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ESSAY  
THE CONSERVATIVE INSURGENCY AND PRESIDENTIAL  
POWER: A DEVELOPMENTAL PERSPECTIVE  
ON THE UNITARY EXECUTIVE

*Stephen Skowronek*

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*Stephen Skowronek\**

A government, by an unlimited power of construction, may stretch consti-  
tutions . . . , or interpret them as synods do scripture, according to the  
temporal interest of the predominant sect.

— John Taylor of Caroline<sup>1</sup>

The American Constitution was designed to render political change slow and difficult, and that has put it at odds with the various insurgencies that have, from time to time, swept over it. Indeed, few things in American political development are more impressive than the ingenuity of empowered movements in confounding the checks and balances that thwart their ambitions, and nothing has proven more consequential for American government over time than the ideas and institutions they have conjured to ease those constraints. The underlying political dynamic has long been familiar. Commenting on the drift of American government in the early nineteenth century, Virginia theorist John Taylor of Caroline decried the tendency of ideologically charged movements to change the Constitution without amendment. The “predominant sect” simply reinterpreted the text, proceeding by means of “construction” to render it more amenable to attainment of the new political purposes in view. Constraints on programmatic action gave way before a “machine called inference,” a machine that works by “conceding [constitutional] principles, and then construing them away.”<sup>2</sup>

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<sup>1</sup> JOHN TAYLOR, CONSTRUCTION CONSTRUED AND CONSTITUTIONS VINDICATED 23 (Lawbook Exch. 1998) (1820).

<sup>2</sup> *Id.* Earlier, in 1815, Hugh Henry Brackenridge similarly observed that “[a] constitution is like a nose of wax; it is twisted by the party that is predominant.” HUGH HENRY BRACKENRIDGE, MODERN CHIVALRY 639 (Claude M. Newlin ed., Am. Book Co. 1937) (1815), *reprinted in* THOMAS GUSTAFASON, REPRESENTATIVE WORDS 54 (1992) (internal quotation marks omitted).

The American presidency, as we know it today, is one of the chief products of the political machinery of constitutional inference. Time and again, the office has proven indispensable to the political ambitions of newly empowered reform movements, and each has brought to it a new set of legitimating ideas and institutional resources designed to attain them. Looking back, it may seem obvious that the presidency is uniquely suited to the promotion of transformative ambitions. But the attraction of insurgent movements to the presidency is, in fact, one of the great paradoxes of American constitutional design. The Framers feared leaders of the sort who would appeal directly to the people on behalf of one political program or another, and they created the presidency in large part to check popular enthusiasms.<sup>3</sup> Far from endorsing presidential leadership, their assumptions in separating executive and legislative power were that Congress, with its vast repository of expressed powers and its close proximity to the people, was the branch most likely to exploit public sentiments, and that a properly constituted executive would help to stabilize the affairs of state.<sup>4</sup> The separation of powers, the provision for indirect presidential elections, the charge to “preserve, protect and defend the Constitution,”<sup>5</sup> the presidential veto of legislation — all marked the presidency as a counterweight to impulsive majorities and a prod to a more deliberative stance in national affairs.<sup>6</sup> It might be said that the Framers anticipated moments like the mid-1860s and the mid-1990s when congressional insurgents flush with power and emboldened by a radical vision

<sup>3</sup> See, e.g., JAMES W. CEASER, *PRESIDENTIAL SELECTION* 51–75 (1979); JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* 27–45 (1987); cf. James W. Ceaser et al., *The Rise of the Rhetorical Presidency*, in *RETHINKING THE PRESIDENCY* 233 (Thomas E. Cronin ed., 1982) (discussing a doctrinal shift in the twentieth century away from the original constitutional ideal and the “increasing pressure” on modern Presidents “to demonstrate their leadership capacity through an ever growing number of rhetorical performances,” *id.* at 236).

<sup>4</sup> See, e.g., *THE FEDERALIST* NO. 48, at 306 (James Madison) (Clinton Rossiter ed., 1999) (“[I]t is against the enterprising ambition of [the legislative] department that the people ought to indulge all their jealousy and exhaust all their precautions.”). Hamilton defended the separation of powers as essential to control an overweening legislature. *THE FEDERALIST* NO. 71 (Alexander Hamilton), *supra*, at 432 (“The tendency of the legislative authority to absorb every other has been fully displayed and illustrated by examples in some preceding numbers. In governments purely republican, this tendency is almost irresistible. The representatives of the people . . . seem sometimes to fancy that they are the people themselves . . .”); see also Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 *U. CHI. L. REV.* 123, 140–53 (1994) (discussing the Framers’ assumptions).

<sup>5</sup> U.S. CONST. art. II, § 1, cl. 8.

<sup>6</sup> On enduring tensions in relations between Presidents and movements, see Sidney M. Milkis, *The President in the Vanguard: Lyndon Johnson and the Civil Rights Insurgency*, in *FORMATIVE ACTS: AMERICAN POLITICS IN THE MAKING* 269 (Stephen Skowronek & Matthew Glassman eds., 2007) [hereinafter *FORMATIVE ACTS*]; Elizabeth Sanders, *Presidents and Social Movements: A Logic and Preliminary Results*, in *FORMATIVE ACTS*, *supra*, at 223; and Daniel J. Tichenor, *Leaders, Citizenship Movements, and the Politics Rivalries Make*, in *FORMATIVE ACTS*, *supra*, at 241.

of new possibilities squandered precious time and energy trying to weaken and circumvent an uncooperative occupant of the White House.<sup>7</sup> What they did not anticipate was that handicapping the legislative branch in the enactment of popular mandates and reconstructive programs would spur the development of alternative instrumentalities designed to work through the executive. The unintended effect of their division of powers has been to direct proponents of programmatic action to elaborate upon the endowments of the presidency and to re-fashion that counterweight to insurgency into its cutting edge.

This Essay traces these successive elaborations through to the most recent construction of presidential power, the conservative insurgency's "unitary executive." Work on this construction began in the 1970s and 1980s during the transition from progressive to conservative dominance of the national agenda. A budding conservative legal movement took up the doctrinal challenge as an adjunct to the larger cause, and in the 1990s, it emerged with a fully elaborated constitutional theory. After 2001, aggressive, self-conscious advocacy of the unitary theory in the Administration of George W. Bush put a fine point on its practical implications.<sup>8</sup> Much has been written about this theory in recent years, but virtually all of the commentary is by legal scholars seeking to adjudicate the constitutional merits of the case. That is to say, commentators have been debating the soundness of the theory's claims as an interpretation of texts and precedents.<sup>9</sup> The objective here is different. It is to situate the theory in the long line of insurgent constructions and to address it more directly as a political instrument and a developmental phenomenon.

<sup>7</sup> On Andrew Johnson's efforts to contain and stigmatize the ambitions of congressional Republicans for a more radical reconstruction of the South in the mid-1860s, see, for example, Nicole Mellow & Jeffrey K. Tulis, *Andrew Johnson and the Politics of Failure*, in FORMATIVE ACTS, *supra* note 6, at 153. On Bill Clinton's efforts to contain and stigmatize the ambitions of congressional Republicans working on behalf of the conservative agenda of the mid-1990s, see, for example, ELIZABETH DREW, SHOWDOWN: THE STRUGGLE BETWEEN THE GINGRICH CONGRESS AND THE CLINTON WHITE HOUSE (1996).

<sup>8</sup> See JOHN P. MACKENZIE, ABSOLUTE POWER: HOW THE UNITARY EXECUTIVE THEORY IS UNDERMINING THE CONSTITUTION 1-4, 31-62 (2008); JAMES P. PFIFFNER, POWER PLAY: THE BUSH PRESIDENCY AND THE CONSTITUTION (2008); Steven E. Schier, *George W. Bush and Washington Governance: Effective Use of a Self-Limiting Style*, 6 FORUM, Issue 2, art. 2, 2008, available at <http://www.bepress.com/forum/vol6/iss2/art2/>.

<sup>9</sup> See, e.g., MACKENZIE, *supra* note 8, at 5-11; Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004); A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346 (1994); A. Michael Froomkin, *Still Naked After All These Words*, 88 NW. U. L. REV. 1420 (1994); Greene, *supra* note 4; Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994); Kevin M. Stack, *The President's Statutory Powers To Administer the Laws*, 106 COLUM. L. REV. 263 (2006); Louis Fisher, Jack Rakove, John Yoo, & Gordon Silverstein, Discussion at the University of California, Berkeley: The Imperial Presidency and the Founding (Sept. 19, 2008) (video available at <http://www.youtube.com/watch?v=w1qGDeAZ9-w>).

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The guiding assumption of this analysis is that a new construction of the presidency gains currency when it legitimizes the release of governmental power for new political purposes. I do not mean to suggest that candid reckoning with construction as a political process disposes of the constitutional claims of the unitary theory or of any other theory for that matter. I contextualize these claims in order to bring other issues to the fore. Significance is to be found in the practical political problems that conservative insurgents had to confront in venting their ambitions, in the sequence of prior constructions on which their response to these problems was built, and in the cumulative effects of the developmental process of construction itself.

The power of ideas is registered, first and foremost, in ideas about power. Those who have sought, time and again, to make American government a more efficient vehicle for their transformative ambitions have understood that fact implicitly. And yet, as constructions of power superimpose themselves one on another, each implicated in the next, standards of control tend to drift, and as plausible premises for action accumulate, calling power to account becomes more difficult. The phalanx of legal scholars currently debating the claims of the unitary executive is indicative not only of the high political stakes at issue in the moment at hand, but also of the high premium to be paid in the twenty-first century for a coherent theory of American government. A developmental perspective may be useful in this regard, for by directing attention to the sequence of change and to the premises upon which modern forms of power emerged, it highlights the contemporary implications of recent interest in doubling back to first principles.

### I. A NEW FORMALISM

From a developmental point of view, it seems reasonable to suppose that conservatives were prompted to construct presidential power anew by limitations they encountered in the received construction when trying to employ it in pursuit of their own ends. What those limitations might have been, however, is not readily apparent. American progressives had already spent the better part of the twentieth century relaxing constraints on the American executive. Dismissive of what they called “Constitution worship” for its blind attachment to the governing arrangements of an earlier day and impatient with what they perceived as the rigid formalities of a written text, these reformers had advanced a pragmatic, capacious, and famously open-ended theory of national power.<sup>10</sup> With that theory, they proceeded to recon-

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<sup>10</sup> On the progressives’ critique of constitutional rigidities and the rejection of “Constitution worship,” see, for example, HERBERT CROLY, *THE PROMISE OF AMERICAN LIFE* 200 (Arthur M. Schlesinger, Jr. ed., Belknap Press of Harvard Univ. Press 1965) (1909); and WOODROW WIL-

struct institutional relationships throughout American government around presidential initiative and administrative capacity. For all appearances, “presidential government” was a done deal by the mid-1960s.<sup>11</sup>

Equally curious is that contemporary conservatives would take up advocacy of a cause that had left many of their own ideological forebears anxious and defensive.<sup>12</sup> In the later years of progressive dominance, American conservatives were still cuing off of a hallowed Whig tradition of hostility to presidential aggrandizement and executive pretension; opposition to progressive political priorities went hand in hand with skepticism toward the progressives’ “modern” presidency. The conservatives of the 1950s and 1960s were formalists who shunned the progressives’ pragmatism and upheld constitutional arrangements that the shift to presidential government threatened. A diverse array of conservative analysts and theorists — James Burnham, Willmoore Kendall, Alfred de Grazia, and James Buchanan — countered the higher-order aggregations of the progressives’ new system of rule by repairing to the original design of American government and expounding upon the congressional and local prerogatives it harbored.<sup>13</sup> Especially notable in light of more recent conservative claims were the prior generation’s concerns about efforts to fortify the presidency with new resources for managing the burgeoning federal establishment, as the specter of unified command and control compounded the threat posed by the expanded administrative establishment to local and congressional responsibilities.<sup>14</sup> It was with an urgent sense of loss and constitutional foreboding that James Burnham wrote of the “managerial revolution” that was sweeping the globe.<sup>15</sup>

The theory of the unitary executive promotes exactly what the earlier generation of conservatives feared. It is a brief for the President to act as the exclusive manager of all matters that fall within the purview of the instrumentalities of the executive branch. By that premise, con-

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SON, CONGRESSIONAL GOVERNMENT 215 (Peter Smith ed., World Publ’g Co. 1973) (15th prtg. 1901).

<sup>11</sup> JAMES MACGREGOR BURNS, PRESIDENTIAL GOVERNMENT 309–51 (1965).

<sup>12</sup> On this oft-noted reversal, see, for example, James Risen, *The Executive Power Awaiting the Next President*, N.Y. TIMES, June 22, 2008, § 4 (Week in Review), at 4; and Sam Tanenhaus, *Sidebar: When Reining in an Imperial President Was the Conservatives’ Cause*, N.Y. TIMES, June 22, 2008, § 4 (Week in Review), at 4.

<sup>13</sup> See JAMES BURNHAM, CONGRESS AND THE AMERICAN TRADITION (1959); ALFRED DE GRAZIA, REPUBLIC IN CRISIS: CONGRESS AGAINST THE EXECUTIVE FORCE (1965); Willmoore Kendall, *The Two Majorities*, 4 MIDWEST J. POL. SCI. 317 (1960); G. Patrick Lynch, *Protecting Individual Rights Through a Federal System: James Buchanan’s View of Federalism*, 34 PUBLIUS, Fall 2004, at 153.

<sup>14</sup> See, e.g., Peri E. Arnold & L. John Roos, *Toward a Theory of Congressional-Executive Relations*, 36 REV. POL. 410 (1974).

<sup>15</sup> See JAMES BURNHAM, THE MANAGERIAL REVOLUTION (1941).

temporary conservatives have sought to limit prerogatives long claimed by the other branches over administrative instruments, procedures, and personnel, to tap the vast repositories of power accumulated in the modern executive establishment, and to expand the capacities of the President to set policy and adjudicate disputes unilaterally. The argument is conservative only in that it draws a hard line against pragmatism and experimentation in institution-building.<sup>16</sup> It rests the case for presidential management squarely on the Constitution as it was originally conceived and ratified.

There are different strands of the unitary theory, and advocates of one do not necessarily endorse all the propositions of another.<sup>17</sup> They do, however, move out from a common core. All proceed upon an elaboration of the principle of the separation of powers, most especially upon the Constitution's grant of independent powers to the President.<sup>18</sup> Of particular importance is the Constitution's vesting of "the executive power" in a single officer, the President, as that is read to imply expansive authority and exclusive responsibility. When the distinctly unqualified wording of Article II's Vesting Clause is figured into other presidential powers derived from the oath of office, the Commander in Chief Clause, and the Take Care Clause, the domain of unfettered action can be broadened along any number of fronts — for example, in interpreting and executing the law, or in conducting foreign relations, or in warmaking and the control of military affairs. The theory has been invoked to justify unilateral warmaking powers for the President.<sup>19</sup> It has been used to expand presidential discretion with signing statements that defend executive prerogatives against possible infringement by specific parts of the legislation being enacted into law.<sup>20</sup> Even in its more modest forms, the theory undercuts ad-

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<sup>16</sup> See, e.g., Steven G. Calabresi, *Political Parties as Mediating Institutions*, 61 U. CHI. L. REV. 1479 (1994) (indicating how a unitary theorist might accommodate the improvisational developments that have come to surround presidential power over time).

<sup>17</sup> For a description of the range of views, see STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE* 18–21 (2008).

<sup>18</sup> See, e.g., Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 45–70 (1995); Steven G. Calabresi, *The Vesting Clauses As Power Grants*, 88 NW. U. L. REV. 1377, 1395–1400 (1994); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541, 570–99 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); see also JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005) [hereinafter YOO, *THE POWERS OF WAR AND PEACE*]; JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* (2006).

<sup>19</sup> See YOO, *THE POWERS OF WAR AND PEACE*, *supra* note 18.

<sup>20</sup> See Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 308, 318, 328–29 (2006); Steven G. Calabresi & Daniel Lev, *The Legal Significance of Presidential Signing Statements*, 4 FORUM, Issue 2, art. 8, 2006, available at <http://www.bepress.com/forum/vol4/iss2/art8/>.

ministrative arrangements designed to secure the independence of prosecutors, regulators, accountants, forecasters, personnel officers, scientists, and the like. It discounts the notion of objective, disinterested administration in service to the government as a whole and advances in its place the ideal of an administration run in strict accordance with the President's priorities. The principal claim is that the Constitution mandates an integrated and hierarchical administration — a unified executive branch — in which all officers performing executive business are subordinate to the President, accountable to his interpretations of their charge, and removable at his discretion. The overall effect is to authorize the President to capitalize on all that the historical development of national power has created while leaving to others the Constitution's most rudimentary and combative instruments: term limits and quadrennial elections, congressional control of the purse and Senate review of appointments, judicial intervention and the threat of impeachment.

The unitary theory serves as an interesting window into developmental processes precisely because there is no simple way of characterizing its relationship to positions advanced in the recent past. Whereas the progressives revamped American government in general, and the presidency in particular, in a concerted "revolt against formalism,"<sup>21</sup> today's conservatives insist on a close reading of constitutional stricture. At the same time, the new conservatives have not invoked formalism, as the earlier generation had, to contain the power of the presidency; they have, on the contrary, deployed it as a vehicle for more aggressively asserting the President's independence and freedom of action. In place of a straightforward refutation of the progressives' case for the "modern" presidency, today's conservatives have, in effect, outbid them. They have reinvigorated traditional conservative arguments for resting power on original understandings of the Constitution, but they have jettisoned traditional conservative reservations about the modern presidency, and they have extended the progressive paradigm of presidency-centered government while jettisoning the distinctly progressive premises on which it was built. What commands our attention, then, is an arresting recombination of the historical elements in play, a new marriage of formalism with presidentialism, of originalism with unilateralism.

## II. EARLY CONSTRUCTIONS

For all the distension it might produce over the long haul, construction is likely, in each instance, to be a highly constrained process. The

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<sup>21</sup> See generally MORTON G. WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* (1949).

constitutional text cannot be ignored, nor can advocates of a new dispensation afford to have their interpretation of it dismissed out of hand as implausible. Notwithstanding the drift over time in the standards employed, constructions of presidential power are likely to succeed to the extent that their premises appear in the course of events familiar, sensible, even restorative.

Arresting as it may be as a new amalgam, today's conservative construction of presidential power is hardly unfamiliar. Advocates of the unitary theory have a long, if contentious, history on which to draw. During the Washington Administration, Alexander Hamilton ventured that when the Framers of the Constitution vested "the Executive Power" in the President, they had in mind a well-established model of what those powers encompassed. It followed that the clauses of Article II should be read expansively in light of what the "general theory and practice" of other nations at the time considered the executive's "natural" domain, and that presidential powers were limited only narrowly by the qualifications stipulated in the rest of document.<sup>22</sup> This argument was reworked at the height of the progressive movement by Theodore Roosevelt in his "stewardship theory" of the presidency.<sup>23</sup> Drawing upon Hamilton's broad reading of the Vesting Clause and celebrating what he called the "Jackson-Lincoln" school of presidential practice, Roosevelt asserted that the American President was free to do anything on behalf of the nation except what the Constitution and the laws explicitly proscribed.<sup>24</sup> The companion notion of "departmentalism" also has a long and distinguished pedigree. It holds that the presidency, as an equal and coordinate branch of government, cannot be subordinated to interpretations of the Constitution and the laws proffered by the other branches but must remain free to interpret both by its own lights in the fulfillment of its executive responsibilities.<sup>25</sup>

The common feature of this family of arguments is that they assess the constitutional distribution of powers from the President's perspective. Today's unitary theorists have elaborated this perspective in the

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<sup>22</sup> See Alexander Hamilton, *Pacificus No. 1* (June 29, 1793), reprinted in 1 CLASSICS OF AMERICAN POLITICAL AND CONSTITUTIONAL THOUGHT 634, 636 (Scott J. Hammond, Kevin R. Hardwick & Howard L. Lubert eds., 2007).

<sup>23</sup> William H. Harbaugh, *The Constitution of the Theodore Roosevelt Presidency and the Progressive Era*, in THE CONSTITUTION AND THE AMERICAN PRESIDENCY 63, 67 (Martin L. Fausold & Alan Shank eds., 1991); see also *id.* at 66–68.

<sup>24</sup> THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 380 (Da Capo Press 1985) (1913); accord *id.* at 371–72, 379–80.

<sup>25</sup> See KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY xi, 14–18 (2007); Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 REV. POL. 401, 411–12 (1986).

form of a lawyer's brief: they have highlighted its doctrinal underpinnings, generalized their application, and drawn out their contemporary implications. The additional rigor has also prompted them to discriminate and choose among historical expressions of the argument. For example, Professor Steven Calabresi, who has done more than any other contemporary scholar to flesh out the theory, pointedly rejects Roosevelt's stewardship notion as overblown and unsupportable.<sup>26</sup> However, when he and his collaborators surveyed presidential history, they found that claims consistent with their more disciplined presentation of the unitary theory have been voiced by virtually all incumbents of the office — the mediocre as well as the great, the failed as well as the successful.<sup>27</sup> Though it is hardly surprising to find that Presidents have sought all along to maximize their power within the constitutional system, the unitary theorists are not out to surprise. On the contrary, the strength of their case for presidential power in contemporary American government hinges on the claim that it is nothing new.

And to a large extent, they are correct. The theory of the unitary executive is new less for what it adds to prior arguments for presidential power than for what it does away with. Indeed, for all that is familiar in the theory and for all the scholarly discipline that has been brought to bear on it in recent years, it is easy to lose sight of what is missing. On inspection, however, this is the first time since the Founding that a political movement has let the constitutional powers claimed by Presidents and their surrogates stand on their own without the deployment of some new mechanisms designed to hold those powers to account. Put another way, the familiarity of the formal arguments on which this construction rests obscures the extent to which past insurgencies relied upon the development of extra-constitutional devices to solve the riddle of empowerment and control and to build the modern presidency.

Previously, presidential empowerment in America has been accompanied by insurgent campaigns to democratize the government more thoroughly; that is to say, new power claims by the President were accommodated by the political movements that supported them in alternative governing arrangements designed to surround and regulate the release of that power from outside the Constitution proper. The Jef-

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<sup>26</sup> See CALABRESI & YOO, *supra* note 17, at 245.

<sup>27</sup> See generally Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451 (1997); Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J.L. & PUB. POL'Y 667 (2003); Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601 (2005); Christopher S. Yoo, Steven G. Calabresi & Laurence D. Nee, *The Unitary Executive During the Third Half-Century, 1880–1945*, 80 NOTRE DAME L. REV. 1 (2004).

fersonian, Jacksonian, and Progressive, though markedly different from one another in their immediate programmatic objectives, each coupled enthusiasm for a more expansive reading of executive prerogatives with innovations designed to render the control of power more collective and cooperative. Unity has hitherto been a *political* ideal directed at *interbranch* relations and achieved through the organization and mobilization of the polity at large; up until now, reconstructive movements have sought *political* solutions to what they perceived to be a constitutional *problem* of separation. Formal checks and balances were eased in the past by the creation of auxiliary institutions and informal mechanisms of political control, mechanisms that sought at once to foster institutional collaboration and to make the representation of public opinion more continuous and effective. Prior insurgencies have, to be sure, interpreted presidential power permissively, but not until now has the Constitution alone lent legitimacy to its development.

Commentators have long contended that Jefferson's conception of presidential power proved in practice to be no less expansive than Hamilton's.<sup>28</sup> But as Professor Jeremy Bailey has recently detailed, there was a crucial difference between them. Whereas Hamilton sought to lodge presidential prerogatives in Article II of the Constitution, Jefferson sought to extricate presidential strength from the constitutional text and anchor it instead in externalized expressions of public opinion.<sup>29</sup> By claiming ground beyond the Constitution, Jefferson's construction was in some ways even less constrained than Hamilton's, and yet its scope was kept circumstantial and subject to the judgments of others. For Jefferson, extraordinary assertions of presidential power could be justified as a collective act of popular will, a mandate from the people, a populist intervention.<sup>30</sup> By implication, these interventions would extend no further than the people's collective action and political indulgence would take it. Checks and balances would be left intact as security against the impositions of individuals and factions who had less than overwhelming popular support.

Jefferson's construction of presidential power was reflected institutionally in innovations that played to the political strengths of his movement. The formation of the Republican Party, the ratification of the Twelfth Amendment, the designation of the congressional caucus as the presidential nominating body, the selection of state electors in

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<sup>28</sup> See, e.g., HENRY ADAMS, HISTORY OF THE UNITED STATES OF AMERICA DURING THE ADMINISTRATIONS OF JEFFERSON AND MADISON 78 (Prentice Hall 1963) (1891).

<sup>29</sup> See JEREMY D. BAILEY, THOMAS JEFFERSON AND EXECUTIVE POWER 18 (2007).

<sup>30</sup> See BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS 5–6, 9, 22 (2005); SIDNEY M. MILKIS & MICHAEL NELSON, THE AMERICAN PRESIDENCY: ORIGINS AND DEVELOPMENT, 1776–2002, at 103 (2003).

accordance with the national party ticket — all served the causes of popular mobilization, political coordination, and institutional cooperation.<sup>31</sup> With them, Jefferson swept the field of his political opponents, secured his party's control of all the elected branches, reconstructed national political priorities, and exercised prerogatives that dwarfed those of his Federalist predecessors. But innovations such as these cut two ways, and they left Jefferson's successors to labor under their constraints. Once the insurgents were safely ensconced in power, the auxiliary instruments they instituted to express the public will strengthened the position of Congress in governmental affairs and saddled Presidents with norms that were deeply suspicious of the formal appurtenances of executive power.<sup>32</sup>

The Jacksonian construction of the presidency extended the Jeffersonian ideal of an office empowered through popular mobilization and institutional coordination, but the mechanisms deployed were different. In the course of their struggle for power, the Jacksonians would reject the trappings of political control of the executive by Congress and find the ideal of a single party of national consensus unwieldy. Pressing his political priorities upon a nation more sprawling and more varied in its interests, Jackson encountered stiffer resistance to his designs than Jefferson had, and his claims to a popular mandate for independent action grew correspondingly sharper.<sup>33</sup> When push came to shove, Jackson embraced the political divisions his policies were creating, proclaimed the presidency superior to Congress as an agency of democratic expression, and set about mobilizing majorities on the electoral battlefield sufficient to gain control of Congress and secure deference to his will. His constitutional assertions fueled the organization and integration of rival mass-based parties designed to compete for power at all levels.<sup>34</sup>

Jackson created a presidency more fully extricated from congressional domination and supported in its popular connection. His followers saw to it that it was also more fully integrated into state and local politics. The characteristic institutional forms of the post-

<sup>31</sup> For a discussion of the nominating caucus, see M. Ostrogorski, *The Rise and Fall of the Nominating Caucus, Legislative and Congressional*, 5 AM. HIST. REV. 253, 263–64 (1899). Ostrogorski may exaggerate the efficiency of this system, but he nicely captures contemporary understandings of its departure from original constitutional assumptions. See also C.S. THOMPSON, AN ESSAY ON THE RISE AND FALL OF THE CONGRESSIONAL CAUCUS AS A MACHINE FOR NOMINATING CANDIDATES FOR THE PRESIDENCY (1902); William G. Morgan, *The Decline of the Congressional Nominating Caucus*, 24 TENN. HIST. Q. 245 (1965).

<sup>32</sup> See WILFRED E. BINKLEY, PRESIDENT AND CONGRESS 67–80 (1962); CEASER, *supra* note 3, at 101–06, 118–19; RICHARD P. MCCORMICK, THE PRESIDENTIAL GAME 76–163 (1982).

<sup>33</sup> See STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE 130–54 (1997).

<sup>34</sup> See ROBERT V. REMINI, ANDREW JACKSON AND THE BANK WAR 176–78 (1967).

Jackson period — the party convention for nominating candidates, and the spoils system of political rotation and partisan appointment to administrative positions — paced the greater strength of the Jacksonian presidency with more disciplined instruments of collective oversight. As the party convention took candidate selection and programmatic commitments out of the hands of Congress, it lodged them more firmly in a national coalition of local party machines. The spoils system, in turn, bolstered congressional support for the executive by transforming the bureaucracy into a jobs program for the local party workforce. Whereas the party of Jefferson had articulated an accord among elites at the center of power and delivered it to the periphery, these new parties generated power from the bottom up; their candidates were, like Jackson, to deliver to the center an accord hammered out by local and regional aggregations of interest.<sup>35</sup>

This new construction was motivated even more clearly than the Jeffersonian by perception of the Constitution's inadequacies. Martin Van Buren, the leading theoretician of the new design, candidly addressed it to defects in the selection procedure that he deemed responsible for the failure to resolve the election of 1824 on democratic principles.<sup>36</sup> Once in place, the new system went far toward upending the original scheme of checks and balances, but it did not endorse separation of powers as the alternative.<sup>37</sup> As a practical matter, it joined the President more tightly to others. Together, the party convention and the spoils system created a near-perfect community of interests for the release, control, and direction of presidential power. Fortifying the President with an organized base of popular support outside the constitutional apparatus created a less insular office. At once, it became easier for the chief executive to forge a concert of interests with fellow partisans in the other branches, and it raised the political risks of his acting alone.

The party-based presidency reached its zenith during the Civil War under the insurgent Republicans. Eyeing the enormous war machine mobilized under Lincoln to contest the meaning of the Constitution, a Republican county convention in upstate New York neatly summed up the prevailing premises: “[H]e has no army, no navy, no resources of any kind except what the people give him. In a word, he is powerless,

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<sup>35</sup> See MCCORMICK, *supra* note 32, at 164–206; MILKIS & NELSON, *supra* note 30, at 130; Martin Shefter, *Party, Bureaucracy, and Political Change in the United States*, in *POLITICAL PARTIES* 211, 218–25 (Louis Maisel & Joseph Cooper eds., 1978).

<sup>36</sup> See Gerald Leonard, *Party As a “Political Safeguard of Federalism”*: *Martin Van Buren and the Constitutional Theory of Party Politics*, 54 *RUTGERS L. REV.* 221, 244–76 (2001).

<sup>37</sup> See LEONARD D. WHITE, *THE JACKSONIANS: A STUDY IN ADMINISTRATIVE HISTORY 1829–1861*, at 558 (1954).

unless the people stand at his back and uphold his hands . . . .”<sup>38</sup> “The Republican organization, in all its principles, in all its practices, and by all its members, is committed to the preservation of the Union, and to the overthrow of the Rebellion. It is the power of the State and the power of the Nation.”<sup>39</sup>

### III. THE PROGRESSIVE CONSTRUCTION

Well before the Jackson insurgency began, the congressional nominating caucus that had empowered Jefferson had become “King Caucus,” a nominating body whose selections had become tantamount to election and whose operations were seen to compromise the independence of state and national officers.<sup>40</sup> By the time the progressive insurgency began, the party convention that had empowered the mid-nineteenth-century Presidents had become the plaything of state and local “bosses” who held the executive branch hostage to the patronage demands of their local organizations.<sup>41</sup> Both developments reflected the bargain implicit in presidential empowerment during the nineteenth century: checks and balances were eased in exchange for shifting presidential power onto less formal and more collective foundations.

The third iteration of this dynamic proved to be more sustained, more broad-ranging, and more systemic in its impact. Successive waves of progressive reform extending over the first two-thirds of the twentieth century expanded the domain of national action, constructed an extensive administrative apparatus for intervention at home and abroad, and concentrated power in the presidency on a scale that dwarfs nineteenth-century precedents. This concerted shift toward national, executive, and presidential power marked a pivotal turn in American political development.<sup>42</sup> If nothing else, decades of progressive advocacy on behalf of a more presidency-centered government have lent a commonsense plausibility, a second nature appeal, to the

<sup>38</sup> Senator A.H. Bailey, Speech at the Republic Party Convention Held at Rome, New York (Sept. 26, 1862), in *Proceedings of the Republican Party Convention Held at Rome, New York*, UTICA MORNING HERALD, Sept. 27, 1862, at 5 [hereinafter *Proceedings of the Republican Party Convention*], available at <http://digital.library.cornell.edu/cgi/t/text/text-idx?c=nys;idno=nys592>.

<sup>39</sup> *Proceedings of the Republican Party Convention*, *supra* note 38, at 11.

<sup>40</sup> With the eclipse of the Federalist party as a serious competitor in presidential elections, the caucus nomination became, de facto, a selection of the next President. See sources cited *supra* note 31.

<sup>41</sup> See, e.g., MATTHEW JOSEPHSON, *THE POLITICOS, 1865–1896*, at 3–315 (1938); E.E. SCHATTSCHNEIDER, *PARTY GOVERNMENT 170–86* (1942).

<sup>42</sup> See, e.g., STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920* (1982); Fred I. Greenstein, *Change and Continuity in the Modern Presidency*, in *THE NEW AMERICAN POLITICAL SYSTEM* 45, 45–86 (Anthony King ed., 1978).

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claims for presidential authority currently advanced by conservatives through their unitary theory. By the same token, however, now that the progressive construction of presidential power has been superseded by another, the character and extent of each break with the past beg closer scrutiny.

The subtle shift in premises that has marked the passage from progressive to conservative advocacy of presidential power in recent decades takes on considerable significance in this regard. The greater investment progressives made in presidential power was not underwritten by greater faith in the Constitution; their faith was placed instead in the development of new forms of authority, in alternative means of representation, in the common purposes of “the public,” and in objective standards of democratic rule. It is little wonder that Theodore Roosevelt’s “stewardship theory” of the presidency makes Steven Calabresi uneasy. Just as surely as Roosevelt’s invocation of the “Jackson-Lincoln school” indicated his preference for an expansive reading of the President’s constitutional powers, it also indicated his interest in new forms of democratic expression. His notion of presidential stewardship combined elements of both. The theory was part of Roosevelt’s larger conception of the presidency as a “bully pulpit” for mobilizing the public; it was promulgated in the midst of an insurgent political campaign that reached out to newly organized national interests and offered to expand federal powers so as to address their new concerns in new ways. Acknowledging at the height of his 1912 bid that the enhanced powers to be claimed in modern America by the nation’s “steward” would require new forms of accountability, Roosevelt radicalized his commitment to democracy and endorsed the notion of a popular recall of Presidents who had lost the confidence of the people.<sup>43</sup>

Considering progressive thought more broadly indicates something similar: like the Jeffersonians and the Jacksonians, the progressives sought at once to empower the presidency and to open it up to more broad-ranging influences; like the Jeffersonians and Jacksonians, their idea was not just to bolster the executive, but also to envelop it in a new community of national interests; like the Jeffersonians and Jacksonians, the objective was an office that would be less self-contained, more fully democratized, and more outwardly directed in its orientation. The progressives saw presidential power as instrumental to a more effective fusion of public opinion with “enlightened administra-

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<sup>43</sup> SIDNEY M. MILKIS, *THEODORE ROOSEVELT, THE PROGRESSIVE PARTY, AND THE TRANSFORMATION OF AMERICAN DEMOCRACY* (forthcoming Aug./Sept. 2009) (manuscript at ch. 5, on file with the Harvard Law School Library); Sidney M. Milkis & Daniel J. Tichenor, “*Direct Democracy*” and *Social Justice: The Progressive Party Campaign of 1912*, 8 *STUD. AM. POL. DEV.* 282, 289–98 (1994).

tion,” which is to say that they did not see it as entirely coincident with either and that they sought to make it more amenable to the promotion of both.<sup>44</sup> The public was to be protected by opening the government up and subjecting its every move to full publicity; administration in the public interest was to be protected by bolstering its capacities for independent action and insulating it as much as possible from political influence. The progressives were emboldened to rethink formal constitutional divisions and protections because they were confident in the new mechanisms they were devising to distill the public interest, promote political cooperation, and induce elite collaboration.

Three elements of the progressive departure mark it as especially radical. First, the progressives broke with the nineteenth-century reliance on party mechanisms for easing constitutional constraints and for balancing presidential empowerment with collective control. As the centerpiece of the received construction, party power struck early-twentieth-century reformers as the central problem to be overcome. Progressives saw the party machines as increasingly indifferent to the interdependencies of industrial society; party competition appeared to them to perpetuate outmoded conflicts and submerge the common interests upon which a new national government might foster greater social cohesion. More pointedly, the progressives wanted to recast the institutional bond between President and Congress around an expandable bureaucracy capable of reconciling national economic interests and tying them to a national purpose, and that ambition placed them at odds with mechanisms of government previously developed to hold the President accountable to state and local concerns.<sup>45</sup> Mounting a sharp critique of the principal instruments of Jacksonian democracy, the reformers worked to displace the selection of candidates by party conventions with a primary system, and they sought to displace the disembodied bureaucracies created by spoils appointments with more capable administrative units. Their primary system was to unleash the entrepreneurial skills of individual leaders and render political coalitions more responsive to opinion at large; their meritocracy was to advance the values of professional competence, policy expertise, and administrative integrity.<sup>46</sup>

<sup>44</sup> The term “enlightened administration” comes from Franklin D. Roosevelt, Campaign Address on Progressive Government at the Commonwealth Club (Sept. 23, 1932), in 1 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 751–52 (Samuel I. Rosenman ed., 1938). See also Sidney M. Milkis, *The Rhetorical and Administrative Presidencies*, 19 CRITICAL REV. 379, 386 (2007).

<sup>45</sup> See ELDON J. EISENACH, *THE LOST PROMISE OF PROGRESSIVISM* 8–47 (1994); MARC STEARS, *PROGRESSIVES, PLURALISTS, AND THE PROBLEMS OF THE STATE: IDEOLOGIES OF REFORM IN THE UNITED STATES AND BRITAIN, 1909–1926*, at 52–87 (2002).

<sup>46</sup> See SIDNEY M. MILKIS, *THE PRESIDENT AND THE PARTIES* 98–124 (1993); SKOWRONEK, *supra* note 42, at 52–55.

At the same time, the progressives unleashed a critique of the Constitution that was more direct, explicit, and sweeping than anything the Jeffersonians or the Jacksonians had contemplated.<sup>47</sup> There was much for these critics to admire in the Framers — realism, nationalism, reconstructive instincts, leadership of public opinion.<sup>48</sup> Rather than defer, however, they proposed to emulate their forefathers with a “new” nationalism,<sup>49</sup> one that would overthrow what they now regarded as “the monarchy of the Constitution.”<sup>50</sup> Their legal realism turned all theories of the state, including the Framers’ theories, into just so many “justifications or rationalizations of groups in power or seeking power — the special pleadings of races, religions, classes [o]n behalf of their special situations.”<sup>51</sup> Their political realism described all institutional arrangements, including the Framers’ arrangements, as contingent expressions of the power of interests.<sup>52</sup> Realism in both forms served progressive purposes by upending unreflected premises about government carried over from an earlier day and by legitimating experimentation with alternative arrangements. The progressives wanted to strip discussions of power of their constitutional pretenses so as to force the defenders of established arrangements to engage in a pragmatic, open-ended, and explicitly political debate over what the largest interest, “the public interest,” demanded. More radically still, they wanted to locate the public interest itself in the evolving concerns of an “organic” society. A government continuously attentive to the current interests of the public required a “living” Constitution, one that would operate as the protean instrument of an ever-developing democracy.<sup>53</sup>

<sup>47</sup> See, e.g., CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913); J. ALLEN SMITH, THE SPIRIT OF AMERICAN GOVERNMENT (Cushing Strout ed., 1965); WILSON, *supra* note 10.

<sup>48</sup> CROLY, *supra* note 10, at 35–38. Even Charles Beard speaks of the Framers as “practical men” who were “able to build . . . government upon the only foundations which could be stable: fundamental economic interests.” BEARD, *supra* note 47, at 151. And again in *The Supreme Court and the Constitution*, Beard writes that the “makers” of the Constitution were conservatives “made desperate by imbecilities of the Confederation and harried by state legislatures” who “drew themselves together in a mighty effort to establish a government that would be strong enough to pay the national debt, regulate interstate and foreign commerce, provide for national defence, prevent fluctuations in the currency . . . , and control the propensities of legislative majorities to attack private rights.” CHARLES A. BEARD, THE SUPREME COURT AND THE CONSTITUTION 75–76 (1912).

<sup>49</sup> CROLY, *supra* note 10, at 169.

<sup>50</sup> HERBERT CROLY, PROGRESSIVE DEMOCRACY 145–48 (Transaction Publishers 1998) (1914); see also EISENACH, *supra* note 45, at 73, 216 n.56 (quoting Croly).

<sup>51</sup> CHARLES E. MERRIAM, NEW ASPECTS OF POLITICS 58 (3d ed. 1970).

<sup>52</sup> See BEARD, *supra* note 47.

<sup>53</sup> See Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the “Living Constitution” in the Course of American State-Building*, 11 STUD. AM. POL. DEV. 191 (1997).

Finally, the progressives seized upon the possibility of constructing a *presidential* democracy: they singled out the chief executive as the instrument around which to build their new national polity. Parties were too decentralized; courts were too tied to precedent; Congress was too cumbersome and beholden to special interests. Only the presidency had the national vision to articulate the public's evolving interests, the political incentive to represent those interests in action, and the wherewithal to act upon them with dispatch. The progressives put the President to work accordingly. They constructed an office in which incumbents would be duty-bound to assume political leadership of the nation on an ongoing basis. Each was individually charged to test his skills in keeping national opinion mobilized behind great public purposes and to overcome thereby the constitutional obstacles in its path.<sup>54</sup> As Woodrow Wilson saw it, Presidents would make their proposals irresistible to Congress insofar as they reached out to the people directly, articulated their common concerns, and garnered their support.<sup>55</sup> As Henry Jones Ford put it, the work of the presidency was "the work of the people, breaking through the constitutional form."<sup>56</sup>

Like Theodore Roosevelt, Henry Jones Ford took Jackson and Lincoln as models for this new presidency, and it may be a fair summary of the progressives' vision to observe that a constitution in which every President does what Jackson and Lincoln did would hardly be a constitution at all. To speak of theirs as a broad construction is to diminish the ambition. As Charles Beard described "the changing spirit of the Constitution," Roosevelt's declaration of a presidential stewardship was not a new constitutional doctrine. It was the liberation of national statesmanship from tired doctrinal disputes, a way of breaking American politics free of debates between "finely spun theories about strict and liberal interpretations of the Constitution."<sup>57</sup> Similarly, Herbert Croly touted the rise of Roosevelt as a release from the narrow-mindedness of "government by lawyers"<sup>58</sup> and an acknowledgment

<sup>54</sup> See generally JAMES MACGREGOR BURNS, *THE DEADLOCK OF DEMOCRACY: FOUR-PARTY POLITICS IN AMERICA* (1963); RICHARD E. NEUSTADT, *PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP* (1960).

<sup>55</sup> WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 68 (1908) ("If [the President] rightly interpret[s] the national thought and boldly insist[s] upon it, he is irresistible . . ."); *id.* at 70-71 ("[I]f Congress be overborne by him, it will be no fault of the makers of the Constitution, — it will be from no lack of constitutional powers on its part, but only because the President has the nation behind him, and Congress has not. He has no means of compelling Congress except through public opinion.")

<sup>56</sup> HENRY JONES FORD, *THE RISE AND GROWTH OF AMERICAN POLITICS* 292-93 (1898).

<sup>57</sup> CHARLES A. BEARD, *AMERICAN GOVERNMENT AND POLITICS* 100 (5th ed. 1930) (1910).

<sup>58</sup> CROLY, *supra* note 10, at 136.

“that the national principle involve[s] a continual process of internal reformation.”<sup>59</sup>

To this extent at least, latter-day charges that the progressives eviscerated constitutional restraints, exacerbated political agitation, and sanctioned demagoguery all have a ring of truth.<sup>60</sup> And yet, the self-regarding “personal president” that critics in our day have found emergent in the shortfall could not have been further from the progressives’ intent.<sup>61</sup> The progressives may have been proven naïve in their faith. The new mechanisms they depended upon to regulate the new forms of power they were generating may be scored in retrospect as unreliable and inconsistent. But theirs was to be a magnetic and catalytic presidency, an office designed to attract interests throughout the government and society and align them for concerted national action.

Progressive designs for presidential power followed directly from their premises: that pervasive public interests in concerted national action existed and could be discerned objectively; that these interests, rather than any others, should determine public policy; and that the people should be able to do what they wanted with their government, so long as they spoke clearly.<sup>62</sup> Ensuring that the presidency would operate reliably as a vehicle for garnering and clarifying the interests of the whole was a conceptual as well as an institutional challenge.<sup>63</sup> Even ardent neo-Hamiltonians, who were eager to concentrate national power in new hierarchically controlled administrative bodies, sought legitimating anchors external to the Constitution itself. Most famous in this regard was Croly’s effort to tie Hamiltonian means to Jeffersonian ends by specifying a substantive precept — the social and economic amelioration of the circumstances of the common man — that would direct the exercise of this sort of power and subordinate it to a purpose in which all Americans could be expected to concur.<sup>64</sup> Pragmatists, following John Dewey, offered a more open-ended and interactive solution in which social experimentation guided by positivism and expertise would work hand in hand with new methods of education, the latter creating a public self-conscious and capable enough to

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<sup>59</sup> *Id.* at 168.

<sup>60</sup> See Ceaser et al., *supra* note 3, at 243–46.

<sup>61</sup> See generally THEODORE J. LOWI, *THE PERSONAL PRESIDENT* (1985).

<sup>62</sup> See CROLY, *supra* note 10, at 35 (“[E]very popular government should in the end, and after a necessarily prolonged deliberation, possess the power of taking any action, which, in the opinion of a decisive majority of the people, is demanded by the public welfare.”). The progressives’ faith in a discernable “public” interest is indicated in a negative way by Walter Lippmann’s announcement of his turn away from progressivism in WALTER LIPPMANN, *THE PHANTOM PUBLIC* (1925).

<sup>63</sup> STEARS, *supra* note 45, at 56–87.

<sup>64</sup> CROLY, *supra* note 10, at 213–14.

engage and direct the former.<sup>65</sup> Woodrow Wilson, a southerner wary of northern enthusiasm for social engineering, devoted his intellectual life to articulating a discipline for democratic leadership: Presidents were to discover “the common meaning of the common voice”<sup>66</sup> and, by constraining their actions accordingly, ensure that national action never exceeded objectives that could be seen as authoritative across the full spectrum of existing interests in play. Just after his defeat in the fight over the Treaty of Versailles, Wilson gave his daughter a lesson in what this meant: “[I]t was best after all that the United States did not join the League of Nations,” he explained, for if he had prevailed, it would have been only “a personal victory,” and short of a true expression of national resolve, American participation in the League could not work.<sup>67</sup>

The diversity of their ideas notwithstanding, the progressives built institutions that expressed their faith in a discernible public interest outside of government, and they never flagged in their efforts to enhance the authority of those institutions or to bring them to bear more directly on the government. While weakening the role of party organizations in presidential selection and ejecting the local parties from their pivotal coordinating role in national administration, they generated an extensive “parastate” apparatus<sup>68</sup> — universities, graduate schools, think tanks, professional associations, information clearing houses, journals of national opinion — all with an eye to infusing national political power with what they thought would be true and reliable distillations of the interests of the whole. Their new bureaucracies were to recruit from these institutions and to speak to the interests of the public by cultivating an independent voice in government. Ad-

<sup>65</sup> See generally JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* (1927).

<sup>66</sup> Woodrow Wilson, Address in Chicago on Abraham Lincoln: A Man of the People (Feb. 12, 1909), in 19 *THE PAPERS OF WOODROW WILSON* 33, 42 (Arthur S. Link ed., 1975).

<sup>67</sup> EDITH GITTINGS REID, *WOODROW WILSON: THE CARICATURE, THE MYTH AND THE MAN* 236 (1934) (internal quotation mark omitted).

<sup>68</sup> The notion of “parastate” institutions comes from Eldon Eisenach. See EISENACH, *supra* note 45, at 18 (“Both organizationally and culturally, the institutions that consciously articulated and enforced claims of a national public good were established largely outside of formal governing institutions and in direct opposition to the most powerful informal governing institution of them all — the mass-based political party. Put in a slightly different way, many of these nongovernmental organizations, like the political parties they were beginning to supplant, took on the characteristics of ‘parastate’ institutions; that is, they claimed to speak for and establish on a voluntary basis what they claimed to be the collective ends of the national community.”); see also Donald T. Critchlow, *Think Tanks, Antistatism, and Democracy: The Nonpartisan Ideal and Policy Research in the United States, 1913–1987*, in *THE STATE AND SOCIAL INVESTIGATION IN BRITAIN AND THE UNITED STATES* 279 (Michael J. Lacey & Mary O. Furner eds., 1993); Michael J. Lacey, *The World of the Bureaus: Government and the Positivist Project in the Late Nineteenth Century*, in *THE STATE AND SOCIAL INVESTIGATION IN BRITAIN AND THE UNITED STATES*, *supra*, at 127. See generally *THE STATE AND SOCIAL INVESTIGATION IN BRITAIN AND THE UNITED STATES*, *supra*.

ministrative authority would stem from the interests of all in technical expertise and professional judgment, in the objective distillation of “the facts” from the situation at hand, and in the production of services attractive to new groups in the polity at large.<sup>69</sup>

Second-generation progressives emerged from World War I with fewer illusions about the consensus to be found for these designs in unvarnished public opinion, but they were no less confident in their ability to distill the public interest independently. They augmented their outreach with efforts to tap the potential of group representation and pluralistic participation. Charles Merriam, a champion of academic political science who served Franklin Roosevelt on his Committee on Administrative Management and on his National Resources Planning Board, proposed an ongoing mobilization of “the political prudence of the community” in the policymaking process.<sup>70</sup> The assembled wisdom of the nation was to circumscribe governmental power and infuse it with “the facts essential to intelligent national government.”<sup>71</sup> In part, this was just an extension of the progressives’ faith in expertise, of their zeal for deploying in government the resources of the nation’s new universities and graduate schools and for consummating a marriage of power with positivism. But, on inspection, Merriam’s offensive on behalf of the prudential authority of the public was remarkably multifaceted. It was addressed to the limits of science as well as the limits of formal governmental authority. He insisted on representation for “all phases of opinion,” for he saw that confidence in progressive government would come to hinge on the public’s perceptions of “the impartiality of the *prudentes* who [were] brought together.”<sup>72</sup> He envisioned integrating and coordinating mechanisms that would tap “the wisdom reached by the few more skilled and experienced” while remaining sensitive to the “general level of judgment and insight reached by the mass of the community itself.”<sup>73</sup> Merriam’s efforts to surround formal power with extra-

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<sup>69</sup> The classic expression of the progressive ideals of administrative expertise and independence is JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938). The ideal in practice is described in SAMUEL P. HAYS, *CONSERVATION AND THE GOSPEL OF EFFICIENCY* (1959); and RICHARD S. KIRKENDALL, *SOCIAL SCIENTISTS AND FARM POLITICS IN THE AGE OF ROOSEVELT* (1966). For examples of the entrepreneurial capacities of progressive administrators to combine these new resources and fashion independent centers of authority and power, see DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928* (2001); and Daniel P. Carpenter & Colin D. Moore, *Robust Action and the Strategic Use of Ambiguity in a Bureaucratic Cohort: FDA Officers and the Evolution of New Drug Regulations, 1950–70*, in *FORMATIVE ACTS*, *supra* note 6, at 340, 345–55.

<sup>70</sup> MERRIAM, *supra* note 51, at 246.

<sup>71</sup> *Id.* at 254.

<sup>72</sup> *Id.* at 258.

<sup>73</sup> *Id.* at 262.

constitutional authority filled a burgeoning potpourri of progressive prescriptions: civic education for the common man, clearing houses to collect and make public information from all sources, data analysis by specialists, advice from neutral experts, forecasting by independent administrators, outreach to national interest groups and professional associations, and representation for diverse communities.

Important aspects of the new balance being struck between presidential empowerment and collective control can be found in the institutional capstone of the progressive presidency, the Executive Office of the President (EOP). Though it tagged the President with new responsibilities for planning and forecasting and bolstered the institution of the presidency with new resources for policy development and administrative oversight, the EOP was less an instrument of unitary command and control than an instrument of institutional coordination and collective action. Its offices were designed to serve interbranch relations, not just the President.<sup>74</sup> They anticipated a new governmental partnership, a partnership built on assurances to Congress that executive actions and recommendations were grounded in shared purposes as well as in the best managerial practices, the latest forecasting instruments, and the most reliable data. President Truman was initially wary of the formation of the National Security Council (NSC) and the Council of Economic Advisors (CEA) within the EOP because he perceived the elevation of professional managers and expert advisors to positions of authority within the presidency as a constraint on his constitutional prerogatives.<sup>75</sup> But it was precisely by means of this technocratic interposition on behalf of “enlightened administration” that the progressive presidency was to meet other centers of power on common ground and solicit their cooperation.

The progressive construction of American government tilted radically in the direction of “presidential government,” but, as Richard Neustadt so astutely pointed out in 1960, this was a presidency well-

<sup>74</sup> See, for example, the retrospective assessment of original purpose in Don K. Price & Rocco C. Siciliano, *Revitalizing the Executive Office of the President*, in *RETHINKING THE PRESIDENCY*, *supra* note 3, at 305, 305–07, as well as the argument that the EOP should be structured to encourage internal cooperation in Hugh Hecl, *OMB and Neutral Competence*, in *THE MANAGERIAL PRESIDENCY* 131 (James P. Pfiffner ed., 2d ed. 1999). Writing of the Employment Act of 1946, which set up a Council of Economic Advisors in the Executive Office and a Joint Economic Committee in Congress, J. Bradford De Long notes: “Their goal was to reduce the freedom of action of the president and his staff by fixing responsibility for stabilization policy planning on identifiable individuals chosen with the consent of the Senate.” J. Bradford De Long, *Keynesianism, Pennsylvania Avenue Style: Some Economic Consequences of the Employment Act of 1946*, *J. ECON. PERSP.*, Summer 1996, at 50.

<sup>75</sup> See JOHN HART, *THE PRESIDENTIAL BRANCH* 52–53, 68–69 (2d ed. 1995); STEPHEN HESS, *ORGANIZING THE PRESIDENCY* 53–55 (1976) (asserting that the NSC and CEA were designed to structure and discipline the flow of information to the President and “force feed” professional advice).

advised not to depend on the Constitution for powers commensurate with its new responsibilities. Neustadt observed in practice not a separation of powers, but a system of “separate institutions *sharing* powers.”<sup>76</sup> *Presidential Power*, the last of the great progressive tracts, described an office engrossed in interactions with others outside its own sphere and charged to orchestrate the far-flung interests of the whole.<sup>77</sup>

#### IV. THE UNITARY EXECUTIVE AS THEORY

By the 1970s, progressives had begun to turn on their handiwork. True to their conception of the modern presidency as a collective instrument of democratic control, they renounced incumbents for what they had come to perceive as overwrought pretensions to imperial rule, they condemned new forms of privilege that had developed behind the façade of a public interest in the administrative state, and they recoiled at the egocentric scramble of modern election campaigns.<sup>78</sup> “Power invested, promise unfulfilled” was their summary judgment of the twentieth century’s great experiment in presidency-centered government.<sup>79</sup> Echoes from conservative voices of the 1950s can be heard in these criticisms. Both lamented the departure from the original design of American government and looked back to the Constitution to expose the derangement of modern practices.<sup>80</sup>

But as the progressives were recoiling and the intellectual foundations of their “modern” presidency were foundering, another insurgency began to rework the case for presidential power. Given past episodes, it is no surprise that these new advocates have been impatient with checks and balances. Like all empowered movements, this one has sought to unleash the presidency against reigning political priorities, to break through the thicket of institutions that has grown up around them, and to reconfigure American government around their own. The only curious thing is the indifference of these new insurgents to the challenge of inventing alternative machinery to surround presidential power and call it to account, machinery that might justify easing checks and balances with superior forms of external supervision, institutional coordination, and collective control. Their premise

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<sup>76</sup> NEUSTADT, *supra* note 54, at 33.

<sup>77</sup> *See generally id.*

<sup>78</sup> *See generally* THEODORE J. LOWI, *THE END OF LIBERALISM: IDEOLOGY, POLICY, AND THE CRISIS OF PUBLIC AUTHORITY* (1969); MILKIS, *supra* note 46; ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973).

<sup>79</sup> LOWI, *supra* note 61; *see also* ARTHUR M. SCHLESINGER, JR., *JOURNALS, 1952–2000*, at 260 (2007) (describing the moment of disillusionment with presidency-centered government for one of the twentieth century’s foremost progressives).

<sup>80</sup> *See generally* LOUIS FISHER, *PRESIDENTIAL WAR POWER* (2d ed. 2004); MILKIS, *supra* note 46; TULIS, *supra* note 3.

cuts the other way. It is that everything needed to justify an expansive indulgence of presidential prerogatives today is to be found in “the text, structure, and ratification history of the Constitution.”<sup>81</sup>

With both critics and advocates of presidential power now appealing to the formalities of the Constitution, the progressives’ insight that modern governance demands both an unprecedented concentration of power in the executive *and* new mechanisms for calling that power to account has fallen by the wayside. Moreover, the debate as it is currently structured finds the critics at a decided disadvantage. While they may lament what they now perceive as a misguided course of development, negotiating a reversal that will reinvigorate checks and balances is a tall order, especially as governance challenges of the sort that prompted the development in the first place continue to mount apace.<sup>82</sup> Advocates, on the other hand, are not asking for a reversal of course but for a codification and extension of what the long history of agitation on behalf of the presidency has actually produced. Not the least of the attractions of the unitary theory is the constitutional discipline it projects back upon accumulated historical practices. It sorts through the far-flung innovations that institutional development of the executive branch has brought in its train and aligns those most favorable to presidential prerogative and independence with first principles and immutable standards. Unlike the progressives, who historicized the Constitution, subsumed it within the stream of national development, and urged the polity to continue experimenting with alternative governing arrangements, the new conservatives disavow risky experiments and advance presidential control over the modern executive establishment on formal grounds alone, as a reaffirmation of the interior logic of the original design.

The critical intellectual move in the unitary theory is a relocation of the dispositive action to the years prior to the inauguration of George Washington. By elevating the significance of the prehistory of the office, the new conservatives undercut the notion that the powers of the “modern” presidency have “developed” over time. The principal claim is that those powers have been there all along and only need to be recovered in their full significance.<sup>83</sup> To this end, the new construction scouts European developments in the theory and practice of executive power leading up to the American Revolution.<sup>84</sup> Advocates observe

<sup>81</sup> YOO, *THE POWERS OF WAR AND PEACE*, *supra* note 18, at 5.

<sup>82</sup> ANDREW RUDALEVIGE, *THE NEW IMPERIAL PRESIDENCY* 211–85 (2005).

<sup>83</sup> In a similar spirit, see DAVID K. NICHOLS, *THE MYTH OF THE MODERN PRESIDENCY* (1994).

<sup>84</sup> See HARVEY C. MANSFIELD, JR., *TAMING THE PRINCE: THE AMBIVALENCE OF MODERN EXECUTIVE POWER* (1989); FORREST MCDONALD, *THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY* 9–97 (1994); NICHOLS, *supra* note 83, at 139–61; see also Benjamin

the clear rejection of that line of development in the Declaration of Independence and the constitutions of the post-Revolutionary period, but they then dwell on the deliberate reintroduction of independent executive authority in the figure of a president in the new Constitution of 1787. The unitary theory rests at bottom on an interpretation of this early developmental sequence. The contention is that the Constitution of 1787 broke decisively with the unorthodox principles of executive organization ushered in by the American Revolution, and that in ratifying the Constitution, the people repaired to the more familiar historical model of a unitary executive authority. Put another way, in repudiating their post-Revolutionary experiments in collective control of the executive power, the people allegedly repudiated all but the rudimentary forms of collective control specified in the rest of the document and foreclosed any future experimentation along those lines.<sup>85</sup> By implication, the efforts of every subsequent generation to qualify the President's unilateral control of executive power stand discredited as a betrayal of the intent of the American people at their most authoritative moment. All told, it is not the powers of the presidency that have developed over time, only illegitimate constraints on those powers.<sup>86</sup>

Today's unitary theorists are certainly not the first to appeal to the Constitution as the sole controlling authority for evaluating presidential power. These appeals have been with us from the start, and they have been associated all along with resistance to those who have sought to alter the basis of presidential action. This was Henry Clay's appeal against the pretensions of Andrew Jackson<sup>87</sup> and William Howard Taft's appeal against the pretensions of Theodore Roosevelt.<sup>88</sup> Both rejected populist trumps to constitutional strictures; both rejected the notion of an "undefined residuum"<sup>89</sup> of presidential power; both sought to hold the powers and duties of the chief executive to a stringent textual standard. In this sense, formalism and originalism

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A. Kleinerman, *Can the Prince Really Be Tamed? Executive Prerogative, Popular Apathy, and the Constitutional Frame in Locke's Second Treatise*, 101 AM. POL. SCI. REV. 209 (2007); Sheldon S. Wolin, *Executive Liberation*, 6 STUD. AM. POL. DEV. 211, 211-16 (1992) (reviewing MANSFIELD, *supra*).

<sup>85</sup> See, e.g., CALABRESI & YOO, *supra* note 17, at 30-36; see also YOO, THE POWERS OF WAR AND PEACE, *supra* note 18, at 30-142 (discussing these early developments with respect to the President's foreign affairs power).

<sup>86</sup> See Hadley Arkes, *On the Moral Standing of the President As an Interpreter of the Constitution: Some Reflections on Our Current "Crises,"* 20 PS: POL. SCI. & POL. 637 (1987).

<sup>87</sup> 10 REG. DEB. 84-85 (1833) (statement of Sen. Henry Clay); Richard J. Ellis & Stephen Kirk, *Presidential Mandates in the Nineteenth Century: Conceptual Change and Institutional Development*, 9 STUD. AM. POL. DEV. 117, 152-53 (1995).

<sup>88</sup> WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS (1916).

<sup>89</sup> *Id.* at 140.

remain today, as they have always been, hallmarks of a conservative construction.

But the developmental complication in the current invocation of formalism is glaring: the likes of Clay and Taft were trounced by the democratizing movements they opposed, and the appeal to constitutional stricture today follows a long history of institutional expansion supported on different premises and by other means. The new construction does not seek to roll back presidential powers as they have developed over time; it seeks, rather, to press forward the case for presidential government without reference to latter-day elaboration of its foundations. Indeed, in its new guise as a late-breaking installment in the history of advocating presidential power, this reversion to the Constitution appears to turn the whole sequence of institutional expansion into a brazen scheme of bait and switch. When powers that swelled on the promise of superseding constitutional divisions with more democratic forms of control are recaptured, contained, and defended by the Constitution alone, collective claims on those powers are abruptly curtailed. Or, to put it another way, when all extra-constitutional interventions are rendered superfluous, the expanded resources of the modern presidency are redeployed on behalf of the personal form of rule which the institutional innovations of all previous reformers were at pains to qualify. A sharp reversion to stricture at this late date confounds the traditional meaning of the term “conservative” and brings the insurgent character of this construction to the fore.

In reworking the case for presidential power, each of America’s great insurgencies has pulled forward prior advances while discarding those legitimating qualifications that no longer served its purposes. In this regard, the conservative construction has been no different than any other. Much as the progressives scooped the Jackson-Lincoln model from its party-based constraints, today’s conservatives have scooped the progressive model. Their return to the Constitution expands the domain of unilateral action by exploiting the progressive legacy of national power, administrative capacity, and executive management.

The cutting edge of the new construction, however, lies on the other side. It does not just scoop up the progressive legacy; it also marginalizes the extra-constitutional mechanisms that the progressives had relied upon to surround and regulate their presidency-centered system. Public opinion, pluralism, publicity, openness, empiricism, science, technical expertise, professionalism, administrative independence, freedom of information — all the operating norms and intermediary authorities on which the progressives pegged their faith in a “modern” presidency — are short-circuited by this appeal back to the formalities of the Constitution. While disillusioned progressives have been lamenting the inadequacy of these old nostrums in recent decades and calling for new forms of institutional restraint, insurgent conservatives

have been busy crafting an alternative that renders those nostrums irrelevant and experimentation with new constraints unduly intrusive. When an interviewer pressed Vice President Cheney on the decisive turn of public opinion against Bush Administration war policies, the quick retort — “So?” — offered a pointed lesson on the distance that has been traveled between these two constructions.<sup>90</sup> Democracy’s claims on presidential power now end with the administration of the oath of office.

## V. THE UNITARY EXECUTIVE AS POLITICS

To leave it at that, however, is to ignore the political paradox at the heart of this construction. On the face of it, the theory of the unitary executive would appear to be as politically self-limiting today as it was in the time of Hamilton. As a rarefied legal brief for the President’s unilateral claims to rule, it is not clear why anyone besides the president would support it. If new constructions of presidential power rise to prominence on the heels of major reform insurgencies, how are we to credit a construction so indifferent to matters of collective control? How does an ideologically charged political movement maximize its leverage in a democratic polity by advancing a closed system of personal rule?

Answers to these questions are to be found in the peculiar circumstances in which the conservative insurgency gestated. In the 1970s, suspicion of the sprawling bureaucratic state spawned by the progressives, anger at the progressives’ repudiation of the Vietnam War, resistance to the progressives’ penchant for market regulations, and rejection of their social and cultural permissiveness all came together in a formidable political tide. The election landslide of 1972 amply demonstrated the potential of this new coalition to dominate presidential contests. And yet, in the short run at least, any hope of its gaining control of Congress appeared a pipe dream. American politics entered into a long period in which conservatives were on the offensive ideologically but unable to consolidate their hold on national power. Shorn of an interbranch consensus on foreign and economic policy and faced with the stubborn persistence of divided government, they could anticipate little but frustration for their new national majority.

The alterations conservative intellectuals made in the ideational foundations of presidential power follow directly. The return to formalism in defense of expansive presidential prerogatives facilitated programmatic action in the absence of an overarching political consen-

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<sup>90</sup> Interview by Martha Raddatz with Richard Cheney, Vice President of the United States, in Muscat, Oman (Mar. 19, 2008) (transcript available at <http://abcnews.go.com/politics/story?id=4481568>).

sus; a unitary executive promised to ease the way to the political reconstruction of a divided polity.<sup>91</sup> The quest for unity, which since the time of Jefferson had prompted political solutions to the problem of constitutional divisions, now prompted a constitutional solution to the problem of political divisions. Given all that had developed in the interim, the difference was easy to miss.

Like all previous constructions, this one played to the political strengths of the insurgent movement behind it. Conservatives could not but notice that the progressives' main stipulation for the release of presidential power — a clear public voice — had become more difficult to meet. In effect, they seized upon the instrument in hand — a presidency-centered government — for an alternative. The new construction sought unity in the executive because there was little prospect of institutional collaboration or political cooperation. It demanded strict administrative subordination to the will of the President because the ideal of administration in service to government as a whole had become vacuous. It was cast as a lawyer's brief because the new insurgents, unlike previous ones, saw no final victory on the horizon; they anticipated a future of ongoing political division, institutional confrontation, and, ultimately, judicial intervention.<sup>92</sup>

The political context also offered something of a democratic defense for the conservatives' assault on collective control, and it was on this count perhaps that the legacy of progressivism was most deeply implicated. It is not just that the presidency-centered government built by the progressives made it easier to imagine incumbents resourceful enough to reconstruct priorities on their own. At least as important was the fact that progressives had raised the political profile of Presidents, foisting them on the public and charging them to act as spearheads of a "continual process of internal reformation." Most important of all was the fact that the progressives' reconstruction of American government had fallen short by its own standards of democracy. With the exposure of interest group control of the progressives' bureaucratic networks, the idea of "enlightened administration" lay exposed.<sup>93</sup> The stage was set for another great reversal, another redirection of presidential power against the auxiliary instruments that had previously justified it. A populist attack on the power of overbearing intellectuals and irresponsible bureaucrats was now of a piece with the traditional demand of all insurgencies to reclaim government

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<sup>91</sup> Instructive on this point is Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

<sup>92</sup> See, e.g., PHILLIP J. COOPER, *BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION* 201–03 (2002) (describing the Reagan Administration's strategic thinking about signing statements).

<sup>93</sup> See LOWI, *supra* note 78.

for the people; it justified the release of presidential power within the executive branch as a restoration of responsibility and accountability in government.

All the conservatives needed to do to tap this sense of democracy was to constitutionalize the public voice, to tie the fact that the President is the only officer in American government who represents the nation as a whole more closely to the notion that the selection of the President had become, in effect, the only credible expression of the public's will. Originalists in their legal theory, the unitarians rely for this point on a form of political realism that would make their progressive predecessors blush. Once the public voice was fused more tightly to the will of the incumbent, extra-constitutional controls could be rejected as inconsistent with democratic accountability, and the vast repository of discretionary authority over policy accumulated in the executive branch could be made the exclusive province of the incumbent.

The Nixon Administration anticipated at a practical level what the new theory would soon seek to elevate as a standard of rule. While he was quick to remind his critics of precedents from his progressive predecessors for everything he sought to do, Nixon was also acutely aware of the very different circumstances in which he was invoking them: he was acting in a government otherwise controlled by his political enemies; there was no cohesive national sentiment on which to base expansive claims to power; his was a "silent" majority. Faced with these circumstances and emboldened by his lopsided victory in 1972, Nixon tapped the historical development of presidency-centered government to sharpen the argument for presidential independence and to press forward on his own with a transformation of American government and politics. Using many of the tools already available, he worked to undercut institutions put in place to foster interbranch collaboration and collective control. The statutory offices of the EOP were downgraded by compromising their neutrality and negating their promise of cooperative action.<sup>94</sup> At the same time, Nixon worked to bolster institutions put in place to enhance his own governing capacities. He concentrated resources in the White House Office itself and extended the political supervision of the White House deeper into the permanent bureaucracy.<sup>95</sup> When asked what was to prevent a President so empowered from overreaching, Nixon invoked the retroactive sanction of voters: "[A] President has to come up before the elector-

<sup>94</sup> See, e.g., HUGH HECLLO, *A GOVERNMENT OF STRANGERS* 78–80 (1977).

<sup>95</sup> See generally RICHARD P. NATHAN, *THE ADMINISTRATIVE PRESIDENCY* (1983); RICHARD P. NATHAN, *THE PLOT THAT FAILED* (1975). Note the Nixon-era breakpoints in the organization history as reviewed by HART, *supra* note 75, at 1–147; see also HECLLO, *supra* note 94, at 13, 75; and KAREN M. HULT & CHARLES E. WALCOTT, *EMPOWERING THE WHITE HOUSE* 166–72 (2004).

ate.”<sup>96</sup> Here then was a clear road map showing how to move away from the idea of governing more collectively *through* the presidency toward the idea of governing more exclusively *within* the presidency.

The key assertions in what would become the unitary theory of the executive circulated through the conservative movement in the tumultuous years between the precipitous collapse of the Nixon presidency at the hands of the political enemies he so feared and the capitulation of George H.W. Bush to a Democratic Congress on the signal conservative issue of taxes in the budget agreement of 1990. In this period of persistent political division and stiff institutional resistance to the conservative turn, arguments circulated in and around the White House for the subordination of executive power to presidential will. The unelected Ford presidency inspired administration insiders to new thinking about the constitutional foundations of presidential authority and how it might be sustained in the face of a hostile and resurgent Congress.<sup>97</sup> The basic ideas were already in place by the time Dick Cheney instigated the minority report of the congressional investigation into the Iran-Contra affair.<sup>98</sup> Terry Eastland responded to the perceived capitulation of George H.W. Bush to Congress by broadening and sharpening the case for independent executive action.<sup>99</sup> The subsequent extension of the conservative movement into the national legal establishment disseminated these arguments and linked them to potent political and intellectual networks.<sup>100</sup> When the contested election of 2000 stripped George W. Bush of a popular endorsement for his ambitious political agenda, a theory was ready at hand to shift the ground for programmatic action further onto the formal vesting of power.

Had the ambitions of the conservative insurgency not met such stubborn resistance for so long, it would be harder to credit its heavy investment in the exclusivity of presidential control. As it stands, the unitary theory is a high-stakes gamble that leaves movement priorities no more secure than the next election cycle. More striking still is the theory’s pretension to upholding constitutional intent, for its personalization of executive power renders the whole of modern American

<sup>96</sup> CHRISTOPHER H. PYLE & RICHARD M. PIOUS, *THE PRESIDENT, CONGRESS, AND THE CONSTITUTION* 74 (1984) (quoting Interview by David Frost with Richard Nixon (May 19, 1977)).

<sup>97</sup> See generally JAMES MANN, *THE RISE OF THE VULCANS* (2004) (exploring the formative years of some Bush Administration officials in the Nixon and Ford administrations).

<sup>98</sup> See Minority Report, in *REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR*, H.R. REP. NO. 100-433, S. REP. NO. 100-216 (1987).

<sup>99</sup> See TERRY EASTLAND, *ENERGY IN THE EXECUTIVE: THE CASE FOR THE STRONG PRESIDENCY* (1992); see also *THE FETTERED PRESIDENCY: LEGAL CONSTRAINTS ON THE EXECUTIVE BRANCH* (L. Gordon Crovitz & Jeremy A. Rabkin eds., 1989) (responding to the frustrations of the late years of the Reagan Administration).

<sup>100</sup> See generally STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* (2008).

government more volatile.<sup>101</sup> When the notion of a presidential stewardship is stripped of progressive provisions for collective oversight by the nation's *prudentes*, when the notion of a politicized bureaucracy is stripped of Jacksonian provisions for collective oversight by the party, when the notion of a concert of power is stripped of Jeffersonian provisions for collective oversight by Congress — when the extra-constitutional ballast for presidential government is all stripped away and the idea is formalized as fundamental law, the original value of stability in government is all but lost from view. It is this confounding of constitutional ideals that points us, in the final analysis, to the limits of construction as a rejuvenating political process.

#### VI. THE TRANSPOSITION OF IDEAS IN THE CONSTRUCTION OF PRESIDENTIAL POWER

Just after his ascent to the presidency in 1801, Jefferson wrote of recapturing the revolutionary zeal of 1776: “[O]ur most important object is to consolidate the nation once more into a single mass, in sentiment [and] in object.”<sup>102</sup> Because political unity is instrumental to the release of governmental power for a concerted purpose, it has been the political objective of every insurgency that has swept through the American system, and each has played fast and loose with constitutional divisions of power to attain some semblance of it. Buffeted by repeated manipulations of this sort, it was perhaps only a matter of time before these formal divisions became a prescription for what they originally appeared to proscribe. By treating familiar premises as historically fungible, by combining them in different ways and applying them to new circumstances, arrangements that were originally thought to inhibit programmatic action have been turned into instruments for programmatic action. This is the political attraction of the unitary executive, of a separate, insulated, and expansive repository of national power to be deployed at the will of the President alone.

Plausibility and timeliness are the leading attributes of a politically effective construction of presidential power. The interpretation of the Founding sequence upon which the theory of the unitary executive is built is certainly contestable,<sup>103</sup> but that is true of the alternatives as well. At this late date in the history of construction, constitutional claims have become so politicized that any demand for an interpreta-

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<sup>101</sup> See Jeremy D. Bailey, *The New Unitary Executive and Democratic Theory: The Problem of Alexander Hamilton*, 102 AM. POL. SCI. REV. 453 (2008).

<sup>102</sup> Letter from Thomas Jefferson to David Denniston and James Cheetham (June 6, 1801), in 34 THE PAPERS OF THOMAS JEFFERSON 264–65 (Barbara B. Oberg ed., 2007).

<sup>103</sup> Louis Fisher relies on a different reading of the revolutionary sequence to reach very different conclusions. See FISHER, *supra* note 80; see also David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb* (pts. 1 & 2), 121 HARV. L. REV. 689, 941 (2008).

tive consensus might justifiably be dismissed as extreme. Establishing credible and coherent principles for the operation of American government as we find it is hard enough. If the unitary theorists were wholly indifferent to the challenge of providing substantial evidence for their central propositions or unable to articulate a legitimating framework for current political ambitions and institutional practices, their work would not command the attention it does. By the same token, legal scholarship that seeks to adjudicate the claims of this theory directly will only take us so far in evaluating it. Probing this construction of power on its own terms offers at best a threshold test; it does not reckon with the political process of which constitutional construction is a part or with the historical drift in the plausibility of outcomes.

Fair to say, the opposite holds for the developmental account offered here. It does not purport either to debunk or to validate the theory of the unitary executive, nor for that matter, does it question the other constructions that have taken hold from time to time. Rather than enter the debate over the unitary theory's main contentions, a developmental analysis approaches it candidly as the latest in a long line of politically effective redactions of the ideational and institutional foundations of presidential power. It acknowledges the politicization of claims about the Constitution by candidly incorporating it into the assessment. The issues brought to the fore through this analysis are less about whether the theory of the unitary executive is correct than about how and with what consequence ideas about presidential power have traveled through time.

The turning points in the politics of construction are each marked by widespread disillusionment with the extra-constitutional mechanisms for collective oversight previously put in place to ease the system of checks and balances and empower the President. The congressional caucus eventually became "King Caucus," the party leaders eventually became the "bosses," enlightened administrators eventually became petty bureaucrats presiding despotically over independent fiefdoms. If nothing else, these developments testified to the fact that as brakes on unilateral control these devices were more than merely cosmetic.

What followed in each successive episode points to certain general dynamics in the political development of ideas: selective appropriation, contextual transposition, and ideological redeployment. Although each insurgency in its turn forthrightly repudiated the political priorities of its predecessor, each used selective appropriation and contextual transposition to alter and extend the case for presidential power. The Jacksonians elaborated upon the Jeffersonian idea of empowerment through a mandate from the people so as to dispense with the extra-constitutional mechanisms the Jeffersonians had put in place to secure presidential deference to the authority of Congress. The progressives elaborated upon the Jacksonian idea of the superiority of the presidency as an instrument for representing the public interest so as to

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dispense with the extra-constitutional mechanisms the Jacksonians had put in place to secure presidential deference to local party organizations. Today's conservatives have elaborated on the progressives' notion of presidency-centered government so as to dispense with the extra-constitutional mechanisms the progressives had put in place to secure presidential deference to the nation's *prudentes*. These selective appropriations accumulate power and legitimacy because they draw forward ideas previously championed by those whose substantive commitments are being repudiated. Progressive opposition to the unitary theory, like Federalist opposition to Jefferson, was compromised from the get-go by its own deep complicity in the construction of a more expansive presidency.

This is development by trump. Ideological enthusiasms come and go, but the idea of concentrating power in the presidency expands more or less continuously by leapfrogging constraints on the back of newly established baselines. The effect is to accumulate a composite of very different justifications for presidential power, a composite that becomes over time both more difficult to decipher and more difficult to resist. The theory of the unitary executive is effective because in doubling back to the predemocratic foundations of executive power, it both extends powers gained through the democratization of the presidency and changes the meaning of democracy itself. The democracy that ratified the creation of the presidency is not the same as the democracy that politicized central administration in the Jacksonian era, nor is it the same as the democracy that nationalized governmental power in the Progressive era. By some unstated transitive property of construction, however, the original act of ratification now provides democratic sanction to unbridled presidential control over the vast powers that have accumulated in the executive branch.

Constitutional construction is an American political tradition, perhaps *the* American political tradition. It is at the core of the successful adaptation of American government to the changing circumstances of its operation. But in the case of the presidency, as in other aspects of constitutional government where construction has been piled upon construction, the interpretive standards appear increasingly problematic. Future insurgents will surely find plausibility an easy discipline to master in asserting presidential power. By combining in their own way the full array of premises now in play, they will, in effect, be freer than ever before just to make things up as they go along. This is the final triumph of construction and the limit of its capacity to legitimate new forms of national government. Once a presidency-centered system of government built on the rejection of formalism and originalism is recast as the very expression of formalism and originalism — once the fruit of democracy's claims against limits are redeployed to limit democracy's claims — there is little left that appears reliable or settled.

One thing that does seem clear is that new ideas about how to assert presidential power are now fast outpacing new ideas about how to hold that power to account. It may seem odd in such a circumstance to caution against the rush to constitutionalize the problem of control, but that is exactly what a developmental analysis does. The sequence of change alters quite profoundly the practical meaning of any return to first principles. On the one side, developmental analysis suggests that the efforts of contemporary critics of the modern presidency to get Congress to reclaim its original role and to reinvigorate checks and balances are unlikely to get very far. Ever since the rise of parties in the nineteenth century, democratic reformers have been seeking ways to ease checks and balances, and the mechanisms they have developed have so altered the operations of American government that going back hardly seems a practical option. On the other side, developmental analysis suggests that contemporary advocates who claim the Constitution as a safe, familiar, and wholly adequate ground on which to venture a further expansion of executive prerogatives are, in fact, pushing down a road that is neither restorative nor well-anchored.

There may be good reasons to alter the terms and conditions under which presidential power extended its reach in the twentieth century and American government as a whole reoriented its operations. But the time has long passed when doing so in the name of reclaiming the wisdom of the Framers was a straightforward proposition.<sup>104</sup> The more sober option for twenty-first-century governance may be the one that reckons with political development more directly and follows the example of the institution builders who transformed American government in the nineteenth and twentieth centuries. They did not resist new claims of presidential power, but neither did they accept them before staking out fresh claims of their own.

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<sup>104</sup> For an interesting response to this conundrum, see Greene, *supra* note 4, at 153–96.