

Unitary Innovations and Political Accountability

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UNITARY INNOVATIONS AND POLITICAL ACCOUNTABILITY

Edward H. Stiglitz†

An important trend in administrative and constitutional law is to attempt to concentrate ever-greater control over the administrative state in the hands of the President. As the Supreme Court recently reminded us in Free Enterprise Fund v. Public Company Accounting Oversight Board, one foundation for this doctrinal trend is a fear that diffusing power diffuses accountability. Here, I study whether institutional innovations resulting from such judicial decisions support this functionalist constitutional value of political accountability, emphasizing under-appreciated complications arising out of interbranch relations. For most of the Article, I conduct an in-depth empirical case study of the legislative veto, one of the legislature’s more potent tools to control the administrative state. I focus in particular on lessons we can draw from the “laboratories” of the states. Using a novel dataset of state session laws, I demonstrate that legislatures respond to a judicial invalidation of the legislative veto by augmenting alternative tools of administrative control. I further show that after the loss of the legislative veto, control over administrative agencies seemingly shifted in favor of the legislature, not the executive—an outcome contrary to the expectations of a unitary executive theorist but consistent with a legislative “backlash” to the judicial decision. These findings question a foundation of the unitary impulse present in much recent judicial doctrine and advocate a dynamic perspective in separation of powers doctrine.

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INTRODUCTION

If there be one principle clearer than another, it is this: that in any business, whether of government or of mere merchandising, *somebody must be trusted*, in order that when things go wrong it may be quite plain who should be punished. . . . *Power and strict accountability for its use* are the essential constituents of good government.

—Woodrow Wilson¹

“[O]ne of the weightiest objections to a plurality in the executive,” Alexander Hamilton famously explained, “is that it tends to conceal faults and destroy responsibility.”² This reasoning helped defeat proposals for a plural executive during the Federal Convention.³ As the Supreme Court recently reminded us,⁴ it also represents a pillar supporting much of modern administrative law and, more generally, the theory of the “unitary executive,” which advocates for the concentration of administrative powers in the hands of the President.⁵

¹ WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 186–87 (1956). This quote is particularly noteworthy because it was used by Justice John Paul Stevens to motivate, in part, his concurrence in *Bowsher v. Synar*, 478 U.S. 714, 738 n.1 (1986) (Stevens, J., concurring).

² THE FEDERALIST NO. 70, at 405 (Alexander Hamilton) (Isaac Kramnick ed., 1987). As with the quote from Woodrow Wilson, jurists have appealed to this quote when advancing arguments in favor of a unitary executive. See *Morrison v. Olson*, 487 U.S. 654, 729 (1988) (Scalia, J., dissenting) (noting that “[t]he President is directly dependent on the people, and since there is only *one* President, *he* is responsible,” and quoting Hamilton in support).

³ See 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 65 (1986) (quoting John Rutledge as saying that “[a] single man would feel the greatest responsibility and administer the public affairs best”).

⁴ *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3155 (2010) (quoting in part from Hamilton and observing that “[t]he diffusion of power carries with it a diffusion of accountability” and “[w]ithout a clear and effective chain of command, the public cannot determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall” (internal quotation marks omitted)).

⁵ See *infra* Parts I, II. For formulations to this effect, see, for example, Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 42 (1995) (stating that plurality in the executive increases the difficulty of both detecting policy er-

Though the Convention opted against a plural executive, questions have persisted throughout the republic's history about the extent to which we wish to fully realize the vision of a unitary executive.⁶

The prevailing judicial and academic perspective favors doctrines supporting a more unitary executive.⁷ Over the last three decades, the Supreme Court has gradually stripped away a variety of institutional devices designed to encourage congressional control or bureaucratic autonomy.⁸ Developments with respect to interpretive doctrines, similarly, concentrate control in the President, granting the Executive ever-greater discretion when implementing statutes.⁹ Though not without dissent,¹⁰ scholars, likewise, often align with the Court, arguing for doctrines promoting the unitary executive on the grounds of constitutional text, history, and democratic values.¹¹

rors and punishing those responsible). Notice that political accountability is one of several functionalist attributes often ascribed to a unitary executive. Montesquieu, for instance, supported a unitary executive on nondemocratic grounds, arguing that “[t]he executive power ought to be in the hands of a monarch; because this branch of government, which has always need of expedition, is better administered by one than by many.” MONTESQUIEU, *THE SPIRIT OF LAWS* 206 (David Wallace Carrithers ed., Thomas Nugent trans., Univ. of Cal. Press 1977).

⁶ See *infra* Parts I, V. For example, the country celebrated its sesquicentennial the same year that the Court decided the landmark *Myers v. United States*, 272 U.S. 52 (1926). Such questions have indeed taken on heightened importance as the administrative state, and hence the plausible scope of “executive power,” has grown in an unprecedented manner in recent decades.

⁷ See Cynthia R. Farina, *False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive*, 12 U. PA. J. CONST. L. 357, 359 (2010) (noting that the unitary executive theory is “[n]o longer just the credo of the Federalist Society and Reagan Republicans, it has attained mainstream constitutional status and won adherents across the political spectrum” (footnote omitted)).

⁸ See *infra* Parts II, IV.

⁹ *Id.*

¹⁰ See, e.g., Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1393–94 (2008) (explaining that the electoral process does not adequately allow voters to control the executive’s policy choices because voter-friendly and special interest-friendly policies can be bundled); Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 456–65 (2010) (providing an excellent account of functional criticisms of the unitary executive and arguing the merits of “fiduciary representation”); Farina, *supra* note 7, at 360 (stating that the unitary executive “threatens the values of expertise and legality that have been foundations of the modern administrative state”); Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741, 1742–43 (2009) (arguing that presidential control over information flow functionally reduces the public’s ability to hold him accountable); Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1261 (2006) (arguing that presidents face incentives to be more parochial than their status as the only nationally elected official suggests, while Congress as a body exhibits less parochialism than one might expect based on its members’ electoral foundations); Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53 (2008) (arguing for the benefits of incomplete control over the bureaucracy).

¹¹ See, e.g., Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 93–94 (1994) (explaining that “unitariness” was a value held by the framers and that the executive’s authority changes not because of a change in values but a

Given the elegance of Hamilton's proposition, and the growing consensus among scholars and jurists, one may be forgiven for taking the connection between doctrinal innovations promoting a unitary executive and increased political accountability as granted. Yet it is remarkable that no empirical study examines the consequences of unitary judicial decisions for this constitutional value. This is of course far from saying that empirical scholars have neglected the relationship between bureaucracy and democratic governance.¹² Scholars have long considered the issue of "representativeness" in bureaucracy.¹³ A sprawling literature considers the extent to which the political branches might control the bureaucracy.¹⁴ More directly

change in our understanding of how the value is best implemented); Calabresi, *supra* note 5, at 37 (providing a series of normative arguments in favor of a unitary executive); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2333–36 (2001) (arguing that concentrating authority over the bureaucracy comports with legal theory and advances democratic values); Christopher S. Yoo et al., *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601, 605 (2005) (arguing that presidents defended the unitariness of the executive over the period studied, rejecting attempts of congressional influence).

¹² See, e.g., Alicia Adserà et al., *Are You Being Served? Political Accountability and Quality of Government*, 19 J.L. ECON. & ORG. 445, 459 (2003) (studying cross-national panel data and finding that "the quality of bureaucracy" is positively influenced by democracy and by newspaper readership and that corruption in the U.S. is responsive to newspaper readership).

¹³ For an early example, see J. DONALD KINGSLEY, REPRESENTATIVE BUREAUCRACY: AN INTERPRETATION OF THE BRITISH CIVIL SERVICE 186 (1944) (observing that bureaucracies "become states within states, perfecting elaborate machinery for their governance and reducing to a minimum the area of detailed supervision by political organs"); see also SALLY COLEMAN SELDEN, THE PROMISE OF REPRESENTATIVE BUREAUCRACY: DIVERSITY AND RESPONSIVENESS IN A GOVERNMENT AGENCY 65–111 (1997) (studying the relationship between bureaucratic policy and representation of women and minorities in the bureaucracy, focusing on the Farmers Home Administration's Rural Housing Loans program).

¹⁴ For recent examples, see WILLIAM T. GORMLEY, JR. & STEVEN J. BALLA, BUREAUCRACY AND DEMOCRACY: ACCOUNTABILITY AND PERFORMANCE 71–116 (3d ed. 2013); KENNETH J. MEIER & LAURENCE J. O'TOOLE, JR., BUREAUCRACY IN A DEMOCRATIC STATE: A GOVERNANCE PERSPECTIVE 1–92 (2006); Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 51 (2006) (surveying agency officials and "conclud[ing], somewhat paradoxically, that agencies, though not comprising elected officials, may better promote political accountability than the White House"). A recent strand of this literature on political control stresses that tighter political control over agencies may dampen agencies' incentives to acquire information, suggesting a trade-off between political control and the quality of bureaucratic policy. On this point, see, for example, Sean Gailmard, *Expertise, Subversion, and Bureaucratic Discretion*, 18 J.L. ECON. & ORG. 536, 547–50 (2002); Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1459–60 (2011) (noting that divergence in preferences between agency and overseer increases the agency's incentives to conduct research relevant to regulatory projects). For some evidence suggesting a trade-off between political control and the quality of bureaucracy, see David E. Lewis & Abby K. Wood, *Judicial Deference and Agency Accountability: A Federal FOIA Experiment* 24 (unpublished manuscript), available at <https://my.vanderbilt.edu/davidlewis/files/2011/12/lewis-and-wood-paper-v.9.pdf> (examining the relationship between agency attributes and the quality and timing of agency responses to Freedom of Information Act requests, finding that agencies with more political appointees perform more poorly on such metrics).

supporting the unitarian premise, we have evidence that presidential elections influence rulemaking behavior, particularly by executive agencies,¹⁵ suggesting that administrations act *as if* in control of and politically accountable for regulatory choices. Consistent with this pattern, we also have evidence that the media connects the President more with executive than independent agencies, plausibly leading voters to an understanding of what they might reasonably hold presidential administrations accountable for.¹⁶ Though not focused on the United States, a cognate literature in comparative politics, likewise, studies accountability in political systems with authority more or less diffused among institutions,¹⁷ tending to support the unitarian perspective.

But even if informative about institutional arrangements that stand in equilibrium, existing studies cast faint light on the choices faced by judges or on the consequences that flow from judicial decisions. Virtually all existing research on this topic of political accountability examines static, unchanging institutional settings. So being, we subsist on assertion when considering the relationship between “unitarian” judicial decisions, which by nature tend to upset an equilibrium, and the value of political accountability. When courts restructure institutions to promote a unitary executive, do they support the functionalist value of political accountability?¹⁸ Despite a large literature on interbranch relations,¹⁹ we have little guidance on this question of institutional dynamics and constitutional values.²⁰

¹⁵ See, e.g., Edward H. Stiglitz, *Unaccountable Midnight Rulemaking? A Normatively Informative Assessment*, 17 N.Y.U. J. LEGIS. & PUB. POL’Y 137 (2014) (observing patterns in rulemaking behavior that indicate presidential administrations act *as if* the public holds presidents accountable for agency actions, particularly executive agency actions).

¹⁶ See, e.g., Alex Ruder, *Mass Media and the Political Accountability of the Bureaucracy* 3 (Aug. 5, 2013) (unpublished manuscript), available at <http://www.princeton.edu/~aruder/varianceFTC.pdf> (finding that the mass media associates the President with executive agencies more than independent agencies, thereby “offer[ing] voters an accurate assessment of presidential responsibility over agencies”). See also *infra* notes 156–59.

¹⁷ See *infra* note 84 and accompanying text.

¹⁸ In this sense, this Article addresses a recent challenge by a scholar that “[p]residential boosters must prove, not simply assume, the superior democratic credentials of their institutional favorite.” Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 60 (2013).

¹⁹ For an excellent account of interbranch relations, see LOUIS FISHER, *THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE* xi (4th ed. 1998) (noting a general principle that “an initiative by one branch sets in motion a series of compensatory actions by the other branch,” and articulating how the executive and legislature largely share constitutional powers).

²⁰ Scholars more often consider the implications of the nondelegation doctrine for political accountability through a dynamic lens, imagining the legislative response to judicial decisions. See, e.g., Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 319–20 (2000) (describing the conventional account). This difference in focus may owe to the fact that the nondelegation doctrine typically addresses legislative behavior, inviting thoughts of behavioral responses to judicial decisions. By contrast, the unitary executive

A critical initial observation is that judicial decisions ostensibly promoting a *unitary* executive do not necessarily have this effect and may in fact engender *plural* control of government administration.²¹ Consider Justice Byron White's vivid dissent in *Chadha*,²² the landmark Supreme Court case invalidating the legislative veto—a device that allows the legislature to review and veto the actions of administrative agencies. There, Justice White argued that the legislative veto acted as an “important if not indispensable” legislative tool to “balance” the administrative state.²³ After the loss of the legislative veto, the legislature, one might speculate,²⁴ turned to a multitude of substitute devices to “re-balance” delegations.²⁵ These alternative devices plausibly prove more damaging to the unitary objective of accountability for executive functions than the legislative veto itself.²⁶ Thus, it is far from clear that judicial decisions attempting to impose unitary conditions enhance political accountability. Unitarian judicial interventions may, indeed, invite pluralism in government administration and inhibit the sought-after lines of democratic responsibility. Even if one agrees with Hamilton and Wilson, one must still question the wisdom of judicial efforts to concentrate trust and power in the executive.

Motivated by this ambiguity over the consequences of judicial decisions, this Article provides the first empirical evidence on the connection between unitarian judicial decisions and political accountability. For most of the Article I focus on the legislative veto, the subject of Justice White's dissent in *Chadha*, as a window into the wider implications of unitary doctrinal innovations. The legislative veto is attractive primarily for two reasons. Substantively, the veto is widely recognized as a potent legislative tool in the context of the modern administrative state, the topic of a landmark Supreme Court case and innumerable law review articles. Prosaically, the veto is at-

decisions typically address some institutional device established by the legislature, perhaps rendering behavioral responses to judicial decisions a more distant thought.

²¹ This argument may fairly be read as an extension of arguments made elsewhere. See William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 540–43 (1992) (understanding the legislative veto as an attempt by Congress to re-balance lawmaking toward the “original” constitutional arrangement). I advance a similar dynamic perspective, though I emphasize the legislature's manifold approaches to re-balancing, and I connect these dynamics to the functional goal of political accountability.

²² *INS v. Chadha*, 462 U.S. 919, 967–1003 (1983) (White, J., dissenting).

²³ *Id.* at 971–72.

²⁴ See *infra* Part II.B.

²⁵ For an excellent analysis of the constitutionally valid instruments through which Congress can manipulate agencies, see Jack M. Beer mann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 69–139 (2006).

²⁶ See *id.* at 144; see also *Bowsher v. Synar*, 478 U.S. 714, 734 (1986) (invalidating an institutional arrangement and noting that Congress “*in effect* has retained control over the execution” for the statute in question (emphasis added)). Here, and elsewhere, the Court gives considerable attention to the functional outcomes promoted by its decisions, even as the Court adopts formalist constitutional reasoning. See *infra* Part I.

tractive because it is relatively easy to identify and track, an important consideration in an empirical study.²⁷ Toward the end of the Article, I consider a range of judicial decisions dealing with institutional arrangements other than the legislative veto.

Unfortunately, it is highly challenging to address this topic in an empirically rigorous fashion at the federal level. This follows for a straightforward reason: we have only a single federal government, and we therefore have no natural comparison group. We have no credible way, in other words, to say what would have happened at the federal level in the absence of *Chadha*.²⁸ The states, however, represent a fertile ground for helping us understand the role of unitary doctrinal innovations.²⁹ The states tend to have broadly similar constitutional frameworks,³⁰ yet they also differ in ways relevant to debates ongoing at the federal level. Heuristically, the approach I adopt allows us to compare outcomes in one state to outcomes in similar states, thereby accounting for important cross-state trends in factors that influence bureaucratic and legislative behavior.³¹ The insights we gather at the state level then provide a perspective into the operation of our federal system, the ultimate object of interest.

The findings, in brief, from this state-based exercise indicate two related consequences of unitary judicial decisions. First, consistent with Justice White's suggestion, legislatures appear to respond in predictable ways when courts strip them of devices to control the administrative state: they augment the use of substitute tools to control the bureaucracy, such as influence achieved through appropriations. Second, using an original dataset of roughly 7,000 newspaper articles, I show that the invalidation of the veto invited, if anything, more plural control over administration and a closer connection between the administrative state and the *legislature*, not the executive—an outcome

²⁷ The Council of State Governments annually publishes *The Book of the States*, a detailed abstract of state-level institutions. See THE COUNCIL OF STATE GOV'TS, *THE BOOK OF THE STATES* (2010).

²⁸ However, we can construct compelling narratives about the connections between events. See, for instance, revisions to the Reorganization Act of 1977 passed in the aftermath of *Chadha*, discussed *infra* Part II.B.

²⁹ In this sense, the Article follows Justice Brandeis's notion that the states serve as laboratories for learning about the consequences of different policies and institutions. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory . . ."). This Article hardly represents the first effort to gain understanding about the federal Constitution through examination of state constitutions. See, e.g., Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1190–91 (1999) (providing an overview of how states interpret the separation of powers doctrine, particularly when the state constitution contains a separation of powers clause).

³⁰ See THE COUNCIL OF STATE GOV'TS, *supra* note 27, at 3–17.

³¹ For instance, regional or national trends may induce legislatures to be more or less active independent of any consequences that follow from doctrinal changes.

contrary to the expectations of proponents of unitary executive doctrines, but one consistent with a legislative backlash to the judicial decision. I further find linkages in the newspaper accounts between the judicial decision and specific devices adopted by the legislature in response to the decision, binding the first empirical finding to the second empirical finding.

This pattern of findings informs our views of the recent trend of judicial decisions seeking to effectuate a more unitary executive. I do not quarrel with Hamilton's elegant proposition, re-cast by Wilson, and recently re-minted by the Court to hold that "[t]he diffusion of power carries with it a diffusion of accountability."³² However, we still must question the relationship between the value of political accountability and judicial decisions attempting to realize the vision of a unitary executive. Such judicial decisions, these findings suggest, potentially induce a legislative "backlash," with the legislature reasserting itself by other means. This dynamic plausibly cashes out in weaker executive electoral accountability for administrative actions: paradoxically, the executive may be more, not less, politically accountable in the absence of judicial decisions fostering a unitary executive. These findings urge us to consider whether the wave of judicial decisions seeking to promote a unitary executive, which often follow a formalist mode of reasoning,³³ undermine the functionalist constitutional objective of political accountability. Political accountability is an important constitutional value, yet it is, at the least, no easy "trump" for advocates of unitary judicial decisions.³⁴

This Article proceeds in five Parts. Part I discusses the foundations of the unitary executive theory, emphasizing the role that the functional goals, centrally political accountability, play in supporting this constitutional perspective. Part II focuses on the legislative veto and sets forth alternative perspectives on the consequences of the institution for political accountability. In Part III, I begin a series of empirical assessments by studying the effects of a 1997 judicial decision in Missouri that mirrored *Chadha* in reasoning. In particular, I examine the effect of the decision on legislative drafting behavior using an original dataset of over 30,000 state session laws. Part IV continues the case study of the Missouri judicial decision but with a focus

³² Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3155 (2010).

³³ See Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 859–60 (1990) (describing the theory of formalism and constitutional interpretation). Obviously, this descriptor does not apply to the interpretative decisions, such as *Chevron*, which do not directly turn on constitutional concerns.

³⁴ Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1741 (1996) (arguing that "for most unitarian scholarship, accountability remains a trump," even as such theorists often consider competing values).

on the implicit perceptions of administrative control reflected in state newspaper reporting. In Part V, I return the focus to the federal level and discuss judicial decisions involving institutions other than the legislative veto. Although the empirical assessments included in Part V can only be tentative, I find patterns that resonate with the state-level studies in Parts III and IV. My conclusions follow in the final section.

I

THE UNITARY EXECUTIVE AND THE VALUE OF ACCOUNTABILITY

A. The Unitary Executive Generally

Over the last three decades, the unitary executive theory has fundamentally shaped the vision of constitutional lawmaking in the American republic.³⁵ The core tenet of the theory is simple to state: the exercise of discretionary executive power belongs, in one form or another, to the President.³⁶ Even if the office of the President itself does not subsume all such discretion, the President, at least, retains authority to veto exercises of the discretion or to remove officers exercising such discretion.³⁷ In this way, proponents of the unitary execu-

³⁵ This Part of the Article draws on many of the same cases and observations I make in another article, the central point of which is that concerns about political accountability figure importantly in areas of administrative and constitutional law. See Stiglitz, *supra* note 15. For other takes on this observation, see, for example, Jacob E. Gersen & Matthew C. Stephenson, *Over-Accountability*, 6 J. LEGAL ANALYSIS (forthcoming 2014) (manuscript at 1–2); Kitrosser, *supra* note 10.

³⁶ It is simple to state, but as the large literature on this topic suggests, hardly simple in its implications. The exercise of nondiscretionary, ministerial executive power generally concerns unitary executive theorists less, though historically this distinction has not always been respected as a relevant boundary by proponents of presidential control. See *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 612–13 (1838) (responding to the argument that the Take Care Clause permits the President control over nondiscretionary duties: “This . . . doctrine . . . cannot receive the sanction of this Court. It would be vesting in the President a dispensing power, which has no countenance for its support in any part of the constitution; and is asserting a principle, which if carried out in its results to all cases falling within it, would be clothing the President with a power entirely to control the legislation of congress, and paralyze the administration of justice.”).

³⁷ See Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1166 (1992). The literature advancing this general perspective is voluminous. See, e.g., STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008); Calabresi, *supra* note 5, at 58; Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 593–99 (1994) (“[T]he President must be able to control subordinate executive officers through the mechanisms of removal, nullification, and execution of the discretion ‘assigned’ to them himself.”); Kagan, *supra* note 11, at 2322 (noting Supreme Court case law suggesting the Executive’s removal power); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1242 (1994) (noting that “the Article II Vesting Clause seems to require” that any discretionary power given agency officials “be subject to the President’s control”); Lessig & Sunstein, *supra* note 11, at 5 (“It was clear that ‘executive’ functions must be performed by officers subject to the unlimited removal and broad supervisory power of the President.”).

tive seek to invalidate restrictions on the exercise of executive discretion. As a practical matter, this often means invalidating constraints that tend to either promote bureaucratic autonomy or enhance congressional control over administrative agencies.

Advocates of the unitary executive find primary support in three sources. Textually, the theory is premised on the Vesting Clause and the Take Care Clause of Article II. The former provides that “[t]he executive Power shall be vested in a President of the United States of America,”³⁸ with emphasis on the articles before “executive” and “President,” along with the imperative “shall.”³⁹ The latter provides that “[the President] shall take Care that the Laws be faithfully executed.”⁴⁰ Unitary theorists argue that history and unbroken practice support this textual position.⁴¹ The term “executive power,” according to one historical analysis, “had a well-known meaning before, during, and after the Constitution’s ratification,” supporting the “chief executive’s preeminence in law execution.”⁴²

When these first two justifications falter, however, unitary theorists turn to general notions of administrative or democratic values.⁴³ For instance, Professors Lessig and Sunstein conclude “with reluctance” that the historical vision of the unitary executive is “just plain

³⁸ U.S. CONST. art. II, § 1, cl. 1.

³⁹ See *Morrison v. Olsen*, 487 U.S. 654, 705–06 (1987) (Scalia, J., dissenting); see also Calabresi & Rhodes, *supra* note 37, at 1165.

⁴⁰ U.S. CONST. art. II, § 3, cl. 1. As discussed below, adherents of the unitary executive theory downplay the significance of the fact that the Constitution allows “Heads of Departments” to appoint inferior officers, arguing that despite this language the President remains in control of inferior officers. See U.S. CONST. art. II, § 2, cl. 2. Likewise, unitary theorists downplay the Opinions Clause, which gives the President the right to opinions from principal officers in the Departments and plausibly implies that the President does not have the constitutional capacity to control principal officers. See U.S. CONST. art. II, § 2, cl. 1.

⁴¹ See Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 819–20.

⁴² *Id.* at 705. Notice, however, that this historical interpretation of the term “executive power” is contested. See *infra* note 50.

⁴³ Further, it is important to note that many see the force of the formalist interpretation as primarily deriving from a functionalist “root.” See, e.g., Flaherty, *supra* note 34, at 1740 (“[T]he formalist framework is simply the best means of making government more responsive to the people [T]he formalist version of separation of powers promotes the Constitution’s fundamental goals of accountability and energy.”). Notice that *Chadha* itself, often criticized for being excessively formalistic in reasoning, appeals to functionalist principles when it holds that, whatever the convenience of the veto device, “it is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency.” *INS v. Chadha*, 462 U.S. 919, 958–59 (1983). For an argument that neither a strict formalist nor a strict functionalist perspective provides a fully adequate understanding of separation of powers questions in the Constitution, see generally John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939 (2011) (arguing that we should interpret clauses of the Constitution according to principles of ordinary textual interpretation).

myth.”⁴⁴ Yet they support a unitary executive on the grounds of “accountability, coordination, and uniformity in the execution of the laws.”⁴⁵ This is not an unreasonable way to evaluate the claims for a unitary executive. Constitutional clause frustrates constitutional clause. The Opinions Clause, for instance, plausibly implies that the President enjoys the right to demand information from principal officers of the Departments but does not have the constitutional capacity to control such officers directly.⁴⁶ One might equally question the formalist unitary position on the basis of the Necessary and Proper Clause.⁴⁷ Or one might observe that it is often not even clear whether administrative agencies operate under the legislative or executive flag.⁴⁸ Or one might point out that the modern American state differs in fundamental ways from the state that governed the modest ratification-era agrarian society, questioning the informativeness of ratification-era notions of executive administration.⁴⁹ Or one might question the construction of the ratification-era views.⁵⁰ Sufficient

⁴⁴ See Lessig & Sunstein, *supra* note 11, at 2. But for an opposing view, see Calabresi & Prakash, *supra* note 37, at 603–05.

⁴⁵ Lessig & Sunstein, *supra* note 11, at 2.

⁴⁶ U.S. CONST. art II, § 2, cl. 1 (“[H]e may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices . . .”). See, e.g., Lessig & Sunstein, *supra* note 11, at 32 (posing the question, “[w]hat possible reason could there be for providing the President with a constitutional power to demand written reports from officers over whom he already had an inherent power of control?”). Hamilton saw this tension but brushed it off, saying of the clause, “[t]his I consider as a mere redundancy in the plan, as the right for which it provides would result of itself from the office.” THE FEDERALIST NO. 74, at 422 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

⁴⁷ U.S. CONST. art I, § 8, cl. 18 (“To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

⁴⁸ See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578–79 (1984). It is usually accepted, at least by proponents of the unitary executive, that agencies exercise executive powers when they interpret and implement statutes. See *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 475 (2001) (noting that a “certain degree of discretion, and thus lawmaking, inheres in most executive or judicial action” (citation omitted)). Yet the recalcitrant debates over the nondelegation doctrine are founded on the contestable yet plausible proposition that agencies, in fact, exercise legislative powers when they interpret statutes.

⁴⁹ This is not to say, of course, that founding-era thoughts on constitutional structure have no meaning. Rather, the point is that founding-era thoughts may provide little guidance on questions of what “executive power,” for instance, means in the context of the modern bureaucratic state. See, e.g., Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 617 (1989) (“[W]hy should we be bound, in our understanding of the President’s proper role vis-à-vis a vast modern administrative bureaucracy, by the conventional conceptualization of administration in an entirely different world?”).

⁵⁰ See FISHER, *supra* note 19, at 70 (“[T]he framers were never able to distinguish clearly between legislative and executive duties.”); Flaherty, *supra* note 34, at 1790 (noting that unitary theory “assumes that there was a generally understood bundle of authority known as executive power”).

textual and historical ambiguity exists, in any event, to propel many scholars and jurists to examine democratic values as arbiters.

Beyond the limited range of text and history, two additional reasons support our consideration of democratic values. Most directly, this reflects the practice of the Supreme Court. The workaday mechanics of the Supreme Court often turn on prosaic concerns regarding the workability of different institutional arrangements.⁵¹ Why, in this age of the unitary executive, do we suffer independent agencies? Why, even as the Court struck down dual for-cause protection, did it leave untouched single for-cause protection? Why did Justice John Paul Stevens, who later wrote to invalidate the line item veto and often stood against the expansion of executive power,⁵² establish the deferential *Chevron* standard for reviewing agencies' interpretations of statutes?⁵³

The answer to all these questions is straightforward, even if sometimes obscured by doctrinal shrouds. In the eyes of the Justices, at least at the time of the relevant decisions, these positions served important democratic or administrative values. For instance, Judge Richard Posner suggests that we tolerate for-cause removal because failing to do so would represent a "seismic constitutional change" and invalidate independent agencies such as the Federal Reserve and the Federal Communications Commission.⁵⁴

At times, the connection between democratic values—political accountability in particular—is on the surface of judicial opinions. Justice Stevens, for example, noted that delegation is a fact of modern government,⁵⁵ and he justified judicial deference to executive interpretations of statutory ambiguities on the premise that the President is "directly accountable to the people."⁵⁶ Similarly, in another case involving statutory interpretation, Justice Stephen Breyer argued that "the President and Vice President are the *only* public officials whom

⁵¹ In this sense, the Court heeds Justice Jackson's admonition that "[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a *workable* government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (emphasis added). For a more recent argument to similar effect, see STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 34 (2005) (observing that "our constitutional history has been a quest for workable government, workable democratic government").

⁵² See Dawn Johnsen, "*The Essence of a Free Society*": *The Executive Powers Legacy of Justice Stevens and the Future of Foreign Affairs Deference*, 106 NW. U. L. REV. 467, 468 (2012).

⁵³ See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984).

⁵⁴ See *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986).

⁵⁵ See *Chevron*, 467 U.S. at 844 (noting the many circumstances under which a delegation of legislative power may occur).

⁵⁶ *Id.* at 865.

the entire Nation elects”⁵⁷ and therefore courts should defer to agency interpretations of statutes.⁵⁸

We find a similar theme on the constitutional questions of appointment and removal powers. As Justice Harry Blackmun summarizes, “[t]he Framers understood . . . that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people.”⁵⁹ The Supreme Court invalidated restrictions on the President’s removal powers using similar reasoning in the recent case of *Free Enterprise Fund v. Public Company Accounting Oversight Board*.⁶⁰ Criticizing the dual for-cause provisions in the Sarbanes-Oxley Act of 2002, the Court maintained that “[t]he diffusion of power carries with it a diffusion of accountability. . . . Without a clear and effective chain of command, the public cannot determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.”⁶¹

A second further reason to turn to democratic values is that they help reconcile democratic governance with the administrative state. Plainly stated, it strikes many observers as odd that unelected bureaucrats craft a wide range of public policies given that we live in a democracy.⁶² Perhaps the most common response to this incongruent circumstance involves presidential accountability.⁶³ Responding to concerns about the broad delegation of authority to administrative agencies, Professor Mashaw, for example, writes that “[a]ll we need do is not forget there are . . . presidential elections and that, as the Supreme Court reminds us in *Chevron*, presidents are heads of administrations.”⁶⁴ Likewise, then-Professor Kagan argued that “presidential control of administration . . . possesses advantages over any alternative control device in advancing . . . core democratic values,” such as “re-

⁵⁷ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 190 (2000) (Breyer, J., dissenting).

⁵⁸ On this question of the “nationalist” president, see generally Nzilibé, *supra* note 10.

⁵⁹ *Freytag v. Comm’r*, 501 U.S. 868, 884 (1991).

⁶⁰ 130 S. Ct. 3138 (2010).

⁶¹ *Id.* at 3155 (citation omitted) (internal quotation marks omitted).

⁶² See Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 987 (1997) (observing that the problem of bureaucratic legitimacy is “an intriguing but awkward family heirloom” that “is handed down from generation to generation”).

⁶³ See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 462–63 (2003) (arguing that administrative law scholars have “become so fixated on the concern for political accountability lately that we have overlooked an important obstacle to agency legitimacy: the concern for administrative arbitrariness”); Michael A. Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L. REV. 827, 841–57 (1996); Kagan, *supra* note 11, at 2331–39.

⁶⁴ Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95 (1985).

sponsiveness and transparency.”⁶⁵ Thus, we might care about the relationship between political accountability and judicially imposed unitary innovations on solely normative grounds as we grapple with the democratic legitimacy of the administrative state.⁶⁶

The Court often develops its administrative and constitutional law doctrines, either explicitly or implicitly, on the basis of functional premises. Scholars, likewise, often give these functional premises a prominent place in their normative analyses. This Article engages the natural question of whether these premises have validity, with a focus on the lessons we can learn from the history of the legislative veto.

B. The Case of the Legislative Veto

The legislative veto represents an important piece in the development of unitarian institutions. The legislative device, used by Congress at least since President Franklin D. Roosevelt,⁶⁷ involves a qualified delegation of authority to administrative agencies. Congress passes a statute enabling an administrative agency to take some action but then reserves the right to review the action *ex post* and possibly to veto it. Such legislative review takes various forms: the statute may permit a legislative committee to exercise the veto, or the veto may be subject to one- or two-house approval.⁶⁸ But, in any event, the legislative veto requires something less than the approval of the executive.

Although this type of legislative review is anathema to the unitary executive, Presidents abided the device for over half a century.⁶⁹ This executive countenance derived from self-interest rather than from dim-wittedness, generosity, or respect for the contributions of a coordinate branch. Under a common view, the executive’s payoff from

⁶⁵ Kagan, *supra* note 11, at 2332; *see also* RICHARD P. NATHAN, *THE ADMINISTRATIVE PRESIDENCY* 1 (1983); RICHARD W. WATERMAN, *PRESIDENTIAL INFLUENCE AND THE ADMINISTRATIVE STATE* 1–2 (1989).

⁶⁶ Note that presidential accountability may be the dominant approach, but it is not the only normative solution to this “awkward” problem. *See, e.g.*, Bressman, *supra* note 63 (arguing for the importance of nonarbitrariness in understanding the legitimacy of the administrative state); Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987) (arguing that Congress controls the administrative state through administrative procedures, thereby legitimizing the bureaucracy); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992) (emphasizing the role of deliberation and civic republican values).

⁶⁷ *See* Bernard Schwartz, *The Legislative Veto and the Constitution—A Reexamination*, 46 GEO. WASH. L. REV. 351, 351–52 (1978).

⁶⁸ *See* Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273, 273 (1993); *see also* Schwartz, *supra* note 67, at 357–58 (listing statutes that included legislative veto provisions in 1976).

⁶⁹ *See* Schwartz, *supra* note 67, at 351–52; *see also* INS v. Chadha, 462 U.S. 919, 970 (1983) (White, J., dissenting) (“Over the quarter century following World War II, Presidents continued to accept legislative vetoes by one or both Houses as constitutional, while regularly denouncing provisions by which congressional Committees reviewed Executive activity.”).

the device came in the form of broader congressional delegations. As Professor Fisher observes, for example, “[b]y attaching the safeguard of a legislative veto, Congress was willing to delegate greater discretion and authority to the executive branch.”⁷⁰ Nevertheless, to strict unitarians, the status of the legislative veto was “crystal clear”—the device was “abhorrent.”⁷¹

Indeed, the legislative veto directly undermined the central tenet of the unitary executive: under the device, according to critics, control over the administration of statutes was plainly plural rather than unitary.⁷² By reviewing administrative rules, or at least threatening to do so, the legislature invested itself in the implementation of laws. As the Chairman of the House Judiciary Committee acknowledged in a post-*Chadha* hearing, “Congress increasingly used legislative veto to control the executive branch in its most ‘executive’ activity: The daily management of government.”⁷³

At the federal level, the Supreme Court invalidated the legislative veto in the landmark 1983 case of *INS v. Chadha*.⁷⁴ The majority opinion characterized the veto as an exercise of legislative powers and held against the veto on the grounds that it violates the Bicameralism and Presentment Clauses of Article I, Section 7.⁷⁵ However, the opinion below, authored by future Justice Anthony Kennedy, expressed considerable uncertainty over the nature of the veto powers, considering all three possibilities—judicial, executive, and legislative—and in all events concluding the veto was unconstitutional. With respect to executive powers, for instance, the lower court considered the possibility that the purpose of the veto was to “share in the administration of the statute.”⁷⁶ Such sharing, the court concluded, represented “egregious” meddling in executive affairs and “trespasses upon central functions of the Executive.”⁷⁷

⁷⁰ Fisher, *supra* note 68, at 273. Notice that Justice White’s *Chadha* dissent reflects this view, too. See *Chadha*, 462 U.S. at 970–74 (White, J., dissenting).

⁷¹ Calabresi, *supra* note 5, at 73. Note that here he refers to something less than two-house vetoes. In other parts of his article he argues against the two-house veto as well.

⁷² *But see* Brief of the U.S. House of Representatives, Appellee-Petitioner at 25–26, *INS v. Chadha*, 462 U.S. 919 (1983) (No. 80-2170) (arguing that if “Congress has withheld from the Executive some part of the function of executing the whole of a statute, the Executive has no more constitutional authorization to perform what has been withheld than to ‘execute a law by disobeying it’”).

⁷³ *Legislative Veto After Chadha: Hearings Before the H. Comm. on Rules*, 98th Cong. 401 (1984) [hereinafter *Hearings*] (statement of Hon. Peter W. Rodino, Jr., Chairman, H. Comm. on the Judiciary).

⁷⁴ 462 U.S. 919 (1983).

⁷⁵ The legislative veto in question involved a one-house veto and an adjudicatory regulatory action. Companion cases linked the *Chadha* holding with bicameral legislative vetoes, see *U.S. Senate v. FTC*, 463 U.S. 1216 (1983), and with rulemaking regulatory actions, see *Process Gas Consumers Grp. v. Consumer Energy Council of Am.*, 463 U.S. 1216 (1983).

⁷⁶ *Chadha v. INS*, 634 F.2d 408, 431 (9th Cir. 1980).

⁷⁷ *Id.* at 432.

II

POLITICAL ACCOUNTABILITY: MECHANICS AND PREDICTIONS

A. A Unitarian View

Hamilton's concern regarding plurality in administration and its tendency to "conceal faults"⁷⁸ is fundamentally a concern about information.⁷⁹ Hamilton recognized that elections present voters with crippling information problems: they observe outcomes, such as economic performance and public corruption prosecutions, but they cannot readily determine who is responsible for these outcomes or whether the outcomes derive from good (bad) luck rather than good (bad) administration. All of this is true as a matter of course in a separation of powers system,⁸⁰ and, thought Hamilton, it is all the more true in the context of plural control of the executive.

So characterized, a straightforward hypothesis emerges from the unitary perspective: concentrating powers in the executive clarifies lines of accountability, thereby allowing voters to punish (reward) the executive for poor (good) performance. As Hamilton warned of plural executives faced with poor performance:

[B]lame is shifted from one to another with so much dexterity, and under such plausible appearances, that the public opinion is left in suspense about the real author. The circumstances which may have led to any national miscarriage or misfortune are sometimes so complicated that where there are a number of actors who may have had different degrees and kinds of agency, though we may clearly see upon the whole that there has been mismanagement, yet it may be impracticable to pronounce to whose account the evil which may have been incurred is truly chargeable.⁸¹

⁷⁸ THE FEDERALIST NO. 70, *supra* note 2, at 405.

⁷⁹ Of course, plural institutions also raise concerns about the incentives faced by elected officials. The fact that it is harder to assign responsibility for performance reduces the incentives to perform well. As such, to the extent plural institutions decrease accountability, we might expect such institutions to also reduce state performance in relevant respects.

⁸⁰ For instance, even absent plural control over executive functions, the executive may cast off blame for performance by arguing the failures of the legislature. In a separation of powers system, the unitary executive, even in ideal form, is no easy cure for problems of democratic accountability; the most that can be said of it is that it increases democratic accountability. *See, e.g.,* Morris P. Fiorina, *The Decline of Collective Responsibility in American Politics*, 109 DAEDALUS 25, 44 (Summer 1980) ("We hold our politicians individually accountable for the proposals they advocate, but less so for the adoption of those proposals, and not at all for overseeing the implementation of those proposals and the evaluation of their results. In contemporary America officials do not govern, they merely posture."). One straightforward understanding of the reason we, as voters, value posture rather than results is that, in a separation of powers system, the former is under the control of individual politicians and the latter is largely not.

⁸¹ THE FEDERALIST NO. 70, *supra* note 2, at 406.

Under this view, a unitary executive removes some ambiguity surrounding the “author” of the administrative actions. This allows voters to more easily assess the characteristics of their leaders—competence, honesty, and so on—and hence allows them to reward or punish government performance.⁸²

Far from a dusty revolutionary-era relic, we find echoes of this unitarian logic in modern theories of democratic accountability. The observation that voters face a difficult problem of sorting out what aspects of government performance to attribute to the actions of elected officials motivates a sizable and growing strand of literature.⁸³ Similarly, a literature in comparative politics studies the institutional arrangements that promote electoral accountability for various aspects of government performance, most notably economic performance.⁸⁴

Moreover, this unitarian logic carries directly to the legislative veto. For instance, Representative Peter W. Rodino, Chairman of the House Judiciary Committee around the time of *Chadha*, criticized the legislative veto in terms that reflect Hamilton’s worries that “such duplication [of executive functions] reduces political accountability.

⁸² Note that a unitary executive was not the only institutional feature that the founders included in our constitutional system designed to advance this functional value. For example, the Origination Clause, which requires “[a]ll Bills for raising revenue,” U.S. CONST. art. I, § 7, cl. 1, to begin in the House of Representatives, was designed to ensure a connection between electoral accountability and a domain of policy decisions. See Rebecca M. Kysar, *The ‘Shell Bill’ Game: Avoidance and the Origination Clause*, 91 WASH. U. L. REV. 659, 666 (2014) (noting the foreign roots of the clause, motivated by “the lower house’s accountability to the people, which would minimize arbitrary, unfair, and overly burdensome taxes”).

⁸³ One way of conceiving the voters’ problem is as a signal extraction problem: voters observe outcomes, such as the unemployment rate, and then face the challenge of filtering out the parts of that outcome that cannot be attributed to the performance of the elected official from the parts that can be attributed to the performance of the elected official. This problem may fairly be seen as a foundational problem motivating Hamilton’s worries. For recent research studying this problem, see, for example, Justin Wolfers, *Are Voters Rational? Evidence from Gubernatorial Elections* (Jan. 30, 2007) (unpublished manuscript) (studying the ability of voters to filter out the noise in economic performance in the context of gubernatorial elections), available at [http://users.nber.org/~jwolfers/Papers/Voterrationality\(latest\).pdf](http://users.nber.org/~jwolfers/Papers/Voterrationality(latest).pdf); Ryan Bubb, *Blame it on the Rain? Voter Rationality and Exogenous Economic Shocks* 3–9 (Apr. 14, 2008) (unpublished manuscript) (on file with author) (studying the filtering problem in the context of Indian parliamentary elections).

⁸⁴ See generally Christopher J. Anderson, *The End of Economic Voting? Contingency Dilemmas and the Limits of Democratic Accountability*, 10 ANN. REV. POL. SCI. 271, 281–86 (2007) (quoting *Federalist No. 70* for partial motivation and summarizing a movement in the comparative politics literature “to systematically tackle the issue of how differences in political institutions impose limits on the relationship between the economy and government support”); see also RAYMOND M. DUCH & RANDOLPH T. STEVENSON, *THE ECONOMIC VOTE: HOW POLITICAL AND ECONOMIC INSTITUTIONS CONDITION ELECTION RESULTS* 252–86 (2008) (summarizing the relevant literature and providing theory and evidence for the proposition that “more concentrated [administrative] responsibility results in higher levels of economic voting”); Thomas J. Rudolph, *Institutional Context and the Assignment of Political Responsibility*, 65 J. POL. 190, 209–11 (2003) (studying same in the context of American states).

With both the executive branch and Congress involved in a particular decision, neither branch will be truly responsible for that decision.”⁸⁵ Another witness in the same hearing, Representative Sam B. Hall, expressed similar concerns. He asked, “[w]ho would actually be responsible for a regulatory decision and how would the public know who is responsible?”⁸⁶ Elsewhere, then-Assistant Attorney General Theodore Olson worried that the legislative veto meant Congress would create an “additional bureaucracy” to oversee the agencies, and that as a consequence “the [regulatory] process [would] becom[e] even more mysterious and [K]afkaesque, intelligible only to lobbyists.”⁸⁷

It is true, of course, that citizens may be able to sort out sensible responses to the question of accountability. A range of public interest groups, for example, specialize in distilling information for voters on just these questions.⁸⁸ Likewise, one view of political campaigns is as a battle of advocates, much as a trial, with each side presenting its best case to the voters and highlighting the flaws in the opposition’s positions.⁸⁹ The claim, therefore, is not that it is impossible for voters to discern who is responsible for particular regulatory actions—at least not as a general matter. Rather, the claim is that the legislative veto makes it more difficult for voters to hold government actors accountable for regulatory actions. This, in any event, is the conventional story that animates much theory and modern constitutional and administrative law doctrine.

⁸⁵ *Hearings, supra* note 73, at 403 (statement of Hon. Peter W. Rodino, Jr., Chairman, H. Comm. on the Judiciary).

⁸⁶ *Id.* at 597 (statement of Rep. Sam B. Hall).

⁸⁷ *Id.* (internal quotation marks omitted). It is, of course, fair to question whether this is precisely what has transpired, though in the executive branch rather than the legislative branch. *See, e.g.,* RENA STEINZOR ET AL., *CTR. FOR PROGRESSIVE REFORM, BEHIND CLOSED DOORS AT THE WHITE HOUSE: HOW POLITICS TRUMPS PROTECTION OF PUBLIC HEALTH, WORKER SAFETY, AND THE ENVIRONMENT 2* (2011) (noting that the Office of Information and Regulatory Affairs routinely “keeps secret the substance of the changes” it makes to other agencies’ draft regulatory submissions).

⁸⁸ *See, e.g.,* ARTHUR LUPIA & MATHEW D. MCCUBBINS, *THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW?* 206 (1998) (noting that during elections a wide array of actors, including interest groups, are able to offer advice to voters). This is not to say, of course, that heuristics allow voters to behave as if they had full information. Heuristics have most value in stable environments that allow voters to learn the relationship between, say, interest group positions and policy outcomes. Such short cuts have less value, naturally, when the relationship between the interest group position and the outcome voters care about is fluid or less certain. *See, e.g.,* Richard R. Lau & David P. Redlawsk, *Advantages and Disadvantages of Cognitive Heuristics in Political Decision Making*, 45 *AM. J. POL. SCI.* 951, 953, 965–67 (2001) (finding varied usefulness of heuristics and less utility when the “political environment is not structured according to [] prior expectations”).

⁸⁹ For a seminal article on the relationship between advocacy and information revelation, see Mathias Dewatripont & Jean Tirole, *Advocates*, 107 *J. POL. ECON.* 1, 17 (1999) (studying the incentives to generate information in a system of advocacy).

The conventional unitarian position is fundamentally a normative view about the best reading of the Constitution and the optimal structure of government. To the extent possible, administrative discretion should be concentrated in the hands of the executive. The unitary view, though, is less developed as a theory of how to realize its overarching institutional objectives. Scholars devote relatively little consideration to the questions of whether reforming institutions will, after institutions re-equilibrate, lead to increases or decreases in the executive's control over the administration. Instead, the dominant unitary approach appears to involve a direct transmission from normative view to prescription: a particular institutional device offends unitary principles, therefore it must go. As such, the unitary view is not geared to provide a firm position on whether the legislature will respond to the loss of the veto by altering its behavior. However this may be, the only reasonable position for a strict unitary theorist is that, whatever the legislative response, the benefits of reforming institutions in the unitary direction justify the costs of any subsequent legislative response. Overall, therefore, it is hard to envision a unitary theorist arguing that unitary innovations will do anything but concentrate authority over executive functions, such as control over regulatory affairs,⁹⁰ in the hands of the President and enhance political accountability for administrative actions.

B. Equilibration and Political Accountability

Much of the separation of powers doctrine follows static rather than dynamic reasoning. A common template for a case runs thus: the Congress aggrandizes power at the expense of the Executive, thereby trespassing upon the Executive's formal or functional constitutional domain. The Court notes this trespass and invalidates the legislative grab, satisfied that a rifle shot opinion has rebalanced the state to its true constitutional form and function. However, the Court often neglects to address the questions of why the aggrandizement transpired in the first instance and of Congress's likely response to the Court's decision.⁹¹ Often, the Court neglects the possibility that Congress's response to the judicial decision undermines the very objectives pursued by the Court.

This is, in fact, a relevant possibility in the context of the legislative veto. As Justice White noted in his vivid *Chadha* dissent, Congress

⁹⁰ In the context of the legislative veto, recall that future Justice Kennedy regarded the device as "trespass[ing] upon central functions of the Executive." *Chadha v. INS*, 634 F.2d 408, 432 (9th Cir. 1980).

⁹¹ Justice White's dissent in *Chadha* is perhaps best read as a complaint along these lines. See *INS v. Chadha*, 462 U.S. 919, 968-74 (1983) (White, J., dissenting) (providing a history of the legislative veto and discussing why Congress has come to rely on it).

often used the legislative veto “to balance broad delegations,” referring to the veto as an “important if not indispensable” device in the context of the modern regulatory state.⁹² The legislative veto, in Justice White’s eyes, and in the eyes of many observers,⁹³ represented a critical institution that Congress used to control the bureaucracy. A sensible prediction, therefore, is that removing the legislative veto from the congressional quiver induced Congress to rely more heavily on alternative mechanisms of control.

After *Chadha*, a number of observers wrote postmortems predicting and chronicling congressional responses to the case.⁹⁴ A representative but nonexhaustive list of mechanisms Congress supposedly considered or turned to includes:

- Including state contingencies in statutes;
- Increased use of statutory sunset provisions;
- Heavier reliance on appropriations riders;
- More frequent and probing oversight hearings;
- Reliance on report-and-wait procedures.⁹⁵

Although no study examines these possible responses empirically in any detail, we have at least compelling narratives surrounding some aspects of congressional behavior. It seems fairly clear, for instance, that *Chadha* induced Congress to revise the Reorganization Act of 1977.⁹⁶ That law provided the President with powers to reorganize administrative agencies without consulting Congress. The Act, however, also provided that such reorganizations would be subject to legislative vetoes. The year after *Chadha*, Congress revised the Act to provide that any presidential reorganization was invalid absent a joint resolution,⁹⁷ a legislative procedure that, as Professor Fisher notes, formally complied with *Chadha* but clearly left the President relatively hemmed in by Congress.⁹⁸ Such relatively clear instances of congressional response encourage a view of a more widespread pattern of congressional adaptations.

⁹² *Id.* at 971–72.

⁹³ *See, e.g.*, Eskridge & Ferejohn, *supra* note 21, at 541 (contending that the legislative veto partially restores the original balance of power between the branches of government).

⁹⁴ *See, e.g.*, Elliott H. Levitas & Stanley M. Brand, *Congressional Review of Executive and Agency Actions After Chadha: “The Son of Legislative Veto” Lives On*, 72 GEO. L.J. 801, 802–07 (1984) (providing alternatives to the legislative veto); Richard B. Smith & Guy M. Struve, *Aftershocks of the Fall of the Legislative Veto*, 69 A.B.A. J. 1258, 1258 (1983) (proposing that Congress enact statutes that would allow Congress to review executive actions).

⁹⁵ Congress codified this report-and-wait procedure in the Congressional Review Act. *See* Congressional Review Act, 5 U.S.C. §§ 801–808 (2012).

⁹⁶ *See* Reorganization Act of 1977, Pub. L. No. 95-17, 91 Stat. 29 (codified in 5 U.S.C. §§ 901–912 (2012)).

⁹⁷ *See* Reorganization Act Amendments of 1984, Pub. L. No. 98-614, § 3(a), 98 Stat. 3192, 3192 (codified in 5 U.S.C. § 906 (2012)).

⁹⁸ For an excellent account of this response to *Chadha*, *see* Fisher, *supra* note 68, at 286.

The simple recognition that the legislature may adapt to the loss of the veto drives a wedge between normative impulse and doctrinal prescription present in the standard unitary view. That is, even if, *ceteris paribus*, removing the veto consolidates executive power, clarifies lines of administrative responsibility, and enhances political accountability, we should question the premise that all else, in fact, remains equal following a judicial intervention. Following the sense of legal observers after *Chadha*, we should examine whether judicial decisions limiting one method of congressional control over the administration induces Congress to amplify other methods of congressional control. This institutional “balancing” or “equilibrating” approach to interbranch relations suggests that if the Court removes one important device of congressional control, we can expect Congress to reply by using other devices of control with increased frequency.

This perspective introduces ambiguity into our assessment of the relationship between doctrinal innovations and political accountability. After recognizing that Congress did not sit idly as the Court stripped it of the veto, we have considerable uncertainty regarding whether the loss of the veto resulted in a more or less plural executive, or tightened the line of responsibility between the executive and administrative actions. The veto, for all its faults, implicated a public dialogue between the executive and the legislature—if the legislature wished to set aside a regulation, and the executive thought he had the “better” position, by public lights, the legislature would be forced to publicly veto the regulatory measure.⁹⁹ Not all of the substitute devices of control implicate such a public dialogue. Appropriations riders, for instance, may attract comparatively little attention, even as they achieve the same objective of influencing regulatory behavior. In this way, the congressional responses to the judicial decision may, in fact, have led to more obscure lines of responsibility, with voters relatively unsure over whether the executive or the legislature authored a particular action. Moreover, the alternative devices available to the legislature may have augmented legislative control over administration.¹⁰⁰ Thus, the invalidation of devices of plural administration,

⁹⁹ For a seminal article on the information properties of veto bargaining, see Tim Groseclose & Nolan McCarty, *The Politics of Blame: Bargaining Before an Audience*, 45 AM. J. POL. SCI. 100, 102–03 (2001) (showing that veto bargaining can increase the public’s awareness of policy positions adopted by elected representatives).

¹⁰⁰ Note that this balancing theory faces a challenge of explaining why, if these alternative tools prove more effective than the veto, the legislature used the veto in the first instance. One possibility is that Missouri simply followed other states in adopting the legislative veto and institutional inertia ensued. Another possibility is that employing these other tools results in a redistribution of authority within the legislature that is unfavorable to individuals, such as House or Senate leaders, even if these alternative tools enhance the legislature’s influence over the bureaucracy. Cf. Kathleen Bawn, *Choosing Strategies to Control the Bureaucracy: Statutory Constraints, Oversight, and the Committee System*, 13 J. L. ECON. &

such as the legislative veto, plausibly attenuates the executive's political accountability for administrative actions.

However plausible this account may be, it remains unsubstantiated. Notice at the outset that observations at the federal level constitute loose evidence for the simple reason that we have no credible way to determine congressional behavior absent *Chadha*. Scholars have assembled some limited evidence at the state level, yet here too the connection between the veto and changes in legislative behavior is not explicit.¹⁰¹ Thus, although some indirect evidence supports the premise, no study to my knowledge squarely addresses the question of whether the loss of the legislative veto leads legislatures to adopt compensating behavior or the question of the relationship between this behavior, to the extent it exists, and political accountability.

C. The States as a Testing Ground

The states represent a fruitful domain in which to assess these perspectives. Variation in institutions at the state level allows us to draw inferences not possible at the federal level. We cannot credibly say what federal lawmaking activity or elections might have looked like had the Court allowed the legislative veto to stand in *Chadha*. We have no counterfactual federal government to consider, and we therefore cannot assess the consequences of the decision in a credible way. The states, on the other hand, adopted and removed the legislative veto at various times, for assorted reasons, and this variation allows us to examine the effect of the veto on political accountability. For example, heuristically, political and economic trends in Pennsylvania or New

ORG. 101 (1997) (observing that the internal organization of the legislature influences the tools used to control agencies). A third is that these alternative tools are more costly to use, discouraging their earlier use, and also more difficult to calibrate, their effect perhaps not adjusting smoothly to changes in legislative effort, resulting in perhaps transitory legislative "overcompensation." A fourth possibility is that the overcompensation follows from uncertainty over the effectiveness of the alternative tools, combined with risk aversion. Here, I simply recognize the problem and raise these possibilities, deferring resolution for later efforts.

¹⁰¹ Professor Huber and colleagues, for instance, examined statutes relating to Medicaid passed in the aftermath of the 1994 election, finding that the statutes passed by legislatures in states without legislative vetoes granted less discretion to the executive over Medicaid policy. See John D. Huber et al., *Legislatures and Statutory Control of Bureaucracy*, 45 AM. J. POL. SCI. 330, 341 (2001). However, the relationship observed in Professor Huber's study may reflect unobserved state-level characteristics. For example, states with vetoes may have less delegation due to some cultural characteristic associated with concern over executive discretion. It thus is not entirely clear whether legislatures treat statutory controls and the legislative veto as substitutes. Another recent study surveyed state legislators and found that lawmakers in states without the legislative veto express a stronger preference for using statutory controls. See Sarah J. Poggione & Christopher Reenock, *Political Insulation and Legislative Interventions: The Impact of Rule Review*, 9 ST. POL. & POL'Y Q. 456, 473-74 (2009). While informative, and certainly interesting, our interest is in legislative behavior, not stated legislative preferences.

York serve as plausible counterfactuals for New Jersey, had the state not introduced the veto by constitutional amendment in 1992.

I define the legislative “veto” in a way analogous to the device the Court invalidated in *Chadha*. The state institution for legislative review (a) must have the power to veto an administrative rule, and (b) this power must not be conditional on executive consent. Thus, in contrast to some existing studies, I exclude forms of legislative review that involve only advisory powers, or powers to “suspend” rules,¹⁰² or powers conditional in some way on the executive’s or the promulgating agency’s approval.¹⁰³ I also do not classify states that refuse to delegate any authority to state agencies, such as West Virginia, Tennessee, and Colorado, as possessing the legislative veto.¹⁰⁴ In such states, no administrative rule takes effect unless enacted by the legislature. This institutional posture, while questionable on policy grounds and perhaps contrary to the spirit of unitary theory, does not run afoul of *Chadha*.¹⁰⁵

State-level adoption of the legislative veto roughly followed the same pattern as the federal level. As state economies became more complex, state legislatures found themselves delegating ever-greater responsibilities to state executives. To check these expansive delegations, many legislatures adopted the legislative veto, beginning with Kansas in 1939,¹⁰⁶ not long after the introduction of the device at the federal level.¹⁰⁷ Since then, some twenty other states have adopted the legislative veto in one form or another.¹⁰⁸ Also mirroring events at the federal level, a number of state courts invalidated the legislative veto during the late 1970s and early 1980s, as the veto threatened to develop into a preeminent institutional device. Doctrinally, these

¹⁰² The power to suspend rules is typically limited to a short period of a few weeks; clearly, as suspension duration increases, suspension powers approach veto powers. *See, e.g.*, Kenneth D. Dean, *Legislative Veto of Administrative Rules in Missouri: A Constitutional Virus*, 57 MO. L. REV. 1157, 1182–83 (1992) (detailing how in Wisconsin, the Joint Committee for Review of Administrative Rules has the power to temporarily suspend administrative rules).

¹⁰³ *See, e.g., id.* at 1175–76 (noting how the Supreme Court of Pennsylvania found the Pennsylvania Sentencing Commission to be a legislative agency and decided that the legislature can override the Commission’s policy statements, but a concurrent resolution must be presented to the governor for approval).

¹⁰⁴ *See* JASON A. SCHWARTZ, INST. OF POLICY INTEGRITY, N.Y.U. SCHOOL OF LAW, 52 EXPERIMENTS WITH REGULATORY REVIEW: THE POLITICAL AND ECONOMIC INPUTS INTO STATE RULEMAKINGS (2010), available at http://policyintegrity.org/files/publications/52_Experiments_with_Regulatory_Review.pdf.

¹⁰⁵ Recently, some groups have advocated such a policy at the federal level. The so-called Regulations from the Executive in Need of Scrutiny (REINS) Act would require agencies to obtain affirmative approval for new rules before they become effective. *See* H.R. 10, 112th Cong. (2011).

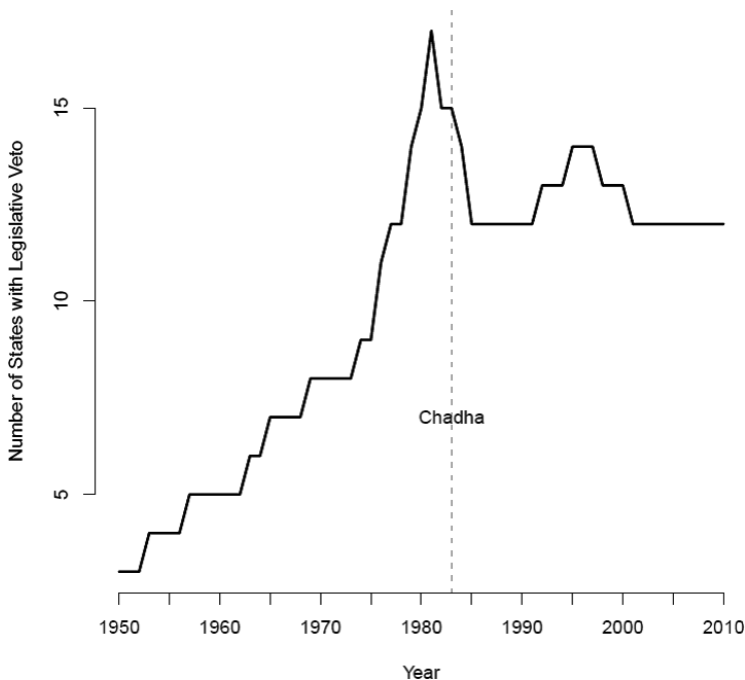
¹⁰⁶ *See* Dean *supra* note 102, at 1160 n.24.

¹⁰⁷ *See id.*

¹⁰⁸ *See infra* Part III.

state cases tend to follow the contours noted above, with challenges based either on a “usurpation” of executive powers¹⁰⁹ or on the failure of the legislature to follow the constitutionally prescribed procedures for producing legislation.¹¹⁰ However, most legislative vetoes remain in place today, and some states countered rulings of their highest courts by passing constitutional amendments.¹¹¹ Recently, New Jersey, in 1992, and North Dakota, in 1995, adopted the legislative veto.¹¹² Yet in both of these recent cases, the institutional changes reflected the constitutional concerns articulated in the 1980s cases: New Jersey, responding to a 1982 state Supreme Court case, passed a constitutional amendment to allow the veto; and North Dakota’s veto statute provides that if the veto is invalidated by the courts, the legislature instead defaults to “suspension” powers. I plot the number of states with the legislative veto in each year in Figure 1.

FIGURE 1. INCIDENCE OF THE LEGISLATIVE VETO



¹⁰⁹ See, e.g., *State ex rel. Stephan v. Kan. House of Representatives*, 687 P.2d 622, 635–36 (Kan. 1984) (noting that the veto in Kansas allows the legislature to “modify, reject or revoke any rules or regulations,” and that this is “a significant interference by the legislative branch with the executive branch and constitutes an unconstitutional usurpation of powers”).

¹¹⁰ See, e.g., *Blank v. Dep’t of Corr.*, 611 N.W.2d 530, 542 (Mich. 2000) (finding that a committee of the Michigan legislature acted in an inherently legislative matter without adhering to the enactment and presentment requirements of the Michigan Constitution).

¹¹¹ See, e.g., N.J. CONST. art. V, § 4(6) (amended 1992).

¹¹² See N.D. CENT. CODE § 28-32-03.3 (1997).

Missouri recently lost the veto in 1997.¹¹³ Missouri introduced the legislative veto in 1976,¹¹⁴ part of a wave of adoptions responding to the growth of administrative government. The state twice rejected proposed constitutional amendments aimed at shielding the veto from the evidently gathering constitutional storm, once in 1976 and again in 1982,¹¹⁵ but *Chadha*-type litigation largely passed over Missouri. In 1997, however, a group of citizens seeking to benefit from an environmental regulation stalled by the veto convinced the Missouri Supreme Court to invalidate the veto on now-familiar grounds.¹¹⁶ The legislative veto, the court held, ran afoul of both the state equivalent of Article 1, Section 7 and the separation of powers provision of the state constitution.¹¹⁷

Most of this Article focuses on Missouri's experience after its Supreme Court invalidated the legislative veto. Missouri holds interest for a simple and prosaic reason: it represents the state with a recent change to its veto regime, and we therefore have access to a great deal of information about its experiences. The fact that Missouri switched its veto regime in 1997, while other states did not, allows us to draw credible inferences about the consequences of losing the legislative veto. First, did the court's ruling compel the legislature to adopt alternative devices to control the bureaucracy? For example,

¹¹³ See Mo. Coalition for the Env't v. Joint Comm. on Admin. Rules, 948 S.W.2d 125, 136 (Mo. 1997). Michigan lost the veto more recently than Missouri. See *Blank*, 611 N.W.2d at 542. However, Michigan's geographic location, bordering Canada and Lake Michigan, makes it more difficult to find credible comparison states: only two states have land borders with Michigan (Indiana and Ohio). Two states have adopted the legislative veto since 1990: New Jersey, which passed a constitutional amendment allowing for the device in 1992, and North Dakota, which introduced the veto by statute. In particular, North Dakota changed the relevant portion of the code to provide that:

The committee on administrative rules may find a rule or portion of a rule void if the committee makes the specific finding that, with regard to that rule or portion of a rule, there is: a. An absence of statutory authority. b. An emergency relating to public health, safety, or welfare. c. A failure to comply with express legislative intent or to substantially meet the procedural requirements of this chapter for adoption of the rule. d. A conflict with state law. e. Arbitrariness and capriciousness.

N.D. CENT. CODE § 28-32-03.3(1) (1997). Thus, starting in 1995, a legislative committee held the power to void administrative rules for a wide range of reasons. Prior to this change, the legislative committee had the authority to "object" to administrative rules, the consequence of which was to shift the burden of persuasion against the agency in the event of judicial review. See N.D. CENT. CODE § 28-32-03.3 (1991).

¹¹⁴ See Dean, *supra* note 102, at 1161.

¹¹⁵ As the state court notes in *Missouri Coalition*, "Senate Joint Resolution No. 29 was defeated August 3, 1976 and House Resolution No. 36 was defeated on November 2, 1982." 948 S.W.2d at 129 n.5.

¹¹⁶ *Id.* at 136.

¹¹⁷ *Id.* at 133 ("[The statutory provision] violates constitutional principles concerning the separation of executive and legislative functions in at least two ways. It permits the legislature: 1) to unconstitutionally interfere with the functions of the executive branch; and 2) to circumvent the constitution's bill passage and presentment requirements.").

did the legislature pass more tightly written or restrictive appropriations bills? Second, what consequences did this re-equilibration, to the extent it transpired, have on the functional objectives associated with the theory of the unitary executive? I address these questions in Parts III and IV, respectively.

III

VETO LOSS AND INSTITUTIONAL RESPONSES

Did the Missouri legislature respond to the judicial decision by reasserting control through alternative avenues? An initial indication of the legislature's response is that it passed revisions to the state's Administrative Procedure Act (APA) in the same session as the decision.¹¹⁸ The revisions clarify that, notwithstanding the judicial decision, agency rules would be invalid if the promulgating agency did not submit proposed rules to the legislature's regulatory oversight committee, and that no final rule takes effect until thirty days after submitting it to the legislature.¹¹⁹ The revisions also provide, ominously, that the oversight committee "may refer comments or recommendations concerning such [final] rule to the appropriations and budget committee of the house of representatives and the appropriations committee of the senate for further action."¹²⁰

As further evidence of the legislative responses, I examine two metrics related to the drafting and funding behavior of the legislature.¹²¹ A first drafting metric relates to the "permissiveness" of delegations of rulemaking authority from the legislature to agencies. Drawing from the key words noted in Judge David S. Tatel's *American Trucking Associations* dissent, which chronicles a number of broad delegations from Congress to administrative agencies, I examine the num-

¹¹⁸ See S.B. 900, 89th Gen. Assemb., 2d Reg. Sess. (Mo. 1998). In the immediate aftermath of the judicial decision, the legislature appears to have passed a stopgap measure, H.B. 850, 89th Gen. Assemb., 1st Reg. Sess. (Mo. 1997), which delays the effective date of regulations until thirty legislative days after the promulgating agency submits the rule to the legislature's regulatory oversight committee.

¹¹⁹ Mo. S.B. 900.

¹²⁰ *Id.*

¹²¹ I also consider a third such measure: the number of defined terms in statutes. I identify such definitions using the following regular expression: '(\\word|term){0,100}mean'. Thus, I seek out language that uses either quotation marks or refers to a "word" or "term," and then quickly discusses the meaning of that word or term. The loss of the veto appears to have no influence on the legislature's use of defined terms (results available on request to author). The average number of defined terms remains fairly constant throughout the series: on average, a delegating statute (see discussion of permissive words) contained 0.96 defined terms per 1,000 words in 1990 and 1.02 defined terms per 1,000 words in 2004 (8.12 and 8.4 in raw counts per statute). One interpretation of this pattern is that, even at the start of the series, legislatures may have heavily employed defined terms, and that further increasing the use of defined terms held little value.

ber of permissive words per 1,000 words of statute.¹²² For my analysis related to this measure, I attempt to limit attention to session laws that explicitly grant rulemaking authority to administrative agencies.¹²³

A second measure builds directly off the ominous suggestion presented in the revision to the APA. In particular, I examine limiting appropriations riders, which serve to prevent, condition, or otherwise limit agencies' expenditure of funds for specified purposes.¹²⁴ At the federal level, Congress has used this approach to substantively control agency behavior in a wide range of policy areas, from education to transportation.¹²⁵ And, just as with the legislative veto, scholars have criticized the practice of including riders in appropriations bills as both an inappropriate form of lawmaking and an unwarranted interference with the executive's administrative prerogatives.¹²⁶ Some observers even argue that the practice is unconstitutional under separation of powers doctrine, much again as is the case with the legislative veto.¹²⁷

To implement these indicators of legislative response, I obtain the complete text of all session laws passed in Missouri and several comparison states between 1990 and 2004, a total of over 30,000 statutes containing, in aggregate, over 100 million words.¹²⁸ As depicted in Figure 2, I select all bordering states with legislatures that convene on an annual basis as comparison states: Iowa, Nebraska, Oklahoma,

¹²² See *Am. Trucking Ass'ns, Inc. v. EPA*, 175 F.3d 1027, 1057–62 (D.C. Cir. 1999) (Tatel, J., dissenting). There, Judge Tatel observes cases involving generous grants of rulemaking authority. In relevant part, the grants of authority tend to use the following words: “fair,” “public,” and “reasonable.” I consider these words, in addition to “may,” as indications of permissive grants of authority (note that I distinguish the term “may” from the term “may not” in this analysis).

¹²³ I do so by limiting attention to session laws that both mention an agency or administrator (“agency,” “bureau,” “board,” “commission,” “department,” “director,” “secretary,” “administrator,” “division”) and also use the word “promulgate.” Roughly 6,000 of the over 30,000 laws meet these criteria.

¹²⁴ This type of rider is distinguished from earmarks, which affirmatively reserve funds for a specified purpose. Unlike earmarks, limiting riders bear a close resemblance to vetoes in the sense that they serve to negate agency actions, programs, or policies.

¹²⁵ See generally Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456 (noting the trend of increasing appropriations riders and criticizing them as an inappropriate method of substantive lawmaking); Beermann, *supra* note 25, at 85–86 (describing several examples of appropriations riders). Recently, for example, Congress refused to fund the enforcement of a new light bulb efficiency standard, giving renewed life to less efficient incandescent bulbs. See Ed O’Keefe, *The Winners and Losers of the New Spending Bill*, WASH. POST (Jan. 14, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/01/13/the-winners-and-losers-of-the-new-spending-bill/>.

¹²⁶ See Devins, *supra* note 125, at 458.

¹²⁷ See, e.g., Archie Parnell, *Congressional Interference in Agency Enforcement: The IRS Experience*, 89 YALE L.J. 1360, 1377–83 (1980); Sandra Beth Zellmer, *Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457, 521–22 (1997).

¹²⁸ I download the session laws from various Lexis databases.

Kansas, Illinois, and Tennessee.¹²⁹ By virtue of geography and history, these states have roughly similar institutional frameworks and serve as plausible comparisons for Missouri. All of the states have reasonably professional legislatures.¹³⁰ For example, all of the legislatures provide personal staff to members, in most cases during the entire year, and at least while the legislature is in session.¹³¹

Using these textual data, I conduct a series of customized searches to determine whether each of the 30,000-plus session laws contains either (a) a permissive delegation to an agency, as above, or (b) a limiting appropriations rider.¹³² Table 1 provides summary statistics, by state, for each of these metrics, along with some other basic information about state drafting practices. To give a sense of drafting practices, the average Missouri law contains about 4,000 words, roughly on par with Illinois and Nebraska, somewhat greater than the number of words used by the Kansas and Iowa legislatures, and far greater than the number of words used by the Tennessee legislature. Relative to the other states, Missouri's legislature is an inactive lawmaker, passing roughly one-third the number of laws as Tennessee; of course, Missouri's statutes are relatively long, and so this may simply reflect different state practices in passing omnibus legislation. Now consider the two delegation metrics of interest: the use of permissive language and the use of appropriations riders. With respect to riders, Tennessee is the most zealous user, and Iowa is the most reluctant. Notice that this simple pattern suggests, but hardly establishes, the substitutability of the veto with other forms of control, as Iowa possesses the veto and Tennessee does not. With respect to permissive language, most states cluster around 6.5 permissive words per 1,000

¹²⁹ Restricting the comparisons to legislatures with annual meetings removes Arkansas and Kentucky from the analysis.

¹³⁰ The state legislatures vary widely in their "professionalism." Some legislatures meet on a part-time basis, pay their members poorly, and provide few resources for staff; other legislatures, most notably California's, approach Congress in their professionalism. See generally Peverill Squire, *Measuring State Legislative Professionalism: The Squire Index Revisited*, 7 ST. POL. & POL'Y Q. 211 (2007) (describing legislative professionalism in detail and providing a metric with scores that indicate the professionalism of certain legislatures).

¹³¹ The states with year-round support for members are Nebraska, Missouri, Illinois, and Tennessee; the states with session-only support are Iowa, Kansas, and Oklahoma. Notice that both Arkansas and Kentucky do not provide any personal staff for members, consistent with the notion that these two states have weakly professionalized legislatures, meeting only biannually. Recall that I exclude Arkansas and Kentucky from this analysis for this reason. For details on state legislative resources, see THE COUNCIL OF STATE GOV'TS, *supra* note 27, at 109 tbl.3.21.

¹³² For permissive delegations, I searched the text of each session law using the following regular expression: "reasonabl|fair|publicl|may". This set of words is motivated by the text from Judge Tatel's *American Trucking* dissent. See *supra* note 122 and accompanying text. I then normalize the number of matching strings by the number of words in the session law. For limiting appropriations riders, I employ the following regular expression: "(nolnone).\{0,15\}(fund|moneys).\{0,50\}(use|expend)".

words in the session law, though Illinois and Tennessee appear to favor somewhat greater use of permissive language.

FIGURE 2. MISSOURI AND NEIGHBORING STATES (1990–2004)



TABLE 1. SUMMARY STATISTICS: LEGISLATIVE PRACTICES (1990–2004)

	Missouri	Kansas	Illinois	Iowa	Nebraska	Tennessee	Oklahoma
Permissive Language	6.46	6.29	7.68	6.51	6.47	8.35	6.3
Limiting Riders	0.07	0.04	0.13	0.02	0.08	0.15	0.03
Defined Terms	0.46	2.68	1.24	1.16	0.03	0.93	1.2
Number of Words	3.98	3.47	4.55	2.23	4.03	0.81	3.21
Number of Session Laws	2738	3775	6828	3280	3237	8388	6442

Note: “Permissive Language” is the average number of occurrences of permissive language, normalized by the number of words in the statute, in session laws that grant rulemaking authority to agencies; “Limiting Riders” is the average number of riders in session laws that appropriate funds; “Defined Terms” is the average number of defined terms, normalized by the number of words in the statute, in session laws that grant rulemaking authority to agencies; the number of words is denominated in thousands, and represents the average over the series. Note that I do not report figures for Arkansas and Kentucky, as those states have legislatures that convene biannually.

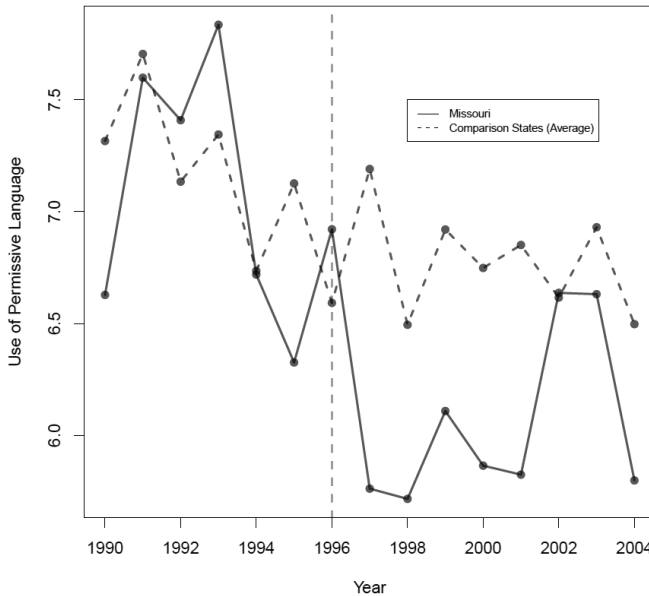
In the Appendix, I use a standard difference-in-differences design to estimate the effect of the legislative veto on Missouri legislative drafting practices.¹³³ Under this approach, we compare the difference in drafting practices in “control” states over the 1997 institutional change to the difference in drafting practices in Missouri over the 1997 institutional change. Crucially, this approach allows us to control both for time-invariant observable and unobservable state-level characteristics, such as culture, and for time trends com-

¹³³ See generally JEFFREY M. WOOLDRIDGE, *ECONOMETRIC ANALYSIS OF CROSS SECTION AND PANEL DATA* 147–51 (2d ed. 2010) (explaining the properties and assumptions related to difference-in-differences estimates).

mon to all states, such as economic or partisan cycles. One may conceive of the trends in drafting practices in the comparison states as “counterfactuals” for Missouri’s drafting practices, had the state not changed its veto device. Missouri’s deviation from this counterfactual trend represents the effect of the veto on drafting behavior.¹³⁴

Here, I focus on graphical representations of the results, which present the core aspects of the patterns. I discuss the regression results only in passing, and I refer the reader to the Appendix for details.¹³⁵ Consider first the permissiveness of the delegations passed by the legislature in the aftermath of the loss of the veto. To the extent the legislature tightens delegations after the loss of the veto, we expect to see a decrease in the use of permissive language following the *Missouri Coalition* decision, at least relative to the “comparison group” of states. Recall that these comparison states provide a sense of how the Missouri legislature might have behaved, had the state Supreme Court not invalidated the veto.

FIGURE 3. VETO LOSS AND PERMISSIVE DELEGATIONS



¹³⁴ Under this design, the critical identifying assumption is that, absent the introduction of the veto, states would have followed the same trends. I allow the reader to visually inspect the plausibility of this assumption in the figures below (Figures 3–7). For these figures, note that the trends of Missouri and the comparison states tend to roughly track each other before the court decision and only thereafter diverge.

¹³⁵ The regressions allow us to account for factors such as divided government, which may powerfully condition our separation of powers arrangements. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2315 (2006) (arguing that “the degree and kind of competition between the legislative and executive branches vary significantly, and may all but disappear, depending on whether the House, Senate, and presidency are divided or unified by political party”).

In Figure 3, I plot the average number of “permissive” words per 1,000 words of law in Missouri and the comparison states between 1990 and 2004. Thus, a value of “7” indicates that the average law passed during the relevant year contained seven permissive words per 1,000 words of statutory text. As I noted above, for this exercise, I only include session laws that explicitly involve the delegation of authority to state administrative agencies. The solid line represents the drafting behavior of the Missouri legislature; the dashed line, the corresponding behavior of the comparison states. The dashed vertical line represents the last year before the Court invalidated the veto: years at or to the left of the line reflect Missouri (and comparison state) behavior before the loss of the veto; years to the right of the vertical line reflect Missouri (and comparison state) behavior after the Missouri judicial decision.¹³⁶

The key to this figure is that, prior to the loss of the veto, Missouri’s drafting behavior approximately tracked the behavior of the comparison states. The density of permissive words in delegations increased and decreased from year to year but generally stayed around 7 permissive words per 1,000 words of law. The behavior of the comparison group did not change in a notable way in 1997 or afterward, continuing to hover around 7 permissive words per 1,000 words of law. However, for Missouri, we note a marked decline in the density of permissive words after the judicial decision. This pattern indicates that the Missouri legislature began drafting tighter statutes as a result of the loss of the legislative veto. Consistent with this figure, regression results reported in the Appendix indicate a decline of about 0.7 permissive words per 1,000 as a result of the loss of the veto; this result is statistically significant.

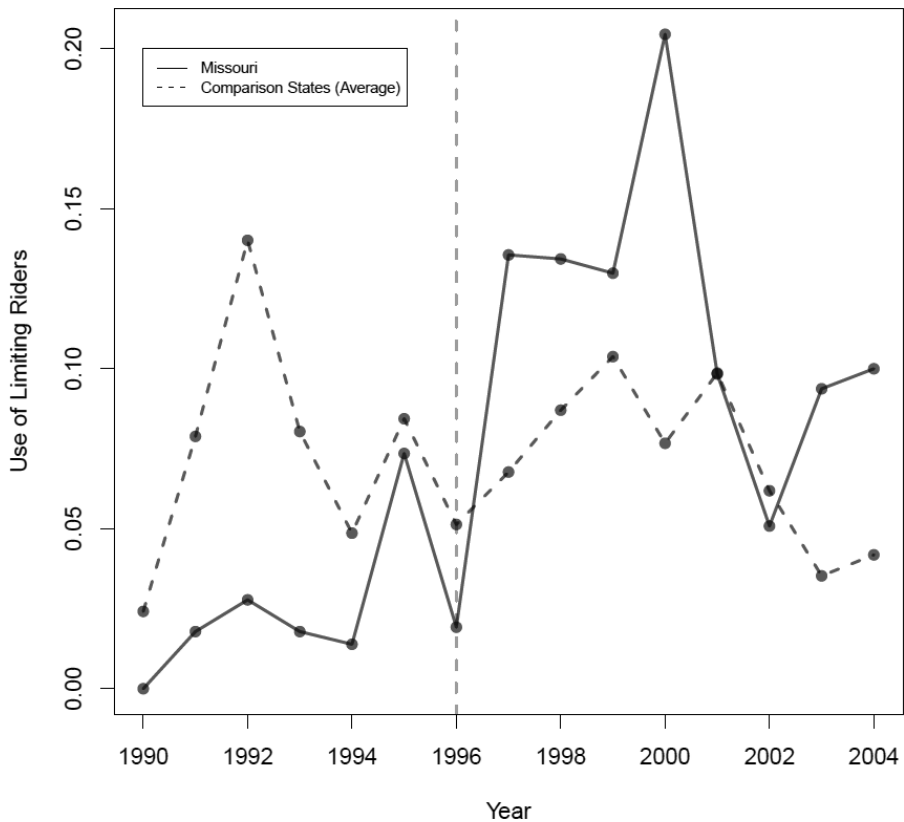
Of course, less permissive statutes simply represent a more precise exercise of legitimate legislative power and, one may argue, do not necessarily tread on executive prerogatives.¹³⁷ So consider the use of limiting riders, a form of legislative control that is similar in consequence to a legislative veto, as highlighted by the state’s revised APA. To the extent these tools behave as substitutes, we expect to see an increase in the use of riders following the loss of the veto in Missouri relative to the behavior of the comparison states. Such behavior would indicate that the Missouri legislature is simply swapping out one tool of control, the veto, for another tool that is insulated from judicial influence.

¹³⁶ Notice that the judicial decision came down in January 1997, so I include laws passed in 1997 in the post-veto regime.

¹³⁷ Much as with appropriations riders, one might imagine arguments of certain forms of specificity in legislation as being unconstitutional on separation of powers grounds, *see* Parnell, *supra* note 127, even if the argument is attenuated in this context.

I report the results related to this type of behavior in Figure 4, which follows Figure 3 in formatting exactly. Here, I examine the average number of limiting riders in statutes appropriating funds. Thus, a figure of “0.2” means that, in that year, for Missouri (or the comparison states), the average appropriations bill contained 0.2 appropriations riders. We might also examine the sum of riders in each year for Missouri and the comparison states; the pattern is similar, suggesting an increase in the total number of riders relative to comparison states in the aftermath of the veto loss.

FIGURE 4. VETO LOSS AND THE USE OF RIDERS



The key, again, to this figure is that prior to the judicial decision, Missouri and the comparison states track each other in the use of riders. Although Missouri is a less enthusiastic user of riders before the decision, the figure suggests that Missouri and the comparison states generally experience similar drafting pressures: in years when Missouri writes in more riders, so do the comparison states; the difference is that Missouri just starts from a somewhat lower level. However, immediately after the loss of the veto, the Missouri legislature increases the use of riders and, in fact, begins to use them more commonly than

the comparison states. Following the decision, we see again Missouri roughly tracking the comparison states; the difference, post-decision, is that Missouri generally starts from a higher baseline than the comparison states. The regression results reported in the Appendix support this figure, indicating that the legislature induced an increase in the use of riders on the order of 0.08 per law containing appropriations language. For example, if we have 10 bills discussing appropriations, the result indicates that the loss of the veto increased the number of riders in the collection of bills by about one.¹³⁸

Overall, then, the pattern is fairly clear. The loss of the legislative veto induced the Missouri legislature to adapt its drafting practices in a number of predictable ways. First, the state revised its APA, apparently in direct response to the judicial decision. Second, the state legislature began using less permissive language when drafting delegating statutes, suggestive of the legislature's sensitivity to the loss of the veto. Third, consistent with this pattern and with the revision of the state APA, the legislature increased the use of limiting appropriations riders. These activities, moreover, most likely represent an incomplete set of legislative responses. For example, we have no data on state legislative oversight hearings, or on more informal contacts between legislators and regulators, though it is reasonable to suppose that the legislature also amplified these tools of control. Thus, after even an incomplete accounting, it is unclear whether *Missouri Coalition* increased or decreased legislative interference in executive decision making. The court removed one instrument of plural control, but the legislature added several instruments back into the equation. Therefore, the executive may have enjoyed more *or less* legislative interference before the loss of the veto.

IV

VETO LOSS AND THE LOCUS OF ADMINISTRATIVE CONTROL AND RESPONSIBILITY

Even if the legislature responds to the loss of the veto, a unitary theorist may protest that these responses matter only at the margin—the dominant consequence of the loss of the veto, one might suppose, is the loss of the veto. As such, despite legislative responses, the invalidation of the veto succeeds both in concentrating authority in the hands of the executive and in making it “quite plain” that this is so. The functionalist constitutional objective of simplifying lines of responsibility and promoting political accountability, in other words, is

¹³⁸ The states do not identify their appropriations bills in a standard way, and so I cast a wide net in identifying session laws with provisions for appropriations: I capture any session law that mentions “appropriations.” In total, I find approximately 8,400 appropriations bills, or 560 per year, or about 80 per state per year.

accomplished even as the legislature attempts to circumvent the judicial decision.

One might counter this unitarian objection in two ways. First, one might argue that the sundry legislative responses compensated for the judicial invalidation of the veto, such that legislative control over regulatory affairs is unaffected or, perhaps, paradoxically enhanced as a result of the judicial decision. Second, one might argue that, even if the decision enhanced executive control over regulatory affairs, the public did not increasingly associate the executive with regulatory policy, perhaps due to legislative sand throwing. To the extent that either of these points prevails, the unitarian ambition of facilitating political accountability is frustrated. The main objective of this Part is to assess the merits of this parry and counter-parry.

I focus on the first counter-parry, regarding legislative control over regulatory affairs, though, as I explain below, in so doing I also gesture toward the second counter-parry. Plainly enough, no ready-made metric of “control” over regulatory policy exists. Earlier efforts of addressing which branch controls the bureaucracy, therefore, have studied whether agencies behave *as if* the Congress or the President controlled them. For example, in a seminal study, scholars examined whether the types of cases considered by the Federal Trade Commission appeared responsive to changes in the composition of congressional committees;¹³⁹ other scholars have examined, for instance, agencies’ spending patterns for evidence that they behave as if controlled by congressional or presidential interests;¹⁴⁰ still others till the Unified Agenda and rulemaking behavior of federal agencies for signs of behavior consistent with congressional or presidential control.¹⁴¹ These studies tend to exploit variation either in agency design (e.g., independent versus executive agencies) or in the composition of the political branches (e.g., the majority party in Congress).

Surprisingly, scholars have devoted little attention to empirically studying whether judicial decisions potentially alter the balance of control over the bureaucracy, the subject of this Article. Still, we might imagine applying the above approaches to the present interest in state-level judicial decisions. Or we might conjure new tests: we

¹³⁹ See Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 766, 780 (1983).

¹⁴⁰ See Christopher R. Berry et al., *The President and the Distribution of Federal Spending*, 104 AM. POL. SCI. REV. 783, 783 (2010); Christopher R. Berry & Jacob E. Gersen, *Agency Spending and Political Control of the Bureaucracy* 16–18 (2010) (unpublished manuscript), available at <http://www.kellogg.northwestern.edu/research/fordcenter/documents/Berry%20Gersen%20Aug2010.pdf>.

¹⁴¹ See Anne Joseph O’Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 895–97 (2008).

might examine, for example, campaign finance records, scrutinizing the flow of money to the governor and legislature for signs of a shift in influence following a judicial decision. The central difficulty with all of these approaches in the context of this Article is simple: we have no relevant data. For instance, the most comprehensive and widely used database of state campaign finance records contains no entries for Missouri gubernatorial elections prior to 1997.¹⁴² We thus seek a source of data that is available historically at the state level and is informative about legislative or executive control over the bureaucracy.

One source that fits this demanding bill is newspaper coverage. An important and voluminous body of scholarship that has recently emerged uses newspaper text to measure difficult-to-observe features of our political system, often motivated by questions of political accountability.¹⁴³ For instance, scholars have recently used newspaper reporting to assess the level of congressional achievement during a session;¹⁴⁴ the size of the legislative agenda;¹⁴⁵ the ideology of Supreme Court justices;¹⁴⁶ the level of public corrup-

¹⁴² The National Institute on Money in State Politics maintains a terrific database of state campaign finance record. See NAT'L INST. ON MONEY IN STATE POLITICS, <http://www.followthemoney.org> (last visited Jan. 14, 2014). However, these records only tend to start in the late 1990s. See *id.* Similarly, to my knowledge, no dataset approximating the Unified Agenda or the Federal Assistance Award Data System (FAADS) exists at the state level.

¹⁴³ For research focused on news and political accountability, see, for example, R. DOUGLAS ARNOLD, *CONGRESS, THE PRESS, AND POLITICAL ACCOUNTABILITY* 1–7 (2004) (questioning whether newspapers provide information necessary to hold public officials accountable); Riccardo Puglisi & James M. Snyder, Jr., *Newspaper Coverage of Political Scandals*, 73 J. POL. 931, 931–34 (2011) (using newspaper text to study political scandals); James M. Snyder Jr. & David Strömberg, *Press Coverage and Political Accountability*, 118 J. POL. ECON. 355, 402–03 (2010) (showing the critical link between newspaper coverage and political accountability in the context of congressional elections and behavior). For other recent research on the newspaper industry, see, for example, Matthew Gentzkow & Jesse M. Shapiro, *What Drives Media Slant? Evidence from U.S. Daily Newspapers*, 78 ECONOMETRICA 35, 36–38 (2010) (using newspaper text to estimate the “slant” of various newspapers); Daniel E. Ho & Kevin M. Quinn, *Viewpoint Diversity and Media Consolidation: An Empirical Study*, 61 STAN. L. REV. 781, 785–87 (2009) (using newspaper editorials to estimate viewpoint diversity in local media markets); Riccardo Puglisi & James M. Snyder, Jr., *The Balanced U.S. Press* 2–4 (Nat'l Bureau of Econ. Research, Working Paper No. 17263, 2009) (using newspaper endorsements of ballot propositions to estimate the location of newspapers, finding that they tend to be centrists).

¹⁴⁴ See, e.g., DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946–1990* (1991) (using articles from the *New York Times* and *Washington Post* to estimate Congress's achievements).

¹⁴⁵ See, e.g., Sarah A. Binder, *The Dynamics of Legislative Gridlock, 1947–96*, 93 AM. POL. SCI. REV. 519, 523–24 (1999) (using *New York Times* editorials to estimate the size of the national legislative agenda).

¹⁴⁶ See, e.g., Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 559–60 (1989) (using newspaper editorials to estimate the ideology of Supreme Court Justices). Cf. Edward H. Stiglitz, *Appointment Politics and the Ideological Composition of the Judiciary*, 39 LEGIS. STUD. Q. 27, 34–36 (2014) (using the *Almanac of the Federal Judiciary* to assess the ideology of judges on the U.S. Courts of Appeals).

tion;¹⁴⁷ or the quality of candidates running for office.¹⁴⁸ The challenge these scholars face is the same: they cannot directly observe their outcome of interest. Their intuition about a solution is also the same: they examine the accounts of journalists, a highly educated group that observes and records events at a very local level, to glean insights into their particular interest.¹⁴⁹ So here, I examine the accounts of state-level journalists, a group of “oddly informed” people,¹⁵⁰ for their perceptions of control over administrative agencies. Thus, instead of examining whether agencies behave as if controlled by the legislature or the executive, I examine the recorded thoughts on control over agencies of a class of professional observers. It is reasonable to suppose that if reporters view the executive as central to administration, they will write about the executive and the administration; and just the same for the legislature.

Though it is not my focus, a benefit of this approach is that it also touches upon the question of public or mass perceptions about control over the administrative state.¹⁵¹ A large literature connects media coverage with political accountability, viewing newspapers as a vehicle for informing voters of public affairs.¹⁵² Building off this robust literature,¹⁵³ others have also recognized the relevance of newspaper coverage in this sense with respect to accountability for regulatory actions

¹⁴⁷ See, e.g., Elena Costas-Pérez et al., *Corruption Scandals, Voter Information, and Accountability*, 28 EUR. J. POL. ECON. 469, 470–71 (2012) (using newspaper accounts to measure the incidence of public corruption); Abby K. Wood, *Bounty Hunting: The Limits of Financial Incentives for Reporting Corruption* 14 (Feb. 10, 2012) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1884727 (same). Cf. Richard T. Boylan & Cheryl X. Long, *Measuring Public Corruption in the American States: A Survey of State House Reporters*, 3 ST. POL. & POL'Y Q. 420, 422–29 (2003) (surveying state reporters for their perceptions of corruption in state government).

¹⁴⁸ See, e.g., Shigeo Hirano & James M. Snyder, Jr., *Primary Elections and the Quality of Elected Officials* 19–23 (Oct. 2012) (unpublished manuscript), available at <http://www.vanderbilt.edu/csdi/events/Hirano.Talk.pdf> (using newspaper editorials to measure the quality of candidates for elected office).

¹⁴⁹ WALTER LIPPMANN, *PUBLIC OPINION* 41 (1922) (“The unseen environment is reported to us chiefly by words.”).

¹⁵⁰ I thank Adam Samaha for this turn of phrase.

¹⁵¹ Of course, I do not show that ordinary citizens actually consume these accounts, much less that these accounts influence citizens’ views, in that they cut through the fog of indifference and the din of other information sources available to citizens, or that these views translate to voting behavior. For this reason, the first interpretation of news accounts—as informative of the fact of control—is the preferred interpretation for the purposes of this Article.

¹⁵² See, e.g., *supra* note 143; Jeffrey E. Cohen, *The Presidency and the Mass Media*, in *THE OXFORD HANDBOOK OF THE AMERICAN PRESIDENCY* 254, 254 (George C. Edwards III & William G. Howell eds., 2009) (reviewing the relevant literature in political science and noting that “[c]itizens use information from the news to hold government leaders accountable for their actions in office”).

¹⁵³ See, e.g., *supra* note 143.

in particular.¹⁵⁴ One set of studies examines newspaper attributions of responsibility in the context of the Deepwater Horizon- or Katrina-related administrative failures.¹⁵⁵ More relevant still to the unitary executive debates, another recent study, for example, probed the extent to which newspapers discussed Office of Information and Regulatory Affairs (OIRA) interventions into the rulemaking process, with an eye to political accountability.¹⁵⁶ Another closely related and productive line of research focuses on agency design, examining variation in newspaper coverage of the President in relation to agencies over which the President has more or less formal control.¹⁵⁷ There, the motivation is to study whether newspapers attribute presidential responsibility more in the former than in the latter, and whether these news accounts influence readers' views, generally concluding in affirmances on both questions. Together, this suggests that the media facilitates accountability by leading the public to regard the president as (more) responsible for actions he (more fully) controls. Though, to my knowledge, none of these studies considers judicial decisions or

¹⁵⁴ Of course, political accountability in this context also refers to elected actors either in Congress or the White House. An insight of the research in this paragraph is to focus on accountability for policies or outcomes created more directly by bureaucratic actors, rather than, say, economic performance generally, which cannot be easily connected with any particular regulatory action.

¹⁵⁵ See Thomas Birkland & Sarah Waterman, *Is Federalism the Reason for Policy Failure in Hurricane Katrina?*, 38 PUBLIUS: J. FEDERALISM 692, 701–05 (2008) (studying newspaper attributions of responsibility to the government for responses to Hurricane Katrina); Travis M. Johnston & Stephen N. Goggin, *Presidential Confidence in Crisis: Blame, Media, and the BP Oil Spill* 24–31 (Sept. 17, 2012) (unpublished manuscript), available at http://www.ocf.berkeley.edu/~tmjohnst/johnston_and_goggin-bp_paper.pdf (demonstrating the connection between media coverage and the attribution of blame to Obama in the context of the BP oil spill). Cf. Neil Malhotra & Alexander G. Kuo, *Attributing Blame: The Public's Response to Hurricane Katrina*, 70 J. POL. 120, 122 (2008) (using a survey experiment to study attributions of responsibility to the government for Katrina and emphasizing that “Americans across the country . . . are likely to have been exposed to news coverage of the storm”).

¹⁵⁶ Bressman & Vandenberg, *supra* note 14, at 79 (using a survey of agency officials to study the media's attribution of OIRA influence over rulemaking).

¹⁵⁷ For research examining newspaper coverage of independent and executive agencies at the federal level, see Ruder, *supra* note 16, at 2 (studying “how mass media enables political accountability over agencies,” using newspaper text to study attributions of responsibility for actions of executive and independent agencies, and finding more presidential attributions for executive agencies); Alex Ruder, *Institutional Design and the Attribution of Presidential Control: Insulating the President From Blame* 26 (unpublished manuscript), available at http://www.princeton.edu/~aruder/insulation_paper.pdf (focusing on the framing of news articles featuring executive and independent agencies, “show[ing] that news coverage generally reflects presidential power”). These independently conceived efforts thus bear on bureaucratic accountability but examine static institutional environments, studying how the media acts as a mechanism of information transmission. By comparison, my main interest is in using newspaper text as plausible indicators of elite perceptions of changing authority in response to judicial decisions.

interbranch dynamics,¹⁵⁸ all of these studies, among others,¹⁵⁹ support the plausible notion that studying newspaper coverage allows a trace on mass perceptions.

Thus, examining newspaper coverage most directly provides an indication of who controls the bureaucracy. At a foundational level, a unitary theorist posits that a unitary judicial decision produces more unitary control over executive functions, widely viewed to include regulatory actions.¹⁶⁰ The views of state-level reporters provide insight on this proposition. More indirectly, this approach provides insight into the associations between administration, the executive, and the legislature that ordinary citizens were considering over the period. In both of these senses, newspaper coverage informs the validity of the unitary and dynamic perspectives articulated above. I am able to construct a series of historical newspaper articles dating to 1990 for Illinois, Kansas, Missouri, Oklahoma, and Tennessee.¹⁶¹

Taking a cue from the literature on media information provision and political accountability, I identify the implicit perceptions of control contained in a newspaper article through a simple metric.¹⁶² For this measure, I simply examine the proportion of references to the

¹⁵⁸ I am aware of one other recent paper that examines shifts in newspaper coverage resulting from judicial decisions, but this paper focuses on abortion decisions rather than regulatory events. Daniel L. Chen et al., *Do Policies Affect Preferences? Evidence from Random Variation in Abortion Jurisprudence* (Jan. 2014) (unpublished manuscript) (on file with author).

¹⁵⁹ See *supra* notes 155–56.

¹⁶⁰ Again, recall then-Judge Kennedy's opinion in *Chadha*, regarding the legislative veto as interfering with the "central functions" of the executive branch.

¹⁶¹ In particular, I use Westlaw's state newspaper databases to recover historical articles based on the search string: "(governor legislature) & (regulation rulemaking) & (agency department bureau commission) & da(aft 1990 & bef 2005) % (clinton bush)". Note that the last term in this string is designed to filter out articles containing references to "Governor Clinton" and "Governor Bush," both of whom ran for president during the period in question. I recover a total of approximately 8,000 articles. I then drop any article in which 2/3 or more of the references to states are to states other than the state of publication; this serves to eliminate stories in state X that discuss events in state Y. Notice that not all states neighboring Missouri had newspaper archives dating to the early 1990s; the databases for Iowa and Nebraska, for instance, begin only in late 1996, and thus provide almost no insight into the coverage in these states prior to the relevant judicial decision in Missouri.

¹⁶² See, e.g., Snyder & Strömberg, *supra* note 143 (examining mentions of House representatives in newspaper text); Arnold, *supra* note 143 (same); Cohen, *supra* note 152 (same with respect to references to the president); Ruder, *supra* note 16 (same in the context of stories about independent and executive agencies); Birkland & Waterman, *supra* note 155 (examining mentions of various institutions in news reporting on Katrina). To my knowledge, others have not used such references to infer control over particular organs of government, particularly in the inter-branch balancing context considered in this Article. But on this last point, see Cohen, *supra* note 152, at 256, who examines two series, one consisting of the proportion of front-page *New York Times* stories referring to the president, and the other consisting of the corresponding proportion for Congress. His data show that congressional news stories dominate the front page (relative to presidential stories) in the second half of the nineteenth century, and that the two series essentially converge in the early 1900s.

executive among all political branch references in each article.¹⁶³ This metric, therefore, gives a raw sense of the frequency with which newspapers discuss the executive vis-à-vis the legislature.

The operative question is whether this metric increased or decreased in response to *Missouri Coalition*. Under the straightforward unitary theory, we might expect to see the simple metric increase, reflecting greater executive control over administrative actions. By contrast, under the alternative, rebalancing theory,¹⁶⁴ one might expect no change in the metric, or perhaps even a decrease, suggesting greater legislative control over administrative actions.

I again assess this question through a difference-in-differences approach, this time using the proportion of executive references as the dependent variable. Also, as in the previous Part, I focus on graphical representations of the results in the main text, and I report the corresponding regression results in the Appendix.

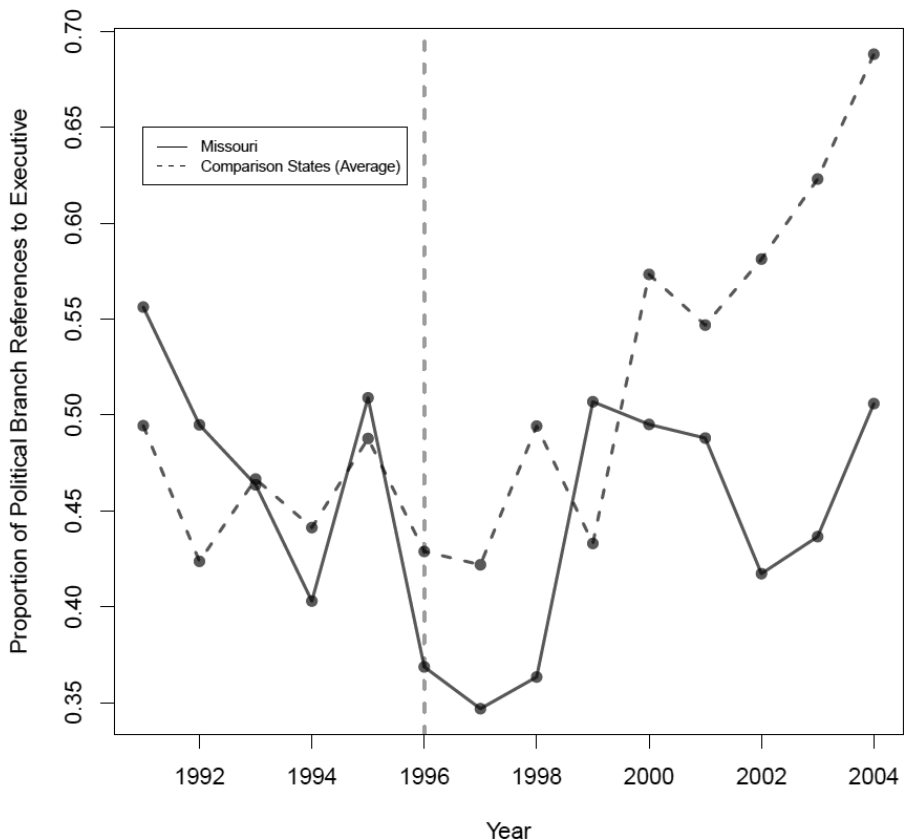
In Figure 5, I present the results related to this metric, using this Article's now familiar formatting. The figure follows, in approximate terms, the following pattern: before the loss of the veto, newspaper accounts in Missouri and neighboring states contain roughly equal proportions of references to the governor; after the loss of the veto, the proportion of references to the governor decreases in Missouri relative to the proportion in newspapers in nearby states. For instance, prior to the judicial decision, Missouri had a higher proportion of references to the executive than neighboring states in three

¹⁶³ For references to the executive, I search for "governor" or "gov.;" for references to the legislature, I search for "legislature" or "assembly." I restrict attention to such references occurring within 100 words of a reference to an administrative agency. The purpose of considering only words in the region of a reference to an agency is to focus on the language most likely to refer to agencies. For this exercise, I drop any article that does not contain at least one political branch reference in the relevant window of text (the incidence of such dropped articles is not correlated with the loss of the veto). I also conduct a simple validation exercise, tasking Amazon Mechanical Turk workers to respond to the following prompt for 400 randomly selected articles (excerpted in the same fashion as used for the metric): "The newspaper article excerpted below refers to a state government agency, such as a state Department of Education or a state Department of Agriculture. Based on the article, who do you think is most responsible for the actions of the agency: the state governor or the state legislature? or is it unclear?" The respondents then have the option of selecting "Governor", "Legislature", or "Unclear." This "most responsible" language is adapted to the state administrative context from commonly used language in related studies of the federal government. See, e.g., Brad T. Gomez & J. Matthew Wilson, *Political Sophistication and Attributions of Blame in the Wake of Hurricane Katrina*, 38 PUBLIUS: J. FEDERALISM 633 (2008); Malhotra & Kuo, *supra* note 157. The results from this exercise support the metric. The proportion of political branch references to the executive corresponds in a sensible way to the workers' judgments about the content of the article: the mean proportion increases from 0.30 for articles in which workers respond "Legislature," to 0.60 for articles in which workers respond "Unclear," to 0.84 for articles in which workers respond "Governor." The difference between each of these means is significant at any conventional level.

¹⁶⁴ See *supra* Part III.

years (1991, 1992, 1995), and the neighboring states had a higher proportion of references to the executive than Missouri in three years (1993, 1994, 1996). Following the judicial decision, Missouri had a higher proportion of such references in only one of eight years in the sample.¹⁶⁵ The corresponding regression results indicate that, on average, the loss of the veto decreased the relative prevalence of political branch references to the governor by about 0.08 units. This gap between the comparison states and Missouri indicates that the veto attenuated the connection, as implied by newspaper accounts, between executive and administrative actions. That is, had the judiciary not eliminated the veto, we might have expected newspapers' implicit perceptions of executive control to increase in the late 1990s and early 2000s, as it did in neighboring states.

FIGURE 5. IMPLICIT PERCEPTIONS OF CONTROL



We can further interrogate the data by examining newspaper articles for evidence of changes in references to the *tools* of legislative

¹⁶⁵ Given that we examine a small number of states, caution is warranted when attempting to draw inferences from any year in particular (e.g., the flip in 1999).

influence. For example, as the legislature responds to the judicial decision, do newspapers discuss matters related to appropriations more frequently? Similarly, do we see changes in the frequency of references to hearings before legislative committees? An increase in references to such tools of legislative influence substantiates a connection between changes in legislative behavior supposedly precipitated by the judicial decision and changes in the public's sense, as reported in newspapers, of responsibility for regulatory affairs. On the other hand, failing to find such a pattern would question the interpretation of the results in Figure 5.

In Figures 6 and 7, I examine the number of references to appropriations and hearings, respectively, using the same format as for the preceding figures.¹⁶⁶ In Figure 6, we see that Missouri newspapers became much more interested in discussing appropriations, relative to the comparison states, in the aftermath of the judicial decision invalidating the legislative veto. This suggests a connection between the legislature exercising its power of the purse and control over administrative agencies. Although this exercise does not focus on limiting riders, this pattern is consistent with the main findings of this Part. As administrative agencies increasingly operated in the shadow of possible riders, we might expect this change to manifest in a more general concern about appropriations and regulatory affairs. Of particular note is the fact that the apex of newspaper stories about appropriations, in the late 1990s and early 2000s, is also the apex of the legislature's use of appropriations riders.

A related series appears in Figure 7, where I focus on references to legislative oversight hearings in stories about regulatory affairs.¹⁶⁷ The formatting of the figure follows the standard approach of this Article. This series, likewise, tends to confirm our views about changes in legislative behavior leading to a shift toward perceptions of legislative control, at least relative to the course taken by neighboring states. The series, in other words, provides a plausible link between the mechanism of legislative control and the sense of administrative responsibility implicit in reporters' writing.

¹⁶⁶ Notice that this exercise follows the spirit of Bressman & Vandenberg, *supra* note 14, at 79, though obviously focused on tools of congressional influence rather than of presidential influence. As in Figure 5, I limit attention to language appearing within 100 words of a reference to an administrative agency.

¹⁶⁷ I identify such hearings using the following regular expression: '(assembly|house|senate|legislative|legislature|committee){0,200}hearings?|hearings?{0,200}(assembly|house|senate|legislative|legislature|committee)'. This regular expression seeks out a reference to the legislatures followed in short order by a reference to a hearing; or, conversely, a reference to a hearing followed in short order by a reference to the legislature.

FIGURE 6. NEWSPAPER REFERENCES TO APPROPRIATIONS

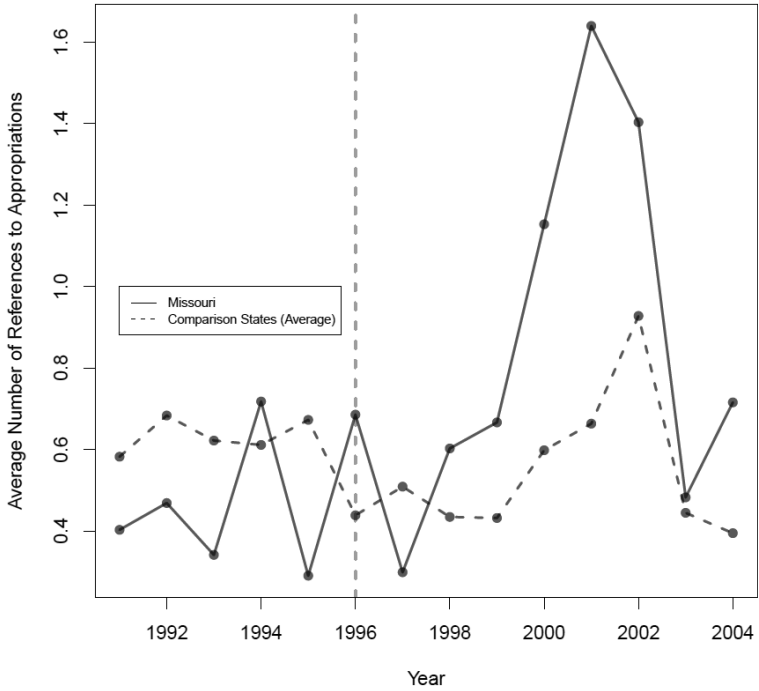
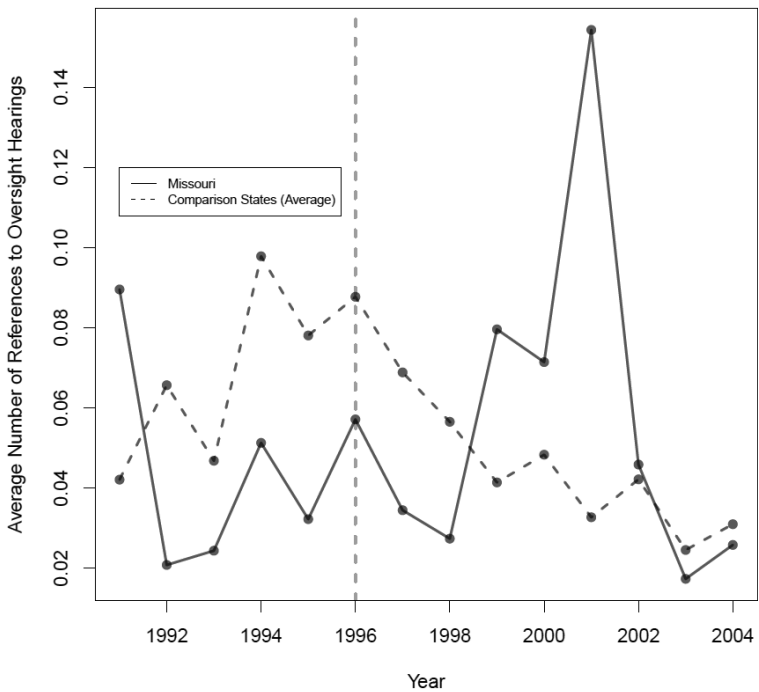


FIGURE 7. NEWSPAPER REFERENCES TO HEARINGS



What does all this add up to? The most straightforward story is the following: injured by the loss of the legislative veto, the legislature turned to alternative, constitutionally valid mechanisms of control over administrative agencies. These alternative devices, in fact, proved quite effective at controlling administrative agencies. The evidence of implicit perceptions of control from newspaper accounts, indeed, suggests that legislative control was enhanced from where it would have been had the court not invalidated the legislative veto. Moreover, the newspaper accounts provide linkages between the mechanisms of legislative control—appropriations and hearings, for example—and evidence of implicit perceptions of control.

However, it is also worth considering an alternative account, in which the legislative responses exert little control over agencies. Under this view, the newspaper accounts reflect the minutes of perhaps less-than-gimlet-eyed journalists who mechanically record events as they transpire. An increase in newspaper attributions of legislative control, therefore, simply means a more active legislature, not, in fact, a legislature with greater control over agencies. It is not possible to entirely rule out this possibility at present, at least in the context of this natural experiment; though it is important to note that much prior research supports the idea that agencies exhibit great sensitivity to both their funding levels and to legislative hearings, for example.¹⁶⁸ It is also worth noting that, even under this alternative account, the unitary objective of it being “quite plain who should be punished” remains unmet, seemingly frustrated by the legislative response and poor newspaper reporting.¹⁶⁹ The more straightforward story though is that agencies care about budgets (for example) and respond when the legislature threatens to withhold funding, leading to the consequences for political accountability set forth above.¹⁷⁰

¹⁶⁸ On appropriations, see, for example, Beermann, *supra* note 25, at 85–89 (discussing the power of the purse); Randall L. Calvert et al., *A Theory of Political Control and Agency Discretion*, 33 AM. J. POL. SCI. 588, 602 (1989) (noting that appropriations give an agency “an incentive to shade its policy choice toward the legislature’s [preferred policy] to take advantage of that inducement”); Jason A. MacDonald, *Limitation Riders and Congressional Influence over Bureaucratic Policy Decisions*, 104 AM. POL. SCI. REV. 766 (2010) (arguing that limiting riders provide leverage over agencies and providing some empirical evidence to this effect); Michael M. Ting, *The “Power of the Purse” and Its Implications for Bureaucratic Policy-Making*, 106 PUB. CHOICE 243 (2001) (studying theoretically the ability of the legislature to control agency actions through budgeting). On hearings, see, for example, Beermann, *supra* note 25, at 85–89 (discussing various purposes of hearings); J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1516 (2003) (noting that oversight committees “have enormous influence and can steer agencies away from their statutory obligations”).

¹⁶⁹ WILSON, *supra* note 1, 186–87. As indicated above, this quote is particularly noteworthy because Justice Stevens used it to motivate, in part, his concurrence in *Bowsher v. Synar*, 478 U.S. 714, 738 n.1 (1986) (Stevens, J., concurring).

¹⁷⁰ I thank Matthew Stephenson for suggesting the complication of this paragraph. On this final point, however, notice that this is also the story that most worries some propo-

V

A TENTATIVE FEDERAL ASSESSMENT

Most of this Article has focused on the states in an effort to draw more rigorous empirical inferences. Although we cannot reach as firm conclusions using data from the federal government—again, for the simple reason that we have no natural comparison government—it is of interest to cast our eyes on Congress and the President, even if our assessment remains necessarily speculative.

The modern wave of doctrinal innovations ostensibly promoting a unitary executive began in earnest in the mid-1970s.¹⁷¹ Starting with *Buckley v. Valeo* in 1976, wherein the Court invalidated a congressional scheme to appoint members to an administrative body,¹⁷² and continuing for the next decade, the Court hemmed Congress's ability to influence administrative agencies in various ways.¹⁷³ *Chadha* then followed in 1983, invalidating the legislative veto.¹⁷⁴ Shortly after, in *Bowsher v. Synar*, the Court restricted officials under the control of Congress from performing "executive" duties.¹⁷⁵ A few years later, the courts invalidated an effort by Congress to "pre-select" allowable candidates for appointment to administrative agencies.¹⁷⁶ This trend in constitutional interpretation, to a large extent, coincided with a move by the Court to loosen constraints placed on the Executive by administrative law. The landmark *Chevron* decision, which endows agencies with a great deal of discretion when interpreting statutes, came down in 1984.¹⁷⁷ Just a year later, the Court clarified that, within a wide zone, agencies had discretion not to enforce statutory provisions.¹⁷⁸

nents of a unitary executive. See Calabresi, *supra* note 5, at 51–54 (arguing that the tools of appropriations and hearings render legislative committees as "rival executives").

¹⁷¹ An earlier set of cases promoting similar values, of course, also exists. See, e.g., *Myers v. United States*, 272 U.S. 52, 163–64 (1926).

¹⁷² See 424 U.S. 1, 140 (1976).

¹⁷³ As noted above, this was not of course an entirely uniform trend. See, e.g., *Morrison v. Olson*, 487 U.S. 654 (1988) (approving an independent counsel, though appointed by a federal court and removable by the Attorney General only with good cause).

¹⁷⁴ See *INS v. Chadha*, 462 U.S. 919, 959 (1983).

¹⁷⁵ 478 U.S. 714, 733–34 (1986) (noting that although Congress determines the nature of executive duty through legislation, once "Congress makes its choice in enacting legislation, its participation ends").

¹⁷⁶ See *Hechinger v. Metro. Wash. Airports Auth.*, 36 F.3d 97, 101 (D.C. Cir. 1994) (holding that Congress may not require appointments to Board of Directors of Airport Authority be made from lists supplied by the Speaker of the House and the President pro tempore of the Senate).

¹⁷⁷ See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

¹⁷⁸ See *Heckler v. Chaney*, 470 U.S. 821, 832–33 (1985) (holding agency decisions not to initiate enforcement proceedings presumptively unreviewable).

Though the trend between the mid-1970s and the next fifteen years or so is not entirely uniform,¹⁷⁹ the general trend nevertheless exists. During this period, on both interpretative and constitutional fronts, the courts endowed the executive with assurances of independence from congressional meddling. This, at least, is the narrative that emerges from the text of these important decisions.

Yet the forgoing compels us to question whether, in response to these doctrinal affronts, members of Congress sat idly as the Court attempted to limit the scope and method of congressional control over the administrative state. On this score we cannot reach firm conclusions. It is not possible, in a general or rigorous way, to say whether, for example, Congress held more aggressive hearings as a result of the judicial decisions. For instance, during this same period of doctrinal innovation, the administrative state was growing rapidly, a fact that plausibly induced Congress to amplify the number of hearings independent of the Court's decisions.¹⁸⁰ Or the composition of interest groups lobbying for or against hearings may have changed. Such considerations confound any firm conclusions. Still, we can reach some tentative assessments.

Consider, for instance, the number of congressional hearings dealing with agency rulemakings.¹⁸¹ In the left panel of Figure 8, I plot the number of congressional hearings that discuss agency rulemaking efforts in each year between 1975 and 1990, a central period in the rise of the unitary executive doctrine, as noted by the judicial decision timeline on the bottom of the figure. Aside from the quite evident periodicity in the number of congressional hearings—the number of hearings drops by about 20% during election years¹⁸²—no dominant pattern emerges from this left panel. However, this left panel reflects raw counts of hearings and is therefore subject to the criticisms of the previous paragraph. As a simple remedy for some of these criticisms, in the right panel I normalize the

¹⁷⁹ For instance, the Court arguably tightened arbitrariness review in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

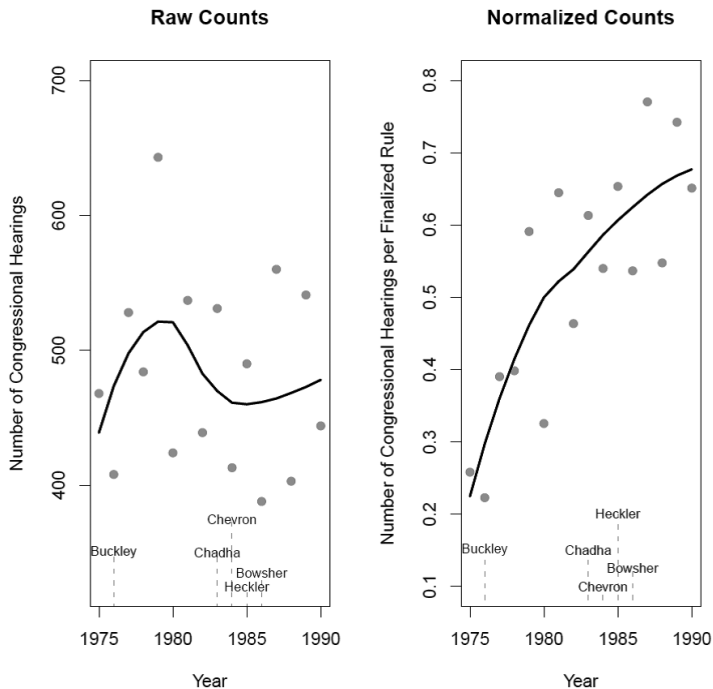
¹⁸⁰ See JOHN MARINI, *THE POLITICS OF BUDGET CONTROL: CONGRESS, THE PRESIDENCY, AND THE GROWTH OF THE ADMINISTRATIVE STATE* 11–13 (1992).

¹⁸¹ For this exercise, I consider all published hearings between 1975 and 1990 and identify any hearing that explicitly discusses “rulemaking.” The hearing publication generally includes witness statements, transcripts of questions and answers, exhibits submitted by witnesses, and correspondence submitted by interested parties. I derive the data for this exercise from ProQuest Congressional, which contains an excellent collection of historical congressional documents. Notice that I include both House and Senate hearings in this exercise.

¹⁸² Between 1975 and 1990, the average number of hearings during odd years is 537; the corresponding figure for even years is 425. The most straightforward interpretation of this decline in hearings during election years is that members spend much of the year campaigning.

number of hearings by the number of rules finalized in each year.¹⁸³ Here, we see that the number of hearings per finalized rule increases fairly steadily throughout the period considered: in 1975, Congress held about one hearing for every four finalized rules; by 1990, Congress held about three hearings for every four finalized rules.¹⁸⁴ Again, we can only regard these patterns as suggestive. All the same, the suggestion is clear: Congress responded to the judicial decisions of the period by increasing oversight on regulatory matters.

FIGURE 8. DOCTRINAL INNOVATIONS AND CONGRESSIONAL HEARINGS



We can also probe, again in a suggestive way, whether these doctrinal changes induced changes in journalists' implicit perceptions of which branch controls the bureaucracy. To consider this possibility, I

¹⁸³ I determine the number of rules finalized in each year by conducting searches on Westlaw's old Federal Register database.

¹⁸⁴ One interesting fact is that, contrary to popular lore, the number of regulations issued by federal agencies has not been steadily increasing for all time. The number of finalized rules was actually considerably higher in the early 1970s than in the 1990s. This pattern reflects the novel safety and environmental programs taking flight in the early 1970s, activity that waned as the regulatory programs matured and, arguably, judicial scrutiny "ossified" agency rulemaking. *But see* Edward H. Stiglitz, *The Reformation of Administration Law and Agency Ossification* 18–25 (Sept. 29, 2013) (unpublished manuscript) (on file with author) (finding that judicial scrutiny had a limited role in producing agency ossification).

examine approximately 5,000 *New York Times* articles published between 1980 and 1990 that discuss regulatory actions or events.¹⁸⁵ After collecting such articles, I then determine, using the simple metric of the proportion of political branch references to the executive applied in Part IV, whether the article posits executive or legislative control over the regulation. The steady stream of Supreme Court cases endowing the executive with administrative authority suggests that we should see a drift toward a discussion of the executive in news accounts. However, the fact that Congress appears to amplify its administrative controls during this same period suggests that we might see no change in implicit perceptions of control, or perhaps even a shift toward the legislature.

In Figure 9, I plot the average score between 1980 and 1990 for articles appearing in the *New York Times*. As in the context of state-based application, higher values indicate a closer connection between the executive and the regulatory action (i.e., a higher proportion of references to the executive); lower values, by contrast, suggest a closer connection between the legislature and the regulatory action (i.e., a higher proportion of references to the legislature). Based on this metric, we see no notable increase in implicit perceptions of executive control. Instead, throughout the period, the dominant theme is one of shared responsibility. After a decline in the early 1980s, the average article hovers around 0.5,¹⁸⁶ suggesting that, at least in the eyes of *New York Times* reporters, neither the President nor Congress dominated the administration during the period—these reporters made about equal reference to the President and to Congress in articles discussing regulatory affairs.

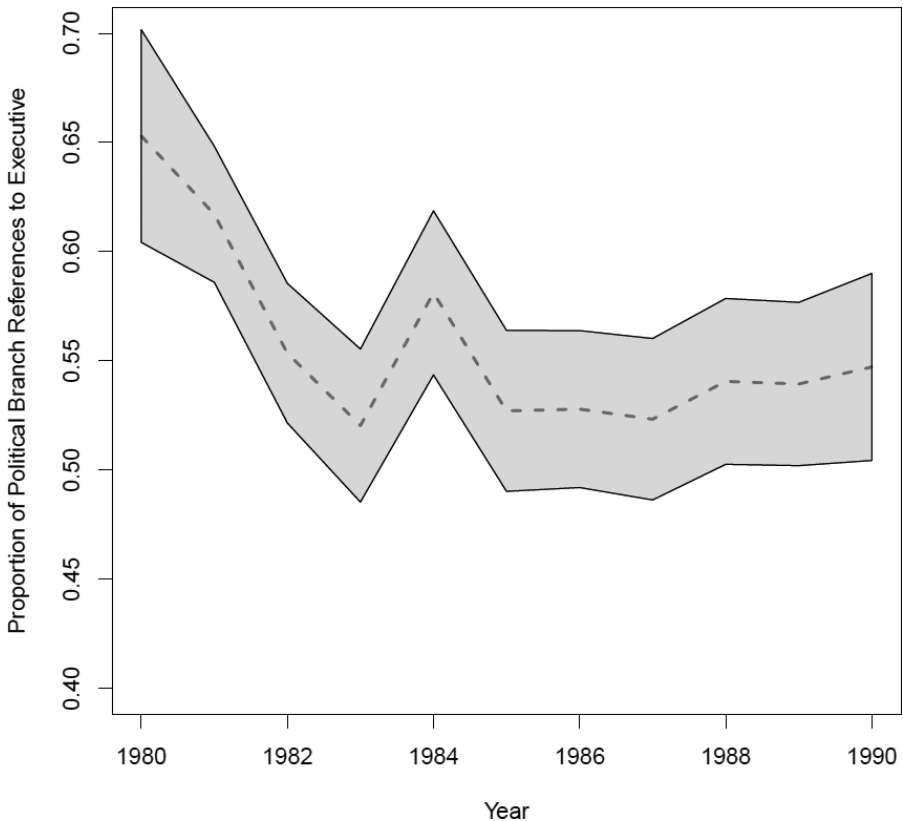
Though this exercise is only suggestive for the reasons indicated above, the results are nevertheless consistent with the perspective of this Article. Despite the wave of judicial decisions from *Chevron* to *Bowsher* endowing the Executive with greater control over the administrative state, we see little evidence of elite observers perceiving a closer connection between administrative actions and executive responsibility. This, at least, is the story that emerges from newspaper coverage. This pattern plausibly reflects the fact that Congress “rebalanced” during this same period of doctrinal innovation, amplifying congressional hearing activity. Thus, the Court may have changed congressional be-

¹⁸⁵ I search Lexis’s newspaper archives for *New York Times* articles that mention (a) the “president” or “Congress”; (b) an “agency”, “commission”, “bureau”, or “department”; and (c) a “regulation” or “rulemaking”; and that appear under the heading of the National Desk of the *Times*. This search recovers approximately 4,800 articles between 1980 and 1990. The series begins in 1980 because that is when Lexis began archiving full-text versions of *New York Times* articles; ideally, the series would begin during the 1970s.

¹⁸⁶ Notice that the shaded region around the dashed line represents the 95% confidence interval around year averages.

havior, but it is not at all clear that it ended up producing more “unitary” control over administrative functions.

FIGURE 9. *NEW YORK TIMES* IMPLICIT PERCEPTIONS OF CONTROL



IMPLICATIONS AND CONCLUSION

As one scholar observed, perhaps the most notable feature of our Constitution is its “silences”—the fact that “it says little about how those it names as necessary elements of government . . . will perform their functions, and it says almost nothing at all about [] unelected officials.”¹⁸⁷ Amidst these silences, constitutional values and principles help resolve disputes over the republic’s proper structure.

Here, I focus on the central constitutional value of political accountability. This value motivates much of the unitary executive doctrine in stripping away instruments of congressional control over the bureaucracy. Concentrating authority in the executive, runs the theory, promotes the constitutional value of political accountability.¹⁸⁸ However attractive in theory, the connection between the judicial de-

¹⁸⁷ Strauss, *supra* note 48, at 597.

¹⁸⁸ See *supra* Part II.A.

cisions promoting a unitary executive and political accountability is not as straightforward as some unitary proponents suggest. Indeed, the empirical pattern in this Article indicates that judicially imposed unitary innovations may, in fact, invite plural control of agencies, plausibly attenuating political accountability.

The idea is simple. Congress invented the legislative veto as a response to the growth of the administrative state. Even as the Court invalidated the veto, the administrative state, and Congress's fundamental unease, remained. The loss of the veto led the legislature to adopt a host of alternative controls.¹⁸⁹ These substitute forms of control plausibly interfered with executive discretion to an even greater degree than the veto itself. As a consequence, the Court's unitary innovation invited more, not less, plurality in the authorship of administrative actions, plausibly *amplifying* congressional control over agencies. A study of Missouri's experience with the judicially imposed loss of the legislative veto supports both propositions: the legislature turned to other methods of bureaucratic control, and, judged by newspaper content, the public did not end up with a bureaucracy more unambiguously dominated by the executive. In this way, the unitary innovation seemingly undermined the functionalist constitutional values it sought to promote.

Hamilton's proposition is not necessarily wrong. The difficulty, instead, is that scholars and jurists take the proposition as a complete theory rather than as just part of a theory. Given that Congress will always have tools to interfere with executive powers, the relevant functionalist question is not whether a specific institutional device, *ceteris paribus*, hampers the exercise of executive powers. The question, instead, is whether the institutional device under consideration is preferable to substitute devices that Congress is likely to take up. Sometimes we will prefer to have Congress use other devices; or perhaps we view it as unlikely that Congress will take up an alternative device. Other times, however, the substitutes prove less appealing—from a functionalist view or, if we root the formalist view in the founders' values, a formalist view—than the initial device.¹⁹⁰ This appears to be the case with the legislative veto.

¹⁸⁹ See *supra* notes 94–96 and accompanying text.

¹⁹⁰ Of course, in this sense this Article has merely raised the question rather than resolved it.

TECHNICAL APPENDIX

A. Regression Results

In this subpart of the Appendix, I explain and report regression results related to Parts III and IV of the main text. I organize this subpart of the Appendix to reflect the organization of the main text.

1. *Veto Loss and Institutional Responses*

For this section, I estimate the following difference-in-difference regression:

$$d_{st} = \alpha_s + \gamma_t + \beta veto_{st} + \varepsilon_{st}(1)$$

where d_{st} is an outcome related to drafting behavior; α_s is a state specific intercept; γ_t is a period (i.e., year) specific intercept; and $veto_{st}$ is an indicator that takes “1” if state s has the legislative veto in period t and a “0” otherwise.¹⁹¹ Notice that the state and period intercepts allow us to account for unobserved state and time characteristics, respectively. Our interest, though, is in the β coefficient, which provides the estimate of the effect of the legislative veto on drafting behavior. Recall that I consider two main legislative responses: (1) changes in the permissiveness of delegations and (2) changes in the use of limiting appropriations riders.

I report the results relating to these regressions in Table A1. The first column of the table reports the results for the permissiveness metric; the third column, the results for appropriations riders. Focus first on the permissiveness results. There, we see that the loss of the legislative veto decreased the average number of permissive words per 1,000 words in delegating statutes by about 0.69 units. In other words, relative to comparison states, Missouri passed considerably more permissive statutes prior to the loss of the veto. Recall that the average number of such permissive words per 1,000 is about 7, so the magnitude of the coefficient is substantively significant. The third column indicates that the loss of the veto induced the legislature to increase the use of appropriations riders. That is, relative to comparison states, Missouri’s legislature included fewer appropriations riders prior to the loss of the veto. The average appropriations bill contains about 0.8 riders, so again the magnitude of the coefficient is substantively significant. In both cases, the coefficient is statistically significant.¹⁹²

¹⁹¹ Data on legislative vetoes comes primarily from various editions of *The Book of the States*. I supplement and corroborate the data from *The Book of the States* using various state-level publications. For example, Dean, *supra* note 102, at 1161–66, provides an excellent history of the veto in Missouri.

¹⁹² For all models discussed in this Appendix, I report standard errors below the coefficients in parentheses. I account for within-state dependence in the data by calculating wild

As a robustness exercise, we can further include covariates in the regression to control for possible factors that might influence legislative practices. Here, I consider the following covariates: divided government, log population, log real personal income, and the unemployment rate. The second and fourth columns of Table A1 report the results for permissiveness and riders, respectively, once we include this set of political and economic covariates. The result on the legislative veto does not appear sensitive to the inclusion of these covariates.

TABLE A1. VETO LOSS AND LEGISLATIVE PRACTICES

	Permissiveness		Appropriations Riders	
	Model 1	Model 2	Model 3	Model 4
Veto	0.69 (0.05)	0.63 (0.07)	-0.08 (0.01)	-0.09 (0.01)
State FE	Y	Y	Y	Y
Year FE	Y	Y	Y	Y
Political Covariates	N	Y	N	Y
N	5910	5910	8431	8431
R-Squared	0.05	0.05	0.01	0.01

Note: Wild cluster bootstrap standard errors, with states as groups, reported in parentheses (400 pseudo samples). “Permissiveness” is number of occurrences of “reasonabl”, “fair”, “may”, or “public” per 1,000 words of statutory text; for this dependent variable, regression run on subset of session laws that both mention the promulgation of rules and an agency. See Part III for the definition of a “rider” and for my approach to detecting such provisions; for this dependent variable, regression run on the subset of session laws that discuss appropriations. Political covariates consist of: divided government indicator, log population, log personal income, and the unemployment rate.

2. *Veto Loss and the Locus of Administrative Control and Responsibility*

The specification I consider in this section is identical to the specification in the previous section. The only difference is that we consider different data: news coverage instead of legislative drafting practices. I discuss the regression results in the order presented in the main text. All results appear in Table A2.

The main results, reported in the first column, indicate that the loss of the veto shifted the proportion of executive branch references among all political branch references toward the *legislature* rather than the executive.¹⁹³ That is, the *loss* of the veto reduced the relative prevalence of references to the executive in newspapers. The relative

cluster bootstrap standard errors. See A. Colin Cameron et al., *Bootstrap-Based Improvements for Inference with Clustered Errors*, 90 REV. ECON. & STAT. 414, 417–18 (2008).

¹⁹³ For references to the executive, I consider: “governor” or “gov.”; for references to the legislature, I consider: “assembly” or “legislature”. I focus on such references within 100 words of a reference to an administrative agency.

prevalence of executive branch references, in particular, decreased by about 0.07 units as a result of the loss of the veto; this result is statistically significant. The third column indicates that the loss of the veto increased the average number of references in newspaper articles to appropriations by about 0.4 units; and the fifth column indicates that the judicial decision ended up also increasing references to oversight hearings in newspaper articles by about 0.03 units; both of these models return with statistically significant coefficients on veto loss.

As in Table A1, we can also account for the following covariates: divided government, log population, log real personal income, and the unemployment rate. The results with respect to the effect of the legislative veto do not appear sensitive to these covariates, as reported in the second, fourth, and sixth columns of the table.

TABLE A2. LEGISLATIVE VETO AND REGULATORY NEWS COVERAGE

	Raw Political					
	Branch References		Appropriations		Oversight Hearings	
	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6
Veto	0.07 (0.03)	0.08 (0.03)	-0.4 (0.03)	-0.38 (0.03)	-0.03 (0.01)	-0.03 (0.01)
State FE	Y	Y	Y	Y	Y	Y
Year FE	Y	Y	Y	Y	Y	Y
Political Covariates	N	Y	N	Y	N	Y
N	5224	5224	7568	7568	7568	7568
R-Squared	0.07	0.07	0.02	0.02	0.01	0.01

Note: Wild cluster bootstrap standard errors, with states as groups, reported in parentheses (400 pseudo samples). “Raw Political Branch References” is the number of references to the governor in the article divided by the total number of political branch references in the article (executive or legislative); “Appropriations” is the number of references to appropriations in the article; “Hearings” is the number of references to oversight hearings in the article. Political covariates consist of: divided government indicator, log population, log personal income, and the unemployment rate. The number of observations for models 1 and 2 is reduced due to the fact that not all articles feature a political branch reference within 100 words of a reference to an administrative agency.