's presidentialist project further, bypassing Congress completely 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. It begins by exploring how Reagan's version of presidential administration departed from administration under law. It shows how Reagan's effort to deregulate on the basis of a new theory of executive power rendered Congress superfluous, breaking with prior practice. Section B turns to Congress' response, showing how the legislature reacted to Reagan's bold claims. Section C analyzes the academic backlash to incipient presidential administration.

#### A. Deregulating Without Congress: EO 12,291 and OIRA ("Hot Wiring" the Administration State)

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. Reagan, by contrast, engaged in "self help."<sup>60</sup> 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 Nixon, 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.<sup>61</sup> 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*.<sup>62</sup> He wanted to roll this back.<sup>63</sup>

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<sup>59</sup> On Nixon's claims, see Skowronek, 2098.

<sup>60</sup> Dave Pozen, *Self Help and the Separation of Powers*, YALE L. J. (2014).

<sup>61</sup> See, e.g., Ronald Reagan, Election Eve Address "A Vision for America," Nov. 3, 1980, available online by Gerhard Peters and John T. Woolley, The American Presidency Project, <https://www.presidency.ucsb.edu/node/285591>; see also ROBERT M. COLLINS, *TRANSFORMING AMERICA*, ch.3 (2007); Michael R. Adamson, *Reagan and the Economy*, in *A COMPANION TO RONALD REAGAN* (Andrew J. Johns, ed. 2015).

<sup>62</sup> Ronald Reagan, Address Before a Joint Session of the Congress on the Program for Economic Recovery, Feb. 18, 1981, available online by Gerhard Peters and John T. Woolley, The American Presidency Project, <https://www.presidency.ucsb.edu/node/246567>.

<sup>63</sup> See Robert V. Percival, *Checks Without Balance*, 54 LAW & CONTEMP. PROBS. 127, 147 (1991)

How to tackle the “virtual explosion” of federal administration was not obvious, though.<sup>64</sup> If the growth in regulation had been merely the result of liberal political ideology, the Republican landslide that brought him to power might be enough to reverse it on its own. But regulation had expanded under Democratic and Republican presidents alike—in spite of the efforts of Nixon, Ford, and Carter to encourage agencies to pare back.<sup>65</sup> 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.<sup>66</sup> Agencies, left to their own devices, remained narrowly concentrated on their own specific goals. 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.<sup>67</sup>

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.<sup>68</sup> The rest of the government and the economy as a whole never needed to enter into 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.

Since the problem was structural, the solution would have to be structural too. Design would counter design. If agencies produced too

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<sup>64</sup> Reagan, Address Before a Joint Session, *supra* note 12.

<sup>65</sup> See Paul L. Joskow and Roger G. Noll, *Deregulation and Regulatory Reform in the 1980s* in MARTIN FELDSTEIN, *AMERICAN ECONOMIC POLICY IN THE 1980S*, 368 (1994).

<sup>66</sup> See Christopher C. Demuth and Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1081 (1986); Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COL. L. REV. 1260, 1263-66 (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 and George C. Eads, *The Prospects for Regulatory Reform*, 2 YALE J. ON REG. 293, 294-98 (1985) (same).

<sup>67</sup> Demuth & Ginsburg, *supra* note 16, at 1081.

<sup>68</sup> 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).

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.<sup>69</sup> The state needed a central command deck.

Nixon's OMB was the natural choice, but it would need 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 EOs 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 Executive Order 12,291, purporting to grant OMB the necessary powers by executive fiat.

The order substantially reworked the rulemaking process. "To reduce the burdens of existing and future regulations, increase accountability for regulatory actions, provide for presidential oversight of the regulatory process, [and] minimize duplication and conflict,"<sup>70</sup> 12,291 required covered agencies<sup>71</sup> to prepare and publish "regulatory impact analyses" reviewing the costs and benefits of their regulations and assessing alternative approaches that could substantially achieve the same regulatory goals at lower cost.<sup>72</sup> EO 12,291 also required that agencies, prior to promulgating "major" rules,<sup>73</sup> prepare and publish memoranda of law explaining how their proposed regulations were

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<sup>69</sup> See *Deregulation HQ: An Interview on the New Executive Order with Murray L. Weidenbaum and James C. Miller III*, 5 REGULATION 14 (1981); see also Blumenstein, *supra* note 6.

<sup>70</sup> Exec. Order No. 12,291, 3 C.F.R. 127, 128-30 (1981) (revoked 1993), *reprinted* in 5 U.S.C. § 601 (1994). Reagan made no mention of more effectively carrying out the statutory purposes for which the various agencies were established by Congress.

<sup>71</sup> The EO 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)." EO § 1(d).

<sup>72</sup> Exec. Order No. 12,291 § 3.

<sup>73</sup> The EO defined major rules to include, inter alia, any rule likely to result in an annual effect on the economy of \$100 million or more. The EO also authorized the OMB Director to designate any proposed or existing rule as a "major rule." *Id.* § 6(a)(1).

“clearly” within their authority and consistent with congressional intent.<sup>74</sup>

Although bolder and more creative than Nixon, Ford, and Carter’s orders, none of these requirements were different in kind. EO 12,291’s real bite lay in the enhanced role it carved out for the OMB Director and a newly-created, non-statutory “Presidential Task Force on Regulatory Relief.”<sup>75</sup> 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.<sup>76</sup> Functionally, this was something close to giving OMB veto power.<sup>77</sup>

To further reduce regulatory burden, the Order also empowered the 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;<sup>78</sup> to identify duplicative, overlapping, and conflicting rules; to require appropriate interagency consultation to minimize or eliminate such duplication, overlap, or conflict;<sup>79</sup> and to require agencies to obtain and evaluate specific data.<sup>80</sup> 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.”<sup>81</sup>

Kagan’s article captured just how transformational these innovations were.<sup>82</sup> EO 12,291 interposed a new set of officials in the White House, most unconfirmed, to control rulemaking across the government. It made OMB a superagency. Under EO 12,291, the EPA Administrator would no longer decide what rules to make under statutes

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<sup>74</sup> *Id.* § 4(a). In a bit of “law and macroeconomics,” see Yair Listokin, Law and Macroeconomics (20XX), the EO also required agencies to take into account “the condition of the national economy” when setting regulatory priorities. *Id.* § 2(e).

<sup>75</sup> This task force was composed of non-Senate confirmed officials selected by the President and chaired by the Vice President. C. Boyden Gray served as counsel to the Task Force.

<sup>76</sup> *Id.* § 3(f).

<sup>77</sup> During the Reagan years, only six covered regulations were promulgated without OMB approval: four pursuant to judicial order and two after the agency successfully appealed to the White House to override OMB’s decision. Kagan, *supra* note \_\_, at \_\_.

<sup>78</sup> *Id.* § 7(c).

<sup>79</sup> *Id.* § 6(a)(5).

<sup>80</sup> *Id.* § 6(a)(3).

<sup>81</sup> *Id.* § 5.

<sup>82</sup> Kagan at 2277-78.

like the Clean Water Act; on the most important questions, mid-level White House bureaucrats like Jim Tozzi would supersede them.

What Kagan left out—indeed, actively obscured—was that Reagan did all this on the basis of what was then seen as a highly dubious legal argument. 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. Reagan functionally added 3,000 words to the APA without holding a hearing, soliciting comment, or providing notice.

Seen from this perspective, the core innovation of EO 12,291 is its legal justification. According to the OLC, Reagan could lawfully promulgate EO 12,291 because it was “[g]enerally within the President’s constitutional authority” and it did not “displace functions vested by law in particular agencies.”<sup>83</sup> To ground its claim, the OLC leaned on a stretched reading of a single clause of Article II, the Take Care Clause.<sup>84</sup> Famously, the Clause requires the President to “take Care that the Laws be faithfully executed.”<sup>85</sup> On its face, it grants the president no powers, but simply imposes a duty. It requires the President to execute the law. The OLC turned it into a grant of new authority by reviving then-discredited dicta from 1925 written by Chief Justice Taft in *Myers v. United States*, a case about whether the President could fire a postmaster without the advice and consent of the Senate, as required by statute.<sup>86</sup>

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<sup>83</sup> Proposed Executive Order Entitled “Federal Regulation,” Office of Legal Counsel, Feb. 13, 1981.

<sup>84</sup> The OLC’s argument appears to come wholesale from a law review article written two years earlier by OLC lawyer Harold H. Bruff. *Presidential Power and Administrative Rulemaking*, 88 Yale L. J. 451 (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.’” According to Bruff, the President has the “unique responsibility to superintend the execution of many statutes at once.” The OLC 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.’” 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.” 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.” 60-61.

<sup>85</sup> U.S. Const. Art II, Sec. 3.

<sup>86</sup> The OLC’s arguments, which it draws from Taft’s dicta, have a long lineage as a fringe interpretation of Article II. The two most significant precursors are Attorney General J.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* Executive Authority to Remove the Chief Justice of Minnesota, 5 Official Opinions of the Attorney General of the United States 288 (1852), and Attorney General Roger Taney’s opinion that Andrew Jackson can lawfully direct the federal attorney in New York to discontinue the prosecution of

*Myers* on its own was a weak foundation for OLC's claim. 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*. But it was the best the OLC had. After invoking it, the president's lawyer's quickly slipped into prudential arguments about the need for executive coordination<sup>87</sup> and the distinctive status of the president among federal officials.<sup>88</sup>

The final product was awfully thin, and it skirted several important questions. For example, the memo seemed to make the Opinions Clause<sup>89</sup> 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 extra-statutory review process. Similarly, the memo did not explain why President 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 made little attention to the purpose of Senate confirmation of principal officers, since its interpretation of Article II permitted the President to authorize unconfirmed White House 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 constrained<sup>90</sup> and that there were limits to how far the President could go in superintending agency action.<sup>91</sup> For the OLC in 1981, presidential administration was a default rule. It could not overcome contrary congressional enactments.

Of course, in making these concessions, OLC flipped what had been the presumption of administration under law. As Fortas had noted, on the American system, Congress designs the government, and the President carries out Congress's design. Reagan's OLC stopped short of

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an action to condemn stolen jewels. *The Jewels of the Princess of Orange*, 2 Op. Att'y Gen. 482 (1831). See *Manners & Menand*, *supra* note \_\_, at \_\_.

<sup>87</sup> OLC at 61 ("If no such guidance were permitted, confusion and inconsistency could result as agencies interpreted open-ended statutes in differing ways.")

<sup>88</sup> *Id.* at 60 ("The President is the only elected official who has a national constituency" so "he 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.")

<sup>89</sup> U.S. Const. Art. II, Sec. 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").

<sup>90</sup> OLC at 61 ("it is clear that the President's exercise of supervisory powers must conform to legislation enacted by Congress").

<sup>91</sup> *Id.* at 61 ("wholesale displacement might be held inconsistent with the statute vesting authority in the relevant official")

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 Kagan later dubbed “presidential administration.”

#### B. Congress Has a Cow (“A Nation of Laws and Not of Men”)

OLC’s caveats were not enough to keep 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 H. Dingell, then the Chairman of the House Subcommittee on Oversight and Investigations. He was unimpressed by the fig leaf OLC had draped over EO 12,291.<sup>92</sup> Seeing the order as “of paramount historical importance,” Dingell asked the American Law Division of the Library of Congress to “prepare a detailed and exhaustive study and analysis of the constitutional issues.”<sup>93</sup> The Division submitted its report, entitled *Presidential Control of Agency Rulemaking*, on June 15, 1981. 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. According to Dingell, the hearings were necessary because the President had “exceeded his authority in issuing [EO 12,291]” and “the order deprives interested persons of their constitutional right to due process of law.”<sup>94</sup> Then Representative and future Vice-President Al Gore called it “the most significant hearing we have had this year.”<sup>95</sup> 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.”<sup>96</sup> In other words, Dingell defended administration

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<sup>92</sup> Letter of Transmittal, PRESIDENTIAL CONTROL OF AGENCY RULEMAKING, Comm. Print. No. 97-O, June 15, 1981, at vi-vii (“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[.]”).

<sup>93</sup> *Id.* at vii.

<sup>94</sup> Role of OMB in Regulation, Hearing Before the Subcommittee on Oversight and Investigations, House of Representatives, 97th Cong., 1st Sess., June 18, 1981, No. 97-70, at 1.

<sup>95</sup> *Id.* at 4.

<sup>96</sup> *Id.* at 2.

under law: the President was just a man, only the legislature could rework the structure of government.

In their testimony, Miller and Gray emphasized the order's continuity with previous presidential actions. "[B]oth Presidents Ford and Carter," they explained, "used Executives orders in their attempts to get a handle on this problem." Reagan was merely "trying to build upon and to improve upon the foundations laid by the previous administration[s]."<sup>97</sup> According to OMB, 12,291 did not trample on agency authority—it left discretion delegated to agency officers intact.

But the Democrats were unconvinced. The Library of Congress analysis highlighted five problems with Reagan's order: (1) Article II did not grant a general management power to the President to control the administrative decision-making process; (2) contemporary case law had not altered the "original conception of the constraints on the exercise of presidential power over administration," that is administration under law; (3) there was no manifestation in Congressional practice with respect to central management and administrative procedure to cede control over informal rulemaking to the President in the manner contemplated by EO 12,291; (4) the order substantively amended 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 rulemaking process in contravention of the Fifth Amendment's guarantee of due process.<sup>98</sup>

In their statements during the hearing, Members embraced all five arguments. Reagan's executive lawmaking was not how "real regulatory reform" that "benefit[s] all the people" was done.<sup>99</sup> "When a President of the United States acts on his own to manipulate the work of the Congress, he is circumventing the democratic process."<sup>100</sup> As Nixon had impounded appropriations, Reagan was "impound[ing] the intent of Congress" by interfering with the rulemaking process set up by the legislature.<sup>101</sup>

Gore captured the tenor and thrust of Democrats' worries. As he explained "the major issue" was "Who makes the decision to allocate resources in this society by regulation?" The Supreme Court decided in *Youngstown* that "the executive branch has such power only when it is given to the executive branch in the Constitution or when it is explicitly

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<sup>97</sup> *Id.* at 3. 12,291 was necessarily because "Unfortunately, [Ford and Carter] were unsuccessful because they were not aggressive enough in their approaches to tame the regulatory monster." *Id.*

<sup>98</sup> PRESIDENTIAL CONTROL OF AGENCY RULEMAKING, Comm. Print. No. 97-O, June 15, 1981.

<sup>99</sup> *Id.* at 7 (Rep. Synar).

<sup>100</sup> *Id.* at 7.

<sup>101</sup> *Id.* at 7.

given to the executive branch by the Congress.” 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].” 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.”<sup>102</sup>

As far as he 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.” 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.”<sup>103</sup> While there “may be a temporarily seductive appeal to [have the White House and the 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.”<sup>104</sup>

One of those problems was the distributional consequences of executive lawmaking. To Gore and his colleagues in 1981, the political economy of EO 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 [OMB] on the telephone and bend the guy’s ear.”<sup>105</sup> 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.”<sup>106</sup> This was not simply unfair. It was also a simple 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.”<sup>107</sup>

Gore’s worry was not merely hypothetical. The Deregulation Task Force realizes his very fears. “[I]t appears that the task force serves as a direct appeal body for any business community group or public sector

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<sup>102</sup> *Id.* at 36.

<sup>103</sup> *Id.* at 38.

<sup>104</sup> *Id.* at 37-38.

<sup>105</sup> *Id.* at 41.

<sup>106</sup> *Id.* at 41.

<sup>107</sup> *Id.* at 41.

group that wants to appeal.”<sup>108</sup> 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. It was made up entirely of large corporations and industry lobby groups.<sup>109</sup> “It does not look like my mom and dad are getting in there,” Congressman Synar quipped.<sup>110</sup>

The hearing reached its climax as Congress pressed to understand the administration’s legal basis for setting up this appeal structure.<sup>111</sup> 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 of results of regulatory proceedings?”<sup>112</sup>

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 enough for Reagan’s order.<sup>113</sup> 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.”<sup>114</sup>

The hearing ended in unresolved division. “That is your characterization of what is going on,” Reagan’s OIRA Administrator responded to Gore. “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.”<sup>115</sup>

### C. The Academy Strikes Back

Scholarly debate was equally intense, and served to highlight the disagreement over the Reagan Administration’s legal claims. Academics were no more persuaded than Congressional Democrats had been that E.O. 12291 was legal. Indeed, even champions of executive

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<sup>108</sup> *Id.* at 53.

<sup>109</sup> *Id.* at 61 (“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.”).

<sup>110</sup> *Id.* at 61.

<sup>111</sup> *Id.* at 53.

<sup>112</sup> *Id.* at 55.

<sup>113</sup> *Id.* at 54.

<sup>114</sup> *Id.* at 55.

<sup>115</sup> *Id.* at 56.

administrations expressed serious concerns about its justifications and sought to cabin it to render it constitutionally sound.

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 “regulatory impact analyses” (RIA) for every “major rule” and submit them to the Director of OMB for final approval.<sup>116</sup> Academics worried that these sections, taken together, upended the administrative process without adequate legal foundation.

As a threshold matter, they 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. EO 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.”<sup>117</sup> This was especially pernicious when statutes were silent about or listed cost as only one among several factors an agency had to consider when developing rules. The EO, as one observer put it, made cost “first among equals” and the “determinative factor” when implementing laws with other goals.<sup>118</sup>

The order also rerouted final authority away from agencies to the President, again potentially in tension with the underlying statutes. Although 3(f)(3) provided that “Nothing in this subsection shall be construed as displacing the agencies’ responsibilities delegated by law,” 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.<sup>119</sup> Moreover, critics maintained, EO 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.<sup>120</sup>

As a result, even those aspects of the order that seemed specific—for instance, the definition of a major rule as costing \$100 million or more—were subject to presidential, or at least OMB, construction. An

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<sup>116</sup> Exec. Order No. 12,291, 3 C.F.R. 127, 128-30 (1981) (revoked 1993), *reprinted* in 5 U.S.C. § 601 (1994).

<sup>117</sup> Rosenberg, *supra* note 8, at 217-18.

<sup>118</sup> Raven-Hansen, *supra* note 8, at 294.

<sup>119</sup> 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, 1203 (1981). One commentator explained that the order bolstered the President’s removal power. Heads of executive agencies were already subject to the threat of removal. Now that power was accentuated by OMB’s finely tuned monitoring of agency activity. Things that had previously slipped under the radar no longer could. Davis, *supra* note 8, at 852-53.

<sup>120</sup> Carlson, *supra* note 10, at 339.

OMB “authorized . . . to prepare standards for the identification of major rules” was an OMB that could decide which rules counted as major.<sup>121</sup> 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.”<sup>122</sup>

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. In some cases, an agency was on the hook for two RIAs.<sup>123</sup> 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.” 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.”<sup>124</sup> Nothing in the executive order<sup>125</sup> set limits on how long a conversation between OMB and an agency could last.

The order’s opponents grasped that the power to delay meant the power to destroy. While nothing in EO 12,291 prevented an agency from ignoring OMB’s “recommendations” and publishing a contested rule, it rarely happened in practice.<sup>126</sup> Christopher DeMuth, OIRA Administrator and Reagan’s “deregulation czar,”<sup>127</sup> 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.<sup>128</sup> “OMB’s power to ‘return’ rules” thus amounted to “de facto veto power” over major rulemaking.<sup>129</sup> 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

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<sup>121</sup> Raven-Hansen, *supra* note 8, at 294. *See also* Rosenberg, *supra* note 14, at 1204 (“The method to be utilized in the preparation is to be defined by the Director”).

<sup>122</sup> Rosenberg *supra* note 14 at 1204.

<sup>123</sup> Exec. Order No. 12,291, 3 C.F.R. 127, 128-30 (1981) (revoked 1993), *reprinted* in 5 U.S.C. § 601 (1994) (requiring both a preliminary and final RIA for certain rules).

<sup>124</sup> Exec. Order No. 12,291, 3 C.F.R. 127, 128-30 (1981) (revoked 1993), *reprinted* in 5 U.S.C. § 601 (1994).

<sup>125</sup> Section 8 exempts emergency rules and rules with statutory or judicial deadlines from the RIA procedures.

<sup>126</sup> Olson, *supra* note 8 at 43.

<sup>127</sup> Gregg Easterbrook, “Ideas Move Nations,” *ATLANTIC* (Jan. 1986), <https://www.theatlantic.com/magazine/archive/1986/01/ideas-move-nations/551621>.

<sup>128</sup> *Office of Management and Budget Control of OSHA Rulemaking: Hearings Before a Subcomm. Of the House Comm. on Gov’t Operations*, 97<sup>th</sup> Cong., 2d Sess, 350 (1982).

<sup>129</sup> Olson, *supra* note 8 at 43, 45.

agencies. Faced with RIAs and OMB Review, embattled agencies could decide to scale back or even abandon proposed rules altogether.<sup>130</sup>

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

For the venerable Kenneth Culp Davis, EO 12,291 thus represented an attack on the very foundations of administrative law. The APA founded a regime, Davis argued, on two principles: (1) the ability of affected parties to influence rulemaking and (2) rationality review by courts.<sup>131</sup> By creating a new terminal point for rulemaking, the order threatened both of those principles. OMB officials could change final rules without considering or even thinking to consider written comments and could hide new facts and influences from the public.<sup>132</sup> This distorted the rulemaking process and incentivized lobbying over reasoned argument. Davis worried that the order portended "a return, to some extent, to autocratic government." Moreover, the lack of transparency doctored judicial review, since the rule might be grounded in one set of considerations but the record before a court would be full "of an entirely different set of facts and ideas."<sup>133</sup>

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 defense of Lloyd Cutler, a longtime Democratic champion of executive administration. When he lauded Reagan's order in an important 1982 law review article, he rehearsed arguments he had made in 1975, which sounded in a functionalist register.<sup>134</sup> The few constitutional claims he did make hewed closely to the OLC memo's reading of *Myers*.<sup>135</sup> His ideological opponent, the Republican C. Boyden Gray, went even further. In his academic work justifying EO 12,291, Gray avoided all constitutional debate. He did not mention "separation of powers," the Vesting Clause, or the Take Care Clause once.<sup>136</sup>

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<sup>130</sup> Raven-Hasen, *supra* note 8 at 245. See also Olson, *supra* note 8 at 45 (describing the order's effect on EPA policymaking).

<sup>131</sup> Davis, *supra* note 8 at 854.

<sup>132</sup> *Id.* at 854.

<sup>133</sup> *Id.* at 856.

<sup>134</sup> Cutler, *supra* note 2 at 835-38.

<sup>135</sup> *Id.* at 840-43.

<sup>136</sup> Gray, *supra* note 7.

Cutler and Gray were representative. Well into the decade, and even as novel and aggressive claims of presidential authority were emerging,<sup>137</sup> those closest to and responsible for carrying out EO 12,291 tried to avoid resting their arguments on constitutional claims.<sup>138</sup> Sometimes, they tried to avoid law completely. Christopher DeMuth and Douglas Ginsburg asserted bluntly that “interesting general questions presented by White House review of agency rulemaking [were] not questions of law, but rather those of politics and of policy.”<sup>139</sup>

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 Library of Congress report for Chairman Dingell, led the charge. In a pair of articles published shortly after EO 12,291 was issued, Rosenberg challenged the order’s legality, rehearsing, in a more academic key, the arguments Dingell and other Democrats had made.<sup>140</sup>

Rosenberg began by challenging the Reagan Administration’s reliance on *Myers*. *Myers* was a removal case. It concerned only one dimension of presidential power over agencies. The OLC memo misread the law when it extracted from *Myers* a “conception-to-enactment influence over administrative rulemaking.”<sup>141</sup> 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.”<sup>142</sup> *Myers*, Rosenberg argued, simply could not justify the latter power.

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

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<sup>137</sup> See, e.g., Geoffrey Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41 (1986).

<sup>138</sup> See, e.g., Christopher C. Demuth and Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1083 (1986) (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 agencies.”)

<sup>139</sup> *Id.*

<sup>140</sup> To wit: (1) Article II did not grant “general managerial power to the President” over the administrative process. (2) Precedent had not changed the historical baseline that the President needs congressional consent to direct agency decision-making. (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. (5) The order denied the public due process of law in rulemaking. Rosenberg, *supra* note 147 at 1205.

<sup>141</sup> Rosenberg, *supra* note 141 at 209.

<sup>142</sup> *Id.*

removal cases,” *Humphrey’s Executor v. United States*<sup>143</sup> and *Wiener v. United States*.<sup>144</sup> 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.<sup>145</sup> Rosenberg found further support for congressional authority in *United States ex rel. Accardi v. Shaughnessy*,<sup>146</sup> in which the Court held that superior officers could not direct federal officers legally vested with discretionary authority. *Accardi* thus “confirmed the ability of Congress to protect the discretion of subordinate officers from Presidential interference.”<sup>147</sup> 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.<sup>148</sup> Well after the expansion of the administrative state, Congress continued to assert its primacy. The continued vitality of the legislative veto “was perhaps 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.”<sup>149</sup> He emphasized that the vast majority of statutes with legislative veto provisions were passed since 1970, including “seventeen acts containing thirty-eight veto provisions” in 1980 alone.<sup>150</sup>

This background underlined the constitutional infirmities of EO 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.”<sup>151</sup> The order “thus significantly interfere[d] with a function over which the Constitution gives Congress primary, if not exclusive control.”<sup>152</sup> Institutional practice had made clear “for more than a century” that the

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<sup>143</sup> 295 U.S. 602 (1935).

<sup>144</sup> 357 U.S. 349 (1958).

<sup>145</sup> Rosenberg, *supra* note 147 at 1211.

<sup>146</sup> 347 U.S. 260 (1954).

<sup>147</sup> *Id.* at 1215,

<sup>148</sup> *Id.* at 1215.

<sup>149</sup> Rosenberg, *supra* note 141 at 225.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 246.

<sup>152</sup> *Id.*

“President’s role . . . was that of a managerial agent for the legislature.”<sup>153</sup> 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.<sup>154</sup>

Rosenberg’s views were not eccentric. They were echoed by many others in the legal literature. Alan Morrison, the Director of Public Citizen’s 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.<sup>155</sup> Peter Raven-Hansen agreed. As Congress had not passed laws granting the president the necessary rulemaking power, and the Take Care Clause could not sustain the president’s claimed authority, EO 12,291 simply could not bind agencies “as ‘law.’”<sup>156</sup> Erik Olson added his voice to the chorus, opining that courts would have to read EO 12,291 to “avoid a constitutional question.”<sup>157</sup>

Constitutional rejoinders were tentative. Peter Shane and Cass Sunstein, now both well known as leading scholars of the administrative state, were the two most prominent defenders of the order to try to answer critics’ constitutional objections. But their responses are notable mostly for what they conceded to their opponents.

Shane was the more enthusiastic of the two. He agreed with critics that the key question with 12,291’s managerial and substantive requirements on rulemaking was “whether they impinge[d] to an unlawful degree on [agency] discretion.”<sup>158</sup> Answering this question required squaring the order with the law on the books. Since presidential power existed in Justice Jackson’s “twilight zone,” Shane argued, it had to have an independent basis and had to be reconciled with “the expressed will of Congress.”<sup>159</sup>

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.”<sup>160</sup> “Each of these goals,” Shane ventured, were “facially commensurate” with congressional policy goals

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<sup>153</sup> Rosenberg, *supra* note 147 at 1209.

<sup>154</sup> Rosenberg, *supra* note 141 at 246.

<sup>155</sup> Alan B. Morrison, Presidential Intervention in Informal Rulemaking: Striking the Proper Balance, 56 TUL. L. REV. 879, 879, 888 (1982).

<sup>156</sup> Raven-Hansen, *supra* note 141 at 311.

<sup>157</sup> Olson, *supra* note 141 at 25.

<sup>158</sup> Shane, *supra* note 138 at 1243.

<sup>159</sup> *Id.* at 1244.

<sup>160</sup> *Id.* at 1245.

in the Paperwork Reduction Act.<sup>161</sup> This still left the question of independent presidential authority. EO 12,291 might be in line with Congress's intentions. But did the president have the constitutional power to issue it?

Shane and his critics agreed on one major point: *Myers* alone would not do. As Shane put it, "By any reasonable measures . . . the legal leap from the power 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."<sup>162</sup> Shane went further. Unlike his colleagues at OLC, he acknowledged the importance of *Humphrey's Executor*.<sup>163</sup> "In any event," he concluded, justifying 12,291's "comprehensive management scheme . . . based solely on the general inference of Presidential supervisory power exemplified by a 1926 analysis of proper government administration seems conspicuously elliptical."<sup>164</sup> The presidential authority underlying EO 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*" and compared it favorably to an earlier defense of presidential oversight from 1979 by Harold Bruff.<sup>165</sup> A functional analysis revealed the importance of *Myers*, "less for [its] characterization of the President's supervisory power than because of the Court's mode of reasoning."<sup>166</sup> Chief Justice Taft had claimed that the President was the only official with the capacity and national constituency to faithfully execute the laws. Shane took this to mean that the Take Care Clause granted the President "a power of interstitial

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<sup>161</sup> *Id.* at Here, Shane squarely disagreed with his opponents. Where they saw a statute concerned with "government paper flow," "information collection," and "budgetary process," he spotted congressional will to rein in regulation. See Raven-Hansen, *supra* note 141 at 298.

<sup>162</sup> Shane, *supra* note 138 at 1247.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* 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, 471-72 (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, 189-90 (1986) (outlining a "powerful theoretical case" drawn from the 1979 ABA Commission on regulatory reform for "greater presidential control over the regulatory process).

<sup>166</sup> *Id.*

administrative coordination.”<sup>167</sup> 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. For Shane, this vision of presidential power best satisfied contemporary necessity while vindicating the “Framers’” commitment to an energetic and effective President.

For all the sweep of Shane’s functional vision, however, he still envisioned a robust role for Congress. “[P]residential oversight”, for example, did “not preclude congressional action” or the “priority of the legislative branch.” This clear primacy meant that only “in the abstract” would “presidential oversight . . . likely be dysfunctional for the regulatory process.”<sup>168</sup> Accordingly, he dismissed the possibility that RIAs would create regulatory delays in practice.<sup>169</sup> Instead, the interstitial power was a reservoir of presidential discretion that was “concededly limited by Congress’ assertion of its own policymaking powers.”<sup>170</sup> Residual discretion, Shane insisted, was entirely consistent with a distinction between coordinating policy goals and enhancing efficiency on the one hand and “the power of fundamental policy choice” on the other.

His intellectual fellow traveler, a young Cass Sunstein, was less optimistic that inherent presidential discretion could coexist with regulatory statutes. For one thing, Sunstein grasped that 12,291 represented a “potentially revolutionary step in the control and supervision of agency action.”<sup>171</sup> “No other President,” after all, had made regulatory action conditional on “benefits exceed[ing] the costs.” And no prior executive order had “accorded such wide-ranging supervisory power over the basic decision whether regulatory action should take place.”<sup>172</sup> 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 the application” of cost-benefit analysis.<sup>173</sup>

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<sup>167</sup> *Id.* at 1251.

<sup>168</sup> *Id.* at 1252.

<sup>169</sup> *Id.* at 1256.

<sup>170</sup> *Id.* at

<sup>171</sup> Sunstein, *supra* note 86, at 1268.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 1269.

To save the order, Sunstein cabined it dramatically. He conceded that on its own terms, E.O. 12,291 seemed to empower 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.”<sup>174</sup> Of course, the order included the proviso that cost-benefit analysis applied only “to the extent permitted by law.” 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?”<sup>175</sup> After surveying the various types of legislation, Sunstein had an answer: not very broadly at all.

The issue was that most regulatory statutes simply did not prioritize efficiency.<sup>176</sup> Congress faced “predominantly distributional” issues and when it legislated, it typically aimed to redistribute wealth, not maximize it. While certain types of legislation, such as antitrust statutes, could be “reasonably understood as intended to promote efficiency,” others, such as civil rights statutes or antipollution laws could not.<sup>177</sup>

Moreover, the order’s “rhetoric of costs and benefits” was undefined. 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.<sup>178</sup> Sunstein thus echoed the order’s critics who blasted its “indeterminacy.”<sup>179</sup> Where Sunstein parted ways with the order’s opponents was prescription. EO 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.”<sup>180</sup>

Sunstein would have to wait nearly thirty years to fully implement his vision of regulatory design. In 1981, meanwhile, he read 12,291 very cautiously. Applying RIAs “in an across-the-board fashion . . . raise[d] serious questions of separation of powers.”<sup>181</sup> On Sunstein’s account, the proviso was arguably the order’s most important clause, since it “operate[d] severely to restrict the scope of that aspect of the order.”<sup>182</sup> However enlightened attempts to impose economic rationality

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<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 1273.

<sup>176</sup> *Id.* at 1273-74.

<sup>177</sup> *Id.* at 1275.

<sup>178</sup> *Id.* at 1276.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 1276.

<sup>181</sup> *Id.* at 1281.

<sup>182</sup> *Id.* at 1281.

on the administrative state might be, if Congress wanted to go regulatory hell, the President had to help. It was his job.

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

Recovering the controversy over EO 12,291 sharpens our understanding of the break Reagan's presidential administration constituted 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 show us 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 dispositive. It would take a transformation in American legal and political culture to make Reagan's arguments persuasive.

## ACT TWO: MOVING THE GOALPOSTS FROM PRESIDENTIAL ADMINISTRATION TO THE UNITARY EXECUTIVE

When EO 12,291 was first issued, it spawned scandal. Members of Congress, law professors, and even lawyers sympathetic to executive control challenged 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 second Act: acceptance. We highlight three factors that contributed to this outcome. The first was the Supreme Court. The 1980s featured a series of decisions, which, 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 Antonin Scalia to respond to the criticism launched against EO

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. Third, in light of Reagan’s political success and the rise of the Unitary Theory, Democratic legal elites came to embrace legal arguments their colleagues had once derided. Combined with the new alternative of Unitary Executive Theory, presidential administration moved from radical to inevitable.

#### A. The Judicial War on Congressional Government

In the fight between the Executive and Congress for control of the administrative state, the Supreme Court was at first quiet. This is not surprising. It had nothing to say. From its perspective the matter had been long settled. Decades before, the Court had come out decisively in Congress’s favor. In *Humphrey’s Executor*, from 1935, a court deeply divided between supporters and opponents of President Franklin Roosevelt’s New Deal nevertheless united to issue a unanimous ruling recognizing Congress’s ability to structure administrative agencies and cabin the president’s removal power.<sup>183</sup> Twenty years later, at the start of the Warren Court, the justices reaffirmed and extended that holding in *Wiener*, again unanimously.<sup>184</sup> By the middle decades of the 20<sup>th</sup> century then, if not before, Congressional supremacy was firmly established in doctrine.

As the liberal Warren Court gave way to the conservative Burger Court, nothing changed at first. Famously, the Warren Court’s pathbreaking rulings in criminal justice and due process occasioned a political backlash,<sup>185</sup> but the replacement of the liberal Chief Justice Earl Warren with the conservative Warren Earl Burger changed less than critics hoped.<sup>186</sup> Despite Burger’s explicit intent to reverse the direction of the Court’s jurisprudence, “no important Warren Court decision was overruled” during his tenure.<sup>187</sup> In some areas of the law, the Burger Court even went beyond its predecessor, consolidating its

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<sup>183</sup> 295 U.S. 602 (1935).

<sup>184</sup> 357 U.S. 349 (1958).

<sup>185</sup> PETER CHARLES HOFFER ET AL., *THE SUPREME COURT: AN ESSENTIAL HISTORY* 369 (2d ed 2018).

<sup>186</sup> ROBERT G. McCLOSKEY & SANFORD LEVINSON *THE AMERICAN SUPREME COURT* 343 (6<sup>th</sup> ed 2016).

<sup>187</sup> Bernard Schwartz, *The Burger Court in Action* at 263 in *THE BURGER COURT: COUNTER-REVOLUTION OR CONFIRMATION?* (Bernard Schwartz, ed. 1998).

rulings and building on them.<sup>188</sup> For this reason, most scholars have come to think of the Burger Court as a “counterrevolution that wasn’t.”<sup>189</sup>

Periodizing by Chief Justice, though, as the literature usually does, risks missing the counterrevolution that did happen in separation of powers law.<sup>190</sup> There, somewhat unexpectedly, the Burger Court upset the New Deal and Warren Court era consensus. The change did not come right away. It took years for the upheavals of deregulatory neoliberalism to ramify their way to the Court. But when its shockwaves finally 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 Burger’s tenure, the Court effected a stunning reversal, moving firmly against Congress’s ability to regulate the executive.

The first tremor came in 1983, with the Court’s shocking decision in *INS v. Chadha*.<sup>191</sup> The case concerned a central tool of Congressional power over the administrative state: the legislative veto.<sup>192</sup> 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. If Congress voted a formal disapproval, the actions would be blocked. Only in the face of Congressional silence would they go into effect.

The legislative veto was an invaluable device 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.”<sup>193</sup> 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

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<sup>188</sup> See *id.* at 263-64.

<sup>189</sup> THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN’T (Vincent Blasi ed. 1983); see also MCCLOSKEY & LEVINSON, *supra* note XX, at 343; but see MICHAEL GRAETZ & LINDA GREENHOUSE, THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT (2016) (disagreeing).

<sup>190</sup> An important exception is John J. Gibbons, *The Legacy of the Burger Court* in THE BURGER COURT: COUNTER-REVOLUTION OR CONFIRMATION? (Bernard Schwartz, ed. 1998), 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.

<sup>191</sup> 462 U.S. 919 (1983). On the shocking nature of the decision, see E. Donald Elliott, *INS v. Chadha*, 1983 SUP. CT. REV. 125, 126 (1983).

<sup>192</sup> See generally BARBARA CRAIG, THE LEGISLATIVE VETO (1983).

<sup>193</sup> See Speech of William Rehnquist, quoted in BARBARA CRAIG, CHADHA: THE STORY OF AN EPIC CONSTITUTIONAL STRUGGLE, 82 (1990).

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*.

This reversal mediated relations between Congress and the Executive and enabled the build out of the managerial presidency. Thanks to the legislative veto, Congress could delegate powers to the executive without creating an untethered government. It allowed the legislature to empower the president without sacrificing supervision or surrendering lawmaking.

The value of the device was apparent from its very first use. In 1932, Congress included a legislative veto in a law granting President Herbert Hoover authority to reorganize the executive branch. Pursuant to the law, the President eventually advanced several reorganization proposals to Congress. By the time he did so, though, 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.

Congress subsequently included a legislative veto in the reorganization authority it granted Franklin Roosevelt and began to include it in other statutes as well. The device went on to become a cornerstone of the New Deal state. It gave Congress the security that it could grant additional statutory powers to the executive without sacrificing accountability. Relying on that security, Congress delegated increasingly important responsibilities to the president and the executive branch more broadly, counting on the legislative veto to ensure that it would retain power to check improper or disagreeable action.

Presidents and executive branch lawyers at OLC regularly raised concerns about the legality of the legislative veto. But the tool was too useful to give up. On some important matters, Congress would only agree to delegate to the executive branch if it could include a legislative veto to make sure the power it granted was not unbounded. 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 using a legislative veto himself.<sup>194</sup> At the start of his only term, President

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<sup>194</sup> 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”).

Jimmy Carter preemptively included a legislative veto in his administration's proposed bill granting him reorganization authority. Carter had made government reorganization a central part of his campaign and wanted Congress to pass the necessary laws for him to make good on his promises. He included the veto in his requested bill in the hopes of speeding Congressional approval. To allay legal concerns, Carter requested his Attorney General prepare an opinion affirming the constitutionality of the one-house veto in the reorganization context.<sup>195</sup> This was controversial since it broke with the formal past position of the Department of Justice. In practice, though, the legislative veto was already long established; Carter's Attorney General wrote the memo.<sup>196</sup>

Reflecting this interbranch consensus, challenges to the legislative veto before the neoliberal era were few and ineffectual. There had been debate in Congress around its constitutionality 1939,<sup>197</sup> and presidents periodically expressed their own concerns as well.<sup>198</sup> But no court case settled the matter; Congress continued to incorporate the veto into legislation; and Presidents often acquiesced after stating their objections.<sup>199</sup> For three decades, conflict subsided. Occasional articles appeared rehashing concerns,<sup>200</sup> but they were largely without effect.<sup>201</sup>

Things only began to shift in the 1970s.<sup>202</sup> The proximate cause was an explosion of new laws incorporating the legislative veto, which raised its salience. The unraveling of Richard 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.<sup>203</sup> At the same time, attitudes about government underwent

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<sup>195</sup> See *id.* at 81, 83.

<sup>196</sup> See *id.* at 82. See also Studies on the Legislative Veto, prepared by CRS for Subcommittee on Rules of the House of the Committee on Rules, US House of Representatives 96 Cong. 2d Session (Feb. 1980), 2 (discussing the history of accommodation between Congress and the executive w/r/t the legislative veto).

<sup>197</sup> See Cooper & Cooper, *supra* note XX, at 469 & n. 9; John D. Millett & Lindsay Rogers, *The Legislative Veto and the Reorganization Act of 1939*, 1 PUB. ADMIN. REV. 176 (1941).

<sup>198</sup> See Cooper & Cooper, *supra* note XX, at 470-71 n. 11.

<sup>199</sup> See *id.* at 471 & n. 12.

<sup>200</sup> See, e.g., Robert E. Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953).

<sup>201</sup> See Cooper & Cooper, *supra* note XX, at 472 (observing that, whatever the theoretical difficulties, "[t]he legislative veto . . . is here to stay").

<sup>202</sup> See DEARBORN, *supra* note XX (detailing the way Congress in the 1970s ought to shift power back from the executive branch).

<sup>203</sup> See CRAIG, *supra* note XX, at 36. Craig also identifies the presidentially-led war in Vietnam, excessive use of presidential impoundments, and government divided between a Democratic Congress and a Republican presidency as additional contributing factors. See *id.*

an important change.<sup>204</sup> The growth of administrative agencies during the New Deal and Great Society had left behind 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.<sup>205</sup> 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 turned back to 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.<sup>206</sup> But the first five years of the 1970s alone saw eighty-nine laws incorporate the device.<sup>207</sup> In 1975, Southern Democrat Elliot Levitas made waves when he introduced a bill to create a “generic veto” giving Congress a legislative veto over all regulatory activity.<sup>208</sup> His aim was explicitly deregulatory: in the hearings on his bill, he testified from a witness table piled theatrically with volumes of the Federal Register.<sup>209</sup> The generic veto, he believed, would give Congress a tool to cut back on red tape and control the bureaucracy. His message resonated. Levitas’ bill attracted over 150 cosponsors and became the subject of significant news coverage.<sup>210</sup> While it worked its way through committee, Levitas urged amendments to pending legislation, adding legislative vetoes to new bills.

This reinvigoration of the legislative veto spurred legal debate. Antonin Scalia, then the head of the OLC, testified against the device during hearings on Levitas’ bill, but Congress ignored his counsel.<sup>211</sup> Law reviews soon jumped into the fray, publishing articles analyzing the veto’s function and constitutionality.<sup>212</sup>

The Supreme Court tried to stay out. In 1975, in *Buckley v. Valeo*, the Court heard arguments on the constitutionality of recent amendments to the Federal Election Campaign Act, which had created a new Federal Election Commission (FEC) whose rulemaking powers

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<sup>204</sup> See generally Gary Gerstle, *The Rise and Fall (?) of America’s Neoliberal Order*, 28 TRANS. OF THE ROYAL HIST. SOC. 241 (2018).

<sup>205</sup> See PAUL SABIN, PUBLIC CITIZENS (2021).

<sup>206</sup> See James Abourezk, *The Congressional Veto*, 52 IND. L. J. 323, 324 (1977).

<sup>207</sup> *Id.* at 324; see also CRAIG, *supra* note XX, at 36.

<sup>208</sup> See CRAIG, *supra* note XX, at 46.

<sup>209</sup> See *id.* at 39-41.

<sup>210</sup> See *id.* at 46-47.

<sup>211</sup> See *id.* at 53-56.

<sup>212</sup> See, e.g., H. Lee Watson, *Congress Steps Out*, 63 CALIF. L. REV. 983 (1975); Harold H. Bruff and Ernest Gellhorn, *Congressional Control of Administrative Regulation*, 90 HARV. L. REV. 1369 (1977); Abourezk, *supra* note XX.

were subject to a legislative veto.<sup>213</sup> 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.<sup>214</sup> The Court demurred, however, ruling on Appointments Clause grounds and avoiding the issue.<sup>215</sup> Congress reenacted an amended version of the law the next year, which retained the veto and included provisions for fast-track judicial review.<sup>216</sup> But a follow-up case, *Clark v. Valeo*, litigated this time by the Ralph Nader affiliated lawyer Alan Morrison, died at the Court of Appeals as unripe.<sup>217</sup>

Progressive advocacy groups and future Reagan Administration legal elites appear as strange bedfellows in hindsight. At the time they shared a common goal, though: resisting Congressional attempts to exert greater control over the executive branch. Indeed, the liberal Morrison had testified alongside the conservative Scalia against Levitas' proposed generic veto.<sup>218</sup> They had different reasons for their opposition. Scalia sought to protect the President, while Morrison worried about the way Congressional involvement in the regulatory process would open the door to more industry lobbying.<sup>219</sup> But at root both were firm against a greater role for Congress.

An unusual immigration case gave them the chance to turn their conviction into law. In 1975, Congress had exercised its legislative veto to overrule the Attorney General's suspension of the deportation of Jagdish Chadha, a student who had overstayed his visa.<sup>220</sup> Chadha's lawyer, in a desperate attempt to keep his client in the United States, argued that the veto was unconstitutional.<sup>221</sup> The case had been working its way through the court system while the high-profile fights over the FEC played out. Morrison learned of the matter soon after losing his follow-up challenge in *Clark* and immediately dove into the litigation.<sup>222</sup>

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<sup>213</sup> 424 U.S. 1 (1975); for the pertinent amendments, see 88 Stat. 1263 (1974).

<sup>214</sup> See Brief for Appellants in *Buckley v. Valeo* at 208 n.9.

<sup>215</sup> See *Buckley*, 424 U.S. at 140 n. 176.

<sup>216</sup> See CRAIG, *supra* note XX, at 69-70.

<sup>217</sup> 559 F.2d 642 (1977).

<sup>218</sup> See CRAIG, *supra* note XX, at 61.

<sup>219</sup> Compare *id.* at 54-55 with *id.* at 65.

<sup>220</sup> *Id.* at 21.

<sup>221</sup> *Id.* at 31. The lawyer was in part inspired by arguments made in the previous case of *Jenny Lee*, in which the threat of a constitutional challenge the legislative veto had led the administration to lobby Congress to overturn its exercise of the veto in a specific case, with success. See *id.* at 35.

<sup>222</sup> *Id.* at 88-89.

Meanwhile, political changes brought the executive branch into the fight. After defending the FEC in *Buckley*,<sup>223</sup> 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.<sup>224</sup> Those decisions were made under President Gerald Ford, though, who had no electoral mandate and worried about presidential overreach. His successor, Jimmy Carter, had no 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.<sup>225</sup> By 1977, his Administration had embraced active opposition to the veto and was affirmatively seeking out opportunities to invalidate it.<sup>226</sup>

Importantly, Carter's fight with Congress was about tactics. Both the president and the legislature 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.<sup>227</sup> He stated he would not treat legislative vetoes as binding.<sup>228</sup> Congress was incensed. It saw itself as the deregulator in chief, uniquely empowered to curb improper lawmaking by "overzealous," "unelected bureaucrats."<sup>229</sup> It ignored Carter's warning, revived consideration of Levitas' generic veto, and added veto provisions to new bills, including all Federal Trade Commission rulemaking.<sup>230</sup>

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.<sup>231</sup> It entered a brief contesting the veto's constitutionality even as it sought out other judicial vehicles in case *Chadha* fell through.

Carter lost reelection before *Chadha* reached a final resolution, but his successor, Ronald Reagan, continued the fight. This was not fore-ordained, as the scholar Barbara Craig has documented in arresting detail.<sup>232</sup> As a candidate, Reagan had been more committed to deregulation than executive power. In fact, he supported the legislative veto as a tool to rein in regulation, and after the election his transition

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<sup>223</sup> See Brief for the Attorney General and the FEC in *Buckley v. Valeo*.

<sup>224</sup> See CRAIG, *supra* note XX, at 86-87.

<sup>225</sup> See *id.* at 88.

<sup>226</sup> See *id.* at 106.

<sup>227</sup> See *id.* at 119.

<sup>228</sup> See *id.* at 120 (quoting Carter's June 21, 1978 message to Congress).

<sup>229</sup> *Id.* at 123 (quoting House Majority Leader James Wright).

<sup>230</sup> See *id.* at 123, 129, 134.

<sup>231</sup> See *id.* at 106.

<sup>232</sup> 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.

team signaled he would support the generic veto as President.<sup>233</sup> 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 Scalia had written when he was head of OLC, making the same point.<sup>234</sup> For added safety, Simms tried to tie the new administration's hands with last minute court filings against the legislative veto.<sup>235</sup> In the event, the new head of OLC, Ted Olson, shared Simms and Scalia's judgment, and Simms stayed on to work for the Reagan Administration.<sup>236</sup> 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.<sup>237</sup> 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*.<sup>238</sup>

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. 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."<sup>239</sup> The Court entertained several amici briefs, including one from Scalia on behalf of the American Bar Association. 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 further and new legislative veto litigation unfolded in District of Columbia courts.<sup>240</sup> The question of the legislative veto seemed headed for a decisive resolution.

The decision, when it finally came, was almost an anticlimax. Chief Justice Burger apparently only grasped the full significance of the case at the end of the term; rather than rule, he set it for reargument to

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<sup>233</sup> See CRAIG, *supra* note XX, at 149-150. Support for the legislative veto was even part of the Republican Party platform. See *id.* at 149.

<sup>234</sup> See *id.* at 153.

<sup>235</sup> See *id.* at 150.

<sup>236</sup> See *id.* at 158.

<sup>237</sup> See *id.* at 165, 169-170.

<sup>238</sup> See *id.* at 171.

<sup>239</sup> Opening argument of Eugene Gressman, *Chadha* Argument Transcript, Feb. 22, 1982.

<sup>240</sup> See CRAIG, *supra* note XX, at 215; the FERC case, the FTC Case.

give himself more time and control the writing.<sup>241</sup> On June 23, 1983, his opinion finally came down. The Court ruled by a vote of 7-2 that the legislative veto was unconstitutional in all its forms.

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."<sup>242</sup> 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."<sup>243</sup> Their "profound conviction" was "that the powers conferred on Congress were the powers to be most carefully circumscribed."<sup>244</sup> For that reason, they had given the president an essential role in lawmaking, that there might be truly national perspective in framing legislation.<sup>245</sup>

In any case, "that a given law or procedure is . . . useful . . . will not save it if it is contrary to the Constitution."<sup>246</sup> Burger then relied on a formalistic separation of powers analysis to strike the legislative veto down.<sup>247</sup> The House's veto of the Attorney General's deportation order was a legislative act.<sup>248</sup> But the Constitution specified that legislation needed to go through bicameralism and presentment.<sup>249</sup> The veto did not do this. Congress's veto was therefore unconstitutional.<sup>250</sup>

Burger recognized that his decision would make life harder for Congress, especially as vetoes were then becoming more frequent.<sup>251</sup> 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 the Constitution."<sup>252</sup> Delivered at the height of the Cold War, his message was clear: however much it might constrain Congress, the Court's ruling was intended to protect liberty itself.<sup>253</sup> Besides, Burger thought

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<sup>241</sup> See CRAIG, *supra* note XX, at 222.

<sup>242</sup> 462 U.S. at 945.

<sup>243</sup> *Id.* at 950.

<sup>244</sup> *Id.* at 947.

<sup>245</sup> See *id.* at 948 (citing *Myers*).

<sup>246</sup> *Id.* at 944.

<sup>247</sup> See *id.* at 946.

<sup>248</sup> See *id.* at 952.

<sup>249</sup> See *id.* at 946.

<sup>250</sup> See *id.* at 959.

<sup>251</sup> See *id.* at 944.

<sup>252</sup> *Id.* at 959.

<sup>253</sup> See also *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").

Congress had other tools at its disposal to discipline in an errant executive.<sup>254</sup>

Congress, predictably, was furious. The House promptly held a special session for members to express their frustration.<sup>255</sup> One mooted a constitutional amendment.<sup>256</sup> That fall, Representative Claude Pepper, chairman of the Rules Committee, convened hearings to decide how to respond, which he opened by comparing “*Chadha’s* historical importance with respect to congressional authority to that of Chief Justice Marshall’s decision in *McCulloch v. Maryland*.”<sup>257</sup> Pepper hoped that the holding would soon be “whittled down” to restore Congressional prerogative.<sup>258</sup> His colleagues proposed other responses, from greater use of sunset provisions to increased oversight.<sup>259</sup>

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.<sup>260</sup> 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.<sup>261</sup> Louis Fisher, then an expert with the Congressional Research Service, argued along similar lines as he urged Congress to reconsider delegations wholesale.<sup>262</sup>

In the age of administration, abandoning delegation was hard. Congress continued to enact legislative vetoes, if only to put pressure on agencies.<sup>263</sup> And it relied increasingly on informal mechanisms of control, including threats to tie the executive branch’s hands if it did not

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<sup>254</sup> See *id.* at 955 n. 19

<sup>255</sup> See CRAIG, *supra* note XX, at 233.

<sup>256</sup> *Id.* at 234.

<sup>257</sup> Opening Statement of Hon. Claude Pepper, Nov. 9, *in* Hearings before the Committee on Rules: Legislative Veto After Chadha, 98 Cong. 2d Sess (1984), at 1.

<sup>258</sup> *Id.* at 3.

<sup>259</sup> See, e.g., Statement of Hon. John Dingell, Nov. 9, 1983 *in* Hearings before the Committee on Rules: Legislative Veto After Chadha, 98 Cong. 2d Sess (1984), at 6. See also Frederick M. Kaiser, *Congressional Action to Overturn Agency Rules: Alternatives to the Legislative Veto*, 32 ADMIN. L. REV. 667 (1980).

<sup>260</sup> See Dingell Statement, *supra* note XX, at 6. Note that 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.

<sup>261</sup> *Id.* at 10.

<sup>262</sup> See Statement of Louis Fisher, Nov. 10, 1983 *in* Hearings before the Committee on Rules: Legislative Veto After Chadha, 98 Cong. 2d Sess (1984), at 228-230.

<sup>263</sup> See Louis Fisher, *The Legislative Veto*, 56 Law & Contemp. Probs. 273 (1993).

follow Congressional instructions.<sup>264</sup> 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 Burger's last opinion, the Court tightened those limits further. The case, *Bowsher v. Synar*, was a replay of *Chadha*. On one side, again, Morrison and the Reagan Justice Department; on the other, counsel for the House and Senate. The question this time was the constitutionality of the Gramm-Rudman-Hollings Act.

The law had been born in desperation. Reagan's attempts to shrink the federal government foundered as Congress continued to increase funding for defense and other projects. The budget deficit ballooned. Unable to restrict spending by other means, conservative legislators attached a provision to a must-pass debt ceiling bill, that mandated sequestration. 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.<sup>265</sup> Congressmen lamented the Act even as they voted for it.<sup>266</sup> With the law, they hoped to tie themselves to the neoliberal mast.

Congress recognized that the Act included a novel enforcement mechanism that might raise constitutional questions. For this reason, the statute included a fallback provision, in case parts of it were struck down. 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 Mike Synar, objected to what they saw as an unconstitutional delegation of Congressional lawmaking. 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.

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.<sup>267</sup> His writing was, if anything, more categorical and formalistic. The Constitution divided the government into "three defined categories," Burger remarked, quoting his *Chadha*

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<sup>264</sup> See JESSICA KORN, *THE POWER OF SEPARATION*, 37 (1998); see also JOSH CHAFETZ, *CONGRESS'S CONSTITUTION*, 72-73 (discussing Congressional control of the bureaucracy in the aftermath of *Chadha*).

<sup>265</sup> Congress would have an opportunity to make the cuts before the President's order went into effect.

<sup>266</sup> See statements quoted in Morrison brief.

<sup>267</sup> Note that Burger's majority only included 5 judges; Stevens and Marshall concurred.

opinion.<sup>268</sup> It “does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts.”<sup>269</sup> The Gramm-Rudman-Hollings Act empowered the Comptroller General to play a role in executing the laws.<sup>270</sup> But the Comptroller was a congressional agent.<sup>271</sup> 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.”<sup>272</sup>

As in *Chadha*, Burger again tied 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.”<sup>273</sup> 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.”<sup>274</sup> 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.”<sup>275</sup>

Burger announced his opinion in July, 1986. As commentators observed at the time, it constituted a decisive step towards overturning the separation of powers regime that had enabled the New Deal state.<sup>276</sup> Under Burger’s new formalism, Congress was severely limited in its ability to legislative the implementation of its laws and bindingly constrain the executive branch.

The summer after his *Bowsher* decision, with its paeon to formalist constitutionalism, Burger resigned from the Court to focus on his work as chairman of the Commission on the Bicentennial of the Constitution. Reagan’s pick for the new vacancy had something poetic to it, ratifying the revolution Burger had presided over. Antonin Scalia had already shaped the Court’s new conception of separation of powers, testifying against the legislative veto in Congress, filing briefs against Congress’s ability to limit the executive in *Chadha*, and, as an appellate

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<sup>268</sup> 478 U.S. at 721.

<sup>269</sup> *Id.* at 722.

<sup>270</sup> *See id.* 733.

<sup>271</sup> *See id.* at 727.

<sup>272</sup> *Id.* at 726.

<sup>273</sup> *Id.* at 730.

<sup>274</sup> *Id.* at 722.

<sup>275</sup> *Id.* at 733.

<sup>276</sup> *See, e.g.,* David P Currie, *The Distribution of Powers after Bowsher*, 1986 SUP. CT. REV. 19, 20, 40.

judge when *Bowsher* was heard, sitting on the court below, striking Gramm-Rudman-Hollings down on the same grounds Burger would affirm. 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. The Rise of Unitary Executive Theory

[This section explores how the Burger Revolution was not enough for some legal elites, especially Antonin Scalia. Joining the court after *Bowsher*, he agreed with its monistic theory, and sought to extend its reach. In a pair of consequential dissents—in *Mistretta* and *Morrison*—Scalia offered a broader interpretation of Article II to underpin the Burger Court’s Separation of Powers revolution and the practices of the Reagan White House. Inspired by Scalia, a coterie of young legal academics turned his dissents into a full-blown legal theory: the theory of the unitary executive. The section traces the links between Scalia’s writings and the first sketch of unitary theory, showing how they grew out of—and eventually went beyond—the Reagan vision.]

### C. “An American Perestroika”

[This section reconstructs how elite democrats—especially the lawyers in the Clinton White House—responded to the growing presidentialism of American jurisprudence, legal theory, and practice. While other Democrats called for a wholesale repudiation of Reagan’s administrative policies, Bill Clinton won election to the presidency by positioning himself as a new kind of Democrat, in part a successor to the Reagan/Bush project. For our purposes, this was evinced most clearly in the way he continued Reagan Era presidential administration. But the rise of unitary theory allowed him to present presidential administration in a new light: not as executive usurpation of Congressional prerogative, but rather as a sensible compromise between outright presidentialism and congressional inefficiency, and a step back from Reagan-like assertions of unbounded executive authority. The gambit succeeded. Elite democratic lawyers, who might have been expected to lament capitulation to a project their predecessors had resisted, made their peace with it instead. The scholarship they produced when they left government—epitomized, of course, in Kagan’s field-defining piece—embodied their compromise, re-narrating what had been a history of conflict and contingent defeat as a story of stepwise, incremental, bipartisan progress.]

ACT THREE:  
CONSTITUTIONALIZING PRESIDENTIAL GOVERNMENT, 2001-2021

[This last Part describes the collapse of the dream of presidential administration. The hope was that the Clinton recasting of presidential administration might hold: that you could have a kind of executive administrative supremacy that did not devolve into the unitary executive. This Part narrates the attempts to realize that dream. It then explores how new developments in the Supreme Court's administrative law and separation of powers jurisprudence thwarted them. It closes by looking at where this leaves those who still see presidential administration as the best balance of institutional competences between Congress, the President, and the bureaucracy.]

A. Kagan's Heirs

[This section surveys the theoretical attempts to build out the Clinton/Kagan project of presidential administration as something that would give the executive the tools to use the administrative state as a vector for realizing presidential policies choices without embracing the unitary executive theory or turning the government into a mere extension of the president's personality. One approach is to embrace "internal separation of powers," harnessing the virtues of separation of powers inside an administrative state led by the president. Another approach is to emphasize the "presidential duty to supervise," relying on the president's responsibility to "take care" to bound the reaches of the president's authority, confining his administrative power to "faithful execution." A third approach seeks to locate limits to the president's administrative authority outside the statutory or constitutional law, through norms, conventions, morality, and electoral politics.]

B. The New Separation of Powers

[This next section shows how the attempts to buttress presidential administration in the three ways described above failed as a result of the Supreme Court's recent administrative law and separation of powers decisions. Beginning with *Free Enterprise Fund*, the Court has constitutionalized aspects of presidential administration. Its appointment clause jurisprudence has undercut the effectiveness of internal separation of powers. Its emerging norm of reasoned elaboration has codified tremendous deference to the president, undercutting the constraining potential of supervision. And its use of the major questions doctrine, combined with the democratic theory that undergirds its decisions in *Seila Law* and *Arthrex*, has eroded the

limiting power of administrative morality. Electoral politics remains as the only legitimate constraint: the plebiscitary president.]

### C. The Road to Damascus

[This section canvasses the responses to the Court's latest presidentialist turn. We begin by looking at where the Court's most recent decisions have left Kagan herself: writing stirring dissents, trying to prevent her vision of presidential administration from collapsing into pure plebiscitarianism. We consider an attempt to salvage presidential administration, and build a new version of it compatible with the Supreme Court's increasingly unitary jurisprudence. And we close by reconstructing the arguments of a small but growing number of scholars who think it is time to abandon the project and develop other models administrative governance.]

### V. Conclusion

[We recap the article and motivate a companion piece that critiques the normative underpinnings Kagan advanced for presidential administration.]