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Resurrecting the Trinity of Legislative Constitutionalism

ABSTRACT. For generations, scholars have called on Congress to counter the Department of Justice's Office of Legal Counsel, which offers legal advice that bolsters presidential power. They argue that a "congressional Office of Legislative Counsel (OLC)" could safeguard Congress's prerogatives in the face of executive and judicial aggrandizement. Recently, these calls have prompted Congress to consider creating such a body. But participants in this conversation have assumed that nothing like a congressional OLC has ever existed on Capitol Hill.

This Article corrects the record. It provides the first analysis of five hundred opinions and memoranda showing that Congress had something like a congressional OLC for a half-century. From 1919 to 1969, the two Offices of the Legislative Counsel—one in the Senate and one in the House of Representatives—developed a system for resolving lawmakers' constitutional questions using a hierarchy of precedential opinions, nonprecedential memoranda, and briefs. When these Offices constructed constitutional meaning, they put a thumb on the scale for congressional power with a novel reasonable-doubt standard designed to vindicate Article I power. Lawyers in Congress used these opinions to construct constitutional meaning, establish drafting conventions, flesh out Congress's role in the administrative state, and build up Congress's hard and soft powers.

This Article unpacks this opinions-drafting practice and its implications for constitutional law, administrative law, the separation of powers, and legislation. Using new tools and untouched primary sources, this Article exhumes a lost vision. Three Progressives—the "Columbia Triumvirate"—built an institution that could vindicate Congress's ability to enact social legislation by bringing "harmony" to the political branches. This vision, which is best preserved in the opinions-drafting practice, helps reveal a missing link in the Progressives' vision for Congress.

The Columbia Triumvirate's actions provide an important example of institution building amid today's "congressional declinism." Like many Americans now, the Columbia Triumvirate looked at Capitol Hill with anguish. Their agenda depended on the construction of a new and implicit governing paradigm. While the opinions are important historical artifacts, their very existence is the more consequential discovery. Ultimately, this Article provides a thick history of the opinions-drafting practice to help us better understand institutional development within Congress. This Article simultaneously aims to help us rediscover the spirit of institutional innovation that gripped the Columbia Triumvirate. If today we are unsatisfied with Congress, we should imagine and build the institutions that will help our national legislature maintain its place of primacy.

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INTRODUCTION

On May 27, 1929, Senator David Reed (R-PA) strode onto the Senate floor near the pinnacle of his institutional prestige.[1] Reed, a decorated veteran of the Meuse-Argonne offensive, personified the postwar period's jingoistic patriotism.[2] Five years earlier, Reed helped codify the national zeitgeist with the 1924 Immigration Act (the Johnson-Reed Act).[3] The Act sharply limited the flow of new immigrants.[4] It fit within Reed's project, which emphasized the reification of Anglo-American political and cultural power.

Reed arrived on the floor to discuss measures that would further limit the role of immigrants in American life. Having restricted immigration to a trickle, nativists looked forward to the 1930 census as an opportunity.[5] The Senate was debating a provision that would exclude noncitizens from the census count and curb their political influence.[6] Because the law implicated the same nativist feelings that were behind the 1924 Immigration Act, all eyes fell on Reed.

Reed's first remarks that day were entirely in keeping with his reputation and legacy. He said, "I do not remember a time when I have been faced in the Senate

1. 71 CONG. REC. 1958 (1929). Senator Reed was little more than one year away from gracing the cover of *Time*. TIME, July 21, 1930, https://content.time.com/time/covers/0,16641,19300721,00.html [https://perma.cc/6JT6-7A8E]. As *Time* documented, the period was maybe the height of Reed's prestige after he took the lead in negotiating the London Naval Treaty. *The Congress: Treaty Debate: The First Week*, TIME (July 21, 1930), https://time.com/archive/6745390/the-congress-treaty-debate-first-week [https://perma.cc/Q9K3-ZLEX]; *see also* SUNDAY STAR (D.C.), Dec. 22, 1929 (carrying a picture of Reed and his colleagues on the American delegation in anticipation of the London conference). But in this period, Reed's political prestige was tied closely to the reigning political establishment. Reed was ultimately swept aside by the New Deal, which precipitated his failed reelection race in 1934 and his growing sympathies with fascism. *See* IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME 12 (2013) ("If this country ever needed a Mussolini, it needs one now." (quoting 75 CONG. REC. 9644 (1932) (statement of Sen. Reed))).

2. *See* David A. Reed, Opinion, *America of the Melting Pot Comes to an End*, N.Y. TIMES, Apr. 27, 1924, at 3, 3 (comparing the United States to a collapsing Roman Empire and calling for limits in new immigration).

3. *See* Immigration Act of 1924, ch. 190, 43 Stat. 153.

4. *See* JIA LYNN YANG, ONE MIGHTY AND IRRESISTIBLE TIDE: THE EPIC STRUGGLE OVER AMERICAN IMMIGRATION, 1924-1965, at 69 (2020) ("Quotas from the 1924 law, true to their design, severely restricted immigration.").

5. For a general review of the ways that nativism influenced the 1930 census, see David Hendricks & Amy Patterson, *The 1930 Census in Perspective*, NAT'L ARCHIVES (2002), https://www.archives.gov/publications/prologue/2002/summer/1930-census-perspective.html [https://perma.cc/YS6H-KQGW].

6. 71 CONG. REC. 1977, 2065-68, 2360, 2451-55 (1929); CONG. RSCH. SERV., R41048, CONSTITUTIONALITY OF EXCLUDING ALIENS FROM THE CENSUS FOR APPORTIONMENT AND REDISTRICTING PURPOSES 12 (2012).

with a proposition which has my more ardent support than this amendment."[7] The avatar of Senate jingoism could appreciate the provision's allure, its potential for siphoning political power away from cities and immigrant communities. "I want to vote for it," Reed said.[8] "[E]verything in my experience and outlook would lead me to vote for this amendment if that possibly could be done."[9]

But from there, Reed broke from the expected script. As much as he "wish[ed] that it [was] possible," he was "oath bound" to vote against it.[10] In his telling, excluding noncitizens from the census "would be unconstitutional" under the Fourteenth Amendment and would "jeopardize the entire measure."[11]

When the stunned Senator Henry Allen (R-KS) demanded that Reed name his authority,[12] Reed responded that he reached this conclusion after consulting an opinion prepared by the Office of the Legislative Counsel for the U.S. Senate.[13]

The measure failed after the defection of Reed, who was arguably the most successful nativist lawmaker in Congress.[14] Reed helped set a precedent that stands to this day.[15] Although courts have only rarely addressed this legislative precedent, most observers think that Congress lacks the power to exclude noncitizens from the census.[16]

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7. 71 CONG. REC. 1958 (1929) (statement of Sen. Reed).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* ("[T]he Senator will find [the authority] in a memorandum prepared by the legislative counsel of the Senate."). For the Senate Office of Legislative Counsel (OLC) opinion, see Memorandum on Power of Congress to Exclude Aliens from Enumeration for Purposes of Apportionment of Representatives from C.E. Turney, Law Assistant, Off. of the Legis. Couns., U.S. Senate (Apr. 30, 1929), *reprinted in* 71 CONG. REC. 1821-22 (1929).

14. *See* CONG. RSCH. SERV., *supra* note 6, at 13 ("Proposals to exclude aliens by statute alone failed as unconstitutional. Proposals to amend the constitutional language also failed.").

15. *See id.* (noting the subsequent failed efforts by legislators to exclude noncitizens from the census).

16. *Id.* at 10 ("[A] constitutional amendment . . . would likely be necessary in order to exclude any individuals from the census count for the purpose of apportioning House seats."). But see, for example, Justice Breyer's dissent in *Trump v. New York*, 592 U.S. 125, 146 (2020) (Breyer, J., dissenting), which addressed Reed's reliance on the Senate OLC opinion. The episode was addressed in more depth in a district-court opinion. *See* City of San Jose v. Trump, 497 F. Supp. 3d 680, 691, 725-26 (N.D. Cal. 2020).

This story confounds the literatures of legal scholars, political scientists, and historians. When the Reed episode took place, the Office of the Legislative Counsel was a fledgling drafting office.[17] What was it doing advising Reed on the constitutionality of pending legislation? And why should Reed have cared what the Office had to say? Scholars have dismissed the Office's pre-1970s influence, characterizing it as weak and inconsequential.[18] The existing literature has no answer to the influence on display in the Reed incident. And the neglected historical record shows that this was no isolated incident: this Office wielded an uncanny ability to convince lawmakers that even their own legislation had to be abandoned as unconstitutional.[19]

Several strands of scholarship are implicated. Legal scholars are newly interested in the "congressional bureaucracy," the nonpartisan offices that help Congress legislate.[20] These scholars mine the congressional bureaucracy for doctrinal insights and to model Congress's performance in the separation of powers. For example, Jesse M. Cross and Abbe R. Gluck argue that Congress built its bureaucracy to counter executive aggrandizement.[21]

Separately, scholars have spent decades lamenting the absence of any congressional equivalent to the Department of Justice's (DOJ's) Office of Legal Counsel.[22] DOJ's Office of Legal Counsel provides legal opinions that settle

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17. *See* Frederic P. Lee, *The Office of the Legislative Counsel*, 29 COLUM. L. REV. 381, 381-88 (1929) (discussing the creation of the Senate OLC).

18. *See* Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807, 812 (2014) ("[The congressional OLCs] were historically small with a narrow focus, but over the last few decades [they] have experienced a dramatic expansion that has allowed professional drafters to be involved in virtually every legislative project."); Jesse M. Cross, *The Staffer's Error Doctrine*, 56 HARV. J. ON LEGIS. 83, 91 (2019) (asserting that Congress's nonpartisan staff were "confined to clerical duties" through the New Deal); Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950*, 123 YALE. L.J. 266, 389-90 (2013) (emphasizing the lack of professional staff in Congress prior to the 1960s and 1970s).

19. *See* Don S. Warren, *Case Switches Tactics on D.C. National Vote*, EVENING STAR (D.C.), Jan. 31, 1954, at A-12, A-12 (detailing Senator Francis Case's abandonment of his own measure to provide a vote for President to District of Columbia residents after the Senate OLC declared the measure unconstitutional).

20. *See* Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541, 1543 (2020) (coining the term "congressional bureaucracy").

21. *See id.* at 1545 ("[The components of the congressional bureaucracy] share surprisingly common origins in a desire to safeguard Congress's legislative power from the executive.").

22. Scholars habitually lament the role played by the Department of Justice's (DOJ's) Office of Legal Counsel and call for a congressional equivalent on the understanding that no similar organization has ever existed. *See, e.g.*, Oona A. Hathaway, *National Security Lawyering in the Post-War Era: Can Law Constrain Power?*, 68 UCLA L. REV. 2, 83-88 (2021) (proposing the

constitutional and subconstitutional questions as they arise in the executive branch.[23] Historically, the Office of Legal Counsel has been populated by lawyers and scholars with an outsize view of presidential power, prompting scholars to complain that the Office has abetted the rise of presidentialism for almost a century.[24] The simultaneous expansion of judicial power and fears of "juristocracy" have left scholars with the impression that Congress is the only branch of government without lawyers dedicated to vindicating its own constitutional power.[25]

Scholars claim that a congressional equivalent to the Office of Legal Counsel is necessary to safeguard Congress's interests.[26] As a result, Congress is considering whether to build such a counterweight.[27] Lawmakers recently asked the Government Accountability Office (GAO) to examine the feasibility of this proposal.[28] In December 2023, GAO's report weighed Congress's options without taking any concrete stance.[29] The GAO report followed the literature in assuming that nothing like DOJ's Office of Legal Counsel has ever existed in Congress.

This Article corrects the record by providing the first analysis of five hundred opinions and memoranda showing that Congress had something like DOJ's Office of Legal Counsel for a half-century.[30] From 1919 to 1969, lawmakers

creation of a congressional OLC); Emily Berman, *Weaponizing the Office of Legal Counsel*, 63 B.C. L. Rev. 515, 562 (2021) ("Congress also could adopt internal mechanisms to better serve its long-term institutional interests. The obvious suggestion is for Congress to create a legislative equivalent of [the Office of Legal Counsel].").

23. *See About the Office*, U.S. Dep't Just., https://www.justice.gov/olc [https://perma.cc/W4PT-U5KR].

24. Berman, *supra* note 22, at 518 (introducing the view in the literature that DOJ's Office of Legal Counsel has abetted expansive presidential power).

25. *See infra* notes 653-660 and accompanying text.

26. For examples of scholars making this claim, see generally sources cited *supra* note 22.

27. William Ford, *What Might a Congressional Counterpart to the Office of Legal Counsel Look Like?*, Lawfare (May 17, 2022, 12:47 PM), https://www.lawfaremedia.org/article/what-might-congressional-counterpart-office-legal-counsel-look [https://perma.cc/JT3E-WC3J].

28. *Id.* ("During the 116th Congress, the House Select Committee on the Modernization of Congress recommended that the Government Accountability Office (GAO) study the feasibility of establishing a Congressional Office of Legal Counsel—a legislative counterpart to [the Office of Legal Counsel] that would respond to the growing body of executive branch legal opinions that undermine . . . Congress's powers.").

29. U.S. Gov't Accountability Off., GAO-24-105870, Legislative Branch: Options for Enhancing Congressional Oversight of Rulemaking and Establishing an Office of Legal Counsel, at ii (2023).

30. *See* Beau J. Baumann, *Resurrecting the Trinity of Legislative Constitutionalism: Appendix*, Yale L.J. (May 2025) [hereinafter *Appendix*], https://www.yalelawjournal.org/files/134.7.BaumannAppendix_ng2pawgy.pdf [https://perma.cc/4DNR-ELP8] (indexing all these new materials).

solicited "opinions of the Office" from the Senate Office of the Legislative Counsel (Senate OLC) and the House Office of the Legislative Counsel (House OLC).[31] These opinions constructed constitutional meaning, set drafting conventions, and helped Congress build its "hard" and "soft" powers.[32] The congressional OLCs maintained this practice in excess of their statutory mandate, which was entirely focused on statute drafting.[33]

Congressional OLC opinions provided a substantive law within Congress defined by a strong form of stare decisis.[34] An *opinion of the Office* was precedential: it bound the congressional OLCs prospectively in drafting opinions and statutes.[35] This Article discusses the force-of-law drafting convention, a way of drafting statutes that flowed from opinions.[36] This is a key example of how precedential opinions could impact the drafting of consequential legislation. The congressional OLCs wrote opinions and drafted statutes; the mutually reinforcing relationship between these two activities is a major theme in this Article.[37] This practice resembles the opinions later issued by DOJ's Office of Legal Counsel. Separately, the congressional OLCs issued *nonprecedential memoranda* that

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31. *See id.* I use these abbreviations as shorthand for convenience. I do not mean to suggest that the Offices of Legislative Counsel *of today* operate anything like Congress's answer to DOJ's Office of Legal Counsel. To the contrary, the congressional OLCs of today have shrunk from their historical role and do not offer any answer to DOJ. *See infra* Part V.

32. *See* JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 3 (2017) (introducing a taxonomy for Congress's "hard" and "soft" powers).

33. 2 U.S.C. § 275 (2018).

34. In a review of the available sources, I have found no reversals in the opinions-drafting practice's substantive outcomes. To the contrary, the opinions exhibited a strong form of stare decisis across the decades. *See infra* note 47 (citing two memos separated by two decades that asserted the same constitutional defects in pending antilynching bills); *see also* Jonathan S. Gould, *Law Within Congress*, 129 YALE L.J. 1946, 1964, 1980 (2020) (describing parliamentary precedent as "procedural" law characterized by "a strong form of stare decisis").

35. An opinion of the Office was "binding" in a soft sense. It was internally binding as a matter of drafting and carried weight with lawmakers. *Compare* Beau J. Baumann, *The Turney Memo*, 97 NOTRE DAME L. REV. REFLECTION 155, 155-56 (2022) [hereinafter *The Turney Memo*] (finding one congressional OLC memorandum expounding on a drafting convention), *with* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 493-528 (2002) (hypothesizing the same convention's existence and showing how it was deployed across the U.S. Code). In this sense, the opinions of the congressional OLCs mirror the "binding" nature of the Office of Legal Counsel in DOJ. *See* Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1456 n.31 (2010) ("[T]here is actually some uncertainty whether [the Office of Legal Counsel's] opinions are truly binding within the Executive Branch as a technical matter. But there is a longstanding practice of *treating* them as binding.").

36. *See infra* Section IV.D.

37. *See infra* Section IV.D.

resolved less consequential issues, cemented drafting conventions, and preserved institutional memory.[38] Third, the Offices issued *briefs* that did not represent the drafters' view of the law.[39] Instead, lawmakers would assign the congressional OLCs a particular viewpoint to flesh out in writing. The congressional OLCs kept these three categories separate with signals in their work product.

The congressional OLCs' system also helps us better understand the nature of legislative constitutionalism within Congress. If legislative constitutionalism were just politics by another name,[40] then this category of opinions would be pointless. Lawmakers' eager consumption of the Offices' views of the law, marketed as legal products distinct from briefs, shows that lawmakers had a genuine interest in vindicating their constitutional oaths. This point is further illustrated by this Article's empirical findings, which show that the opinions-drafting practice was especially powerful among a cadre of bipartisan lawmakers who made constitutionalism a key part of their legislative politics.[41] This is the grouping of lawmakers in both chambers who communicate to their constituents and to their colleagues with a heavy emphasis on constitutional norms and ideas.

To understand the rise of the opinions-drafting practice, this Article details the historical contingencies that made it possible,[42] including developments inside Congress (e.g., the 1910 rebellion in the House and the rise of Southern Democrats) and in the broader culture (e.g., Progressives' emergence as a

38. *See infra* Section IV.A.

39. *See infra* Section IV.A.

40. In releasing a draft of this Article, I became familiar with the view, popular in sections of the legal academy, that Congress does not *actually* take the Constitution seriously as a general matter. *See, e.g.*, Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1368 (1997) (asserting without citation that there are vanishingly few examples of Congress forgoing preferred policy for constitutional principles). Although this surprisingly widely held view has always been unsubstantiated, this Article reveals that it is little more than some constitutional-law professors' cynicism for legislative politics. *See, e.g.*, *supra* note 19 and accompanying text (describing an instance in which a constitutional opinion from the Senate OLC killed legislation by appealing to lawmakers who preferred the legislation as a matter of policy); Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L.J. 465, 472 & n.43 (2023) (discussing the legal professoriate's cynical views of legislative politics).

41. *See infra* Part III.

42. The opinions-drafting practice grew out of the push to create the congressional OLCs. *See infra* Part III. The reformers' successful sales pitch hinged on the Democratic Party's need for assistance in redesigning the nation's revenue system. *See infra* Section III.B.1. Ultimately, then, much of the story contained in this Article depended on broader economic conditions that brought the Democrats to power and incentivized them to pursue new fiscal policy. *See generally* DAVID I. MACLEOD, INFLATION DECADE, 1910-1920: AMERICANS CONFRONT THE HIGH COST OF LIVING (2024) (describing price increases starting in 1897 as the driver of much of Progressive Era policy).

distinct social class). It also discusses internal developments within the congressional OLCs that powered and then doomed the opinions-drafting practice.[43]

Though influential, the opinions-drafting practice ultimately failed to overcome the material realities of Congress.[44] The congressional OLCs depended on the support of Southern Democrats who were newly ascendant in the "Jim Crow committee system."[45] These Southerners allowed the congressional OLCs to skirt the thin specifications of the Offices' organic statute.[46] While these Southerners could cosign state-building projects, their influence required the opinions-drafting practice to declare unconstitutional bills that would have ameliorated the worst realities of the racial caste system.[47] They constructed a "southern cage" that constrained the practice's potential for decades.[48]

This lost history of the opinions-drafting practice should inform extant calls for a congressional equivalent to the Office of Legal Counsel. The history recovered in this Article shows that these reform efforts are more than a pipe dream — they are an attempt to rebuild what was lost. In a time when fears of "congressional declinism"[49] are "rampant," the story of the Columbia Triumvirate is a

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43. *See* PHILIP SELZNICK, LEADERSHIP IN ADMINISTRATION: A SOCIOLOGICAL INTERPRETATION 7 (1957) ("The relation of an organization to the *external* environment is, however, only one source of institutional experience. There is also an *internal* social world to be considered." (emphasis added)).

44. Like other kinds of bureaucracies, the congressional OLCs became dependent on a particular faction, gained stability, and then contorted themselves to avoid offending that faction. *See id.* ("[W]hen an enterprise begins to be more profoundly aware of dependence on outside forces, its very conception of itself may change . . . . As a . . . government agency develops a distinctive clientele, the enterprise gains the stability that comes with a secure source of support . . . . At the same time, it loses flexibility.").

45. Daniel Schuman, *Eras of Control of the House of Representatives*, FIRST BRANCH FORECAST (Aug. 30, 2022), https://firstbranchforecast.com/2022/08/30/eras-of-control-of-the-house-of-representatives [https://perma.cc/T2D6-ZC4M]; *see* KATZNELSON, *supra* note 1, at 15-18 (casting Southern Democrats as a critical faction in the New Deal Congresses).

46. *See* Lee, *supra* note 17, at 388 (describing the underspecified features of the congressional OLCs' organic statute).

47. *See, e.g.*, Memorandum in re Constitutionality of Dyer Anti-Lynching Bill from Charles F. Boots, Off. of the Legis. Couns., U.S. Senate, to Sen. Charles S. Deneen 9 (Apr. 2, 1928) [hereinafter Memo No. 72] (on file with Nat'l Archives, Ctr. for Legis. Archives, Rec. Grp. 46, Ops. of the Off. of the Legis. Couns. for the U.S. Senate, Memo No. 72); Memorandum on the Power of Congress to Create a Federal Crime of Lynching and to Provide a Criminal Penalty upon Persons Convicted of Such Crime 11-13 (Apr. 10, 1948) (on file with Nat'l Archives, Ctr. for Legis. Archives, Rec. Grp. 46, Ops. of the Off. of the Legis. Couns. for the U.S. Senate, Memo No. 269).

48. *See* KATZNELSON, *supra* note 1, at 16 (using the term "southern cage" to describe the ways that the Southern Democrats constrained the potentials of the New Deal).

49. *See* Baumann, *supra* note 40, at 472-73 (using the term "congressional declinism" to refer to the belief that Congress "is partisan, gridlocked, ineffective, unproductive, and in decline").

tonic.[50] These insights will be instructive as scholars think about how to reify Congress's role in our government. And as policymakers weigh the 2023 GAO report, the lessons of the Columbia Triumvirate should loom large.

Part I of this Article overcomes what is perhaps the greatest barrier to understanding the opinions-drafting practice: the legal academy has almost completely ignored the practice's architects. The congressional OLCs and the Offices' opinions-drafting practice were created by three Progressives known as the "Columbia Triumvirate."[51] These three—Joseph P. Chamberlain, Thomas I. Parkinson, and Middleton Beaman—set out to reform Congress so that it could enact "social legislation."[52] By focusing on the Columbia Triumvirate at the expense of other, more familiar figures (whether Harlan Stone or Ernst Freund in the United States, or the likes of James Bryce in the United Kingdom), this Article casts unexpected light on the Progressives' designs on Congress.

Part II examines several layers of context that help us understand the Columbia Triumvirate's world. These layers include the different political constituencies in favor of a bill-drafting bureau, a 1910 rebellion in the House of Representatives that paved the way for the Columbia Triumvirate's work, and a wave of bureaucratization that swept through Anglo-American legislatures, including the U.S. Congress.

Part III narrates the creation of the congressional OLCs and the opinions-drafting practice. In particular, it highlights the historical contingencies at play and the Columbia Triumvirate's role as savvy "policy entrepreneurs."[53] From 1910 to 1914, the Columbia Triumvirate mobilized a wide-ranging coalition to create what would become the congressional OLCs. They were directly involved in efforts to pass legislation that would have established the congressional OLCs, deploying different arguments to target key legislators.[54] Congress ultimately

50. *See* Cross & Gluck, *supra* note 20, at 1547 ("[T]he [congressional] bureaucracy offers something of an antidote to the rampant cynicism about Congress as an institution.").

51. Charles B. Nutting, *Department of Legislation: The Columbia Triumvirate*, 51 A.B.A. J. 493, 493 (1965).

52. *See id.*; *see also* WILLIAM J. NOVAK, NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE 1-2 (2022) (writing that between 1866 and 1932 "[s]ocial legislation and social welfare emerged as new objects of state and national governments").

53. *See* JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 179 (2d ed. 2003) (describing "policy entrepreneurs" as "advocates who are willing to invest their resources—time, energy, reputation, money—to promote a position in return for anticipated future gain in the form of material, purposive, or solidary benefits").

54. *See* Letter from J.P. Chamberlain to Thomas I. Parkinson (n.d.) (on file with Univ. of Wy., Am. Heritage Ctr., Thomas I. Parkinson Papers, 1900-1959, Box 3, Correspondence, Professional, 1911-1914) (discussing which lawmakers—the "Progressive Republicans"—to target when Thomas I. Parkinson and Middleton Beaman traveled to Capitol Hill in support of legislation that would create the forerunner to the congressional OLCs).

failed to enact the legislation, thwarting the Columbia Triumvirate for several years.[55] After regrouping, the Columbia Triumvirate pried open the "policy window" by recalibrating their pitches around the agenda of a newly ascendant Democratic Party.[56] This second attempt proved successful. But the triumvirs' initial failure portended problems that would later undermine the opinions-drafting practice.[57]

Part III's second-order objective is to correct the literature on the congressional bureaucracy. The existing literature tends to provide a linear story of consistencies across different Congresses.[58] The resulting narrative surrounding the congressional bureaucracy ignores its relationship to distinct constitutional politics and political economies.[59] It misses how each component of the congressional bureaucracy was designed around particular ends. The congressional OLCs, for example, were built to ensure the production of social legislation and new modes of regulation.[60] This Article pivots to politics to contextualize the congressional bureaucracy's development.[61] It describes "disjointed pluralism": institutional developments within Congress are stacked on top of one another in

55. *See infra* Part V (discussing the death of the opinions-drafting practice and the concomitant rise of the Congressional Research Service (CRS)).

56. The Columbia Triumvirate was an exceptional band of "policy entrepreneurs" in that they overcame their initial failure to reopen the policy window from 1916 to 1918. *Cf.* KINGDON, *supra* note 53, at 175-78 (explaining a model of "policy entrepreneurs" that hinges on their ability to seize the moment when the "policy window" is open).

57. *See infra* Section V.A.

58. *See* Cross & Gluck, *supra* note 20, at 1565 (describing the 1940s and 1970s as moments of progress in the development of the congressional OLCs); Shobe, *supra* note 18, at 816 (describing the 1970s in the same way); Shobe, *supra* note 18, at 820-21 ("The modernization of the Offices of the Legislative Counsel began with the Legislative Reorganization Act of 1970.").

59. *Cf.* Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1792 (2020) (pivoting away from the usage of "political economy" in economics departments, which refers to "the application of rational-choice models to governmental actors and institutions," and toward a usage that "investigates the relation of politics to the economy").

60. *See infra* Part I; *infra* Section III.B.

61. *Cf.* Ashraf Ahmed, Lev Menand & Noah A. Rosenblum, *The Making of Presidential Administration*, 137 HARV. L. REV. 2131, 2136 (2024) (offering a new history of presidential administration that moves away from a narrative of "a smooth working out of a particular notion of administrative governance" toward a narrative of contestation in the realm of "the political, intellectual, and legal").

ways that can be in tension or inconsistent.[62] In this case, a coalition came together to create the congressional OLCs and the opinions-drafting practice, only to be displaced by subsequent developments in the 1950s and 1960s.[63]

Part IV gives an overview of the opinions-drafting practice. Because the materials are too voluminous to discuss each opinion in detail, this Part focuses on some of the practice's outputs to illustrate the Article's broader themes and to illuminate the practice's inner workings. It provides a brief glimpse into the world of the congressional OLCs with new materials absent from the existing literature. Within a few years of the creation of the congressional OLCs, the Columbia Triumvirate created a powerful institution with connections across Capitol Hill, the administrative state, and even the White House. This new institution, and the personalities that drove it, laid important groundwork for the New Deal, and ultimately helped realize Franklin Delano Roosevelt's reconfiguration of the American state.[64]

Part V discusses the downfall of the opinions-drafting practice. By the end of the 1940s, the Columbia Triumvirate and its followers had achieved many of their objectives. They were followed by a younger generation of congressional bureaucrats who were in the process of abandoning the Triumvirate's vision. In the end, the opinions-drafting practice drowned in still waters. Instead of a counterrevolution, the practice was quietly snuffed out by a generation of bureaucrats who flinched at the Triumvirate's aspirations. While the existing legislation literature presents a Whiggish history of progress,[65] this Article suggests that some developments between and after the 1946 and 1970 Legislative

62. Eric Schickler, Disjointed Pluralism: Institutional Innovation and the Development of the U.S. Congress 4 (2001) ("By *pluralism*, I mean that many different coalitions promoting a wide range of collective interests drive processes of change."); *id.* ("By disjointed, I mean that the dynamics of institutional development derive from the *interactions* and *tensions* among competing coalitions promoting several different interests.").

63. *See infra* Part V (describing the downfall of the opinions-drafting practice); *see also* Schickler, *supra* note 62, at 12 ("Multiple collective interests typically shape each important change in congressional institutions." (emphasis omitted)); Schickler, *supra* note 62, at 14 ("Entrepreneurial members build support for reform by framing proposals that appeal to groups motivated by different interests." (emphasis omitted)).

64. *See, e.g.*, Richard E. Farley, Wall Street Wars: The Epic Battles with Washington That Created the Modern Financial System 112 (2015) ("Despite his less than charming disposition, Beaman was perhaps the most important unelected official in Congress during the Roosevelt years. He was religiously non-partisan and was trusted by both parties to be a fair practitioner in the drafting of legislation.").

65. For some examples of such literature, see generally sources cited *supra* note 58.

Reorganization Acts presented serious setbacks to the congressional bureaucracy's influence and functioning.[66]

The Conclusion gestures at future avenues of research with a focus on institutional developments within Congress. Because of the vast scope of the materials unearthed (including materials beyond the opinions-drafting practice), this Article sets the table for a multi-article agenda that will be published over several years. One article in this series will focus on the opinions-drafting practice's implications for our conception of legislative constitutionalism. A second article will show that the Columbia Triumvirate's techniques revolutionized Congress's statute drafting and made the statutory state possible. This second article will deal with related doctrinal questions, such as whether the congressional OLCs made textualism and purposivism possible by making Congress's statutes professional and legible. Finally, a third article will place the Columbia Triumvirate in a jurisprudential lineage that complicates our understanding of twentieth-century legal schools of thought.

Before proceeding, a caveat. I do not mean to suggest that the Columbia Triumvirate used the opinions-drafting practice to "capture" Congress and dictate outcomes.[67] Instead, the practice was an implicit governing paradigm—a

66. This Article takes no position on whether the hyperneutrality of the contemporary congressional bureaucracy is normatively justifiable in a time of hyperpartisanship. The midcentury occupants of the congressional OLCs pushed beyond the Columbia Triumvirate's nonpartisanship to embrace neutrality on questions of congressional power. In this, the congressional OLCs set a precedent for other components of the congressional bureaucracy—for example, CRS—that have been stymied by a kind of hyperneutrality that demands that congressional bureaucrats avoid answering consequential questions entirely. *See, e.g.*, Daniel Schuman, *The Balance of Powers Demands a Strong Congressional Research Service*, WASH. MONTHLY (July 24, 2024), https://washingtonmonthly.com/2024/07/24/the-balance-of-powers-demands-a-strong-congressional-research-service [https://perma.cc/49DT-PD46]. Whatever we make of this kind of hyperneutrality, one downside is that we lack any contemporary institution that is devoted to pushing an aggrandized view of congressional power.

67. This is not to say that the Columbia Triumvirate failed to benefit from the system they established. Joseph P. Chamberlain, then described as the American Association for Labor Legislation's point person for the "technical work of bill drafting," appeared before Congress to advocate in favor of the Association's new workmen's compensation bill for marine workers. Lloyd F. Pierce, The Activities of the American Association for Labor Legislation in Behalf of Social Security and Protective Labor Legislation 208-11 (May 25, 1953) (Ph.D. dissertation, University of Wisconsin), https://minds.wisconsin.edu/bitstream/handle/1793/6589/Pierce1953.pdf?sequence=1&isAllowed=y [https://perma.cc/DT2V-N7PY]. Chamberlain's appearance in Congress focused on whether the bill that became the Longshoremen's and Harbor Workers' Compensation Act of 1927 comported with a dense web of Supreme Court precedent. *Id.* After his testimony, lawmakers were uncertain as to the legality of the bill. They turned to the Senate OLC for the Office's opinion, which eventually greenlit revised legislation. *Id.* at 211-12. In a recurring pattern, a member of the Columbia Triumvirate supported legislation that was ultimately vindicated by one of the congressional OLCs populated with the Triumvirate's students.

practice that specified a means for analyzing legal questions in Congress that sustained its creators' own normative priors.[68] The opinions-drafting practice did not ensure any particular outcome in the legislative process. But that does not mean that it was neutral. It embedded the Triumvirate's worldview, norms, and priorities in the legislative process.[69] Because lawmakers, like bureaucrats, are shaped by the institutions they inhabit, institutional developments may shape official actions.[70] This means of institutional hegemony was also reinforced by the revolving doors between the Legislative Drafting Research Fund (LDRF), the congressional OLCs, agency positions, and the private sector. The Columbia Triumvirate's students headed to Capitol Hill and were greeted by a procedure that sustained their teachers' mission. This dynamic behind the opinions-drafting practice is worth studying and, perhaps, replicating.

I. THE COLUMBIA TRIUMVIRATE

This Part focuses on the forgotten architects of the opinions-drafting practice. The Columbia Triumvirate — Chamberlain, Parkinson, and Beaman — were Progressives who came together to reform Congress. This Article treats these lawyers as a unit for straightforward reasons. The group served as a drafting unit

68. *See* K. Sabeel Rahman, Structural Change and Administrative Practice 11 (Feb. 5, 2024) (unpublished manuscript) (on file with author). Rahman identifies a growing literature on the study of bureaucracies showing that "everyday practices" order the normative purposes of the state. *Id.* at 5 (quoting William Boyd, *With Regard for Persons*, 86 LAW & CONTEMP. PROBS., no. 3, 2023, at 101, 126). Even minute practices affect the world state actors inhabit and thus are key to "shaping the degree of success [in] translating political moments and new legislation into policies that embody more democratic [and] egalitarian values." *Id.* at 6. This Article shows how a particular political moment, the Progressive Era, led to the creation of a practice that structured the realities of the nascent congressional bureaucracy.

69. *Cf. id.* (describing "the micro and internal level of bureaucratic procedure, where concepts and frameworks are encoded into day-to-day practice of governance"); Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1081-82 (2013) (describing a "'small-c' approach" to the Constitution as concerned with the "web of documents, practices, institutions, norms, and traditions that structure American government").

70. *See* Rahman, *supra* note 68 (manuscript at 11); *see also* Aaron-Andrew P. Bruhl, *Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345, 392 (2003) ("For while the legislature is at bottom a collection of preference-bearing individuals . . . its simple foundation is adorned with a variety of decision-shaping structures and procedures.").

within the Progressives' "Bull Moose" Party,[71] cohered around the LDRF,[72] and helped lead the American Association of Labor Legislation (AALL).[73] In the space between these progressive bastions, the Columbia Triumvirate built a dense network of supporters and fellow travelers. The LDRF allowed them to pluck out promising legal talent and imbue them with their priors. Using the LDRF and the congressional OLCs, the Triumvirate created a class of likeminded elites whom they would inject into Congress to replicate their ideas. Privately, these men celebrated their capture of the congressional OLCs on behalf of Columbia Law School.[74]

A brief biographical section on the Columbia Triumvirate is necessary for two reasons. First, all three men have been almost entirely ignored by the legal academy. Because the Columbia Triumvirate embodied a distinctive philosophy, this Part will make what follows more legible to the reader. Second, all three men played critical roles in guiding the congressional OLCs and the opinions-drafting practice through the late 1940s. Beaman's role is obvious: as the de jure head of the House OLC and the de facto head of both chambers' offices, Beaman oversaw the drafting of opinions and the training of opinion drafters. Parkinson appears to have invented the medium of the opinions and to have pioneered the Thayer-like standard of review on which the opinions-drafting practice depended. James Bradley Thayer was a Harvard law professor who championed judicial minimalism through a clear-error standard that would require federal judges to uphold the constitutionality of all but the most evidently

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71. New archival evidence shows that the Columbia Triumvirate served as drafters for the Progressive ("Bull-Moose") Party. Letter from Samuel McCune Lindsay, Professor, Columbia Univ., to Paul Underwood Kellogg, Journalist, Survey 1 (July 17, 1913), https://digital.janeaddams.ramapo.edu/items/show/6251 [https://perma.cc/WK6Z-5W3J]. Specifically, the Columbia Triumvirate were brought aboard to draft social legislation that William Draper Lewis, then-Dean of the University of Pennsylvania Law School, would disseminate to progressive legislators before the bills were formally adopted by the Party through the Department of Social and Industrial Justice. *Id.* at 1-2.

72. *See* John M. Kernochan, *A University Service to Legislation: Columbia's Legislative Drafting Research Fund*, 16 LA. L. REV. 623, 624-38 (1956) (discussing the origins and impact of the Legislative Drafting Research Fund (LDRF)).

73. Pierce, *supra* note 67, at 9, 22-23, 31-32, 35, 343, 391. The Triumvirate became enmeshed with the American Association of Labor Legislation (AALL) after the creation of the LDRF, with Chamberlain and Parkinson together serving multiple terms as the AALL's president. *Id.* at 9.

74. *See* Letter from Goldsby, Assistant Draftsman, Off. of the Legis. Couns. for the U.S. House of Representatives, to Thomas I. Parkinson, Vice President, Equitable (Mar. 5, 1924) (on file with Univ. of Wy., Am. Heritage Ctr., Thomas I. Parkinson Papers, 1900-1959, Box 4, 1924) (reiterating Parkinson's instruction that the congressional OLCs hire graduates from Columbia Law School); *id.* (telling Parkinson that he tells Columbia students that if they want to work in Congress, they must enroll in Chamberlain's classes).

unconstitutional federal statutes.[75] Parkinson took things one step further: he advocated for and adopted a standard under which *legislators* would not vote against efficacious legislation unless the legislation was clearly unconstitutional.[76] Chamberlain held an outsize role in influencing the Offices by training the drafters himself. He imbued new generations of legal talent with the Triumvirate's constitutional politics and thereby sustained the opinions-drafting practice. Finally, all three helped maintain the group's control over the Offices with informal tools like input on appointments and by holding out the prospect of private-sector employment.

What follows is no "great man" history.[77] Instead, the discussion helps us understand a mode for thinking about Congress that, by historical necessity, is bound up with the Columbia Triumvirate's idiosyncrasies—especially their lost brand of constitutional politics. These three men are a subject for understanding institutional developments and the Progressives' designs on Congress.

A. Who Were They?

The Triumvirate formed in 1910, when Dean Harlan Stone of Columbia Law School decided to establish a group focused on statute drafting.[78] Collectively, these men were emblematic of the emergence of a new social class, an urban

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75. *See infra* Section III.B.2.

76. *See infra Section* III.B.2.

77. The "great man" theory of history was articulated by Thomas Carlyle in a series of lectures that were subsequently published in a single volume. *See generally* THOMAS CARLYLE, ON HEROES, HERO-WORSHIP, & THE HEROIC IN HISTORY (New York, Wiley & Putnam 1841) (introducing a theory of history as driven by certain archetypes of transformative figures). This view of history has been rejected by contemporary historians and scholars in other fields. *See* Bert Alan Spector, *Carlyle, Freud, and the Great Man Theory More Fully Considered*, 12 LEADERSHIP 250, 251 (2016) (collecting citations on the widespread rejection of the "great man" theory). Unlike Carlyle, this Article focuses on contingency, lost alternatives, and the material conditions that surrounded reformers. *See infra* Parts II-III. Its focus on the Columbia Triumvirate is less a celebration of their genius contributions to Congress than a skeleton key for unlocking a lost constitutional politics that makes the opinions-drafting practice more legible to contemporary audiences. The outsize role of Middleton Beaman in the back half of the Article helps accurately portray what was, at the time, a thinly staffed and hierarchical combination of offices.

78. In the 1910s, Harlan Stone defended courts that eviscerated social legislation on the grounds that the legislation was poorly drafted. JULIUS GOEBEL, JR., A HISTORY OF THE SCHOOL OF LAW: COLUMBIA UNIVERSITY 256 (1955). Accordingly, Stone consulted with George Scott, the Law Librarian of Congress, and John Bassett Moore to establish a "laboratory" that could develop a "scientific" method of drafting legislation. *Id.*

intelligentsia, that sought to reorder American governance.[79] If Progressivism is best viewed as a set of competing impulses,[80] the Columbia Triumvirate are a lost shard of anglophiles set on vindicating congressional power that have been ignored by the legal academy and other scholars of the Progressive Era.[81] This mission entailed an expansive view of Congress's constitutionally endowed authorities, including the interstate-commerce and taxation powers.[82] The Triumvirate used the LDRF to advocate for the creation of a bureau of nonpartisan statute drafters in Congress.

The Columbia Triumvirate's mission also depended on the cultivation of allies: Stone, Ernst Freund, William Draper Lewis, Samuel Williston, James Bryce,[83] Courtenay Ilbert, Noel T. Dowling, Walter Gellhorn, F. Reed Dickerson, Harry W. Jones, and Paul B. Hays, among others. Some of these fellow travelers

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79. Stephen Skowronek, Building a New American State: The Expansion of National Administrative Capacities, 1877-1920, at 42-45 (1982); *see also* Robert Harrison, Congress, Progressive Reform, and the New American State 4 (2004) (describing shifts in modes of governance).

80. *Cf.* Harrison, *supra* note 79, at 3 ("It has been many years since historians have felt able to write with confidence about the character and composition of the 'progressive movement.'").

81. A branch of the literature unpacks Progressive Era thinking and relates it to German political philosophy. *See generally* Blake Emerson, The Public's Law: Origins and Architecture of Progressive Democracy (2019) (casting Progressive Era thinking as an American adaptation of Hegelian political philosophy). The Columbia Triumvirate sat orthogonally to the philosophy described in that branch. I have found no indication that they were directly impacted by German political philosophy. The Triumvirate tended to look to Britain and Lord Thring instead of Hegel. *See, e.g.*, Memorandum in re Bibliography of Materials on Preparation of Proposed Legislation and History of Legislative Drafting from Frederic P. Lee, Off. of the Legis. Couns., U.S. Senate 1 (Jan. 1918) (on file with Nat'l Archives, Ctr. for Legis. Archives, Rec. Grp. 46, Ops. of the Off. of the Legis. Couns. for the U.S. Senate, Memo No. 1).

82. *E.g.*, Thomas I. Parkinson, *Congressional Prohibitions of Interstate Commerce*, 16 Colum. L. Rev. 367, 367 (1916) ("By far the greater number of the pending proposals for extending federal control depend for their constitutionality on the commerce clause and the taxing power.").

83. James Bryce's inclusion in this list is interesting in light of new scholarly interest in Brycian thought. *See* Noah A. Rosenblum, *A Body Without a Head: Revisiting James Bryce's* The American Commonwealth *on the Place of the President in the 19th Century Federal Government*, 2 J. Am. Const. Hist. 575, 582 (2024). As Noah A. Rosenblum notes, Bryce is a key character in the story of how English ideas from the Victorian and Progressive Eras helped influence the trajectory of American state building. *Id.* at 580-82 (citing, as examples describing nineteenth-century English influence over modern American law, Samuel Moyn & Rephael G. Stern, *To Save Democracy from Juristocracy: J.B. Thayer and Congressional Power After the Civil War*, 38 Const. Comment. 315 (2023); and Rephael G. Stern, *The Lost English Roots of Notice-and-Comment Rulemaking*, 134 Yale L.J. 1955 (2025)). In this Article, Bryce features as a character who helped sell the idea of the congressional OLCs to Congress. *See infra* Section II.C. The Columbia Triumvirate's embrace of administration, the pursuit of unity, and their openness to a presidential role in the legislative process all suggest that they were some of the most powerful adherents to Brycian thought on Capitol Hill.

helped with the political effort to establish the congressional OLCs; others were involved in either the LDRF or the opinions-drafting practice directly.[84] Understanding this coalition helps the reader see that this was an elite-managed reform effort that involved a significant number of leading twentieth-century legal academics. Although this Article is focused on the Columbia Triumvirate, the triumvirs' success depended on the support of a coterie of extremely influential legal academics.

1. Joseph P. Chamberlain

Joseph P. Chamberlain was a rich heir who helped fund the Triumvirate's activities.[85] He was born in Ohio, the son of a blue-blooded lawyer.[86] Chamberlain indulged in an international education that mirrored other Progressive Era elites like Ernst Freund and Frank Goodnow.[87] After growing up in California,

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84. Ernst Freund, William Draper Lewis, and Samuel Williston all helped foment the creation of the congressional OLCs by partnering with Parkinson on an American Bar Association committee devoted to the subject. *See infra* Section III.A.2 (discussing the committee's influence). Dowling and Dickerson both wrote through the opinions-drafting practice. *See, e.g.*, Memorandum upon Right to Jury Trial in Eminent Domain Proceedings from Noel T. Dowling, Off. of the Legis. Couns., U.S. Senate (Sept. 14, 1927) (on file with Nat'l Archives, Ctr. for Legis. Archives, Rec. Grp. 46, Ops. of the Off. of the Legis. Couns. for the U.S. Senate, Memo No. 55); Memorandum from Reed Dickerson, Assistant Couns., Off. of the Legis. Couns., U.S. House of Reps., to Rep. T. Millet Hand (May 29, 1947) (on file with Nat'l Archives, Ctr. for Legis. Archives, Rec. Grp. 46, Ops. of the Off. of the Legis. Couns. for the U.S. House of Reps., Memo No. 257). Gellhorn fell into the Columbia Triumvirate's circle of influence through Parkinson, who offered early career guidance and an introduction to teaching legislation. *See generally* Class Notes for 1934 Legislation Course at Columbia Law School (on file with Univ. of. Wy., Am. Heritage Ctr., Thomas I. Parkinson Papers, Box 3, Legislation 1934) (providing the class notes from a new, shared legislation course that was cotaught by Parkinson and Gellhorn).

85. Thomas I. Parkinson's son and biographer described Chamberlain bluntly: "academically oriented and rich." THOMAS I. PARKINSON II, TIP BY A SON 20 (Privately Printed, 1984) (on file with author).

86. GOEBEL, *supra* note 78, at 284. Chamberlain's father was an 1860 graduate of Yale University who served in the Civil War, moved west, practiced law, and served as mayor of Santa Barbara. OBITUARY RECORD OF GRADUATES OF YALE COLLEGE DECEASED DURING THE ACADEMICAL YEAR ENDING IN JUNE, 1881, at 523-24 (New Haven, Press Tuttle, Morkhouse & Taylor 1881); CATALOGUE OF THE OFFICERS AND STUDENTS OF YALE COLLEGE, WITH A STATEMENT OF THE COURSE OF INSTRUCTION IN THE VARIOUS DEPARTMENTS, 1860-61, at 12 (New Haven, E. Hayes, 1860).

87. *See* Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration*, 122 COLUM. L. REV. 1, 22 (2022) (discussing Frank Goodnow's education in Paris and Berlin); *see also* Oren Tamir, *Our Parochial Administrative Law*, 97 S. CAL. L. REV. 801, 815-25 (2024) (describing an era of administrative-law comparativism when scholars traveled internationally and drew on foreign law and institutions).

Chamberlain studied at Harvard University (1893-1894), the University of California (1894-1896), the University of Paris (1896-1897), and "at the universities of Berlin and Leipzig for one term each."[88]

Chamberlain's travels gave him a willingness to engage in transatlantic borrowing.[89] He was the triumvir with the greatest expertise in international law. He helped draft an early version of the Kellogg-Briand Pact[90] and was an expert in immigration law.[91] The globe-trotting Chamberlain eventually obtained an LL.B. from Hastings College of Law in 1898.[92] He briefly practiced law in San Francisco (1902-1905) before becoming a lecturer at the University of California School of Jurisprudence.[93]

Chamberlain was the triumvir most preoccupied with incorporating the insights of political science into the law. He anticipated our contemporary emphasis on "congressional insiders" by focusing on the minutiae of legislative politics and procedure.[94] Chamberlain hoped that judges, lawyers, and administrators could benefit from understanding the realities of the legislative process. This predisposition gave him a well of knowledge when he was advocating for reforms to Congress.

Chamberlain bankrolled the creation of the LDRF.[95] He eventually became a tenured professor at Columbia Law School and in Columbia's political-science faculty.[96] Chamberlain sat *primus inter pares* in the Columbia Triumvirate. Parkinson, in particular, drew on Chamberlain's leadership as if he were a father

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88. GOEBEL, *supra* note 78, at 284.

89. *See generally* DANIEL T. RODGERS, ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE (1998) (providing a history of Progressives' transatlanticism and framing this history as an exception to longer-running themes of American exceptionalism).

90. GOEBEL, *supra* note 78, at 285.

91. *Cf.* Reuben Oppenheimer, *Recent Developments in the Deportation Process*, 36 MICH. L. REV. 355, 381 (1938) (documenting Chamberlain's role in the production of the 1933 Report of the Ellis Island Committee).

92. GOEBEL, *supra* note 78, at 284-85.

93. *Id.*

94. For two prominent examples, see generally Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013), which reports findings from a survey of congressional staffers—termed "congressional insiders"—about the legislative-drafting process and relating these results to contemporary debates in statutory interpretation; and Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193 (2017), which evaluates "the implications of the process-based turn in statutory interpretation" exemplified by Gluck & Bressman, *supra*.

95. GOEBEL, *supra* note 78, at 285.

96. *Id.*

figure.[97] These close personal bonds kept the Columbia Triumvirate cohesive through the 1950s, which helped the triumvirs maintain a joint stake in the congressional OLCs.[98] Because of Chamberlain's influence, Parkinson and Beaman both seemed eager to accept Chamberlain's emphasis on legislative politics and procedure, a preoccupation that set the Columbia Triumvirate apart from other schools of American legal thought.[99]

2. *Thomas I. Parkinson*

Thomas I. Parkinson was an upwardly mobile wunderkind with a knack for ingratiating himself with politicians, reformers, and deep-pocketed businesspeople like John D. Rockefeller.[100] Parkinson got his start in reform politics in New York City's Bureau of Municipal Research (BMR).[101] As the BMR's counsel, Parkinson soaked up the Bureau's constitutional politics. The BMR wanted to reorient policymaking around executives,[102] and it published a massive report on the government of New York, which "became the foundation for the recommendations of New York Governor Al Smith's Reconstruction Commission."[103]

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97. *See* PARKINSON, *supra* note 85, at 16-17 (listing Chamberlain as one of four men who influenced the trajectory of Parkinson's career).

98. Long after Chamberlain's star had faded in the American legal academy, Parkinson went out of his way to endow the Joseph P. Chamberlain Memorial Fund at Columbia Law School as a monument to his friend and colleague. *See* Letter from Thomas I. Parkinson, President, Equitable Life Assurance Soc'y, to Dr. Grayson Kirk, President, Columbia Univ. (n.d.) (on file with Univ. of. Wy., Am. Heritage Ctr., Thomas I. Parkinson Papers, Box 7, 1913-1953).

99. Chamberlain wrote an entire book focused on legislative politics and procedure. *See* JOSEPH P. CHAMBERLAIN, LEGISLATIVE PROCESSES: NATIONAL AND STATE (1936). His mastery of these subjects stands in sharp contrast with other schools of thought, including the Legal Process School. *See* VICTORIA NOURSE, MISREADING LAW, MISREADING DEMOCRACY 3 (2016) (critiquing the Legal Process School's lack of focus on legislative procedure). By the standards of the contemporary legal academy, the Columbia Triumvirate were much more interested in studying the institutions of American democracy. *Cf. id.* at 1 ("One of the 'dirty little secrets' of legal education today is that it teaches so little about so much – democracy."). *But see supra* note 94 (citing pieces that discuss the contemporary countermovement of scholars focused on Congress's internal workings).

100. According to a privately printed family biography, Parkinson grew up on a small farm outside of Philadelphia. PARKINSON, *supra* note 85, at 13-14. He started studying law at the University of Pennsylvania when he was seventeen, skipping undergraduate studies entirely. *Id.* at 16-18.

101. PARKINSON, *supra* note 83, at 19.

102. *See* Noah A. Rosenblum, Presidential Administration: An Intellectual and Legal History, 1888-1938, at 179 (2023) (Ph.D. dissertation, Columbia University), https://academiccommons.columbia.edu/doi/10.7916/hyxp-8580/download [https://perma.cc/YYH5-M42L].

103. *Id.* at 180.

Parkinson studied the ordinances that effectively regulated power in New York and drafted a new administrative code in 1907.[104] Gradually, he helped draft laws and ordinances across the nation that furthered progressive reform efforts. Parkinson arrived at Columbia after gaining a reputation for clear drafting.[105] Because of his time focused on city government, Parkinson was the triumvir with expertise in federalism and local government.

Parkinson also had vast administrative-law knowledge stemming from his wartime experiences. During World War I, he was special counsel to the Bureau of War Risk Insurance (which was absorbed into the precursor agency to the Department of Veterans Affairs).[106] In that capacity, he drafted and implemented the War Risk Insurance Act of 1917.[107] As a result, Parkinson was one of the first academics to study systematically judicial review of agency actions.[108]

One other biographical note is important. While Parkinson was climbing the steps of the academy and advocating social reforms, he was simultaneously becoming one of the country's most significant insurance executives. Parkinson led the Equitable Life Assurance Society (ELAS) from 1927 to 1953.[109] From this perch, Parkinson developed deep connections to some of the largest companies in America. He also became a leader in the Democratic Party and a leading commenter on New Deal monetary policy.[110] To understand Parkinson's dimensions, we must imagine a high-profile businessman, not unlike today's Jamie Dimon,

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104. *See generally* Memorandum from Thomas I. Parkinson, Gen. Couns. to the Bureau of Mun. Rsch., to Frederick A. Cleveland, Tech. Dir. of the Bureau of Mun. Rsch. (Aug. 7, 1908) (on file with Univ. of. Wy., Am. Heritage Ctr., Thomas I. Parkinson Papers, 1900-1959, Box 3, Bureau of Municipal Research) (detailing the technicalities behind the New York City charter dealing with city warrants).

105. *See generally* PARKINSON, *supra* note 85 (explaining Parkinson's work at the Bureau of Municipal Research in redrafting city charters in New York, St. Louis, and across the country).

106. *See generally* Memorandum from Thomas I. Parkinson to Frederick A. Cleveland, *supra* note 104 (noting this fact).

107. PARKINSON, *supra* note 85, at 27.

108. *See generally* Personal Notes on Judicial Review (on file with Univ. of. Wy., Am. Heritage Ctr., Thomas I. Parkinson Papers, 1900-1959, Box 1, Administrative Law) (collecting Parkinson's copious notes on the judicial review of agency actions during the war).

109. *Thomas I. Parkinson Is Dead; Ex-Head of Equitable Life, 77*, N.Y. TIMES, June 18, 1959, at 31, 31.

110. Parkinson's business success made him a much-pursued expert on monetary and fiscal policy. *See, e.g.*, George A. Mooney, *Parkinson's Feud with Banks Grows*, N.Y. TIMES, Oct. 10, 1948, at F1, F1 (detailing Parkinson's speeches that assailed extant practices in the banking industry before the Chamber of Commerce of New York and the Economic Club).

who just happened to double as one of the most talented statute drafters of his generation.[111]

ELAS became a revolving door for the congressional OLCs' drafters—a way for them to cash in after serving Congress and collect a reward for following the Columbia Triumvirate's direction.[112] Parkinson's business life is also important because it helps us understand the Columbia Triumvirate's outlook. Parkinson's notes evince an appreciation for the collective nature of modern risk that predisposed him and his colleagues toward social legislation and administrative apparatuses.[113] In his notes, Parkinson speculated about the relationship between modern regulation and insurance, writing that "[i]nsurance is a good supplement of regulation wherever it tends toward prevention."[114] Insurance could keep harms from coming to working people, for example, by providing incentives for employers who bore the costs from maintaining hazardous working conditions. The efficacy of this insurance supplement to regulation depended, Parkinson wrote, on "its effectiveness to secure redress of the private wrong."[115] Parkinson had expertise with statutes, regulation, and insurance. This gave him an intuition that these were all different modes of structuring society to lessen social harms.

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111. Jamie Dimon is an American banker who has been the chief executive officer of JPMorgan Chase from 2006 through the publication of this Article. *Jamie Dimon*, BRITANNICA MONEY, https://www.britannica.com/money/Jamie-Dimon [https://perma.cc/PH6Z-W6UW]. Dimon has exercised a level of political influence since the 2008 financial crisis that is a throwback to Parkinson's era, before the New Deal displaced prominent businessmen as fiscal and monetary experts in favor of academically trained economists. *See* Matt Egan, *JPMorgan Chase CEO Jamie Dimon Hints at Future in Politics*, CNN (May 31, 2023), https://www.cnn.com/2023/05/31/economy/jamie-dimon-politics/index.html [https://perma.cc/Q7PX-UXKV] ("Jamie Dimon is arguably the most powerful person in corporate America. Dimon has built a banking empire at JPMorgan Chase and his advice is sought by presidents, prime ministers and central bankers."); ZACHARY D. CARTER, THE PRICE OF PEACE: MONEY, DEMOCRACY, AND THE LIFE OF JOHN MAYNARD KEYNES 286-95 (2020) (discussing the New Deal's legitimization of academic economists at the expense of business magnates).

112. *See infra* Section IV.A (describing the milieu of the congressional OLCs).

113. This way of thinking was related to a revolution in how lawyers thought about collective risk. *See generally* JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW (2004) (describing the revolution in American law occasioned by industrial accidents and insurance).

114. Personal Notes (n.d.) (on file with Univ. of. Wy., Am. Heritage Ctr., Thomas I. Parkinson Papers, 1900-1959, Box 4, 1908-1925); *see also id.* ("As an aid to this regulation there stands usually a liability to the individual wronged or injured the possibility of which tends to make the individual regulated respect the regulation. How far this general liability supplements the regulation depends on its effectiveness to secure redress of the private wrong.").

115. *Id.*

3. Middleton Beaman

> "Middleton Beaman is a difficult man to describe. I had thought I knew something of legislative draftsmanship until I met him."
>
> —James M. Landis[116]

The third triumvir was Middleton Beaman. Beaman has a strong claim to being the most consequential statute drafter in American history. He drafted the 1916 Shipping Act,[117] the Transportation Act of 1920,[118] the provisions providing for the estate tax in the Revenue Act of 1916,[119] the Packers and Stockyards Act of 1921,[120] the World War Adjusted Compensation Act of 1924,[121] all revenue legislation between 1917 and 1948,[122] the Securities Act of 1933,[123] the Social Security Act of 1935 (he may have coined the term "social security"),[124] the Federal

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116. James M. Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29, 37 (1959).

117. OFF. OF THE LEGIS. COUNS., U.S. SENATE, A HISTORY OF THE OFFICE OF THE LEGISLATIVE COUNSEL OF THE UNITED STATES SENATE (1919-1994), at 3-4 (1994) [hereinafter SENATE OLC ANNIVERSARY HISTORY]; *Legislative, Executive, and Judicial Appropriation Bill, 1921: Hearing Before Subcomm. of the H. Comm. on Appropriations, Part I*, 66th Cong. 5 (1920) [hereinafter *1921 Appropriations Hearing*] (statement of Middleton Beaman, Draftsman, House Branch) (claiming that "the first work [he] ever did" in Congress was the drafting of the "Shipping Board Act").

118. *1921 Appropriations Hearing*, *supra* note 117, at 5 (statement of Middleton Beaman, Draftsman, House Branch).

119. George K. Yin, *Textualism, the Authoritativeness of Congressional Committee Reports, and Stanley Surrey*, 86 LAW & CONTEMP. PROBS., no. 2, 2023, at 107, 112-13 (describing Beaman's early work in Congress as including the Revenue Act of 1916 and two complicated 1917 tax bills that added "a complicated new excess profits tax").

120. *Legislative Establishment Appropriation Bill, 1923: Hearings Before Subcomm. of the H. Comm. on Appropriations*, 67th Cong. 54 (1922) [hereinafter *1923 Appropriations Hearing*] (statement of Middleton Beaman, Draftsman, House Branch).

121. *Legislative Establishment Appropriation Bill, 1926: Hearings Before Subcomm. of the H. Comm. on Appropriations*, 68th Cong. 25 (1925) [hereinafter *1926 Appropriations Hearing*] (statement of Middleton Beaman, Legislative Counsel (House Office)); *id.* at 24 ("[W]e cooperated with a committee in the Treasury Department in drafting the revenue bill. We worked on that all summer.").

122. Jasper L. Cummings, Jr. & Alan J.J. Swirski, *Interview: Ward M. Hussey*, 32 ABA SECTION TAX'N NEWSQUARTERLY, no. 3, 2013, at 4, 5.

123. *See* ROBERT A. CARO, THE YEARS OF LYNDON JOHNSON: THE PATH TO POWER 322 (1981) (describing the chain of events that led Sam Rayburn to install Beaman to head up a redraft of the 1933 Securities Act); Cummings & Swirski, *supra* note 122, at 5.

124. Wilbur J. Cohen, *The Development of the Social Security Act of 1935: Reflections Some Fifty Years Later*, 69 MINN. L. REV. 379, 386-87 (1983).

Food, Drug, and Cosmetic Act of 1938,[125] the Lend-Lease Act of 1941,[126] and the Philippine Rehabilitation Act of 1946.[127] Beaman also worked on major legislation like the Volstead Act[128] and the Fordney-McCumber Tariff of 1922.[129] He trained the lead drafters of much of the New Deal legislation.[130]

Despite all this, Beaman remains a cipher. Scholars searching for information on him have largely been limited to a brief description on the House Budget Counsel's website: "[Beaman] was described as a tense, caustic, redheaded Yankee, and as a Vermont schoolmarm."[131] This line led Professor Jesse M. Cross to marvel: "This insane sentence is roughly 80% of the public information about [Beaman]. Just incredible."[132]

Beaman's legacy of constitutional consultation is an even bigger mystery. Despite this hole in the literature, it was casually reported after the New Deal that it was "normal procedure" for Beaman to resolve lawmakers' constitutional questions.[133]

We do know the basic outlines of Beaman's life. He was born on September 25, 1877, in Vermont.[134] His father, George Beaman, was a rear admiral in the U.S. Navy.[135] Middleton Beaman graduated from Harvard College in 1899 and

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125. *See, e.g.*, David F. Cavers, *The Food, Drug, and Cosmetic Act of 1938: Its Legislative History and Its Substantive Provisions*, 6 LAW & CONTEMP. PROBS. 2, 22 (1939) (indicating that Beaman and Allan Perley spent two years reworking an original draft of the Act).

126. WARREN F. KIMBALL, THE MOST UNSORDID ACT: LEND-LEASE, 1939-1941, at 135-37 (1969).

127. 92 CONG. REC. 2773 (1946) (statement of Rep. John Dingell).

128. *1921 Appropriations Hearing*, *supra* note 117, at 5 (statement of Middleton Beaman, Draftsman, House Branch).

129. *See 1926 Appropriations Hearing*, *supra* note 121, at 25 (statement of Middleton Beaman, Legislative Counsel (House Office)) (specifying that he worked out the administrative, legal, and technical components of the bill without "assum[ing] responsibility for all of it").

130. *See, e.g.*, *Creation of a System of Federal Home Loan Banks, 1932: Hearing on S. 2959 Before the Subcomm. of the Comm. on Banking and Currency, Part 1*, 72d Cong. 13 (1932) (statement of John O'Brien, Assistant Legislative Counsel) (revealing that Beaman's protégé John O'Brien drafted the Federal Home Loan Bank Act); *see also* 87 CONG. REC. 1373 (1941) (listing O'Brien as the head of Beaman's assistants).

131. *House Office of the Legislative Counsel: Middleton Goldsmith Beaman*, BUDGET COUNS. REFERENCE, https://budgetcounsel.com/%C2%A7051-office-of-legislative-counsel-house/%C2%A7051-01-holc-middleton-beaman [https://perma.cc/Y36U-LHP8].

132. Jesse Cross (@JesseMCross), TWITTER (Feb. 25, 2022, 10:59 PM), https://twitter.com/JesseMCross/status/1497420977512325123 [https://perma.cc/38FG-QAA6].

133. *See, e.g.*, Ernest E. Johnson, *Unofficial Answer Is That Meeting Results "Good,"* JACKSON ADVOCATE, Dec. 16, 1944, at 1, 1.

134. *House Office of Legislative Counsel: Middleton Goldsmith Beaman*, *supra* note 131.

135. *Id.*

from Harvard Law School in 1902.[136] His Harvard transcript reveals that he was one of James Bradley Thayer's final students—a fact that may have later influenced his thinking.[137] After graduating from law school, Beaman left for Washington, D.C.

Beaman was a new kind of D.C. resident. In the 1900s and 1910s, young, progressive elites with connections to the federal government populated the city.[138] D.C. funneled these young elites into new institutions centered on nonpartisan expertise. Beaman was professionalized at Herbert Putnam's Library of Congress.[139] Putnam was a Progressive who wanted the Library to model the potential of the new era. As the Library of Congress's sixth Law Librarian, Beaman produced a new index of the revised *Statutes at Large*,[140] which gave him the pedigree he needed to join the LDRF in 1910.[141]

B. What Did They Want?

> "There is undoubtedly need in this country for the lawyer who has a constructive imagination and is willing to apply it to the betterment of projects of social reform. . . . Especially is this true in these days of distrust of the courts; *surely no one so well as a lawyer can know how to tie their hands*."
>
> —Thomas I. Parkinson[142]

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136. *Id.*

137. Harvard Law School Transcript for Middleton Goldsmith Beaman at 2 (on file with Harv. Univ. Archives & Rec. Mgmt.).

138. *See* BEVERLY GAGE, G-MAN: J. EDGAR HOOVER AND THE MAKING OF THE AMERICAN CENTURY 38-48 (2022) (describing the Progressive Era in Washington).

139. *See id.* at 40-42 (describing Putnam's role in reforming the Library of Congress and the influence of the Library on J. Edgar Hoover).

140. *See generally* Middleton G. Beaman & A.K. McNamara, *Index Analysis of the Federal Statutes (General and Permanent Laws) 1789-1873 [1873-1907]* (1911) (providing a detailed index and analysis of all the general and permanent laws enacted by the U.S. Congress from 1789 to 1907).

141. *See* S. REP. NO. 62-1271, at 120 (1913) [hereinafter ROOT REPORT] (statement of Middleton Beaman) ("I was for over five years serving [Congress] in the law library . . . during the greater part of that time having in charge the preparation of the index to the Statutes at Large; I may say, probably, that I am one of the few men in this country who has read all the legislation of Congress. In the work of indexing we read every line.").

142. Parkinson Draft Speech 8, 10 (n.d.) (on file with Univ. of Wy., Am. Heritage Ctr., Thomas I. Parkinson Papers, 1900-1959, Box 1, Statutes 3) (emphasis added). Beaman paraphrased these words in the *Law Library Journal*. Middleton Beaman, *Bill Drafting*, 7 LAW LIBR. J. 64, 69 (1914) ("[W]hen it comes to choosing words to convey an idea and so to convey it that it

The Columbia Triumvirate started imagining the congressional OLCs after they founded the LDRF. Like many Progressives, they accepted the primacy of Congress.[143] To reify that primacy, the Triumvirate worked out a series of interlocking goals. They had five objectives: (1) to institute better statute drafting; (2) to vindicate Congress's power to enact social legislation; (3) to give the President a greater role in the legislative process; (4) to draw on the knowledge and experience of agency administrators; and (5) to overcome an increasingly aggressive judiciary.[144] The surviving correspondence between the Triumvirate and their allies indicates that they were hoping that this agenda would "foster more cooperative relations between Executive and Legislature."[145] Although there were conservatives in their coalition, the Columbia Triumvirate hoped that the political branches could combine their efforts and rely on expert draftsmen to overcome the nation's juristocratic trajectory.[146]

These goals require some explanation. First, the *Lochner* era judiciary made professional drafting an objective that could unite Progressives and conservatives.[147] In *Ives v. South Buffalo Railway Co.*, New York State's high court declared the United States's first major workmen's compensation statute unconstitutional less than nine months after it was enacted.[148] *Ives* ignited immense popular and

cannot be misunderstood, it seems evident that no one can do this so efficiently as a member of that profession whose business it is to tear the bill to pieces after it is enacted. Especially is this true in these days of distrust of the courts; surely no one so well as a lawyer can know how to tie their hands.").

143. *See, e.g.*, Blake Emerson, *The Democratic Reconstruction of the Hegelian State in American Progressive Political Thought*, 77 REV. POL. 545, 569 (2015) (emphasizing that Progressives accepted the primacy of legislative governance and elevated it to the status of a "democratic constitutional norm").

144. *See infra* notes 146-190 and accompanying text.

145. Letter from L.E. Opdycke to Thomas I. Parkinson 2 (May 31, 1913) (on file with Univ. of Wy., Am. Heritage Ctr., Thomas I. Parkinson Papers, 1900-1959, Box 7, 1913-1953).

146. "Juristocracy describes a particular governing regime in which other political actors defer to courts to decide policy questions that otherwise would have belonged to a legislature or an executive." Allen C. Sumrall & Beau J. Baumann, *Clarifying Judicial Aggrandizement*, 172 U. PA. L. REV. ONLINE 24, 31-32 (2024).

147. *See* W.F. Dodd, *Social Legislation and the Courts*, 28 POL. SCI. Q. 1, 1-3 (1913) (reporting that courts were coming under widespread and unprecedented criticism for their hostility toward social legislation).

148. 94 N.E. 431, 448 (N.Y. 1911). For background on the *Ives* decision, see WITT, *supra* note 113, at 152-86.

elite backlash.[149] The decision became a focus of Progressives' rebuke of judicial review before it was overruled by constitutional amendment.[150]

Ives inflicted a psychic wound on the Columbia Triumvirate that motivated their push to empower professional drafters within Congress.[151] Cases like *Ives* were the concrete that held together the foundation of the Triumvirate's coalition; Progressives equated *Ives* with *Dred Scott* and *Lochner*.[152] The resulting public animosity toward courts made conservatives reflexively defend the legal system.[153] For example, Harlan Stone blamed legislators for cases like *Ives* and traced the problem to poor drafting.[154] The Triumvirate leveraged conservatives' defensiveness to generate support for a drafting bureau in Congress.[155]

Second, the Columbia Triumvirate wanted to vindicate Congress's power to enact social legislation. Social legislation, as a conceptual category, sought to remedy the deleterious effects of modernity.[156] The idea of social legislation turned on shifts in how elites conceptualized law, politics, and society. Whereas

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149. *See, e.g.*, WITT, *supra* note 113, at 152 ("*Ives* was greeted with a storm of disapproval. . . . *Ives* quickly became a centerpiece – alongside the U.S. Supreme Court's infamous decision in *Lochner v. New York*, striking down a maximum hours law – in the *greatest court controversy since Dred Scott*." (emphasis added)).

150. *Id.* at 175-76; *see also* John Fabian Witt, Ives *and* MacPherson*: Judicial Process in the Regulatory State*, 9 J. TORT L. 43, 45 (2016) (placing the *Ives* decision in historical context).

151. *See, e.g.*, Ernst Freund, *Constitutional Status of Workmen's Compensation*, 6 ILL. L. REV. 432, 433 (1911-1912) (critically evaluating *Ives*); ROBERT C. POST, THE TAFT COURT: MAKING LAW FOR A DIVIDED NATION, 1921-1930, at 124 (2024) (discussing Stone's reaction to *Ives*). The effects of the *Ives* decision went well beyond the Triumvirate's circle of intimates. *See, e.g.*, Lael Weinberger, *Frankfurter, Abstention Doctrine, and the Development of Modern Federalism: A History and Three Futures*, 87 U. CHI. L. REV. 1737, 1768 (2020) (suggesting that *Ives* chastened Felix Frankfurter and James Landis).

152. WITT, *supra* note 113, at 152.

153. *See generally* George Sutherland, *The Courts and the Constitution*, 35 ANN. REP. A.B.A. 371 (1912) (arguing that the *Ives* decision resulted from sloppy drafting).

154. GOEBEL, *supra* note 78, at 256. Stone's best treatment in recent years appears in Robert C. Post's monograph on the Taft Court. Post describes Taft in the 1910s as a conservative who favored the common law and the judiciary over statutes and legislatures. POST, *supra* note 151, at 122-23. These preferences were related to his hesitance at the speed of progress. *Id.* at 124.

155. *See, e.g.*, Beaman, *supra* note 142, at 65 ("A failure to observe the provisions of the Constitution of the State and of the United States frequently results in well-meant efforts for the public welfare being declared unconstitutional, though many people put the blame for this upon the courts rather than upon the persons responsible for the preparation of the legislation.").

156. Parkinson had an elastic conception of "social legislation." *See* Lecture Notes 1 (n.d.) (on file with Univ. of Wy., Am. Heritage Ctr., Thomas I. Parkinson Papers, 1900-1959, Box 6, 1920-1922) (asking "[w]hat is social legislation?" and answering "[a]ny amendment or extension of common law in the interest of the social welfare"). It included both public and private law and was built on the foundational "departure from the doctrine of *laissez faire*" in favor of "the idea that society is interested in the welfare of the individual." *Id.*

previously hegemonic notions of "free labor"—imbued as they were with a Gilded Age, liberty-of-contract spin[157]—emphasized the individual, new academics, lawyers, businessmen, and reformers saw "public" problems that should be handled by the state.[158] Some of these Progressive Era thinkers arrived at this conclusion by interacting with new business practices.[159] For example, John Fabian Witt has argued that the rise of insurance and actuarial sciences inspired a deeper appreciation for the collectivized nature of social issues.[160] It was no mere coincidence that Parkinson was an academic and reformer while becoming one of the country's most important insurance executives.[161]

Parkinson was a pioneer in social legislation: he taught one of the first classes devoted to the subject.[162] For his class, Parkinson stipulated that "common law principles" were "inadequa[te] . . . to meet changed economic and social conditions."[163] He summed up the need for social legislation for his students: "Justice by prevention of wrong rather than redress of wrong involves legislation and prescribing more definite standard of right and duty and administration enforcing observance of these standards."[164]

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157. Free labor was a historically contingent ideational tradition that originated in the "republican discourse that had dominated American political thought since the Revolution" and, more specifically, in "the 'Free Labor' and 'Antislavery' republicanism that knitted together the Northern working and middle classes during the Civil War." William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded* Age, 1985 WIS. L. REV. 767, 769. A branch of the free labor tradition motivated unionists' and free labor reformers' critique of "industrial wage labor and corporate ownership." *Id.* at 768. Judges weaponized another branch originating in the Gilded Age to articulate a freedom of contract. *Id.* at 768-69.

158. *See* WITT, *supra* note 113, at xxv-xxvii (arguing that modern conditions forced thinkers to confront free labor's emphasis on the individual).

159. *See, e.g.*, JESSE TARBERT, WHEN GOOD GOVERNMENT MEANT BIG GOVERNMENT: THE QUEST TO EXPAND FEDERAL POWER, 1913-1933, at 3 (2022) (emphasizing the extent to which the Elite Reformers' constitutional politics were shaped by the rise of modern budgeting in corporate America); *id.* at 7 (arguing that business-minded reformers in the 1910s and 1920s "dream[ed] of a government with the capacity to implement *national* solutions to *national* problems" (emphasis added)). *See generally* ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS (1977) (charting the rise of modern managerial practices and this phenomenon's effects on American industry, society, and governance).

160. *See* WITT, *supra* note 113, at 4 (describing the industrial-accident crisis of the late nineteenth and early twentieth centuries as a paradigm shift in American public law).

161. *See supra* Section I.A.2 (discussing Parkinson's role in the insurance industry).

162. Syllabus for Course on Social Legislation and Administration (on file with Univ. of Wy., Am. Heritage Ctr., Thomas I. Parkinson Papers, 1900-1959, Box 7, 1913-1914).

163. *Id.*

164. *Id.*

It was the Columbia Triumvirate's observation—steeped in the Progressive Era's congressional declinism[165]—that a Congress beset by parochialism and partisan politics could not enact successful social legislation. The need for expert drafters was made more salient by the conspicuous failure of the social legislation that *was* enacted. The Columbia Triumvirate pitched an expert drafting unit that could *Lochner*-proof social legislation with an eye toward successful implementation.[166]

The emphasis on social legislation necessarily entailed certain commitments regarding Congress's affirmative powers. The Columbia Triumvirate became important explicators of an expansive view of congressional power.[167] They argued in 1916 that Congress's interstate-commerce power included the power to prohibit harmful commerce altogether.[168] Their fallback was an expansive view of the taxation power.[169] Overall, the Triumvirate analogized Congress's powers to pursue social legislation to the states' police powers.[170] This meant that Congress could regulate commerce in the interest of public welfare when the regulated commerce was "a menace to health and morals."[171] Congress's powers "may be used not only to protect, benefit or advance commerce itself . . . but also to advance the *general welfare* by indirection through commercial regulation."[172]

Third, the Columbia Triumvirate wanted to legitimate a role for the President in the legislative process. To be clear, the Triumvirate were not presidentialists in the modern sense.[173] Contemporary notions like the "unitary executive

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165. *See, e.g.*, HENRY JONES FORD, THE RISE AND GROWTH OF AMERICAN POLITICS: A SKETCH OF CONSTITUTIONAL DEVELOPMENT 55 (New York, The Macmillan Company 1898) (calling Congress an "incurably deficient and inferior organ"); WALTER LIPPMANN, PUBLIC OPINION 288 (1922) (depicting any representative-based lawmaking body as "a group of blind men in a vast, unknown world").

166. *See* Beaman, *supra* note 142, at 67 (discussing the necessity of having statute drafters conduct an "analysis on the side of the administrative devices to make the law effective").

167. *See infra* Section III.B.2 (discussing Parkinson's role in advising Congress on the passage of child-labor legislation).

168. *E.g.*, Parkinson, *supra* note 82, at 369; Thomas I. Parkinson, *The Federal Child-Labor Law*, 31 POL. SCI. Q. 531, 533-38 (1916).

169. *See, e.g.*, Parkinson, *supra* note 82, at 368 ("By such tax laws Congress is enabled indirectly to regulate matters which it could not constitutionally regulate directly.").

170. *E.g.*, *id.* at 374; Parkinson, *supra* note 168, at 538 (arguing against limits on "the power of Congress to regulate commerce in the interest of public health, safety, morals or welfare—i.e., the so-called police power of Congress").

171. Parkinson, *supra* note 168, at 538.

172. Parkinson, *supra* note 82, at 374 (emphasis added).

173. By presidentialism, I mean the relatively new notion that the President has the power to direct agencies with only limited oversight from Congress. *See* Ahmed et al., *supra* note 61, at 2133-

theory" or "presidential administration" would have been illegible to them.[174] To understand the Triumvirate's simultaneous emphases on vindicating congressional power and securing a role for the President in the legislative process, some Progressive Era context is necessary.

The resolution between these paired goals lies in the Triumvirate's "constitutional politics."[175] Josh Chafetz has used that term to describe the way our separation-of-powers system is populated by actors seeking both outcomes and the power to decide.[176] The Columbia Triumvirate had a distinctive constitutional politics that resonated with Progressive Era themes. The Progressives emphasized "harmony," both between the political branches and, separately, between politics and administration.[177] The Progressives thought that the realities of modern life challenged the traditional separation-of-powers system to create a governance dilemma. Many Progressives wanted to integrate what the

34. Importantly, Progressives shared very little with contemporary presidentialists. *See* Andrew Scoseria Katz & Noah A. Rosenblum, *Becoming the Administrator-in-Chief:* Myers *and the Progressive Presidency*, 123 COLUM. L. REV. 2153, 2156-57, 2160-61 (2023) (arguing that even William Howard Taft defended congressional limits on presidential power in a way that would have been anathema to contemporary presidentialists).

174. *See, e.g.*, Emerson, *supra* note 143, at 570 (noting that Progressives like President Woodrow Wilson emphasized presidential leadership on legislative policy above direct oversight of the administration of agencies). David H. Rosenbloom has identified the kind of constitutional politics that, in 1946, conceptualized agencies as an extension of Congress. DAVID H. ROSENBLOOM, BUILDING A LEGISLATIVE-CENTERED PUBLIC ADMINISTRATION: CONGRESS AND THE ADMINISTRATIVE STATE, 1946-1999, at 2 (2000).

175. *See* CHAFETZ, *supra* note 32, at 15-16 (introducing "constitutional politics" as shorthand for the interbranch contestation over the authority to resolve political conflicts).

176. *See id.* at 14 ("[A]t its heart, the American constitutional separation of powers focuses on the creation of (or the attempt to create) space for conflict between branches of government without an overarching adjudicator to resolve the conflict in a principled, binding, and lasting way. These conflicts play out in public . . . ."); *id.* at 18 ("Political institutions are involved in constant contestation, not simply for the substantive outcomes they desire, but also for the authority to determine those outcomes.").

177. *See, e.g.*, M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 6-7 (2d ed. 1998) ("Thus the demand for the establishment of 'harmony' between legislature and government, which characterized the theory of parliamentary government in Britain and France and the Progressive movement in the United States, was accompanied by a new 'separation of powers'—that between the 'political' branches of government and the bureaucracy."); Rosenblum, *supra* note 87, at 24 (discussing a Progressive Era emphasis, represented by the views of Frank Goodnow, on "harmony" between politics and administration); Andrea Scoseria Katz, The Progressive Presidency and the Shaping of the Modern Executive 15, 17 (2011) (unpublished manuscript), https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1031&context=law_scholarship [https://perma.cc/FGD5-T69F] (discussing Woodrow Wilson's emphasis on "harmony" between the political branches and Frank Goodnow's writings on "harmony" between politics and administration).

Constitution separated.[178] They envisioned a rhetorical presidency that could provide policy leadership to lawmakers in Congress.[179] The Triumvirate hoped that presidential leadership could help lawmakers rise above the parochialism of legislative politics. This vision was an elaboration on the Progressive Era hope that Congress could be made to function in the modern era through presidential leadership.[180]

Fourth, the Columbia Triumvirate wanted to bring administrators into the legislative process. This idea was distinct from bringing the President into the legislative process because the Triumvirate did not view agencies as an extension of the presidency. The views of administrators were important because they could speak to policy implementation, which was the Columbia Triumvirate's obsession.[181] In their view, existing modes of drafting failed to consider adequately the means of policy implementation.[182] Beaman acknowledged that "any statute can be rendered ineffective by dishonest or careless administration" but maintained throughout his career that "it is equally true that a statute which works out the administrative features in a careful and comprehensive way stands a much better chance of being properly enforced."[183] This was clear to them in the 1910s, but it became even clearer amidst the failures associated with Prohibition.[184] By bringing in administrators, the Triumvirate hoped to head off problems with implementation.

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178. *E.g.*, Jeremy D. Bailey, The Idea of Presidential Representation: An Intellectual and Political History 89-90 (2019) (describing Woodrow Wilson's constitutional politics as advancing that, "in place of dividing and separating the functions of governmental authority, it made more sense to encourage 'cooperation' and 'a community of purpose'").

179. *See* Emerson, *supra* note 143, at 560 ("The relationship between legislation and execution would be mediated by a president who played an active but indirect role in both legislation and administration.").

180. *See* Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 Harv. L. Rev. 2070, 2087 (2009) (explaining Progressives' hope that presidential leadership could create a new dynamic of "presidential democracy" that would overcome Congress's parochialism).

181. *See, e.g.*, Am. Bar Ass'n, Final Report of the Special Committee on Legislative Drafting 454-55 (1921) (arguing that statute drafters needed to start studying enforcement to be effective); *see also* Beaman, *supra* note 142, at 67 (discussing the need for statute drafters to conduct an "analysis on the side of the administrative devices to make the law effective").

182. *See, e.g.*, Beaman, *supra* note 142, at 67-68 (lamenting the failure of bill drafters to consider the administrative tools that might make a policy effective).

183. *Id.* at 68.

184. *See* Post, *supra* note 151, at 25, 142 (emphasizing the important failure to implement Prohibition as a catalyst for a shakeup in jurisprudential commitments).

This objective became the hallmark of Beaman's tenure in the House, when his summits with administrators became the stuff of Capitol Hill legend.[185] Importantly, however, Beaman did not let agencies draft legislation with a free hand. He used administrators to his own ends. When he died, congressional staffers found agencies' draft bills essentially untouched in the drawer of the desk at which he had worked.[186]

Fifth and finally, the Columbia Triumvirate had a nuanced and ambivalent view of courts. The Triumvirate was preoccupied with an increasingly juristocratic legal system populated by self-aggrandizing judges.[187] As the Triumvirate emerged from their legal educations, there were widespread concerns "that federal courts were too readily interfering with labor disputes and the legislative process."[188] This attitude led President Taft into a defensive posture, from which he vigorously asserted that "the authority of the courts shall be sustained."[189] Legalists like Taft were engaged in large-scale judicial self-aggrandizement: he mobilized ideas and norms about courts and Congress that reified the centrality of judicial power.[190] The Triumvirate worried that courts were elevating expansive views of judicial power in a way that might crowd out legislative creativity.

This preoccupation with legislative creativity flowed from the Triumvirate's emphasis on social legislation. They believed that legislatures had to articulate new paradigms of legislation to address emerging social issues and feared the gravitational pull of a juristocratic and formalistic legal culture. They imagined lawmakers who would take a stingy view of congressional power either because they adopted the judiciary's views of Article I or because they were cowed by assertive judges.[191]

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185. *See, e.g.*, Cummings & Swirski, *supra* note 122, at 5-7 (describing Middleton Beaman's summits with tax officials that, for half a century, were the source of new national policies).

186. *Id.* at 5.

187. *See* Sumrall & Baumann, *supra* note 146, at 38 ("Judicial aggrandizement is the successful deployment of ideas and norms that reinforce the judiciary's role as the final arbiter of political disputes at the expense of other governing institutions.").

188. Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2067 (2022).

189. *Id.*

190. *See generally* Allen Sumrall, *Nondelegation and Judicial Aggrandizement*, 15 ELON L. REV. 1 (2023) (casting William Howard Taft's tenure as Chief Justice as a moment of judicial self-aggrandizement that involved ideational and institutional change).

191. *See infra* Section III.B.2 (discussing Parkinson's advocacy around child-labor legislation).

II. OPERATING IN THE PROGRESSIVE ERA

This Part situates the Columbia Triumvirate in the different layers of context that shaped their efforts to reform Congress, adding nuance to the existing literature on the congressional bureaucracy. Forces of politics and institutional development affected every effort to establish a professional drafting office on Capitol Hill. These forces provided the Triumvirate with resources and constraints. How the Columbia Triumvirate successfully interacted with these forces is drawn out in Part III. The balance between a big-picture account of extant forces (Part II) and an account that emphasizes contingency and reformer politicking (Part III) gives the reader a much more nuanced description of the congressional bureaucracy's rise. And by distinguishing between the different factions that held sway in the Progressive Era, this Article presents a more complete picture of the era's fractured politics.

A. Progressive Era Constitutional Politics

Treating the constitutional politics of the Progressive Era as a coherent category is a notoriously fraught endeavor.[192] The Columbia Triumvirate built on a foundation of support provided by Republican Progressives. Simultaneously, they needed the support of a group Jesse Tarbert calls the "Elite Reformers," business-minded state builders who have been variously described as Progressives and conservatives.[193] The Progressives launched an important critique of constitutional formalism and, like the Triumvirate, wanted to reimagine the text.[194] The Elite Reformers were more legalistic.[195] Nonetheless, these groups coalesced around reforms that expanded Congress's nascent bureaucracy.[196]

Although these two groups disagreed on much, the overlap in their constitutional politics helped create the policy window for the creation of the

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192. *See, e.g.*, Daniel T. Rogers, *In Search of Progressivism*, 10 REV. AM. HIST. 113, 121-23 (1982); *see also* Andrea Scoseria Katz, *The Lost Promise of Progressive Formalism*, 99 TEX. L. REV. 679, 685-86 (2021) (unpacking a Progressive tradition of constitutional formalism that was in tension with some Progressive leaders like Woodrow Wilson).

193. TARBERT, *supra* note 159, at 3.

194. *See* Katz, *supra* note 192, at 683 ("Almost a century-and-a-half ago, popular discontent spurred calls to radically reimagine the whole of the American government, even the Constitution itself.").

195. *See, e.g.*, Jonathan Zasloff, *Law and the Shaping of American Foreign Policy from the Gilded Age to the New Deal*, 78 N.Y.U. L. REV. 239, 369 (2003) (depicting Elihu Root as the paragon of American legalism).

196. *See infra* Part III (discussing the role of elite reformers and Progressives in the creation of the congressional OLCs).

congressional OLCs. By separating these two groups, this Article avoids treating the state-building politics of the 1910s as a unified whole. Moreover, by adopting the "Elite Reformers" label, this Article avoids the temptation to follow the "Progressives vs. conservatives" articulation that has dogged histories of the Progressive Era.[197]

1. The Progressives

Progressivism shaped the constitutional politics of congressional reform. First, many Progressives embraced "presidential representation"—the claim that the President alone is a representative of all the people.[198] This went together with a sense of congressional declinism—in this instance, the belief that legislatures were captured by monied interests and party politics.[199] Second, the Progressives believed in a separation between politics and administration. They generated the new fields of administrative law and public administration, two central preoccupations of the Columbia Triumvirate.[200] Third, many Progressives fought a stringent separation-of-powers paradigm. Progressives resented judicial retrenchment and hoped that curbing the restrictions of the Constitution would allow the "policy state" to emerge.[201]

Progressivism's heartland was in Northern and Midwestern Protestant communities that cultivated "national reform associations, the faculties and leaders of the leading colleges and universities, both public and private, and almost all realms of higher journalism."[202] From there, Progressivism spread across the

197. *See generally* TARBERT, *supra* note 159 (offering a reconceptualization of the Progressive Era that takes seriously the state building of men traditionally regarded as conservative antagonists to the Progressives).

198. *See generally* JOHN A. DEARBORN, POWER SHIFTS: CONGRESS AND PRESIDENTIAL REPRESENTATION (2021) (discussing the importance of presidential representation in twentieth-century American political development).

199. HARRISON, *supra* note 79, at 1-2, 5, 16-17.

200. As administrative-law experts, the Columbia Triumvirate joined the influential Legal Research Committee of the Commonwealth Fund to help influence the field's trajectory. For an example of a report written as part of the Legal Research Committee of the Commonwealth Fund, see generally JOSEPH P. CHAMBERLAIN, NOEL T. DOWLING & PAUL R. HAYS, THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES (1942).

201. *See generally* KAREN ORREN & STEPHEN SKOWRONEK, THE POLICY STATE: AN AMERICAN PREDICAMENT (2017) (arguing that American government's original basis around the provision of traditional rights gave way to a "policy state" centered around the provision of public-facing policy during the Civil War, the Progressive Era, and the New Deal).

202. Eldon Eisenach, *A Progressive Conundrum: Federal Constitution, National State, and Popular Sovereignty*, *in* THE PROGRESSIVES' CENTURY: POLITICAL REFORM, CONSTITUTIONAL GOVERNMENT, AND THE MODERN AMERICAN STATE 16, 28 (Stephen Skowronek, Stephen M. Engel & Bruce Ackerman eds., 2016).

country. Although the Progressive Party failed as an alternative to the Republican and Democratic Parties, Progressives' influence "dominated American political and academic culture in the early twentieth century."[203] The Progressives gained prominence in both major parties at different moments.

The Progressives' designs on Congress were defined by a preoccupation with "harmony" between the political branches that would allow them to enact meaningful social legislation.[204] The Triumvirate and their allies did not attempt to check executive aggrandizement. Their real goal is revealed in their surviving correspondence. The reformers wanted to expand the President's role in the legislative process.[205] To the extent the reformers disagreed, it was not on empowering the President. The only disagreement was on whether a drafting bureau would further this goal.[206]

2. The "Elite Reformers"

The movement to build the congressional OLCs drew the support of another group. It included figures that have been variously categorized as conservatives, legalists, and representatives of business interests. This category—the "Elite Reformers"—includes William Howard Taft, Charles Evans Hughes, Elihu Root, Charles D. Norton, and Henry L. Stimson.[207] They represented a class of "corporation lawyers, bankers, corporate executives, genteel reformers, and philanthropists" who supported state building but were not uniformly Progressives.[208]

The Elite Reformers' constitutional politics overlapped with the Progressives' in material ways. The group was unified by an outlook that drew on the "managerial revolution" in industry.[209] As a result, they mirrored the

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203. *Id.*

204. *See* Rosenblum, *supra* note 87, at 24 ("Goodnow believed that [politics in Congress and administration by agencies] needed to take place in harmony for the state to avoid paralysis."). *See generally* VILE, *supra* note 177 (collecting citations on the Progressives' emphasis on "harmony").

205. *See* Letter from L.E. Opdycke to Thomas I. Parkinson, *supra* note 145, at 1-2 (discussing the best ways to build a new role for the Executive in the legislative process).

206. L.E. Opdycke worried that a professional drafting office would be *too obvious* an attempt to build an executive role in Congress and that the effort risked significant blowback. *See id.* at 3.

207. *See* TARBERT, *supra* note 159, at 3.

208. *Id.*

209. *Id.*

Progressives' interest in a rearticulated presidency.[210] This predisposition toward presidential aggrandizement dovetailed with more congressional declinism. The Elite Reformers pursued government reorganization that was modeled on corporate reorganization.[211] They believed in state building, but the Elite Reformers' political rhetoric emphasized rule-of-law values.[212] They mirrored Progressives' disdain for the parochialism of party politics and hoped that good-government reforms could right the ship of state.[213]

Jesse Tarbert suggests that the Elite Reformers' politics flowed from wedding two distinct traditions. The first tradition emphasized "the proper functioning of government institutions" and ran through from the "civil service reformers of the 1880s to the municipal researchers at the turn of the twentieth century."[214] The second tradition dated to Reconstruction, when Republicans emphasized "the struggle to satisfy federal obligations owed to African Americans after the Civil War."[215] The Elite Reformers differed from Progressives on constitutional politics. Whereas the Progressives increasingly drew on socialists' opposition to a retrenched judiciary, the Elite Reformers were more legalistic.[216] They invested moral authority in the rule of law and saw danger in court reform.[217]

B. Congressional Time: The 1910 Rebellion

Americans have lived through the resurgence of strong party leadership in Congress. Images of Speaker Nancy Pelosi as master of the House leap to

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210. *See generally id.* (discussing the executive-centric nature of the Elite Reformers' agenda). Stephen Skowronek discusses Taft's legalistic approach to state building, *see* SKOWRONEK, *supra* note 79, at 171, 173-74, 176, as well as Root's approach, *see id.* at 214-22, 234-35.

211. *See* TARBERT, *supra* note 159, at 6.

212. *Id.* at 7.

213. *See, e.g.*, 2 PHILLIP C. JESSUP, ELIHU ROOT 233-34 (1938) (describing Elihu Root's support for a postal-savings system modeled on similar programs in Europe).

214. TARBERT, *supra* note 159, at 10.

215. *Id.*

216. For example, Elihu Root's break with Theodore Roosevelt around the presidential election of 1912 was guaranteed by Roosevelt's stance against recalcitrant judges. *See* BAILEY, *supra* note 178, at 112-15 (discussing Root's efforts to secure William Taft that election's Republican nomination and their ideological divide on the popular review of judicial decisions).

217. TARBERT, *supra* note 159, at 7. For an illustration of the Elite Reformers' instincts on courts, consider Lewis L. Gould's diagnosis of the Taft-Roosevelt split around the presidential election of 1912. Gould's description of Taft hinges on his appreciation for the rule of law and the Supreme Court. LEWIS L. GOULD, THE REPUBLICANS: A HISTORY OF THE GRAND OLD PARTY 124 (2014). Theodore Roosevelt's embrace of court reforms in 1912 precipitated the final split between the old-line Elite Republicans (who flocked to Taft) and Roosevelt's Progressives. *Id.* at 137.

mind.[218] Our era of centralized congressional power mirrors the period between 1890 and 1910—decades that were defined by "Czar" rule in the House, under which the Speaker wielded unprecedented powers.[219] That arrangement emerged from the accrual of power across the speakerships of Thomas B. Reed (R-ME, 1895-1899) and Joseph G. Cannon (R-IL, 1903-1911).[220] Czar rule was powered by ideological homogeneity within the parties and polarization between them.[221] And Czar rule coincided with Republican dominance in both chambers.[222] In the Senate, there was a lack of "effective leadership," but many suspected that a coterie of senior Republicans controlled the agenda: Nelson W. Aldrich (R-RI), William B. Allison (R-IA), Orville H. Platt (R-CT), John Spooner (R-WI), and Eugene Hale (R-ME).[223]

The project depended on the necessary but insufficient passage of what I call "congressional time." This concept was inspired by Stephen Skowronek's notion of "political time," which tracks cyclical paradigms of presidential leadership.[224] Political time describes the sequencing of different ideological regimes that are initiated by reconstructive elections that ultimately reshape the governing authority that Americans will sustainably accept. In Skowronek's telling, shifts in these paradigms coincide with the election of *reconstructive Presidents*—Andrew Jackson, Abraham Lincoln, Franklin Roosevelt, and Ronald Reagan.[225] Oppositional leaders (think Bill Clinton) ultimately avoid direct conflict with the prevailing regime until it collapses under the weight of its own successes.[226] This kind of periodization allows us better to understand path dependencies and the way that institutional innovations move through time. The idea of political time portrays Presidents as the constitutional actors most responsible for making and

218. *See* Joshua Huder, *Speaker Nancy Pelosi: A Master of the House*, 21 FORUM 141, 149-51 (2023).

219. *See, e.g.*, HARRISON, *supra* note 79, at 18-19 (discussing the conditions of Czar rule).

220. *Id.* at 18.

221. *See* SCHICKLER, *supra* note 62, at 23-24, 27.

222. *See id.* at 27 ("The Republican electoral sweep of 1894-96 gave the GOP a relatively secure hold on the House, Senate, and presidency that endured for the rest of the 1890s and the first decade of the 1900s.").

223. HARRISON, *supra* note 79, at 30, 35-36; *The Senate Four*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/generic/People_SenateFour.htm [https://perma.cc/GW5E-UE4X].

224. *See* STEPHEN SKOWRONEK, PRESIDENTIAL LEADERSHIP IN POLITICAL TIME: REPRISE AND REAPPRAISAL 18 (4th ed. 2020) (distinguishing "political time"—cycles of action and contests for authority— from "secular time"—considerations of power in institutional resources and strategies); *see also infra* note 249 (defining the concept of secular time).

225. STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE 36-39 (1997).

226. *See* SKOWRONEK, *supra* note 224, at 105 (arguing that Bill Clinton was neither a reconstruction President nor a faithful of the extant regime, but was instead an oppositional leader working to "preempt" the extant Reagan regime by offering a "third way").

breaking the ideological paradigms that inform political development across time. Presidents' distinct institutional advantages allow them to initiate transformations that remake our political orders in the broadest sense.

Congressional time, by contrast, refers to the boom-bust cycle in how Congress allocates power between members, party leadership, committees, party caucuses, and legislative cartels.[227] This cycle depends on exogenous factors and internal developments. Political scientist Barbara Sinclair has drawn attention to some of these developments—most notably, the centralization of power in party leaders and the death of the "textbook" model of Congress across the late twentieth century.[228]

Legal scholars are familiar with the idea of congressional time, even if they have never named it. For example, legislation scholars have emphasized the degree to which our era of centralized "unorthodox lawmaking" should change our understanding of how Congress interacts with courts.[229] Implicit in the work of Sinclair and legal academics who study Congress is the idea that our national legislature is always evolving to respond to electoral, legislative, and societal developments. If political time suggests that Presidents' formal and informal powers allow them to reconstruct ideological paradigms, congressional time suggests that Congress's ability to refashion itself dynamically across time allows our national legislature to manage political conflict. In our present era, the combination of hyperpartisanship and competitive elections led lawmakers to centralize power in party leaders. This has allowed some Congresses (notably, the 111th and 117th Congresses) to pass enormous legislative packages at the cost of rank-and-file deliberation.[230]

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227. Daniel Schuman's taxonomy of "eras of control" in the House of Representatives includes: the "Federalist" era (1789-1800); the "Jeffersonian" era (1800-1812); the "Party Caucus" era of Henry Clay (1812-1825); the multiparty "Slavocracy" era (1825-1860); the "Vetocracy" era (1860-1890); the "Czar" era (1890-1910); the "King Caucus" era (1910-1918); the "Strong Jim Crow" committee era (1918-1950); the "Weakening Jim Crow" committee era (1950-1970); the "Bipartisan" era (1970-1994); and the era of "Strong Congressional Party Leaders" (1995-present). *See* Schuman, *supra* note 45.

228. *See generally* BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS (5th ed. 2016) (juxtaposing the "textbook model" of Congress with our current era of "unorthodox lawmaking").

229. *See, e.g.*, Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1847-48 (2015).

230. *See* Peter DeFazio, Opinion, *We Just Had the Most Productive Congress Since the Eisenhower Era—Here's What That Means for the Country*, HILL (Sept. 12, 2022, 2:45 PM ET), https://thehill.com/opinion/congress-blog/3639158-we-just-had-the-most-productive-congress-since-the-eisenhower-era-heres-what-that-means-for-the-country [https://perma.cc/2VCK-XR8S] (describing the high productivity of the 117th Congress); Lisa Lerer & Laura Litvan, *No Congress Since 1960s Has Impact on Public as 111th*, BLOOMBERG NEWS (Dec. 22,

Congressional time informs this Article's project because the timing of the 1910 rebellion set the stage for the more decentralized congressional politics of the 1910s and empowered figures who played an important role in the creation of the congressional OLCs. Relations between congressional leadership and President Theodore Roosevelt began to sour after the 1907 election.[231] After the emergence of an opposition coalition, reforms to the House Rules Committee substantially diminished the speakership.[232] In 1909, Republicans joined Democrats to pressure Speaker Joe Cannon into creating "Calendar Wednesdays," a "procedure whereby, every Wednesday, the standing committees would be called alphabetically and allowed to bring legislation within their jurisdiction to the floor, thereby circumventing the Rules Committee."[233] In 1910, a Progressive named George Norris (R-NE) motioned to change the standing rules of the House and was ruled out of order by the Speaker before being vindicated by a cross-partisan majority consisting of Democrats and Progressive Republicans.[234] A similar coalition expanded the Rules Committee, banned the Speaker from serving on the Rules Committee, and provided "that the members of the Rules Committee would be elected by ballot and would then elect their own chairman."[235] Cannon smarted that

> the assault upon the Speaker of the House by the minority, supplemented by the efforts of the so-called insurgents, shows that the Democratic minority, aided by a number of so-called insurgents . . . is now in the majority, and that the Speaker of the House is not in harmony with the actual majority of the House.[236]

Cannon persisted until the 1910 House elections forced him to hand the Speaker's gavel to Champ Clark (D-MO).[237]

2010, 6:47 PM EST), https://www.bloomberg.com/news/articles/2010-12-22/no-congress-since-1960s-makes-most-laws-for-americans-as-111th [https://perma.cc/V86U-Q7XH] (discussing the high impact of the 111th Congress).

231. SCHICKLER, *supra* note 62, at 71.

232. *See id.* at 78 ("The 1910 reforms barred the Speaker from the Rules Committee, doubled the committee's membership from five to ten, and provided that Rules members would be elected by the House. These changes weakened the speakership and inhibited majority party control in the House.").

233. CHAFETZ, *supra* note 32, at 288.

234. *Id.*

235. *Id.*

236. 45 CONG. REC. 3437 (1910).

237. CHAFETZ, *supra* note 32, at 289.

The period after the 1910 rebellion was defined by a weak speakership and increased power in the party caucuses and in the parties' floor leaders.[238] Speaker Clark "inherited" a "much-diminished Speakership" that lacked control over the Rules Committee and was further degraded by 1911 House rules that "provided that the members and chairs of all standing committees were to be elected by ballot, not selected by the Speaker."[239] The Democratic Party controlled the House from 1913 to 1919.[240] The party's floor leaders during this period were Oscar W. Underwood (D-AL, 1911-1915) and Claude Kitchin (D-NC, 1915-1919).[241] The Republicans, who spent these years in the political wilderness, were led by James R. Mann (R-IL).[242]

The revolt did not immediately decentralize power—at least, not completely. Power temporarily shifted to Majority Leader Underwood, who also chaired the House Ways and Means Committee.[243] Under this new transitional paradigm, the "caucus was run by the Ways and Means committee, its chairman, and President Wilson."[244] This dynamic set the stage for the development of a strong seniority system in the late 1910s and 1920s, which only strengthened the Southerners.[245]

The 1910 revolt and its aftermath are important both for the creation of the congressional bureaucracy and for the congressional OLCs' first several decades in existence. It diffused power and diminished conservative elements that were the reformers' natural antagonists.[246] More directly, the rebellion's diffusion of power benefited men who favored the congressional bureaucracy, men like Underwood and Kitchin (who, as floor leaders in a moment of decentralized power, were strengthened just in time to play a decisive role in the creation of the

238. *See* Schuman, *supra* note 45 ("The Speaker was a figurehead and the majority party caucus, and the floor leader over the caucus, became dominant. . . . The caucus chose its own officers, nominated party candidates for Speaker and elsewhere, and also now decided matters of legislative policy and defined the legislative program.").

239. CHAFETZ, *supra* note 32, at 289.

240. Hist., Art & Archives, *Party Government Since 1857*, U.S. HOUSE REPRESENTATIVES, https://history.house.gov/Institution/Presidents-Coinciding/Party-Government [https://perma.cc/F3MA-VABE].

241. VALERIE HEITSHUSEN, CONG. RSCH. SERV., RL30567, PARTY LEADERS IN THE UNITED STATES CONGRESS, 1789-2019, at 8 (2019).

242. *Id.* at 7.

243. GEORGE ROTHWELL BROWN, THE LEADERSHIP OF CONGRESS 174-75 (1922).

244. Nelson W. Polsby, Miriam Gallaher & Barry Spencer Rundquist, *The Growth of the Seniority System in the U.S. House of Representatives*, 63 AM. POL. SCI. REV. 787, 802 (1969).

245. *Id.* at 803-07.

246. *See* CHAFETZ, *supra* note 32, at 288-89 (describing Speaker Joseph Cannon as a powerful conservative who faced successful opposition from Progressives in both parties). For a discussion of parallel developments in the Senate, see *id.* at 289-90.

congressional OLCs).[247] For the congressional OLCs to maintain sufficient support within each chamber, the congressional bureaucrats had to balance the competing interests of the 1920s and 1930s Congresses. Increasingly, this meant aligning themselves with Southern Democrats, who came to wield tremendous power because of the seniority system.[248]

C. The Two Models of Legislative Bureaucratization

The creation of the congressional OLCs occurred at the end of a secular cycle[249] in which numerous Anglo-American legislatures experienced a wave of bureaucratization and professionalized bill drafting at around the same time. This cycle offered two competing models of professionalization that reformers drew on in creating the congressional OLCs.

Congress was already familiar with this kind of influence. American legislatures evolved through processes of institutionalization and professionalization since the colonial period.[250] Institutionalization played out on two tracks. First, American legislatures developed "organizational boundaries."[251] Second, they developed and perpetuated "complex procedures and structures, something that was fully achieved during the nineteenth century."[252] Professionalization is the process by which American legislatures have invested in "member pay, session length, and staff resources and facilities."[253]

Institutionalization and professionalization have occurred organically and through exchange. Contrary to the suggestion of Keith Krehbiel, there was

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247. *See* Lee, *supra* note 17, at 385-86 (emphasizing the important roles played by Claude Kitchin and Cordell Hull in the creation of the congressional OLCs). For background reading on how the 1910 revolt strengthened the floor leader at the expense of the Speaker, see WALTER J. OLESZEK, CONG. RSCH. SERV., RL30665, THE ROLE OF THE HOUSE MAJORITY LEADER: AN OVERVIEW 2-3 (2009).

248. *See* GEORGE B. GALLOWAY, CONGRESS AT THE CROSSROADS 187 (1946) ("Seniority in point of service has been the prevailing principle of governing both committee assignments and the selection of chairmen since . . . 1910 in the House.").

249. Secular time, as distinguished from political time, is a concept used by political scientists to describe the evolution of power structures through a chronological sequencing of events, that is, the "progressive development of the institutional resources and governing responsibilities of" political officials rather than the particular "ideolog[ies]" or "actions" of those officials. STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON 30 (1997).

250. PEVERILL SQUIRE, THE EVOLUTION OF AMERICAN LEGISLATURES: COLONIES, TERRITORIES, AND STATES, 1619-2009, at 8-10 (2012).

251. *Id.* at 266.

252. *Id.*

253. *Id.*

probably never an American legislature that existed in a "primitive state[]" that was essentially an "egalitarian collective choice bod[y]."[254] Colonial assemblies drew on parliamentary practices; state legislatures drew on what came before; and, across time, Congress drew upon experiments in institutionalization and professionalization from state, territorial, and colonial legislatures.[255]

Throughout the nineteenth century, institutionalization led to sophisticated parliamentary rules, norms, leadership structures, and standing committees.[256] These attributes helped American legislatures weather the turbulence of the time, but because Americans came to loathe legislative politics,[257] professionalization had to pick up much of the remaining slack in the late nineteenth and early twentieth centuries. American legislatures increased lawmakers' pay, invested in staff, and pushed toward full-time legislating.[258]

Each component of the congressional bureaucracy resulted from a different secular cycle, and Congress was never developing in a vacuum. As discussed below, the congressional OLCs and the opinions-drafting practice drew on a unique moment in secular time when states and foreign legislatures were experimenting with professionalizing different aspects of the legislative process.

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In the 1910s, Congress saw that it was being left behind as other legislatures rode a wave of professionalization powered by the Progressives. Lawmakers drew on the two dominant models of professionalization, which shaped their imaginations and gave them a permission structure to pursue reforms.

First, there was the example of the Office of Parliamentary Counsel in the United Kingdom. Parliament created a professional drafting office that was led by Henry Thring.[259] Thring drafted "all the most important . . . bills which were introduced into parliament on the responsibility of the cabinet."[260] And he started training a new generation of master drafters including Sir Henry Jenkins

254. KEITH KREHBIEL, INFORMATION AND LEGISLATIVE ORGANIZATION 248 (1991).

255. SQUIRE, *supra* note 250, at 1-2.

256. *Id.* at 3-5; *see also* Nelson W. Polsby, *The Institutionalization of the U.S. House of Representatives*, 62 AM. POL. SCI. REV. 144, 144-45 (1968) (defining institutionalization as the mandate that "organizations must be created and sustained that are specialized to political activity").

257. Baumann, *supra* note 40, at 473 (discussing "congressional declinism").

258. *See* SQUIRE, *supra* note 250, at 266-316 (discussing professionalization in the twentieth century).

259. *See* James Bryce, Brit. Ambassador to the U.S., The Methods and Conditions of Legislation, Address Before the New York State Bar Association (Jan. 24, 1908), *in* 31ST ANNUAL REPORT OF THE PROCEEDINGS OF THE NEW YORK STATE BAR ASSOCIATION 153, 163-64 (1908) (pitching the New York Bar on the importance of the parliamentary draftsman).

260. COURTENAY ILBERT, THE MECHANICS OF LAW MAKING 63 (1914).

and Courtenay Ilbert. One important byproduct of Parliament's professionalization was the government's accrual of power. By the late nineteenth century, members of government (the Prime Minister, the Cabinet, and the junior ministers) had a monopoly on the introduction, drafting, and passage of significant bills.[261]

The Columbia Triumvirate's Anglophilia (Parkinson's love of all things British led him to name one of his sons after Courtenay Ilbert) drew them to this parliamentary model.[262] The Triumvirate also seems to have at least *thought* that the model implied a greater role for the drafter as a legislative counselor—no mere scrivener.

It is not clear, however, that the Columbia Triumvirate fully understood the role of the Parliamentary Counsel. Accounts of the Office suggested that its drafters were responsible for advising Parliament on legal obstacles that arose in the drafting process,[263] but no evidence suggests that the Office ever had a procedure like the opinions-drafting practice.[264] It appears that the Triumvirate—already imagining that they would manage Congress's drafting bureau—imbued the example of the Parliamentary Counsel with more authority than it maintained.[265]

The Triumvirate's enthusiasm for the Parliamentary Counsel has another historical irony. Because of the nature of Parliament, the lawyers in that office functioned as *executive* civil servants; they did not offer general advice to Members of Parliament and instead served the executive in Parliament.[266] That they

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261. *Id.* at 9. On the usage of the word "government" in the British system, see *Parliament and the Government*, UK PARLIAMENT, https://www.parliament.uk/about/how/role/relations-with-other-institutions/parliament-government [https://perma.cc/9DBA-AZUM].

262. PARKINSON, *supra* note 85, at 27-28.

263. *See* Bryce, *supra* note 259, at 163 ("The business of the Parliamentary draftsman is not only to take the ideas and plans of the minister and put them into the clearest and most concise form, but also to warn the minister of all the consequences his proposition will have upon every part of the law . . . .").

264. The existing literature casts the Office of Parliamentary Counsel as being primarily concerned with the technicalities of drafting. *See, e.g.*, N.K. Nampoothiry, *The Role of Parliamentary Counsel in Legislative Drafting*, 36 COMMONWEALTH L. BULL. 57, 57-58 (2010).

265. This is a reminder that institutional developments are often informed by distorted understandings of historical precedent. *See generally* JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION (2024) (describing how arguments based in history and collective memory, whether right or wrong, are intrinsic to American legal reasoning).

266. *See* Bryce, *supra* note 259, at 162-64 (explaining that Parliament's drafters work for the government in power and that government bills are generally the only pieces of legislation with any chance of passage in the modern era).

publicly glossed over this feature of the Parliamentary Counsel hints at the Columbia Triumvirate's goal of aggrandizing the President within Congress.

To sell the parliamentary model, the Triumvirate and their allies made the British into salespeople. James Bryce, the British Ambassador to the United States, gave an address before the New York Bar Association in 1908 that pleaded with the Bar to address the woeful state of statute drafting.[267] He started by suggesting that changing times—"swift changes in economic and social conditions"—elevated statute drafting to paramount importance.[268] Bryce claimed that the British system had relieved members of Parliament of the pressure of spending too much of their time advocating for constituents' interests through private bills.[269] And then he settled into his pitch: the benefits of the British system could come only through a drafting bureau.[270] To capitalize on the benefit of a bureau, he contended, lawmakers ought to funnel all major legislation through it.[271]

About halfway through his address, Bryce emphasized the parliamentary drafter. The drafter's role would not be confined to drafting:

> The business of the parliamentary [drafter] is not only to take the ideas and plans of the minister and put them into the clearest . . . form, but also *to warn the minister of all the consequences his proposition will have upon every part of the law*, and to lead him to see what is the best way in which the amendment to the law he desires to effect can be affected.[272]

Bryce's pitch conceived of the drafter as a generalist who would navigate the whole body of law. Later, Bryce would explicitly suggest that this included constitutional law.[273]

Bryce made a special appearance before Congress to advise lawmakers on the creation of a professional drafting bureau.[274] At the same time, the Columbia

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267. *See id.* at 154 ("Here, in particular, this subject [of drafting well-made laws] has an urgent claim upon your attention . . . .").

268. *Id.*

269. *Id.* at 158-61.

270. *Id.* at 162.

271. *See id.* ("Nearly all our important bills, nearly all the controverted bills that pass are bills brought in by the government of the day.").

272. *Id.* at 163 (emphasis added).

273. *See id.* at 175 (suggesting that the need for professional drafters was greater in the United States because of the "difficulty" that "arises from the fact that legal skill is often required to avoid transgressing some provision of the Federal or a State Constitution").

274. ROOT REPORT, *supra* note 141, at 74.

Triumvirate personally arranged for Courtenay Ilbert to come to America and evangelize about the need for professional drafters.[275]

The second model of professionalization was the Wisconsin Idea.[276] At the state level, professionalization entailed two innovations. One was a "drafting bureau," a group that focused on drafting new legislation.[277] The second innovation was a "legislative reference service."[278] A reference service helped legislators accumulate raw information in the form of periodicals, research, and foreign sources.[279] Some states had one of these units; others had both.[280]

The most important figure associated with the Wisconsin Idea was Republican Robert La Follette, Wisconsin's governor from 1901 to 1906 and senator from 1906 to 1921.[281] La Follette was a key figure in the rise of the congressional OLCs. For now, it is important to understand his political operation. La Follette and his followers accomplished a breathtaking level of reforms. A portion of La Follette's agenda focused on democracy reform: he instituted a direct primary election, regulation of lobbying, and limits on political spending.[282]

The Wisconsin Idea advanced a legislative program. To La Follette and his followers, legislatures were too indebted to monopolies, trusts, and "[p]redatory wealth."[283] Participants felt a deep skepticism of legislatures. For example, Wisconsinite Charles McCarthy asked whether "a legislature, even if it were perfect, [could] justly say whether gas should be ninety or ninety-five cents?"[284] And

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275. *See* Letter from Joseph P. Chamberlain to Thomas I. Parkinson (1913) (on file with Univ. of Wy., Am. Heritage Ctr., Thomas I. Parkinson Papers, 1900-1959, Box 3, Correspondence, Professional, 1911-1915) (suggesting that the Columbia Triumvirate should arrange for Sir Courtenay Ilbert to come and speak on parliamentary drafting); PARKINSON, *supra* note 85, at 27-28 (discussing the impact Ilbert and his 1913 Carpentier lectures at Columbia had on Parkinson).

276. *See generally* CHARLES MCCARTHY, THE WISCONSIN IDEA (1912) (summarizing the Progressive movement's goals and philosophy).

277. The emphasis on a "drafting bureau" can be found in several pieces of draft legislation from the 1910s that use that term. *See, e.g.*, ROOT REPORT, *supra* note 141, at 1 (discussing S. 8337, "the bill . . . to create a legislative drafting bureau").

278. *See, e.g.*, *id.* at 140 (statement of Professor Ernst Freund) ("The value and advantages of legislative reference service[s] in connections with public libraries now generally conceded, and have been sufficiently demonstrated by practical experience.").

279. *Id.* at 140-41.

280. SPECIAL COMM. ON LEGIS. DRAFTING OF THE AM. BAR ASS'N, BILL DRAFTING AND LEGISLATIVE REFERENCE BUREAUS, S. DOC. NO. 63-262, at 4-5 (1913).

281. Paul D. Carrington & Erika King, *Law and the Wisconsin Idea*, 47 J. LEGAL EDUC. 297, 313 (1997).

282. *Id.*

283. MCCARTHY, *supra* note 276, at 1.

284. *Id.* at 3.

even if a legislature had that ability, McCarthy asked, "are we not basing all on the presumption that the legislature is willing and ready to do our will?"[285]

The Wisconsin Idea also targeted the drafting process. In the lead-up to the reform movement, the Wisconsin state legislature had a chaotic legislative process. The legislature had many employees, but many were aimless winners of the statewide spoils system.[286] Members relied on local lawyers to draft bills.[287] The halls were crowded with lobbyists, the only people aware of the legislature's committee-hearings schedule.[288]

When La Follette's reformers took over, they created a legislative reference department ("Legislative Reference Library") and a drafting unit ("Drafting Room").[289] The role of the drafters in Wisconsin was narrower than in the parliamentary model. They operated within rules that constrained their role:

> *Rules for the Drafting Room*
>
> 1. No bills will be drafted in the Reference Room. A separate Drafting Room and a separate force have been provided.
> 2. No bill shall be drafted, nor amendments prepared, without *specific detailed written instructions* from a member of the Legislature. Such instructions must bear the member's signature.
> 3. The draftsman can make no suggestions as to the contents of bills. Our work is *merely clerical* and *technical*. We cannot furnish *ideas*.
> 4. We are not responsible for the *legality* or *constitutionality* of any measures. We are here to do *merely* as *directed*.
> 5. As this department cannot *introduce* bills or *modify* them after introduction, it is not responsible for the *rules* of the *legislature* or the *numbering* of sections either at the time of *introduction* or on the *final passage*.[290]

As shown by rule four, there was no reason for lawmakers familiar with the Wisconsin Idea to think that drafters would be advising lawmakers on bills' constitutionality. Moreover, rules two, three, and five paint a picture of a narrower,

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285. *Id.* at 4.

286. *See id.* at 194 ("The place was full of useless employees, many of whom never did a stroke of work.").

287. *Id.* at 194-95.

288. *Id.* at 195 ("If hearings were held, no one save the lobbyists knew when they were scheduled.").

289. *Id.* at 196-97.

290. *Id.* at 197.

more technocratic bureaucracy than what the Columbia Triumvirate ultimately built.

Overall, the clash between the Wisconsin Idea and the parliamentary model (or, more precisely, the parliamentary model that reformers imagined) gave the Columbia Triumvirate room to operate. Only a few members of Congress understood the differences between these models at a high level of detail. By being ambiguous about which of these models they were drawing upon, the triumvirs could avoid alienating either side of their coalition. Because the parliamentary model was associated with an attempt to turn the President into a legislative leader, à la prime minister, the triumvirs' ambiguity avoided upsetting potential legislative allies who were less enthusiastic about the legislator-in-chief model.

III. ESTABLISHING THE CONGRESSIONAL OLCS

In their attempt to build a drafting bureau within Congress, the Columbia Triumvirate became savvy policy entrepreneurs who helped alter lawmakers' preferences.[291] The existing literature casts Beaman and Parkinson as apolitical, technical drafters and academics who only played a role in the creation of congressional OLCs from 1916 to the Revenue Act of 1918.[292] The primary-source documents, however, demonstrate that the Triumvirate operated behind the scenes to create a combined drafting bureau and legislative reference service in the earlier push for professional drafting from 1910 to 1914.

The story in this Part recasts the Columbia Triumvirate as influential policymakers. After Congress failed to create a drafting bureau from 1910 to 1914, the Columbia Triumvirate quickly adapted and developed a new pitch around the Democratic Party's policy platform. Juxtaposing these two periods reveals the reformers' vague sense that professional drafters would *have* to interpret the Constitution and background law to succeed. Moreover, by recasting the triumvirs as savvy operators in a political-reform project, this Part shows how a group of academics, once empowered, subsequently exceeded their statutory authority and wielded tremendous influence on Capitol Hill.

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291. *See* KINGDON, *supra* note 53, at 179 (describing policy entrepreneurs as "advocates who are willing to invest their resources—time, energy, reputation, and money—to promote a position in return for anticipated future gain").

292. *E.g.*, Cross & Gluck, *supra* note 20, at 1564; Shobe, *supra* note 18, at 820.

A. 1910-1914: A Challenge to the Legislator's Role

1. The Bills

From 1910 to 1914, lawmakers introduced different bills creating some combination of a drafting bureau, a legislative reference service, and a corps of investigators. By discussing the differences between these bills, this Section illustrates lawmakers' differing visions for the congressional bureaucracy and the contingency at play in the Columbia Triumvirate's project. From the 61st through the 63rd Congresses, lawmakers focused efforts to establish a drafting bureau and a legislative reference service on the House and Senate Committees on the Library.

Senator La Follette's proposal (the La Follette Bill)[293] was most popular. The La Follette Bill separated a drafting bureau from a legislative reference service.[294] It would have lodged the reference service in the Library of Congress.[295] The drafting bureau would serve both chambers under a "chief draftsman" appointed by the President.[296] Rhetorically, the La Follette Bill tried to split the baby and cobble together support from those who wanted Congress to model its reforms on Parliament or the Wisconsin Idea.[297]

The La Follette Bill embodied the overlapping priorities of Republican reformers. Its backers, a cocktail of Progressive Republicans and Elite Reformers, attempted to give the President a beachhead in the legislative process through the appointment of a chief draftsman. This move allowed for a marriage of convenience between bitterly opposed factions. Along with La Follette, for instance, the bill was championed by Senator Elihu Root (R-NY), the archetypal Elite Reformer.[298]

The Elite Reformers' involvement and interest in building a presidential outpost in Congress was on ostentatious display with the arrival of Frederick

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293. S. 8337, 62d Cong. (1913).

294. ROOT REPORT, *supra* note 141, at 1.

295. *Id.*

296. Section 2 of the La Follette Bill provided that the drafting bureau "shall be under the direction of an officer, to be known as the 'chief draftsman,' *to be appointed by the President of the United States*, by and with the advice and consent of the Senate." S. 8337, § 2 (emphasis added).

297. *See* ROOT REPORT, *supra* note 141, at 1 ("In both of these respects all that the bill undertakes to do has already been done by some of the States of our Union and by the British House of Commons.").

298. *See* TARBERT, *supra* note 159, at 30-31 ("Root was a central figure in the Wall Street-allied northeastern wing of the Republican Party. Among the elite reformers, Root's preeminence was rivaled only by ex-president Taft.").

Cleveland, who testified before Congress.[299] Cleveland was an economist with a reputation for having mastered the budget-reform politics that Elite Reformers favored.[300] After the formation of the BMR in 1907, Cleveland was Parkinson's colleague following his appointment as the Bureau's technical director.[301] Cleveland was also involved with President Taft's Commission on Economy and Efficiency (Taft Commission), which recommended executive reorganization and modern budgeting practices as good-government reforms.[302] Cleveland's testimony shows that the new congressional bureaucracy was connected to reformers' interests in state building and administration, not just the technicalities of bill drafting.[303]

A more radical bill was offered by Progressive Senator Robert Owen (D-OK).[304] Owen resented the Anglophilic tendencies of Root and the Columbia Triumvirate that manifested themselves in the La Follette Bill.[305] This led him to claim that he — and ironically not La Follette — was the faithful bearer of the Wisconsin Idea's spirit.[306]

Unlike the La Follette Bill, the Owen Bill established a sprawling corps of university professors and experts who would help Congress produce social legislation.[307] Owen envisioned a legislative reference bureau located in the Library

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299. ROOT REPORT, *supra* note 141, at 88 (printing Cleveland's testimony); TARBERT, *supra* note 159, at 15 (discussing Cleveland's role within the Elite Reformers).

300. TARBERT, *supra* note 159, at 15.

301. *See id.* at 14-15; *supra* text accompanying notes 100-104.

302. *See* TARBERT, *supra* note 159, at 14-15.

303. *See* ROOT REPORT, *supra* note 141, at 88 (statement of Frederick A. Cleveland, Chairman, President's Commission on Economy and Efficiency) ("It is in these relations that I think members of Congress can find much that is worthy of consideration. Many bills are drawn which do not properly take into consideration either the proper organization to be provided . . . [or] the discretion which should be left to the officer . . . .").

304. Senator Owen was a radical member of the nascent Progressive faction in the Democratic Party. *See generally* Senate Hist. Off., *Senate Stories: Senate Progressives vs. the Federal Courts*, U.S. SENATE (May 3, 2021), https://www.senate.gov/artandhistory/senate-stories/senate-progressives-vs-the-federal-courts.htm [https://perma.cc/3E27-NFJ5] (describing Owen's constitutional politics in the 1910s as being defined by opposition to the courts that were striking down the social legislation he helped enact).

305. *See* ROOT REPORT, *supra* note 141, at 21 (statement of Sen. Robert L. Owen) ("[The La Follette Bill] is entirely out of harmony with democratic ideals. It is a proposal to engraft upon our free institutions a bureau that is used only where the English cabinet system of parliamentary government is in operation. The few men in the English Cabinet are the ruling power.").

306. *See id.* at 19.

307. *See id.* at 9 ("The Bill which I introduced proposes to establish a corps of professors and experts in social and legislative science in addition to the bill-drafting and reference library provisions.").

of Congress operating as a hub for the information generated by Congress, universities, federal agencies, and foreign governments.[308] When it came to bill drafting, Owen provided for the creation of a "Congressional Corps of Legislative Investigators."[309] This corps would also be lodged in the Library of Congress so that information gathering and bill drafting would be connected in a single location.[310]

Owen provided that the corps should serve as Congress's "counselors."[311] He proposed a more outsize role for the corps that would require its officials to influence policy directly. In defending his system, Owen granted his envisioned expert bureaucrats a democratic pedigree that could overcome legislative parochialism: "Thus the people should have two sets of representatives—the experts in business affairs who are elected to Congress, and the experts who are known as professors who are counselors to the people as well as teachers and engaged in research."[312]

Ultimately, Owen knew which way the wind was blowing and substantially amended his bill to align it with the desires of his Republican colleagues. The amended Owen Bill would have created a legislative drafting bureau headed by a chief draftsman, "to be appointed by the President of the United States."[313] The chief draftsman would serve a ten-year term and be paid $7,500 per year (the equivalent of over $230,000 in 2024 dollars).[314] The chief draftsman could be removed by the President "upon the recommendation of the Judiciary Committee of both Houses of Congress, acting jointly."[315]

An important provision of the revised Owen Bill, section 4, provided that "public bills, or amendments to public bills, shall be drafted or revised by the

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308. Section 2 of the Owen Bill declared that "the purpose of said bureau shall be to make more readily available for the President and Members of Congress the legislative reference material now within the Library of Congress and the departments of the Government" and information generated "in other countries." S. 1240, 63d Cong. § 2 (1913). Section 3 of the Owen Bill aimed to approximate as closely as possible the data-collection practices of "a social-science department of a national university, as other great nations have." *Id.* § 3.

309. ROOT REPORT, *supra* note 141, at 9 (statement of Sen. Robert L. Owen).

310. *Id.* at 17 ("By systematizing the work we can greatly increase the effectiveness of each worker, giving him a definite field wherein he will become an expert, having in mind the answer to a large mass of questions.").

311. *Id.* at 18-19.

312. *Id.* at 16.

313. S. 1240, § 2.

314. *Id.* The amount is adjusted for inflation using the inflation calculator from the Federal Reserve Bank of Minneapolis. *See Inflation Calculator*, FED. RSRV. BANK MINNEAPOLIS, https://www.minneapolisfed.org/about-us/monetary-policy/inflation-calculator [https://perma.cc/L27M-HRDQ].

315. S. 1240, § 2.

said bureau on the request of the President, any committee of either House of Congress, or of eight members of the Senate or of twenty-five Members of the House of Representatives."[316]

This section is perhaps the clearest indication that the compromise legislation reflected the Senate Committee on the Library's main goal of tamping down congressional parochialism via a presidential role in the legislative process. At the same time, the bill made lawmakers operate in concert, either in groups or through committees, to receive the benefits of the new drafters.[317]

Owen's revised bill also kept a provision establishing a legislative reference bureau in the Library of Congress.[318] Thus, heading into the summer of 1913, the key bills in the Senate separated drafting from the collection of information.

2. The Forces of Reform

Because of the La Follette Bill's implications for the presidency (recall that it would give the President an appointment power and, perhaps, a foothold in the drafting process), it ultimately garnered the support of three Presidents: Roosevelt, Taft, and Wilson.[319] A bipartisan group of congressional leaders testified in favor of the bill.[320] Ambassador Bryce made an unorthodox appearance on Capitol Hill to testify on the need for professional, nonpartisan staff in Congress.[321]

All the while, the Columbia Triumvirate worked behind the scenes. They mobilized the British drafters, the legal academy, the American Bar Association (ABA), and the Chamber of Commerce. Some surviving personal papers show the Triumvirate maneuvering—sometimes with Stone—to pressure key

316. *Id.* § 4.

317. *Id.*

318. *Id.* § 6.

319. *See* ROOT REPORT, *supra* note 141, at 72 (statement of Rep. John M. Nelson) (quoting a letter of support sent by President-elect Woodrow Wilson some time before his inauguration, and referencing a similar letter sent by ex-President Theodore Roosevelt). President Taft consulted with Charles McCarthy on the creation of a legislative drafting bureau and offered McCarthy a role in leading the bureau, which McCarthy declined. Marion Casey, *Charles McCarthy's "Idea": A Library to Change Government*, 44 LIB. Q. 29, 38 (1974).

320. *See* ROOT REPORT, *supra* note 141, at 71, 113-14, 116.

321. *Id.* at 74-77.

lawmakers.[322] They used their financial resources and connections to arrange for British drafters to evangelize reform.[323]

Parkinson worked through the ABA to commission a Special Committee focused on statute drafting. Along with Parkinson, the Special Committee was loaded with the Columbia Triumvirate's allies: William Draper Lewis, Ernst Freund, Samuel Untermyer, Louis Brandeis, and Henry Hall.[324] The Special Committee mainly operated as a tool for credentialing the Triumvirate's vision for congressional reform.

The Special Committee's reports provide the first hints at what would develop into the opinions-drafting practice. The reports argue that the professional drafters would have to keep an eye toward "[c]onformity with constitutional requirements" and with the "purpose" of a statute.[325] In more hushed tones, and as the Columbia Triumvirate's coalition foresaw, the Special Committee indicated that drafting bureaus were most effective when they prioritize "Administration Bills" (bills from the President), "Commission Bills," and "Department Bills" (bills originating in agencies).[326] The committee members hinted that drafting bureaus could serve as a hub for presidential drafting.[327]

The Special Committee ended with a recommendation that Congress establish its own reference service and drafting bureau:

> *Resolved*, That in the opinion of the Association, an official legislative drafting and reference service, when properly organized and directed, *forms an efficient agency tending to prevent the enactment of unconstitutional*, obscure and otherwise defective statutes . . . and we hereby recommend the establishment and generous support of such service at Washington and in those states not now having such service.[328]

As this report reveals, the reformers possessed an ambient understanding that a drafting bureau would prevent the production of unconstitutional legislation.

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322. *See* Letter from Joseph P. Chamberlain to Thomas I. Parkinson, *supra* note 275 (strategizing about which lawmakers to persuade with the help or consultation of "Stone").

323. *See id.* (suggesting that the Columbia Triumvirate should arrange for Sir Courtenay Ilbert to come and speak on parliamentary drafting); *see also* PARKINSON, *supra* note 85, at 27-28 (discussing the impact Ilbert had on Parkinson in a 1913 meeting through a lecture series).

324. AM. BAR. ASS'N, LEGISLATIVE DRAFTING: REPORT OF THE SPECIAL COMMITTEE OF THE AMERICAN BAR ASSOCIATION 14 (1923) [hereinafter ABA SPECIAL REPORT] (on file with Nat'l Archives, Ctr. for Legis. Archives, Rec. Grp. 200, Frederic P. Lee Personal Papers, Boxes 2-3).

325. *Id.* at 3.

326. *Id.* at 6.

327. *See id.*

328. *Id.* at 14 (emphasis added).

Apart from the ABA, the Chamber of Commerce launched its own campaign. The creation of a drafting bureau became a referendum issue.[329] By implication, this meant that business interests across the world began debating the desirability of a drafting bureau.[330] The referendum is an interesting glimpse into how reformers pitched these changes. In a flight of fancy, the referendum suggested that a skilled legislative bureaucracy could "perfect[] statutory language[,] clear as to meaning, certain as to effect and free from conflict with existing laws or court decisions."[331] The referendum indicated that legislators were buckling under the weight of a "burden" from the pull of "office-seekers, agents of special interests and other petitioners for governmental recognition."[332]

The referendum made the case for a bureaucracy that could engage the political process without losing its nonpartisan edge. "It is," the referendum claimed, "a function of the bureau to furnish arguments."[333] In a moment of honesty, the referendum acknowledged that "[t]his includes not only facts but political arguments, which may be as important."[334] Here, the Bureau hinted at the function ultimately filled by the congressional OLCs' briefs, which furnished lawmakers with well-drafted arguments that did not reflect the Offices' views of the law.

The Chamber's referendum also included hints of a role in constitutional law: "No legislator, moreover, can know without specializing in it what must be known about *existing constitutions*, court decisions, statutes, and administrative situations if he is to avoid pitfalls."[335] The Chamber shared the atmospheric understanding that successful drafting required a firm grip on extant public-law doctrine.[336]

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329. U.S. Chamber of Com., Referendum No. 6: On the Question of the Establishment by Congress of a Bureau or Bureaus of Legislative Reference and Bill-Drafting 1 (1913).

330. *See, e.g.*, Am. Chamber of Com. in Paris, *Recent Meetings of the Chamber*, *in* Bulletin No. 120, at 180, 180 (discussing the debate and approval of the Chamber of Commerce's referendum on the creation of a legislative drafting bureau).

331. U.S. Chamber of Com., *supra* note 329, at 3; *see also* Beaman, *supra* note 142, at 66 (arguing that a key to good drafting was a "careful study of the existing" bodies of law a statute would be integrated into).

332. U.S. Chamber of Com., *supra* note 329, at 3.

333. *Id.*

334. *Id.*

335. *Id.* at 4 (emphasis added).

336. *See, e.g.*, *id.* ("A bill may contain a word which has not been judicially interpreted, when another word satisfactory for present purposes has been so interpreted; for instance, the legislator writes 'restriction of trade' when 'restraint of trade' which has been through the crucible of the United States Supreme Court, would do as well.").

This support created momentum, especially in the Senate Library Committee, where the most important bills were being debated. At a February 4, 1913, hearing on the La Follette Bill, the senators present were so confident in the measure that they wondered aloud whether La Follette needed to defend it:

> [Senator La Follette]: Mr. Chairman and gentlemen of the committee: *I assume that it is unnecessary to take any time* upon the general proposition of the advisability of creating a legislative drafting bureau and establishing a Legislative Reference Division in the Library of Congress.
>
> . . . .
>
> [Senator Albert B. Cummins (R-IA)]: My own mind is at rest upon that.
>
> [Chairman George P. Wetmore (R-RI)]: I think the general feeling is favorable.
>
> [Senator La Follette]: My own belief is that the committee is of one mind upon that question.[337]

Despite the support, reform efforts still had an overwhelming Republican flavor. The only Southern Democrat who engaged on the issue was Owen.[338]

Revealingly, the leading legislation provided that the head drafter would be appointed by the President with the advice and consent of the Senate.[339] This was one of the starkest indications that the effort to create a drafting bureau was powered by a coalition seeking to legitimate a presidential role in Congress.

The reform movement had ample support among Progressive Republicans and the Elite Reformers, but Democratic support was absent. This meant that once the La Follette Bill was reported out of conference, the measure was doomed. On the floor of the Senate, the bill faced new opposition on July 11, 1913. Senator Augustus O. Bacon (D-GA) called the bill "the most astonishing piece of legislation" he had "ever heard proposed in this body."[340] Bacon continued:

> If the time has come . . . when Senators are going to need a schoolmaster to teach them how to draft a bill, I think it is about time that the Senators

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337. ROOT REPORT, *supra* note 141, at 4 (emphasis added).

338. *See id.* at 3 (listing the participating lawmakers); *id.* at 9 (statement of Sen. Robert L. Owen).

339. *See* SENATE OLC ANNIVERSARY HISTORY, *supra* note 117, at 3 ("The bill under consideration did have its defects. The chief draftsman was to be appointed by the President, by and with the advice and consent of the Senate, but could be removed by the President upon the joint recommendation of the two Judiciary Committees.").

340. 50 CONG. REC. 2376 (1913) (debating S.B. 1240).

> who are in such need should retire to their homes, resume their seats on their school benches, and let somebody else come here who is capable of doing such work.[341]

After this exchange, S.B. 1240 went nowhere.[342]

To salvage his efforts, La Follette inserted an amendment into an appropriation bill to create a legislative reference bureau in the Library of Congress.[343] In 1946, the reference bureau was renamed the "Legislative Reference Service"; in 1970, it was rechristened the "Congressional Research Service."[344] As discussed below, CRS emerged as a major competitor to the opinions-drafting practice after the notion of a limited reference service faded.

3. Diagnosing the Failure

Congress's failure to create the congressional OLCs in 1914 revealed that the coalition behind congressional reform lacked the legislative muscle to realize the vision of the Columbia Triumvirate. Although constitutional politics, congressional time, and secular cycles had all aligned to create a unique policy window, more was required from the reform coalition. The progressive wing of the Republican Party had been declining since 1910.[345] Likewise, the value of the Elite Reformers' network of civil-society groups and business interests was offset by their weak standing in Congress and disdain for legislative politicking. While Elihu Root had more *dignitas* than his contemporaries, he had little effect on the calculus of vote-getting in the Senate.[346] The main ballasts of support for the

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341. *Id.*

342. *See* George K. Yin, *Legislative Gridlock and Nonpartisan Staff*, 88 Notre Dame L. Rev. 2287, 2294-95 (2013).

343. *Id.* at 2293; *see* Appropriations Act of July 16, 1914, ch. 141, 38 Stat. 454, 463 (appropriating funds to create a legislative reference bureau).

344. Yin, *supra* note 342, at 2294.

345. The Republican faction was best situated between 1908 and 1910. In the Senate, there were ten Republican Progressives led by Robert La Follette (R-WI), Jonathan Prentiss Dolliver (R-IA), Albert B. Cummins (R-IA), Albert J. Beveridge (R-IN), Joseph L. Bristow (R-KS), and Jonathan Bourne, Jr. (R-OR). 2 Jessup, *supra* note 213, at 217; *see also* Lewis L. Gould, Four Hats in the Ring: The 1912 Election and the Birth of Modern American Politics 10 (2008) (describing the group of ten insurgent Progressive Republicans in the Senate). *See generally* William B. Murphy, *The National Progressive Republican League and the Elusive Quest for Progressive Unity*, 8 J. Gilded Age & Progressive Era 515 (2009) (discussing the National Progressive Republican League, an attempt at progressive unity in the GOP headed by Senator Jonathan Bourne). This group was cemented by their participation in tariff fights during the Taft Administration. 2 Jessup, *supra* note 213, at 217.

346. 2 Jessup, *supra* note 213, at 137-270 (discussing Root's career in the Senate and his passive disinterest in legislative politics after years spent in executive institutions).

creation of a drafting bureau were two groups with depreciating assets in Congress. Like Root, many were exiting public office.

The *more* that was required was the Democratic Party. Although Democratic leadership—both Wilson and Champ Clark—supported the effort to create a drafting bureau, the effort did not catch on with the rank and file. Moreover, Clark's support did not carry the weight that a Speaker's endorsement might have a decade earlier. Because of the Rebellion of 1910, power had begun decentralizing; the Southern contingent, in control of different levers of power, was of central importance.[347]

Outside the Committee on the Library, the Owen Bill provoked tension around whether Congress really needed both a legislative reference service *and* a drafting bureau.[348] Although a nonpartisan reference service was "uncontroversial," there were deep divides over "whether a bill-drafting service was needed, and whether it should be nonpartisan or serve the members of each party separately."[349]

The Owen Bill seems to have engendered a more visceral reaction because of how it challenged lawmakers' self-conceptions. Because the reformers envisioned a *congressional counselor*,[350] Southern Democrats resented the suggestion that they needed a "schoolmaster."[351] That Republicans drove the reform effort exacerbated Democrats' resentments.

From the perspective of the Columbia Triumvirate, the worst setback of the 1912-1914 period may not have been the failure to create a drafting bureau. It may instead have been the creation of a legislative reference service in the Library of Congress.

Middleton Beaman went to Capitol Hill to argue that the roles of a drafting bureau and a legislative reference service should not be separated. He started by arguing that bill drafters needed to "know something about the subject matter."[352] In a fretting tone, Beaman continued: "The reason I bring up this point is that I am afraid in your consideration of the bill you might be led to separate

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347. *See* DONALD R. KENNON & REBECCA M. ROGERS, THE COMMITTEE ON WAYS AND MEANS: A BICENTENNIAL HISTORY 1789-1989, at 217 (1989) (discussing the institutionalization of the power of the Chairman of the Committee on Ways and Means after 1910 under the influence of Chairman Oscar Underwood (D-AL)).

348. As George K. Yin noted, "The main point of contention in Congress was whether the bureau should incorporate both a reference service and bill-drafting." Yin, *supra* note 342, at 2293.

349. *Id.*

350. *See supra* text accompanying notes 262-312.

351. *See supra* note 341 and accompanying text.

352. ROOT REPORT, *supra* note 141, at 121 (statement of Middleton Beaman).

the two functions in that way, and to my mind, if you separate them, you will not get the value of them."[353]

The Columbia Triumvirate envisioned new offices that *they* would run and concluded, naturally, that it would be better not to divide those offices' strength between Congress and the Library.[354] Imagining a role that he would soon inhabit, Beaman claimed that the chief drafter of Congress would need to manage the flow of information to lawmakers.[355] Whatever the merits of the Triumvirate's vision, the creation of a legislative reference service in the Library was a deviation from their plan.

There were, however, glimmers of hope. Although his fellow Southerners opposed the reform effort, Owen issued a report urging his colleagues to enact a similar effort.[356] He noted that after the 1912 elections, Democrats would need to realize their many campaign promises with new and complex legislation.[357] Going further, Owen bluntly asserted that a legislative reference service, a legislative corps, and some kind of professional drafters were necessary to realize President Wilson's New Freedom agenda.[358]

B. 1916-1918: Beaman the Tax Man, Parkinson the Constitutional Consigliere

What followed the 1912-1914 failure is a remarkable display of policy entrepreneurship. From 1916-1918, the Columbia Triumvirate learned from the reform effort's mistakes and recalibrated their approach. Their efforts proceeded on two tracks—one widely understood in the literature and the other missed entirely. Beaman worked through the House and demonstrated that he was indispensable to the Democratic Party's major policy initiatives. Meanwhile, Parkinson rebranded as a constitutional consigliere to reformers interested in passing

353. *Id.* at 122.

354. Special Comm. on Legis. Drafting of the Am. Bar Ass'n, Bill Drafting and Legislative Reference Bureaus, S. Doc. No. 63-262, at 4 (1913) (recommending that Congress establish a reference service that would "directly contribut[e] to the drafting service").

355. *See id.* ("I think that the head of the bureau should be a man who is, not necessarily a practicing lawyer, but a man of legal education, a man of sound ideas of the law, who knows the law and appreciates what is necessary; and all information should be gathered that way, and if you separate the two ideas you are going to get into trouble.").

356. S. Rep. No. 63-73, at 1 (1913).

357. *Id.* ("It is highly desirable that the legislative reference bureau be established as quickly as possible, for the party in power is pledged to legislate on many great reforms.").

358. *See id.* at 7 ("Furthermore, just now there is an especial need for the investigators and bill drafters, for, as pointed out in President Wilson's The New Freedom, great changes are to be made in the laws of the Nation affecting every special privilege.").

child-labor legislation. These demonstration projects ended with the creation of the congressional OLCs and the beginning of the opinions-drafting practice.

Before proceeding, it is worth briefly describing the complicated dynamics of the Democratic Party at the time. The Democrats were powerful allies, not just because they had won majorities in both chambers of Congress,[359] but also because their votes were more dependable than the Republicans'. The Democrats were more reliably progressive, with their most conservative members voting more progressively than all but the most progressive of Republicans.[360] Moreover, the Democrats were better managed and held together as a solid bloc against Republicans on the votes that mattered.[361]

But the Democratic Party was also a complicated cocktail of progressive instincts and antistatist biases. The Democrats favored statutory enactments that could ameliorate the problems of modernity and redesign the revenue system. They sought what Elizabeth Sanders described as the "statutory state."[362] At the same time, they were suspicious of the expert bureaucracies that Republican Progressives favored.[363] So an appeal coming from Parkinson and Beaman—the administrative scholar and the future New Dealer—had to be carefully couched. That the Southern Democrats eventually came aboard only adds another note to one of the great ironies of the Progressive Era: time and again, "driven by social movements deeply hostile to bureaucracy, [the Democratic Party] produced a great bureaucratic expansion."[364]

Three Democrats are especially important to the Columbia Triumvirate's success: Cordell Hull (D-TN, future Secretary of State to President Franklin Delano Roosevelt (FDR)), Claude Kitchin (D-NC, House Majority Leader and Chairman of the Ways and Means Committee), and John Nance Garner (D-TX, future Vice President to FDR). These are names to remember. Later, Garner and Hull—ever impressed by the prowess of Middleton Beaman—would help empower the congressional OLCs during the New Deal.

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359. *See* Hist., Art & Archives, *supra* note 240.

360. HARRISON, *supra* note 79, at 234.

361. *Id.* at 233-34.

362. ELIZABETH SANDERS, ROOTS OF REFORM: FARMERS, WORKERS, AND THE AMERICAN STATE, 1877-1917, at 389 (1999).

363. *Id.*

364. *Id.*

1. *Beaman and the Tax Code*

Beaman's side of the story is well known.[365] While this portion of the story has been presented in the literature, it has downplayed the degree to which the Columbia Triumvirate regeared their efforts toward advancing the Democratic Party's policy priorities.[366]

The Democratic Party had organized itself around opposition to protective tariffs.[367] From the 1890s through the 1920s, the tariff was perhaps the most consistent and most ardent point of departure between the two major political parties.[368] But while opposition to the tariff was an effective economic and moral stance—especially after affordability concerns rose from 1908 to 1912—it would necessitate a redesign of the nation's revenue system.[369]

Once the Democrats seized control of Congress in 1912 and won the White House with the election of Woodrow Wilson, they launched a fresh round of state building. The Democrats enacted the Revenue Act of 1913, which resurrected the federal income tax and slashed tariffs.[370] This legislation was the culmination of long-gestating politics. The Democrats also enacted the Federal Reserve Act,[371] which symbolized the increasingly progressive orientation of Wilson's party.

Despite the Democrats' apparent momentum, there were problems on the horizon. The Revenue Act of 1913 had major drafting errors. The initial bill was drafted by Hull,[372] who drew on an eclectic brew of precedents: a more-than-century-old income law from Britain; other state, federal, and foreign

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365. *See, e.g.*, Yin, *supra* note 119, at 112-13 (describing Beaman's demonstration project with no reference to Parkinson's work in the Senate).

366. Emblematic of this trend in the literature is the otherwise outstanding work of George K. Yin. Yin acknowledges that the efforts to create the congressional OLCs floundered at first. *Id.* at 112. But aside from Beaman, Yin fails to connect the Columbia Triumvirate to those earlier attempts. *See id.* Because of this, Yin and others do not appreciate the Columbia Triumvirate's nimbleness or the change in lawmakers' positions between the two periods of active legislating on the topic of the congressional OLCs. *See id.*; Cross & Gluck, *supra* note 20, at 1564; Shobe, *supra* note 18, at 819-20.

367. *See* HARRISON, *supra* note 79, at 237.

368. *See id.* at 235 ("For decades the tariff had provided the main staple of party warfare . . . .").

369. *See id.* at 238-39 (describing early Democratic attempts to offer up alternatives to the GOP's tariff agenda).

370. Revenue Act of 1913, ch. 16, 38 Stat. 114.

371. Federal Reserve Act, ch. 6, 38 Stat. 251 (1913) (codified as amended in scattered sections of 12 U.S.C.).

372. George K. Yin, *James Couzens, Andrew Mellon, the "Greatest Tax Suit in the History of the World," and the Creation of the Joint Committee on Taxation and Its Staff*, 66 TAX L. REV. 787, 792 (2013).

precedents; and the 1909 corporate excise tax.[373] One recent review of the Act concluded that it was "a poorly drafted hodgepodge that seems to have reflected none of the more principled approaches to a fundamental definition of income that is now taken for granted."[374] George K. Yin has described the result as "confusingly drafted and contain[ing] some gaping holes."[375] It was "perhaps the least comprehensible in a very long line of complicated tax statutes."[376] And a contemporaneous account of the 1913 Act described widespread confusion over the extent of new tax liabilities.[377]

To be sure, the 1913 Act was the first step in building out a new revenue system. Because this effort was crucial to the Democratic Party, issues with statute drafting and administration loomed large. The changing landscape prompted by World War I only increased the salience of the Democratic Party's new project.[378]

Because of the calamitousness of the 1913 Act, the need for better drafting was felt acutely in Congress. Hull or Garner sought and received the help of the Columbia Triumvirate, who offered to come to the Capitol for a new demonstration project.[379]

When Beaman started his demonstration work, Kitchin chaired the Ways and Means Committee and opposed the creation of a drafting bureau staffed by professors.[380] This changed when Beaman positioned himself as an asset to the Democratic Party's larger mission. After drafting the 1916 Shipping Act, Beaman

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373. *Id.*

374. Charlotte Crane, Pollock, Macomber, *and the Role of Federal Courts in the Development of the Income Tax in the United States*, 73 LAW & CONTEMP. PROBS., no. 1, 2017, at 1, 17.

375. Yin, *supra* note 372, at 792.

376. Yin, *supra* note 119, at 112.

377. *See* Roy G. Blakey, *The New Income Tax*, 4 AM. ECON. REV. 25, 27 (1914) ("Since the law went into effect a short time ago, criticism has broken out anew. . . . [T]he press of the whole country has been flooded with statements of lawyers, bankers and others to the effect that the provisions of the law are intricate, inconsistent, and incomprehensible."). *But see id.* at 38 ("[I]t is important to view the new income tax, not as an ideal or perfected system, but as the first step in the introduction of a vast and more or less complex system.").

378. *See* TARBERT, *supra* note 159, at 42 (suggesting that World War I increased the salience of revenue reform because of the resulting war debt).

379. Initially, Beaman worked for the House Committee on Merchant Marine and Fisheries. Yin, *supra* note 372, at 811 n.122. Kitchin was, at first, reluctant to accept Beaman's services in the House Ways and Means Committee. *Id.* Depending on the source, either Garner or Hull supported Beaman's demonstration project on the Committee. *Compare* 1 CORDELL HULL, THE MEMOIRS OF CORDELL HULL 80 (1948) (providing an example of Hull claiming credit himself), *and* Yin, *supra* note 119, at 112 ("Hull, already hard at work on a bill redrafting the 1913 income tax and adding a new estate tax, quickly enlisted the assistance of [Beaman]."), *with* SENATE OLC ANNIVERSARY HISTORY, *supra* note 117, at 5-6 (crediting Kitchin and Garner as the congressional OLCs' great patrons).

380. Lee, *supra* note 17, at 385; Yin, *supra* note 342, at 2295 (detailing Kitchin's initial opposition).

spearheaded the creation of an estate tax in the Revenue Act of 1916, "two 1917 tax bills adding a complicated new excess profits tax," and a complicated revision of "both the income and excess profits taxes."[381] With this effort, Beaman helped further the Democratic Party's reconfiguration of the nation's revenue system.

Beaman's work in drafting the Revenue Act of 1918 won universal praise. Recalling the impact of Beaman's work a few years later, Representative Allen Treadway (R-MA) was clear that this work made the creation of a professional drafting unit a priority:

> [Beaman's drafting work] was of the utmost value, not alone in improving the phraseology of the bill but in preventing serious discrepancies from appearing in the text. . . . The Committee on Ways and Means felt that Congress should not be a mendicant on Columbia University nor receive favors at its hand, however gladly offered.[382]

His work won over three critical supporters in the House: Hull, Kitchin,[383] and Garner.[384] After 1918, Beaman personally drafted every revenue act until his retirement.[385]

2. *Parkinson and Child Labor*

In 1916, Parkinson went to Congress to advocate for the Keating-Owen Child Labor Bill.[386] Existing accounts of the congressional OLCs have missed this critical element of the Offices' creation story. Parkinson's efforts are important because they helped cement support for the creation of the congressional OLCs. But Parkinson's efforts warrant special attention for two more reasons. First, Parkinson's constitutional advice and his briefing style help us understand why the Senate would later accede to the opinions-drafting practice after Parkinson and Beaman were installed as the heads of the congressional OLCs. Second, Parkinson developed a novel standard for legislative constitutionalism that was incorporated into the practice.

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381. Yin, *supra* note 119, at 112-13. Yin only insinuated that Beaman redrafted the estate-tax provision. He wrote that Hull had already started work on the bill in 1916 and that after Beaman was brought aboard it became "a much more clearly drafted statute." *Id.* at 112.

382. 59 CONG. REC. app. at 8829 (1920) (statement of Rep. Treadway).

383. *See* Yin, *supra* note 119, at 112-13.

384. *See* Lee, *supra* note 17, at 386 (describing how Garner called for "legislative provision . . . for the establishment of an official agency to render aid upon the legal phases of legislation").

385. Cummings & Swirski, *supra* note 122, at 5.

386. *See infra* notes 392-398 and accompanying text (describing Parkinson's testimony before Congress).

Prior to 1916, the Progressives encountered tremendous difficulty in legislating against child labor. In 1907, Senator Albert Beveridge (R-IN) submitted a bill that would have combatted the worst excesses of industrial child labor.[387] Beveridge defended the constitutionality of this measure, but during debates on the floor of the Senate he conceded that his bill would set precedent allowing for the regulation of adult-male working conditions and thereby doomed the measure.[388]

Parkinson's mission was to defend the constitutionality of the Keating-Owen Bill. The bill prohibited goods produced with child labor from being sold through interstate commerce.[389] After convincing himself of the bill's constitutionality and merit, Parkinson wrote in his notes that "[t]he only consideration which might tend against the desirability of such legislation is the fear that such an extension of the federal power may inspire similar extension in other matters."[390] He continued:

> To those fearful of the possibility of such further extension of federal power, it would seem sufficient to point out that it is seldom that there occurs a combination of moral sentiment, economic conditions, and inability of the states to accomplish the desired and like that which supports this proposition.[391]

Congress had to act, and Parkinson crafted his rhetoric to dispel lawmakers' slippery-slope concerns.

Parkinson's rhetoric split the constitutional difficulties surrounding the measure into two sets.[392] First, there was an issue over "the respective jurisdictions of the Federal Government and the State governments over commerce."[393] This was separate from the second question — "what are the respective rights and powers of the federal government and the individual" — a question implicating

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387. Logan E. Sawyer III, *Creating* Hammer v. Dagenhart, 21 Wm. & Mary Bill Rts. J. 67, 119 (2012).

388. *Id.* at 119-20.

389. Keating-Owen Child Labor Act of 1916, ch. 432, § 1, 39 Stat. 675, 675.

390. Personal Notes Marked "Final" 3 (n.d.) (on file with Univ. of Wy., Am. Heritage Ctr., Thomas I. Parkinson Papers, 1900-1959, Box 4, 1914-1916).

391. *Id.*

392. *See An Act to Prevent Interstate Commerce in the Product of Child Labor, and for Other Purposes: Hearings on H.R. 8234 Before the S. Comm. on Interstate Com.*, 64th Cong. 114 (1916) (statement of Thomas I. Parkinson, Professor, Columbia University) ("[T]he [constitutional] problem is not only capable of division into two general parts, but it requires that division, if we are to keep the precedents and our own consideration[s] clear of confusion.").

393. *Id.*

the Fifth Amendment.[394] This rhetorical gambit dampened concerns over the bill's constitutionality.[395] When he appeared in person, Parkinson's reasoning found purchase.

In Parkinson's view, Congress did not bear an exacting standard of proof as to its constitutional judgment. Unless there were strong doubts about a bill's constitutionality, he said, Congress should legislate so that the law could keep developing in the public interest.[396] Parkinson's legal theory relied on an expansive view of Congress's interstate commerce power: he viewed it as coterminous with Congress's foreign commerce power, which more clearly included the power to prohibit commerce.[397] To strike the proper balance, Parkinson said that in the realm of interstate commerce, Congress is limited only by due process.[398] Practically, his thinking went, the due-process limitation was a rule of reasonableness: Congress could enact any prohibition in interstate commerce so long as it provided reasons.[399]

Parkinson refined the bill's substance while he defended its constitutionality. His notes are filled with objections to the statute's provisions, especially the bill's substantive provisions.[400] He helped lawmakers craft amendments.[401] In particular, Parkinson instructed that the law must contain a provision "entrusting the enforcement of the act either to the Department of Labor generally, or should create a new Bureau in the Department with full power to make rules and

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394. *Id.*

395. Sawyer, *supra* note 387, at 120 ("Parkinson used that division to counter concerns that the passage of a child labor law meant an adult labor law was also constitutional.").

396. *Constitutionality of Keating-Owen Child Labor Bill: Statement Delivered Before the H. Comm. on Labor*, 64th Cong. 3 (1916) (statement of Thomas I. Parkinson, Director of the Legislative Drafting Department, Columbia University) ("[Y]ou do not need to have it demonstrated to you beyond all doubt that this proposed legislation is constitutional. If you did, there would be no progress in our constitutional law, and particularly no progress in the development of the Federal power under the commerce clause.").

397. *See id.* at 6 ("We all know that Congress has excluded and prohibited the importation of specified persons and things in foreign commerce."); *id.* ("Congress has prohibited the importation in foreign commerce, in the embargo acts, in the inferior grade of tea acts, in the various provisions excluding foreign convict-made articles, fur seal skins taken in violation of law, and eggs of game birds.").

398. *Id.* at 12.

399. Draft Brief 7-8 (n.d.) (on file with Univ. of Wy., Am. Heritage Ctr., Thomas I. Parkinson Papers, 1900-1959, Box 4, 1914-1916).

400. Draft Statutory Text (n.d.) (on file with Univ. of Wy., Am. Heritage Ctr., Thomas I. Parkinson Papers, 1900-1959, Box 4, 1914-1916). Parkinson's personal papers contain annotated drafts of the Keating-Owen Act (appearing as H.R. 8234) and other related provisions, like S. 1083. *Id.*

401. *Id.* at 3.

regulation."[402] As demonstrated later, Parkinson and the Columbia Triumvirate were always focused on enforcement, to ensure that social legislation had its intended effect.

Parkinson's advocacy—which some credited with helping to secure the passage of the bill[403]—turned on his legal standard. He argued that the Senate need not know beyond a reasonable doubt that the courts would hold the legislation under consideration constitutional.[404] Instead, Congress should enact socially beneficial legislation unless its unconstitutionality was plain. Parkinson advised lawmakers that there would be no development in constitutional law if they refused to pass bold legislation that pushed the boundaries of congressional power.[405] On this view the onus fell on opponents of legislation to establish more than the mere possibility that legislation was unconstitutional.[406] This standard became the calling card of both the Columbia Triumvirate and, later, the congressional OLCs.

The Columbia Triumvirate's rhetorical innovation drew on ambient themes of deference. Beaman's Harvard law professor, James B. Thayer, became one of the most influential legal academics of all time by delivering a "clear error" standard of judicial review.[407] Thayer "command[ed] judges to invalidate federal laws only when indisputably unreasonable" and framed his standard as "the quintessence of America's best traditions."[408] This standard flowed from Thayer's emphasis on "educative democracy," his preference for a model of mass electoral democracy that required judges to allow voters to learn through their mistakes.[409] But Thayer felt that *legislators* were not similarly situated. Judges, unlike lawmakers, were determining "what judgment is permissible [as] to another

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402. *Id.*

403. *See, e.g.*, Sawyer, *supra* note 387, at 120 (crediting Parkinson's advocacy with downplaying concern with the bill's unconstitutionality).

404. *See supra* note 396.

405. *See supra* note 396.

406. Personal Notes 4 (n.d.) (on file with Univ. of Wy., Am. Heritage Ctr., Thomas I. Parkinson Papers, 1900-1959, Box 4, 1914-1916) ("If this legislation is desirable, it certainly ought not be held up by Congress because of the *possibility* of its being held unconstitutional.").

407. Samuel Moyn & Rephael G. Stern, *To Save Democracy from Juristocracy: J.B. Thayer and Congressional Power After the Civil War*, 38 CONST. COMMENT. 315, 317 (2023).

408. *Id.*

409. *See id.* ("That mission was based, most fundamentally, on an optimistic transatlantic theory of 'educative democracy' that allocated mass electoral democracy both the power and the responsibility, not to rule unerringly, but to learn from its mistakes better than alternative governing elites ever would.").

department which the constitution has charged with the duty of making it."[410] He thought that legislators approached the question of constitutionality de novo, and that a determination was specific to any legislator's judgment.[411] This standard respected the fact that in a legislature, "there is often a range of choice and judgment" and "that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice."[412]

The Columbia Triumvirate went further than Thayer. Because the *Lochner* era judges were aggrandizing their own authority,[413] a de novo standard of review focused on extant judge-made law would lead lawmakers to become too conservative in enacting legislation, killing the kind of innovation that the Progressive Era required. Unlike Thayer, the Columbia Triumvirate appreciated that in a juristocratic legal culture in which more of what was previously "political" was being subsumed by courts, lawmakers would internalize the courts' claims to authority.[414] The standard they developed mirrored Thayer in that lawmakers would internalize a permissive posture toward their own constitutional review of legislation with a clear-error standard. The standard required lawmakers to vote against efficacious legislation only if that legislation was clearly

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410. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

411. *See id.* ("[O]ne who is a member of a legislature may vote against a measure as being, in his judgment, unconstitutional; and being subsequently placed on the bench, when this measure, having been passed by the legislature in spite of his opposition, comes before him judicially, may there find it his duty, although he has in no degree changed his opinion, to declare it constitutional.")

412. *Id.*

413. For recent articles on this period's themes of juristocracy and judicial self-aggrandizement, see generally, for example, Allen C. Sumrall, *Separation of Powers and the Judiciary Act of 1925*, 100 NOTRE DAME L. REV. (forthcoming 2025), https://ssrn.com/abstract=5106213 [https://perma.cc/S6GJ-4GY6], which explores the Taft Court's incredible political influence; and Robert Post, *The Supreme Court's Crisis of Authority: Law, Politics, and the Judiciary Act of 1925*, 100 NOTRE DAME L. REV. (forthcoming 2025), https://ssrn.com/abstract=5075524 [https://perma.cc/HW8W-LQY3], which argues that the actions of Chief Justice Taft and the 1925 Judiciary Act set the Supreme Court on a path to reimaging its expansive role in American society.

414. *See supra* notes 396-399 and accompanying text; *see also* Beau Baumann, *Susan Collins and Juristocracy*, PASSING POL. TIME (Feb. 8, 2025), https://bbaumann.substack.com/p/susan-collins-and-juristocracy [https://perma.cc/LK6P-BRLZ] (providing a contemporary example of a senator's refusal to act in Congress's own interest because she had internalized courts' increasingly broad claims to authority). The Columbia Triumvirate appreciated the ideational component of judicial power—judges' ability to deploy ideas, norms, and assumptions that might adversely affect lawmakers' mindset. *See generally* Allen C. Sumrall, *The Ideational Dimension of Judicial Power*, 109 MARQ. L. REV. (forthcoming), https://ssrn.com/abstract=5134903 [https://perma.cc/3T2G-P3FZ] (describing this ideational component).

unconstitutional.[415] This standard operated like a thumb on the scale in favor of legislative power on Capitol Hill; it was designed to lessen the impact of a *Lochner* era juristocratic trend. This standard reflected the constitutional politics of the moment: Progressives needed to create space for policymaking outside the strictures of a juristocratic separation of powers.[416]

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Beaman and Parkinson's combined efforts proved successful. The Democratic power players that dominated the Ways and Means Committee added a provision to the Revenue Act of 1918 creating a professional drafting bureau initially called the Legislative Drafting Service (the forerunner to the congressional OLCs) and dropping the odious presidential appointment from previous legislation.[417] The Senate and House components of this bureau were rechristened as the Offices of the Legislative Counsel in the Revenue Act of 1924.[418] Mediating earlier conflict, the Revenue Act of 1918 provided that the heads of each OLC would be appointed by the Speaker of the House and the President of the Senate (the Vice President), respectively.[419]

The forces opposed to professional drafting lingered for a few more years. In 1923, Representative Thomas U. Sisson (D-MS) motioned on the House floor to strike the legislative vehicle providing for the congressional OLCs' funding.[420] Sisson declared that he had "never . . . been able to find any sort of justification" for paying nonpartisan drafters.[421] Sisson framed his opposition to the congressional OLCs around his commitment to representative democracy.[422] But Sisson soon exited Congress.[423] After 1923, there is little documented opposition to the congressional OLCs.

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415. *See supra* notes 404-405 and accompanying text.

416. *See supra* notes 156-172 (discussing the triumvirs' constitutional politics and their emphasis on social legislation).

417. SENATE OLC ANNIVERSARY HISTORY, *supra* note 117, at 4.

418. *Id.*

419. Revenue Act of 1918, ch. 18, § 1303(a), 40 Stat. 1057, 1141-42.

420. 64 CONG. REC. 2111 (1923) (statement of Rep. Sisson).

421. *Id.*

422. *See id.* ("I do not believe when people elect Members of Congress . . . they expect them to employ other people to do their thinking.").

423. Hist., Art & Archives, *SISSON, Thomas Upton*, U.S. HOUSE REPRESENTATIVES, https://history.house.gov/People/Listing/S/SISSON,-Thomas-Upton-(S000456) [https://perma.cc/Q4FW-VKNV].

In the end, the Columbia Triumvirate won an underdetermined mandate.[424] The text of the Revenue Act of 1918 only envisioned drafting, but its sparse provisions hid unresolved tensions from earlier debates. The Columbia Triumvirate could expect space to develop the Offices' practices. They were empowered and constrained, for the most part, by their patrons from the South. The battle to gain legitimacy within Congress was not over. Republicans and Northern Democrats in Congress publicly opposed the congressional OLCs for several years to come.[425] But within ten years, the Columbia Triumvirate overcame many obstacles to create two powerful institutions in Congress.

It is worth considering the birth of the congressional OLCs and the birth of the opinions-drafting practice as an important example of disjointed pluralism.[426] The different groups behind the creation of the Offices—the Columbia Triumvirate, their academic allies, Progressive Republicans, the Elite Reformers, and the Southern Democrats—had distinct interests and constitutional politics.[427] The Triumvirate helped focus the terms of the debate around issues that would unite diametrically opposed forces.[428] That is natural: "more than one interest determines institutional change" in Congress's different epochs.[429] Nonetheless, once the congressional OLCs were established, that pluralism created a grab bag of different values the Triumvirate could vindicate to ensure the Offices' survival.

At the same time, the *operations* of the congressional OLCs are textbook examples of disjointed institutional developments. Namely, the opinions-drafting practice became a force on Capitol Hill despite never having been formally debated on the floor of either chamber. The Columbia Triumvirate seized on the "*interactions* and *tensions* among competing coalitions promoting several different interests."[430] The practice was envisioned by the Triumvirate and their allies in the academy. The practice's survival depended on its interactions between the various interests represented by other actors in Congress.

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424. *See* Shobe, *supra* note 18, at 820 ("The law establishing the offices, the Revenue Act of 1918, was vague and left much to congressional discretion.").

425. *See* SENATE OLC ANNIVERSARY HISTORY, *supra* note 117, at 5-6 (detailing the defenses offered by John Nance Garner and Claude Kitchin).

426. *See* SCHICKLER, *supra* note 62, at 4 (coining the term "disjointed pluralism").

427. *See id.* ("By *pluralism*, I mean that many different coalitions promoting a wide range of collective interests drive processes of change.").

428. *See id.* at 14 ("[E]ntrepreneurial members define issues so as to facilitate cooperative action among legislators who might normally oppose one another.").

429. *Id.* at 4.

430. *Id.*

IV. THE OPINIONS-DRAFTING PRACTICE

Once Congress established the forerunner to the congressional OLCs, Middleton Beaman was selected to head the House component and Thomas I. Parkinson was selected for the Senate.[431] Joseph P. Chamberlain stayed behind at Columbia and assumed sole leadership of the LDRF.[432] The next several years were chaotic. The Columbia Triumvirate initially lacked funding for talented assistants.[433] Moreover, the underdetermined nature of their mandate meant that the Triumvirate had to proceed gingerly. The lack of direction was compounded by changing political headwinds. The GOP swept back into power after World War I.[434] Recent scholarship pushes back on the narrative that the war suddenly ended Progressivism; in Congress, the Columbia Triumvirate readily awaited the New Deal.[435] In the meantime, the GOP had its own state-building program.[436]

Section IV.A provides an overview of the surviving congressional OLC sources. This Section shows that a bipartisan group of lawmakers were almost immediately receptive to the opinions-drafting practice, which operated without any relevant statutory authority. Although some scholars have expressed skepticism that the constitutionality of legislation is subsumed by the practicalities of legislative politics and plays almost no meaningful role in Congress,[437] lawmakers underwrote a hierarchical system of precedent that distinguished the congressional OLCs' best view of the law (opinions) from the OLCs' best take on senators' own arguments (briefs). This bipartisan project was especially important for one type of lawmaker—the representatives and senators whose politics, their way of communicating with each other and their constituents, revolved around constitutional discourse. These lawmakers were the repeat players that disproportionately drove solicitations for legal opinions from the congressional OLCs. This finding helps us understand where the Constitution mattered most on Capitol Hill: in the bipartisan segment of lawmakers in both chambers whose politics turned on rhetoric about constitutional values.

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431. SENATE OLC ANNIVERSARY HISTORY, *supra* note 117, at 5.

432. Kernochan, *supra* note 72, at 627 & n.11. Chamberlain "served as Director from 1918 until his death in 1951." *Id.*

433. *See, e.g.*, SENATE OLC ANNIVERSARY HISTORY, *supra* note 117, at 9-10 (describing Beaman's quest to increase staff salaries).

434. TARBERT, *supra* note 159, at 42.

435. Rosenblum, *supra* note 102, at 184 n.715 ("The current consensus sees the 1920s as a time in which Progressive ideas continued to matter, but were less influential and strident.").

436. *See generally* TARBERT, *supra* note 159 (describing Elite Reformers' state-building projects, which gained salience during GOP rule in the 1920s).

437. Alexander & Schauer, *supra* note 40, at 1368.

Just as importantly, this Part operates from the perspective that the opinions-drafting practice was a constitutive part of the congressional OLCs' broader operations. Section IV.B discusses the different aspects of the congressional OLCs that helped solidify the opinions-drafting practice. The practice depended on the prestige of the Offices, the importance of the Offices' drafting expertise, and the rising star of Middleton Beaman.

Section IV.C shows that the opinions-drafting practice was powered by a Thayer-like standard designed to vindicate congressional power. This is one of the most important findings of the Article. Parkinson's standard for enacting social legislation—explained in Part III—was appropriated by the congressional bureaucrats and powered their review of constitutional questions. This Section shows that the opinions-drafting practice was an implicit governing paradigm.[438] The Columbia Triumvirate found a standard of review that reflected their own constitutional politics. By putting a thumb on the scale in favor of expansive views of congressional power, the congressional OLCs offered a way to ameliorate the Triumvirate's fear that lawmakers might fail to enact progressive legislation because of the prospect of judicial review. Because Congress has nothing like this standard in the present, this Section provides important background for Part V.

Section IV.D offers an example opinion that demonstrates how the opinions-drafting practice influenced statute drafting. The opinions in isolation were important; they could even move lawmakers to abandon their own pieces of legislation. But the opinions-drafting practice also created a body of law in the congressional OLCs, which formed part of the legal background against which drafters would draft statutes. Because congressional OLCs drafted much of the most important legislation of the twentieth century, this background law was an important feature of our republic of statutes.[439]

Next, Section IV.E discusses the congressional OLCs' work undermining antilynching legislation, which shows the Offices' limitations amid political realities in Congress. Finally, Section IV.F focuses on the congressional OLCs' role

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438. *See supra* text accompanying notes 68-70.

439. In 2010, William N. Eskridge, Jr. and John Ferejohn wrote a landmark book on our "republic of statutes." William N. Eskridge, Jr. & John Ferejohn, A Republic of Statutes: The New American Constitution (2010). Eskridge and Ferejohn argued that the Constitution's focus on limited government and individual rights "neglects the reason why we have government at all." *Id.* at 1. Instead, the authors focused on the "statutes, executive orders, congressional-executive agreements, and agency rules" that "mold[ed] the Constitution itself." *Id.* This Article shows how the congressional OLCs contributed a new technology for building our republic of statutes. The opinions-drafting practice provided a subterranean law within Congress that, when combined with the Offices' statute drafting, helped make possible many of the "super statutes" that embody quasi-constitutional values. *See id.* at 7.

advising Congress on its use of "hard" and "soft" powers.[440] This aspect of the opinions-drafting practice's legacy is an important part of the story. The Offices' opinions and memoranda helped build an internal body of precedent that reified "Congress's Constitution."[441] These documents were made possible by the Columbia Triumvirate's emphasis on legislative procedure and politics.

A. The Dataset and Top-Line Findings

It did not take long for the opinions-drafting practice to become a bipartisan phenomenon. A close look at the data suggests an important insight for the literature on legislative constitutionalism: the opinions-drafting practice was widely used, but it was used disproportionately by a specific kind of lawmaker in both parties. This Section explains the dataset before breaking down top-line findings and discussing the audience for the opinions-drafting practice. It provides a big-picture perspective on the practice that helps inform the substantive Sections that follow.

Most of this Article's dataset comprises a recently unsealed collection of opinions, memoranda, and briefs that was opened to the public when the last soliciting lawmaker passed away. That was Senator Robert Byrd (D-WV), who died in 2010 at the age of ninety-two.[442] In the years between Byrd's death and the research undergirding this Article,[443] no scholar had discovered the opinions-drafting practice in the National Archives. This Article is the first analysis of the surviving primary sources.

Recall that the opinions-drafting practice operated under a hierarchy of precedents.[444] Opinions of the Office reflected the official position of the congressional OLCs—they were internally binding and sustained by a strong norm of stare decisis.[445] Opinions were supplemented with nonprecedential memoranda.[446] Finally, and most elusively, the congressional OLCs drafted an unknown number of "briefs," which did not represent the congressional OLCs'

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440. *See* CHAFETZ, *supra* note 32, at 3 (coining the terms "hard" and "soft" congressional powers).

441. *See generally id.* (describing "Congress's Constitution"—the collection of powers that allows Congress to engage in constitutional politics).

442. David Welna, *Robert Byrd, Longest-Serving U.S. Senator, Dies at 92*, NPR (June 28, 2010, 12:00 AM ET), https://www.npr.org/2010/06/28/81190288/robert-byrd-longest-serving-u-s-senator-dies-at-92 [https://perma.cc/25K2-AQWZ].

443. I discovered the opinions-drafting practice in 2019 on a research trip to the National Archives. It took four years to collect and analyze the practice along with other primary-source documents.

444. *See supra* notes 34-39 and accompanying text.

445. *See supra* notes 35-37 and accompanying text.

446. *See supra* text accompanying note 38.

view of the law.[447] Instead, they were the best argument in favor of a lawmaker's chosen position.[448]

The decision to seal these materials might have flowed from the controversial subject matters discussed therein.[449] Even while the opinions-drafting practice was still operational, opinions, memoranda, and briefs were subject to strict confidentiality unless the soliciting lawmaker greenlit publication.[450] Although some materials from the opinions-drafting practice appeared in public,[451] the vast majority have never seen the light of day.

This Article's dataset is limited in important respects. The opinions preserved in the National Archives do not represent all the relevant materials, a reality revealed by the opinions' chain of custody. As the opinions were drafted, they were preserved in the Offices' copious files. Much later, after the practice had died off, the Senate Historical Office tried to preserve the opinions and memoranda it could get its hands on.[452] The Historical Office then bound copies and originals of the available opinions into a multivolume collection transferred to the National Archives on August 31, 1992.[453] Rodney Ross, a reference archivist with the National Archives, oversaw the creation of microfilm copies of the opinions in 1997.[454]

This means that the archived materials are skewed toward the opinions produced by the Senate OLC. Only about five percent of the available materials were

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447. *See supra* text accompanying note 39.

448. *See supra* text accompanying note 39.

449. *See, e.g.*, Memorandum from John M. Reynolds, Assistant Couns., Off. of the Legis. Couns., U.S. Senate, to Sen. Everett Dirksen 1 (Jan. 19, 1954) (on file with Nat'l Archives, Ctr. for Legis. Archives, Rec. Grp. 46, Ops. of the Off. of the Legis. Couns. for the U.S. Senate, Memo No. 369) (responding to Senator Dirksen's "request for an opinion respecting the power of Congress to prohibit interracial marriages").

450. *See, e.g.*, Lee, *supra* note 17, at 399 ("The confidential work of the Office is not discussed with newspaper reporters or commented upon publicly . . . .").

451. *Compare* Memorandum from Harry B. Littell, Assistant Couns., Off. of the Legis. Couns., U.S. Senate, to Sen. Clifford P. Case 2 (Jan. 22, 1954) [hereinafter Memo No. 370] (on file with Nat'l Archives, Ctr. for Legis. Archives, Rec. Grp. 46, Ops. of the Off. of the Legis. Couns. of the U.S. Senate, Memo No. 370) (finding that a plan to allow D.C. residents to vote in presidential elections would be unconstitutional), *with* Warren, *supra* note 19 (detailing Senator Case's decision to publicize the adverse results of Memo No. 370, *supra*).

452. The origin of the materials related to the opinions-drafting practice is laid out in a letter on the front of the microfilm copies of the materials. *See* Senate Historical Office Letter (Aug. 31, 1992) (on file with Nat'l Archives, Ctr. for Legis. Archives, Rec. Grp. 46, Ops. of the Off. of the Legis. Couns. for the U.S. Senate, Roll No. 1).

453. *See id.*

454. *See* Note on Attribution (on file with Nat'l Archives, Ctr. for Legis. Archives, Rec. Grp. 46, Ops. of the Off. of the Legis. Couns. for the U.S. Senate, Roll No. 2).

drafted for the House. Many publicly salient House opinions are simply missing. (For instance, in 1948, the Washington *Sunday Star* reported that the House OLC had issued a major opinion on the constitutionality of D.C. home rule.[455] This opinion is nowhere in the Congressional Record or in online databases.) Fortunately, the Senate OLC did preserve copies of some of the House materials. This suggests that the congressional OLCs collaborated on the opinions-drafting practice and may have even treated opinions as interoffice precedent.[456] A few documents were damaged over the years.[457] Several pages are simply missing altogether from the archives.[458]

Practically, the sheer weight of these materials leaves a complete exploration beyond the scope of this Article. This Part explores only a sampling that illuminates key themes. Importantly, the opinions-drafting practice did not stand alone. It helped constitute a package of norms, procedures, and institutional reputations that legitimated the congressional OLCs. Other factors—the milieu of the congressional OLCs, the Offices' drafting work, and the incredible reputation of Middleton Beaman—all helped make the congressional OLCs' opinions valuable.

Several top-line findings are worth discussing. I have recovered 119 opinions and memoranda from the 1920s.[459] After the articulation of a denser system of precedent, the congressional OLCs set themselves to resolving scores of

455. Don S. Warren, *House Advisers Call Home Rule Constitutional: Legislative Counsel Office Suggests Bill Might Go Further*, SUNDAY STAR (D.C.), Feb. 15, 1948, at A1, A1.

456. Internal documents from the Senate OLC add some support to this thesis. *See* SENATE OLC ANNIVERSARY HISTORY, *supra* note 117, at 11 (quoting *Hearings on the Legislative Establishment Appropriation Bill, 1928 Before the Subcomm. in Charge of Legislative Establishment Appropriation Bill for 1928 of the H. Comm. on Appropriations*, 69th Cong. 51 (1927) (statement of Middleton Beaman, House Legislative Counsel)) (indicating that the congressional OLCs allowed for the intermingling of each office's drafters and the development of a rule of reciprocity).

457. *See, e.g.*, Memorandum in re Prohibit FCC from Giving Out Information on the Financial Reports of TV Stations from John C. Herberg, Off. Of the Legis. Couns., U.S. Senate, to Com. Comm'n (Feb. 17, 1955) (on file with Nat'l Archives, Ctr. for Legis. Archives, Rec. Grp. 46, Ops. of the Off. of the Legis. Couns. for the U.S. Senate, Memo No. 387) (including several badly damaged pages). Because of the damage to Memo No. 387, several components of identifying information such as the memo title were absent. To fill in these missing details, I referred back to an index on the front of the roll of microfilm reproductions in the National Archives. *See Appendix*, *supra* note 30, at 56.

458. *See, e.g.*, Memorandum in re Bills to Correct the Military Records of Dishonorably-Discharged Service Men from Ganson Purcell, Assistant Couns., U.S. Senate (Oct. 15, 1931) (on file with Nat'l Archives, Ctr. for Legis. Archives, Rec. Grp. 46, Ops. of the Off. of the Legis. Couns. for the U.S. Senate, Memo No. 148) (missing a portion in the National Archives). Because of missing pages in Memo No. 148, several components of identifying information were absent. To fill in these missing details, I referred back to an index on the front of the roll of microfilm reproductions in the National Archives. *See Appendix*, *supra* note 30, at 20.

459. *See Appendix*, *supra* note 30, at 1-16.

constitutional and subconstitutional questions in both chambers of Congress. Across the 1930s, the congressional bureaucrats produced seventy-eight opinions and memoranda.[460] The congressional OLCs designated eleven opinions.[461] The congressional OLCs crafted 103 opinions and memoranda across the 1940s.[462] They designated fourteen opinions.[463] The 1940s saw a spike in the opinions-drafting practice as President Roosevelt's domestic legislative agenda slowed. Congressional bureaucrats were not immune to military service in World War II, and the Offices for a time had trouble maintaining their manpower as assistants left for the war.[464]

I have been able to identify the soliciting lawmakers for some, but not all, of the opinions and memoranda. The data on soliciting lawmakers is, for the most part, only available for the Senate. In the 1920s, an eclectic array of lawmakers solicited multiple opinions and memoranda, among them Senators William H. King (D-UT), Robert M. La Follette Jr. (R-WI), James Eli Watson (R-IN), William M. Calder (R-NY), Charles L. McNary (R-OR), Hiram Bingham (R-CT), Robert F. Wagner (D-NY), Charles W. Waterman (R-CO), Hiram Johnson (R-CA), Henry F. Ashurst (D-AZ), and Charles S. Deneen (R-IL).[465] Of these, King (eight), La Follette (seven), and Watson (seven) were the most prolific solicitors of opinions and memoranda.[466] King was a semiconservative Democrat who venerated the Constitution.[467] La Follette was his father's successor as head of the Wisconsin Progressive organization, a man with an entirely different worldview from King's.[468] Watson was an establishment figure. He was a protégé of Speaker Joe Cannon during his time in the House of Representatives.[469]

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460. *See id.* at 16-27.

461. *See id.*

462. *See id.* at 27-43.

463. *See id.*

464. *See* SENATE OLC ANNIVERSARY HISTORY, *supra* note 117, at 19 (discussing the departure of two Senate OLC drafters for military service).

465. *See Appendix*, *supra* note 30, at 1-16 (listing, where available, the soliciting lawmakers from the opinions-drafting practice).

466. *See id.*

467. *See* ROSENBLOOM, *supra* note 174, at 36-37 (describing King's concerns about the administrative state and his avowed desire to protect individual Americans' constitutional rights).

468. *See* ROBERT T. JOHNSON, ROBERT M. LA FOLLETTE, JR. AND THE DECLINE OF THE PROGRESSIVE PARTY IN WISCONSIN, at vii (1970) (describing La Follette as a reluctant successor to his father and a proponent of many progressive causes).

469. *See* Ira E. Bennett, *Western Affairs at Washington*, 18 PAC. MONTHLY 666, 672 (1907) ("Two Hoosiers are numbered among Speaker Cannon's confidants. . . . Speaker Cannon relies much upon 'Jim' Watson, the Republican whip, who represents the Sixth Indiana district.").

That these three figures were the leading consumers of the opinions-drafting practice demonstrates its wide appeal in the Senate.

In the 1920s, Republicans led solicitations. Of the sixty-eight opinions and memoranda solicited in the 1920s, forty-five were solicited by Republicans, including the Vice President—exceeding their proportion of seats.[470] After the opinions-drafting practice became more formalized in the mid-1920s, the Republicans used the congressional OLCs prolifically. The Democrats also participated in the opinions-drafting practice, albeit at a lower rate when they were out of power in the 1920s.

In the 1930s, the solicitation practice was more established but similarly bipartisan, eclectic, and regionally diverse. Some of the repeat soliciting lawmakers included Senators King, McNary, Wagner, Robert B. Howell (R-NE), Tasker L. Oddie (R-NV), William Gibbs McAdoo (D-CA), Arthur H. Vandenberg (R-MI), Dwight W. Morrow (R-NJ), and Augustine Lonergan (D-CT).[471] In these results we see a practice that appealed to Progressives (e.g., McAdoo and Howell), congressional leadership figures (e.g., McNary), and up-and-comers (e.g., Wagner and Vandenberg).[472] Of the recovered 1930s memoranda and opinions that authoritatively list their soliciting lawmakers, thirty were solicited by Democrats and twenty-five were solicited by Republicans.[473] But of the opinions and memoranda solicited from Democrats, only nine were solicited by Southerners.[474]

Here, it is worth recalling what the Southern Democrats thought they were signing up for. The Democratic Party of the Progressive Era wanted a bureaucratic unit that would help their project of state building, summed up as the "statutory state."[475] The New Deal provided a compelling reason for Democrats once again to use the congressional bureaucrats for statute drafting and state building. But constitutional consultation was of the greatest value to Democrats outside of the South. Overall, these findings reinforce the analysis of the Democratic Party above and the idea that the opinions-drafting practice was part of a greater disjointed pluralism.

Aside from the eclectic and bipartisan nature of the opinions-drafting practice, one of the most interesting observations concerns the constitutional politics of the leading soliciting lawmakers. In the 1920s and 1930s, two critical decades

470. *See Appendix*, *supra* note 30, at 1-16 (listing soliciting lawmakers for 1920s opinions, memoranda, and briefs where available).

471. *See id.* at 16-27.

472. *See id.* at 17-24

473. *See id.* at 16-27.

474. *Id.*

475. SANDERS, *supra* note 362, at 389.

for the congressional OLCs, we see the practice weighted toward each party's legalists who placed a heavy emphasis on the Constitution. These were the lawmakers who communicated to their peers and their constituents in a register of constitutionalism. Senator King is an obvious example of a lawmaker whose politics were only barely downstream from his constitutional veneration.[476] Even Vandenberg, who was later understood as a proponent of cosmopolitan internationalism, used the opinions-drafting practice when he was at his most conservative.[477]

This finding helps us better understand legislative constitutionalism. The archival remnants of the opinions-drafting practice suggest that it was most salient among a bipartisan core of legislators in both chambers whose approach to legislative politics was cloaked in constitutional discourse. This finding suggests that something like the opinions-drafting practice for the present might be geared toward, and find an audience among, the contemporary Congress's legalists.

Although the practice was used by lawmakers of all stripes, lawmakers who repeatedly solicited opinions claimed to incorporate their own interpretations or constructions of constitutional meaning into their politics. From an institutional perspective, the opinions-drafting practice bolstered the standing of the congressional OLCs with these lawmakers. This fits in with the narrative of the Columbia Triumvirate throughout this Article. The opinions-drafting practice channeled lawmakers' constitutional impulses in productive directions with a procedure that put a finger on the scale for congressional power. Again, procedure helped shape Congress's direction at a critical moment in American political development.

B. The Rise of the Congressional Bureaucracy

Why did lawmakers care what the congressional OLCs had to say on constitutional matters? The answer has to do with the lawyers the Offices attracted, the importance of the Offices' drafting services, and the rising prestige of Middleton Beaman. While the previous Section shows that the opinions-drafting practice was a bipartisan project with a special appeal for a cross-section of legalists in both parties, this Section breaks down the material bases for the opinions-drafting practice's sway on Capitol Hill.

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476. *See* ROSENBLOOM, *supra* note 174, at 36-37 (describing King's complaints about the New Deal as complaints about the constitutionality of administrative government).

477. *Appendix*, *supra* note 30, at 13, 17. *See generally* LAWRENCE S. KAPLAN, THE CONVERSION OF SENATOR ARTHUR H. VANDENBERG: FROM ISOLATION TO INTERNATIONAL ENGAGEMENT (2015) (discussing Vandenberg's evolution from conservative to internationalist).

Once established, the congressional OLCs became a meeting place for young elites in Washington. The political columnist Drew Pearson regarded the congressional OLCs as a breeding ground for Capitol Hill power players.[478] Pearson was not alone. Will P. Kennedy covered the deployment of the House OLC's lawyers during the first one hundred days of the New Deal, calling them the House's "shock troops":

> With the House members lining up for a bitter fight . . . there is unusual interest in this question:
>
> "Who are the shock troops?"
>
> The "shock troops" have been in action for more than eight weeks—day and night, literally sleeping on their arms. They are the specialists on legislative form in the office of the legislative counsel. . . .
>
> One particularly knotty problem which shows the scope of the work these "shock troops" had to perform was in determining how to dodge the Constitution in granting wholesale authority for the President to reorganize the administrative branch of the Government.[479]

Here, Kennedy provided an intimate view of the House OLC snapping into action with the New Deal, doing what it was designed to do—helping Democrats massage the constitutional limitations on executive reorganization. Beaman built an institution that could provide expert drafting advice *and* high-quality constitutional consultation. This was all done just conspicuously enough for an eagle-eyed reporter at the *Washington Star* to take note.[480] But the coverage helped solidify the Offices' reputation.

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478. *See* Drew Pearson, *Chief Blame for Emasculated Tax Bill Placed on Lobbyist Alvord; Lawyer Who Battles for Big Business Long Influential in Capital; Tax Return He Handled for Mrs. Patenotre in 1930 Under Question; Fraud Charged in Her Claim of No Profit from Sale of Newspaper*, WASH. MERRY-GO-ROUND, Dec. 23, 1943, at 1, 1 (on file with Am. U. Libr., Special Collections, Drew Pearson Collection, https://digitalcollections.american.edu/Documents/Detail/the-washington-merry-go-round-december-23-1943/136574 [https://perma.cc/6NYK-4S6N]) (depicting the congressional OLCs as a launchpad for Ellsworth Alvord's effective influence in Congress and the Roosevelt Administration).

479. Will P. Kennedy, *Capital Sidelights*, SUNDAY STAR (D.C.), Apr. 24, 1932, at 2, 2.

480. Prior to the rise of the *Washington Post*, the *Washington Star*, whose Sunday edition was called the *Sunday Star*, was the Capitol's paper of record. John Kelly, *Remembering Washington's Shining Star, a Great Newspaper That Died in 1981*, WASH. POST (Oct. 16, 2019, 2:29 PM EDT), https://www.washingtonpost.com/local/remembering-washingtons-shining-star-a-great-newspaper-that-died-in-1981/2019/10/16/32094c36-f02a-11e9-8693-f487e46784aa_story.html [https://perma.cc/L8ES-QBZW] (describing the lost legacy of the *Washington Star*). This Article cites many *Star* articles because they provide some of the best insights into the congressional OLCs.

Existing accounts of the nascent congressional bureaucracy have elided any deep sociological examination of the congressional OLCs' early years. One of the most interesting insights can be found in the memoirs of Thomas R. Mulroy, a mid-twentieth-century Chicagoan.[481] As an ascendant member of Chicago's well-to-do class, Mulroy was sent to Washington after law school to work in the Senate OLC in 1928.[482] As an assistant, and despite lacking legal expertise, Mulroy immediately started drafting legislation and advising senators.[483] He describes working "one on one" with Senators Smoot, La Follette, Borah, Vandenberg, Norris, Nye, Walsh, and Reed, among others.[484] Just as important (at least to Mulroy), the Senate OLC offered an entryway into the upper echelons of D.C., including White House officials.[485] Mulroy's time in the Senate gave him the professional and social opportunities to ingratiate himself with the Hoover family.[486] Over the years, the Offices grew closer to GOP elements because of the party's legislative program.[487] Mulroy talks about drafting, but he admits that the bulk of his time was spent advising lawmakers on constitutional questions.[488]

The reason that Pearson had high regard for the congressional OLCs, and the reason that Mulroy hastened to the Senate OLC, was that the Columbia Triumvirate had built the Offices into proving grounds for young legal elites. By 1928, half of the twenty-two legal staffers who had worked at the House or Senate OLC attended law school at either Columbia or Harvard.[489] Adding graduates of the University of Chicago Law School and George Washington Law

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481. *See* THOMAS R. MULROY, AS LUCK WOULD HAVE IT: THE MEMOIRS OF THOMAS R. MULROY 68 (1984).

482. *Id.* at 60.

483. *Id.* at 60-61.

484. *Id.* at 61.

485. *Id.* at 62-65.

486. *See id.* at 62 (describing friendships with Herbert Hoover, Jr., Allan Hoover, and the Hoovers' personal staff).

487. *See id.* at 64 (detailing Mulroy's support for President Hoover because of the President's initiative to reorganize the executive branch); *id.* at 65 (describing invitations from the White House for receptions and being driven to those receptions in presidential limousines). Recall that Beaman worked on the Packers and Stockyards Act of 1921, the World War Adjusted Compensation Act of 1924, the GOP revenue laws of the 1920s (including, specifically, the Fordney-McCumber Tarriff of 1922), and the Volstead Act. *See supra* notes 117-130 and accompanying text.

488. MULROY, *supra* note 481, at 67.

489. Lee, *supra* note 17, at 398 n.37.

School accounts for more than eighty percent of the OLCs' legal staff in that first decade.[490]

The congressional OLCs became the launchpads for proto-New Dealers. The Offices produced Frederic P. Lee, who later joined the New Deal and drafted the Roosevelt era agricultural legislation.[491] They also produced Charles S. Murphy, who became President Truman's White House Counsel,[492] President Kennedy's Under Secretary of Agriculture, and the Chair of the Civil Aeronautics Board under President Johnson.[493] Clayton E. Turney, the drafter who successfully persuaded Senator Reed to change his vote on the amendment to exclude noncitizens from the census,[494] became a high-ranking lawyer in the Roosevelt Treasury Department.[495] Ganson Purcell, one of Turney's colleagues, was the Assistant Director of the Trading and Exchange Division at the Securities and Exchange Commission.[496] This was a fitting role for Purcell, who assisted with the drafting of the Securities Exchange Act of 1934.[497] Ellsworth C. Alvord was another important drafter who later became a powerful lobbyist during the Roosevelt Administration.[498] This is a small sample meant to show that from the beginning of the New Deal through the 1940s, the congressional OLCs cultivated young legal talent who later helped power an important shift in governing authority toward federal agencies.

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490. *Id.*

491. *See generally* Letter from George N. Peek to Frederic P. Lee (June 16, 1933) (on file with Cornell Univ. Lib., Div. of Rare & Manuscript Collections, Frederic P. Lee Papers, 1926-1965, Collection No. 2941, Folder on Farm Relief Legislation, Employment by Agriculture-1933) (inviting Lee to join the administration and draft agricultural legislation).

492. *See* Interview by James Hyde, Jr. & Stephen J. Wayne with Charles S. Murphy, in Washington, D.C. (1973), https://www.trumanlibrary.gov/library/oral-histories/murphycs [https://perma.cc/5VQK-KH93] (explaining that Murphy's time with the Senate OLC ingratiated him with then-Senator Truman, who invited Murphy to join his administration).

493. *See generally id.* (providing an overview of Murphy's life and career).

494. *See supra* notes 10-13 and accompanying text.

495. *See* U.S. DEP'T OF THE TREASURY, ANNUAL REPORT OF THE SECRETARY OF THE TREASURY ON THE STATE OF THE FINANCES FOR THE FISCAL YEAR ENDED JUNE 30, 1933, at XV (1933) (listing Turney as Special Assistant to the Office of the Internal Revenue Service (IRS) Commissioner). Turney was later promoted to the number-two legal job at the headquarters of IRS. U.S. CIV. SERV. COMM'N, OFFICIAL REGISTER OF THE UNITED STATES 1936, at 12 (1936).

496. *Ganson Purcell Wins Securities Promotion*, SUNDAY STAR (D.C.), Oct. 4, 1936, at 7, 7.

497. *See id.* ("In this capacity [with the Senate OLC], he participated in the drafting of the securities exchange act.").

498. *See* Pearson, *supra* note 478, at 1 (excoriating Alvord's effective lobbying on behalf of monied interests).

Many drafters could look forward to richer rewards in private practice. Parkinson built a revolving door between ELAS and the congressional OLCs. Drafters Glenn McHugh, Ferdinand Tannenbaum, and Henry G. Wood all joined Equitable's orbit after serving in the congressional OLCs.[499]

In short, the opinions-drafting practice was powered by bright, young legal elites who provided constitutional advice to lawmakers. They came for expert training, for proximity to Capitol Hill power, and — sometimes — with an expectation of private-sector remuneration.

Just as important was the congressional OLCs' drafting work, which legitimated the Offices in the eyes of lawmakers. The congressional OLCs never advertised the full extent of their drafting work. But from what we know, the congressional OLCs immediately took over the drafting of the revenue statutes that were powering the expansion of federal government. This work provided entry to more assignments, namely the drafting of social legislation. In the 1920s, the congressional OLCs were able to cement their reputations by offering the most nuanced syntheses of legislative prowess and administrative knowledge.

Recall that this was the pitch — the Columbia Triumvirate envisioned drafters with a new focus on the *effective administration* of new statutes.[500] Before the Triumvirate, Congress provided new taxes with no means of collection.[501] The congressional OLCs' professionalism in statute drafting helped legitimate their role in providing constitutional and subconstitutional advice to lawmakers.

And Middleton Beaman legitimated the opinions-drafting practice. Although the congressional OLCs were ostensibly two separate entities and Beaman formally ran only the House side, the sources all agree that both Offices were dominated by Beaman's force of personality and institutional prestige.[502] Studying Congress years after Beaman's death, Kenneth Kofmehl reported the widespread belief that the congressional OLCs were "an institutionalization of Mr. Beaman," as though they came to embody the man's essence.[503] The drafters in

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499. Senate OLC Anniversary History, *supra* note 117, at 13-15.

500. *See* Beaman, *supra* note 142, at 67 (discussing the necessity of having drafters conduct an "analysis on the side of the administrative devices to make the law effective").

501. *See 1921 Appropriations Hearing*, *supra* note 117, at 8 (statement of Thomas I. Parkinson, Draftsman, Senate Branch) (recounting how a proposed bill "did not provide for collection under the new law of the tax which it levied").

502. *See* Senate OLC Anniversary History, *supra* note 117, at 12 ("The figure of Middleton Beaman dominated during these early years."); Harry W. Jones, *Middleton Beaman: Doctor of Laws*, 35 A.B.A. J. 778, 778 (1949) ("In this instance the man and the Office seem inseparable, since the Office of the Legislative Counsel was, in a very real sense, built around Mr. Beaman . . . ."); Lee, *supra* note 17, at 386 ("The Office of the Legislative Counsel . . . was constructed around one man . . . .").

503. Kenneth Kofmehl, Professional Staffs of Congress 184 (1962).

the Senate OLC treated Beaman with overwhelming deference. Take, for example, Charles F. Boots's statement before the Joint Committee on the Organization of Congress in 1945:

> I might say, first, that I feel that most anything I could say after Mr. Beaman's statement the other day on the work of the Office of Legislative Counsel would be in the nature of anticlimax and probably a more prudent man would be content to rest on endorsing Mr. Beaman's statement and let it go at that; but I would like to say something about our own office on the Senate side.[504]

The only lawyer who ran one of the congressional OLCs and emerged outside of the Columbia Triumvirate's orbit, John E. Walker, openly admitted that he deferred to Beaman on substantive matters.[505]

Beaman's authority over the congressional OLCs was cemented by the Columbia Triumvirate's role in selecting the staff and heads of the Senate OLC. Parkinson's immediate successor as head of the Senate OLC was selected with the Columbia Triumvirate's informal advice and consent.[506] Later, on August 1, 1930, Boots was named the fourth head of the Senate OLC only after Beaman and Parkinson voiced their support.[507] It was no accident that Boots was an alumnus of Columbia Law School, where he worked under Chamberlain in the LDRF.[508]

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504. *Organization of Congress: Hearing Before the Joint Comm. on the Org. of Cong., Part 3*, 79th Cong. 455 (1945) (statement of Charles F. Boots, Legislative Counsel, U.S. Senate).

505. *See 1923 Appropriations Hearing*, *supra* note 120, at 57 (statement of John E. Walker, Draftsman, Senate Branch) ("I am always willing to defer to [Beaman's] superior judgment on the question of draftsmanship policies."). John E. Walker was Parkinson's successor as head of the Senate OLC. SENATE OLC ANNIVERSARY HISTORY, *supra* note 117, at 8. At the time of his selection, Walker was chief clerk of the Ways and Means Committee. *Id.* at 9. In that capacity, he worked closely with Beaman on revenue legislation and knew that Beaman was the undisputed master drafter. *See 1923 Appropriations Hearing*, *supra* note 120, at 57 (statement of John E. Walker, Draftsman, Senate Branch) (detailing Walker's history with Beaman).

506. *See, e.g.*, Letter from Middleton Beaman, Draftsman, Legis. Drafting Serv., to Sen. Boies Penrose (Jan. 20, 1921) (on file with Univ. of Wy., Am. Heritage Ctr., Thomas I. Parkinson Papers, 1900-1959, Box 2, Correspondence, Professional, 1919-1946) (describing Walker as possessing "unfailing industry, enthusiasm, . . . zeal for his work, and . . . qualifications of sound judgment and skillful handling of difficult situations"); Letter from Thomas I. Parkinson, Professor of L., Columbia Univ., to Calvin Coolidge, Governor, Massachusetts (Jan. 21, 1921) (on file with Univ. of Wy., Am. Heritage Ctr., Thomas I. Parkinson Papers, 1900-1959, Box 2, Correspondence, Professional, 1919-1946) (expressing his belief to the incoming Vice President that Walker was "the best qualified man who is available for the position").

507. SENATE OLC ANNIVERSARY HISTORY, *supra* note 117, at 17.

508. *Id.*

The New Deal further enhanced Beaman's authority. The congressional OLCs' organic statute vested appointment authority for the Senate OLC in the President of the Senate,[509] who is also the Vice President of the United States. After Roosevelt became President, Vice President John Nance Garner oversaw Senate OLC appointments.[510] Because Garner was one of the Democrats who helped create the congressional OLCs, he had an abiding fondness for Beaman.[511] Garner told Boots that he would appoint his preferred candidates if they had Beaman's stamp of approval.[512] A personal relationship with Garner boosted Beaman's internal control over the congressional OLCs and his standing with the Roosevelt Administration.

Beaman had the reputation and connections to play an important role in the New Deal.[513] For example, when President Roosevelt assigned the drafting of new securities legislation to Felix Frankfurter, Frankfurter brought in his "happy hot dogs"—the brain trust behind the New Deal.[514] In this case, that meant James Landis, Benjamin Cohen, and Thomas Corcoran—legends all—were assigned to draft what became the Securities Act of 1933.[515] Because the Democrats retook Congress,[516] the passage of the New Deal legislative agenda depended primarily on Southern Democrats who knew and respected Beaman. Sam Rayburn (D-TX), the future Speaker of the House, required Frankfurter's team to bring in Beaman.[517] Rayburn knew that the bill needed a professional drafter.[518]

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509. Lee, *supra* note 17, at 387.

510. SENATE OLC ANNIVERSARY HISTORY, *supra* note 117, at 18.

511. *Id.*

512. *See id.* ("I have no objection to you going ahead and filling the vacancies according to your own good judgment. As you know, I am very fond of Mr. Beaman and if you should see proper to talk it over with him, it would be quite all right with me. I don't mean by this that I don't have similar confidence in your judgment, but I was associated with Beaman so long I could 'cuss him out' easier than I could you." (quoting Letter from John Nance Garner, Vice President, U.S., to Charles F. Boots, Legis. Couns., U.S. Senate (Nov. 18, 1933))).

513. *See, e.g.*, Landis, *supra* note 116, at 36 (noting that Beaman had already secured the bipartisan admiration of both parties for his competence and impartiality).

514. *See generally* Sujit Raman, *Felix Frankfurter and His Protégés: Re-Examining the "Happy Hot Dogs,"* 39 J. SUP. CT. HIST. 79 (2014) (reexamining Frankfurter's many protégés to assess his influence over New Deal law and policy).

515. Landis, *supra* note 116, at 29-36.

516. *See* Hist, Art & Archives, *supra* note 240.

517. *See* Landis, *supra* note 116, at 37.

518. CARO, *supra* note 123, at 321.

Beaman overruled Cohen on whether to exclude a "detailed schedule of data" relating to registration statements from the draft legislation.[519] Beaman was "eager to eliminate from the draft any material not essential to the bill's structure."[520] This apparently enraged Cohen, who threatened to quit the drafting team.[521] Beaman's work on the Act has been hailed for its brilliance by scholars of the Securities Act.[522]

More to the point, the drafting of the Securities Act demonstrates that Beaman's role by the 1930s put him on par with the likes of Landis, Cohen, and Corcoran on bill drafting. The episode led Landis—a prince of the New Deal labeled the best draftsman of his generation—to write of Beaman: "I had thought I knew something of legislative draftsmanship until I met him."[523]

These different ingredients helped create institutions—the congressional OLCs—with the sway to sell constitutional consultation to lawmakers who were previously skeptical of the congressional bureaucracy.[524]

C. The Columbia Triumvirate's Thayer-Like Standard

Recall that Thomas I. Parkinson helped sell child-labor legislation to Congress with a Thayer-like standard for legislators.[525] Under this standard, lawmakers should enact socially beneficial legislation unless the legislation is unconstitutional beyond a reasonable doubt. This consequential framing of the lawmaker's role was integrated into the opinions-drafting practice as a standard for reviewing constitutional questions. The following is an illustration of that standard, which informs the remainder of the Article. In Part V, I argue that today's Congress has nothing like a Thayer-like standard and that the institution has suffered as a result.

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519. Sean M. O'Connor, *Be Careful What You Wish For: How Accountants and Congress Created the Problem of Auditor Independence*, 45 B.C. L. Rev. 741, 811-12 (2004).

520. Joel Seligman, The Transformation of Wall Street: A History of the Securities and Exchange Commission and Modern Corporate Finance 64 (Aspen Publishers 3d ed. 2003) (1982).

521. O'Connor, *supra* note 519, at 812.

522. *See, e.g.*, Farley, *supra* note 64, at 112 (crediting Beaman with drafting one of the most important and durable portions of the 1933 securities legislation); *id.* at 243 ("It has proven to be a durable, elegant, and precise piece of statutory work, perhaps Middleton Beaman's best.").

523. Landis, *supra* note 116, at 37.

524. *See supra* Sections III.A.2-3 (documenting the resistance against the efforts to establish the congressional OLCs).

525. *See supra* Section III.B.2.

The forces that built the congressional bureaucracy were ardently opposed to the spoils system that had defined much of the nineteenth century.[526] After a disappointed office seeker assassinated President Garfield in 1881, Congress enacted the Pendleton Act of 1883 to create a civil service.[527] Authorized by the Act, President Arthur issued a rule to prevent coercion by government employees.[528] President Theodore Roosevelt expanded the rule in 1907.[529] Increasingly, the law restricted the ways that government employees could "take an active part in political management or in political campaigns."[530]

From 1936 to 1938, critics alleged that the Democratic Party, through New Deal organs, was misusing funds for partisan advantage. One congressman described a Works Progress Administration superintendent in Tennessee who demanded political contributions even of "destitute" women working on sewing projects.[531] Senator Carl Hatch (D-NM) introduced S. 1871 (the Hatch Act), which would codify the rules of the civil service and "extend[]" them to "nearly all employees."[532] The law's provisions encompassed sweeping restrictions on federal employees:

> The original Act prohibited coercing votes and promising a government position or withholding government relief funds as compensation or punishment for political activity. Penalties for violation of the criminal provisions of the Act included fines and imprisonment. For violation of the ban on use of authority, however, the penalty was removal from office.[533]

This legislation was controversial. One opponent charged that the bill would "reach out to millions of people who have never been sought to be touched by the Federal Government in the last 150 years and to gag them and handcuff them in the exercise of their political rights."[534] Before the law was enacted, Senator

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526. *See* Scott J. Bloch, *The Judgment of History: Faction, Political Machines, and the Hatch Act*, 7 U. PA. J. LAB. & EMP. L. 225, 229-30 (2005) ("In the mid-nineteenth century, political patronage in the government became the focus of a lengthy national debate.").

527. *Id.* at 230.

528. *Id.*

529. *Id.*

530. *See* 5 U.S.C. § 7323 (2018).

531. Bloch, *supra* note 526, at 231 n.33 (quoting 84 CONG. REC. 9598-99 (1939) (statement of Rep. Taylor)).

532. *Id.* at 231.

533. *Id.* (footnotes omitted).

534. *Id.* at 232 (quoting 84 CONG. REC. 9599 (1939) (statement of Rep. Creal)).

Hatch asked the Senate OLC for an opinion on the constitutionality of his legislation.[535]

The opinion, written by Charles S. Murphy, was a realization of the Columbia Triumvirate's vision of legislative constitutionalism. Murphy, citing legislative precedents, indicated that Congress's standard for the constitutionality of its legislation ought to be the permissive clear-error standard Parkinson had pitched in the 1910s.[536] Murphy said that most of the Hatch Act was obviously constitutional.[537] The exception was the Act's first section, at least insofar as it dealt with presidential elections.[538] (Murphy found Section 1's regulation of congressional elections banal.[539]) But Congress's power might not, Murphy suggested, extend to presidential elections.[540] Murphy laid out all the arguments for and against the constitutionality of the Hatch Act in a dispassionate voice. But he concluded with a broad greenlighting of the Hatch Act that would have made Parkinson proud:

> In conclusion, it may be said that it is the *opinion of this office* that the provisions of S. 1871, other than those provisions of the first section which relate to the election of presidential electors, the President and Vice President are constitutional. There is *grave doubt* as to the constitutionality of those provisions of the first section which are applicable with respect to presidential electors, presidents, and Vice Presidents; and the weight of authority appears to be against sustaining their validation. However, *it does not appear to be a question which has been directly decided by the Supreme Court*. In view of these circumstances it would seem that if in any case *the Congress is justified in enacting legislation about which it*

535. Memorandum in re Constitutional Questions RE: S.1871, An Act to Prevent Pernicious Political Activities from Charles S. Murphy, Assistant Couns., Off. of the Legis. Couns., U.S. Senate, to Sen. Carl A. Hatch (July 26, 1939) [hereinafter Memo No. 197] (on file with Nat'l Archives, Ctr. for Legis. Archives, Rec. Grp. 46, Ops. of the Off. of the Legis. Couns. for the U.S. Senate, Memo No. 197).

536. *See id.* at 1-2; *see also supra* notes 396-399 and accompanying text (discussing Parkinson's constitutional standard in his pitch for pending child-labor legislation).

537. Memo No. 197, *supra* note 535, at 2-3.

538. *See id.* ("Returning to the bill to prevent pernicious political activities now under consideration, it may be said that the first ten sections of the bill, which contain its substantive provisions contain a number of separate and independent provisions each designed in some way to prevent certain forms of political activities. It is believed . . . that it can be plainly demonstrated that all of these provisions are constitutionally valid. . . .").

539. *See id.* at 7 ("Insofar as this section is applicable with respect to elections of Members of Congress, there seems to be no doubt of its constitutional validity.").

540. *See id.* at 8 ("Insofar as this section is applicable with respect to elections held for choosing a President, Vice President, or presidential electors, there is reason for having considerable doubt as to its constitutionality.").

> *entertains doubts as to the constitutional validity*, in order that the courts may definitely prescribe constitutional limitations with respect to important matters of public policy, this might well be regarded as such a case.[541]

Just as Parkinson argued that Congress had to push the envelope to develop the law, Murphy proposed a risky experiment by harnessing a similar ambivalence toward courts. In his view, the availability of judicial review should liberate lawmakers to experiment in the national interest (at least, so long as the courts were deferential).

On August 2, 1939, President Roosevelt signed the Hatch Act.[542] For years, a Supreme Court increasingly dominated by Roosevelt appointees dodged challenges to the Hatch Act's constitutionality. And despite Murphy's concerns about Section 1, the challenge that eventually reached the Court focused on another provision. In *United Public Workers of America v. Mitchell*, the Court upheld Section 9 of the Hatch Act.[543] The Hatch Act persists to the present, having been amended several times by Congress.[544]

In context, the Hatch Act was an important flexing of Congress's muscles vis-à-vis the presidency. The Act has been framed as a response to Roosevelt's attempt in 1938 to purge disloyal Democrats.[545] Simultaneously, Roosevelt distributed patronage benefits to loyalists, sparking new fears that the expanded administrative state could become a President's political machine.[546] The Hatch Act's restrictions helped allay these fears and served as an important opening gambit in 1930s and 1940s attempts to reify congressional control over the administrative state.

With the benefit of Murphy's opinion, we now know that the Hatch Act also was an important flexing of Congress's muscles vis-à-vis the judiciary. Overall, the congressional OLCs pushed back against the creep of juristocracy, at least in their first several decades.

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541. *Id.* at 9-10 (emphasis added).

542. Hatch Political Activity Act, ch. 410, 53 Stat. 1147 (1939).

543. 330 U.S. 75, 93 (1947).

544. *See* Hatch Act Reform Amendments of 1993, Pub. L. No. 103-94, 107 Stat. 1001; Hatch Act Modernization Act of 2012, Pub. L. No. 112-230, 126 Stat. 1616.

545. ROSENBLOOM, *supra* note 174, at 10.

546. *Id.*

D. The Mutually Reinforcing Relationship Between Opinions and Statute Drafting

The above might suggest that the opinions-drafting practice mattered only insofar as it could advise lawmakers on formal constitutional requirements. That would undersell the practice's importance. The congressional OLCs were able to connect opinions and memoranda with their statute-drafting roles to expand congressional capacity and sustain the Offices' practices. This is best illustrated by the force-of-law drafting convention, which statutes used to indicate whether agency rules could carry the force of law.

Over two decades ago, Thomas W. Merrill and Kathryn Tongue Watts put forward a bold hypothesis in the pages of the *Harvard Law Review*.[547] They argued that Progressive and New Dealer lawmakers used a long-forgotten drafting convention to communicate when agencies were delegated the authority to promulgate rules with the force of law.[548] This convention, which would have affected scores of bills and statutes, could be used to understand when agencies had the authority to issue legislative rules and to better appreciate the absence of any similar convention after the middle of the twentieth century.[549] This paper was more impressive than might be apparent at first glance because Merrill and Watts had no primary-source verification. Instead, they proceeded through a mess of statutes to reverse engineer the drafting convention.[550] Merrill and Watts framed this drafting convention as a major development in Congress's expansion and formalization of the administrative state's statutory authorizations. They hypothesized that the convention's existence owed something to the little-known congressional OLCs that had been built around the convention's emergence.[551] They nonetheless cautioned: "We are not aware of any direct evidence about the kind of advice the [congressional OLCs] provided to members of Congress concerning how to signal whether a statute authorized legislative rulemaking."[552]

This Article vindicates Merrill and Watts. As they hypothesized, the congressional OLCs had a major role in creating and sustaining the force-of-law convention. The only thing Merrill and Watts did not understand—and could not

547. *See generally* Merrill & Watts, *supra* note 35 (presenting this hypothesis).

548. *Id.* at 472.

549. *See id.*

550. *E.g.*, *id.* at 503-14.

551. *See id.* at 520 ("One notable institutional development took place at approximately the same time Congress began systematically following the convention: the creation of the Office of Legislative Counsel in both the Senate and the House.").

552. *Id.* at 521.

have understood until the unsealing of these documents—was how the convention was sustained.

The congressional OLCs sustained the force-of-law convention through their opinions-drafting practice. Take, for instance, the Air Commerce Act of 1926. On July 1, 1929, the Senate Office of Legislative Counsel produced a memorandum tackling the Act's constitutionality.[553] The memorandum discussed the nondelegation doctrine and the effect of the regulations promulgated under the Act. With respect to nondelegation, the memorandum advised the Senate that the doctrine was no real constraint on legislative power.[554] The memorandum would have made the Columbia Triumvirate proud. It offered a sober analysis of Supreme Court precedent and pragmatic ways to avoid a direct confrontation with the Supreme Court.[555]

The Air Commerce Act memorandum confirms the existence of the force-of-law convention. It advised lawmakers that "Congress must fix the penalty."[556] The memorandum describes what Merrill and Watts hypothesized: to tell whether an agency can promulgate "legislative" rules capable of binding the public, read the statute and see whether Congress specified that a violation of agency regulations was punishable with penalties.[557]

Why does this matter? Contemporary legal challenges to agency actions *partially* turn on whether an agency is authorized to act with the force of law.[558] In 2021, for example, President Biden issued an executive order urging the Federal Trade Commission (FTC) to curtail the use of noncompete clauses that unfairly

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553. Memorandum on Constitutionality of Provisions of Air Commerce Act of 1926 Delegating Regulatory Powers to Secretary of Commerce from C.E. Turney, Off. Of the Legis. Couns., U.S. Senate (July 1, 1929), *reprinted in The Turney Memo*, *supra* note 35.

554. *See id.* ("The impossibility of establishing clearly the limits of constitutional delegation of such power is due to the fact that the general rules and principles on which the Court professes to rely are transcended by many of the decisions under them . . . .").

555. *Id.* at 177-88; *see also* William N. Eskridge, Jr. & John Ferejohn, *The APA as a Super-Statute: Deep Compromise and Judicial Review of Notice-and-Comment Rulemaking*, 98 NOTRE DAME L. REV. 1893, 1954 (2023) (casting the Turney Memo as an example of a bipartisan, interwar understanding that "the nondelegation doctrine . . . obliged" Congress "to provide a principle or policy to guide . . . officials to implement the statute as Congress designed it").

556. *The Turney Memo*, *supra* note 35, at 187.

557. *See* Merrill & Watts, *supra* note 35, at 472 ("That convention was simple and easy to apply in most cases: If Congress specified in the statute that a violation of agency rules would subject the offending party to some sanction—for example, a civil or criminal penalty; loss of a permit, license, or benefits; or other adverse legal consequences—then the grant conferred power to make rules with the force of law.").

558. *See id.* at 470 ("Whether Congress has delegated to particular agencies the authority to make rules with the force of law has been, *until very recently*, a question of little interest in the administrative law community." (emphasis added)).

impinge on worker mobility.[559] Litigants brought immediate challenges suggesting that the FTC lacks the authority to issue legislative rules banning noncompete clauses.[560] This dispute—one of the most consequential legal questions in the administrative-law field today—highlights the salience of the force-of-law convention and the opinions-drafting practice that perpetuated it. One half of the case turns on whether the FTC's organic statute gave it the power to issue legislative rules. The force-of-law drafting convention shows us that the FTC's organic statute did not confer the rulemaking authority it has claimed in the Biden era because the statute did not specify that violations of agency rules would be sanctionable.[561] Whether the FTC may nonetheless have the authority it claims under later legislation is another question the courts will resolve.[562]

Aside from its present-day relevance, the force-of-law drafting convention also demonstrates the link between the opinions-drafting practice and the congressional OLCs' statute-drafting work. Recall that the Columbia Triumvirate thought that drafting effective statutes required navigating extant public-law doctrine. The practice allowed the congressional OLCs' drafters to engage with these doctrines and concoct drafting shortcuts that could navigate judicial scrutiny. Because the congressional OLCs were drafting many of the most salient statutes of the 1920s, 1930s, and 1940s, these opinions and memoranda helped preserve drafting knowledge.

The Columbia Triumvirate's emphasis on the connections between public-law doctrine and drafting techniques was vindicated by the opinions-drafting practice and its force-of-law convention. The practice shows that drafters *should* be knowledgeable about extant public-law doctrines, and that they should draft statutes to avoid judicial scrutiny and to help Congress realize its agenda.

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559. Promoting Competition in the American Economy, Exec. Order No. 14036, 3 C.F.R. 609, 615 (2022).

560. *The FTC Non-Compete Rule Approaches: What to Do Now*, DENTONS (Aug. 19, 2024), https://www.dentons.com/en/insights/articles/2024/august/19/the-ftc-non-compete-rule-approaches [https://perma.cc/SKE4-UZV4].

561. Only half of the Federal Trade Commission's (FTC's) case turns on the original meaning of the Federal Trade Commission Act. The other half asks whether a D.C. Circuit holding that the FTC *did* have the power to issue legislative rules was codified in subsequent legislation. *See* Thomas W. Merrill, *Antitrust Rulemaking: The FTC's Delegation Deficit*, 75 ADMIN. L. REV. 277, 302-15 (2023). The force-of-law drafting convention has little relevance to this second question.

562. *See id.*

E. The Thicket of Congressional Time: The Congressional OLCs' Undermining of Antilynching Legislation

The Columbia Triumvirate operated within a specific moment of congressional time in which power was diffused down from the Speaker to committee chairs and to Southern Democrats with seniority. These Southerners became the backbone of the congressional OLCs' support. Although congressional time can empower crafty reformers, it also limits the potential of the congressional bureaucracy in subtle ways. This is illustrated most vividly by the Senate OLC's approach to antilynching legislation. This Section shows the limitations of the opinions-drafting practice. For all the congressional OLCs' influence, they were still bound by the material realities of power on Capitol Hill.

The Columbia Triumvirate was drawn to this issue early. On May 4, 1918, Walter White, then Assistant Secretary of the National Association for the Advancement of Colored People (NAACP) and later its long-time Executive Secretary, wrote to Thomas I. Parkinson to obtain his advice on the Dyer Antilynching Bill.[563] The Dyer Bill tried to protect African Americans from racist violence by making lynching a federal felony.[564] It would remedy the failure of government officials to protect African Americans from lynching, which constituted a deprivation of the right to equal protection.[565] Section 3 of the Dyer Bill would have created different criminal offenses for state and municipal officials who were complicit in lynchings.[566] Section 4 would have criminalized conspiracies between state officials and private individuals.[567]

White was referred to Parkinson because of the latter's friendship with John R. Shillady, the Irish American Executive Secretary of the NAACP from 1918 to 1920.[568] This was an important moment for the NAACP. Until 1919, its white

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563. Letter from Walter White, Assistant Sec'y, Nat'l Ass'n for the Advancement of Colored People (NAACP), to Thomas I. Parkinson, Dir. of the Legis. Drafting Bureau, Columbia Univ. (May 4, 1918) (on file with Libr. of Cong., Papers of the NAACP, Part 6: The Anti-Lynching Campaign, 1912-1955, Series A: Anti-Lynching Investigative Files, 1912-1953, Lynching-General. May 1-10, 1918) ("Will you be good enough to give us your frank opinion of this bill with any criticism[s] that you have to offer . . . [?]").

564. Memo No. 72, *supra* note 47, at 1.

565. *Id.*

566. *Id.*

567. *Id.* at 2.

568. *See* Letter from Walter White to Thomas I. Parkinson, *supra* note 563 (acknowledging that John R. Shillady referred White to Parkinson).

leadership was uncomfortable throwing the organization's full support behind the Dyer Bill. Its leaders suspected that the bill was unconstitutional.[569]

The literature has never connected the NAACP and the congressional OLCs. Yet the NAACP's archival records demonstrate that its leaders knew about the powerful role of the congressional OLCs and leveraged these institutions to produce antilynching legislation.[570] White also told his peers that the Senate OLC was responsible for helping the antilynching forces on constitutional questions.[571] Assuming White was accurately describing the Senate OLC's involvement—a reasonable assumption, given White's central role in the effort—the Office's work on this is very well concealed. No opinions, memos, or briefs capture the Senate OLC's work to *advance* antilynching legislation, and Parkinson's response to White's letter to him was lost.

What the NAACP may not have known, however, was that lawmakers had asked the Senate OLC to take an official stance on the constitutionality of antilynching legislation. In 1928, Senator Charles S. Deneen (R-IL) solicited an opinion of the Office that would discuss the constitutionality of the Dyer Antilynching Bill.[572] When Deneen was the Governor of Illinois, he helped secure

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569. *See, e.g.*, William B. Hixson, Jr., *Moorfield Storey and the Defense of the Dyer Anti-Lynching Bill*, 42 NEW ENG. Q. 65, 67-72 (1969) (discussing the views of Moorfield Storey, a leading white civil-rights attorney, who was in communication with Shillady).

570. In 1935, Walter White wrote a letter claiming that Senators Costigan and Wagner had Charles F. Boots of the Senate OLC and others—such as Karl Llewellyn—assist with drafting antilynching legislation. Letter from Walter White, Exec. Sec'y, NAACP, to Drew Pearson, Columnist, Washington Merry-Go-Round (May 9, 1935) (on file with Libr. of Cong., Papers of the NAACP, Part 7: The Anti-Lynching Campaign, 1912-1955, Congressional Action. June 1-30, 1935). White wrote another letter in 1935 claiming that Boots and Charles H. Tuttle, the former U.S. Attorney for the Southern District of New York, provided the constitutional advice for the effort to craft the antilynching legislation. Letter from Walter White, Exec. Sec'y, NAACP, to H.H. Elders 1 (June 11, 1935) (on file with Libr. of Cong., Papers of the NAACP, Part 7: The Anti-Lynching Campaign, 1912-1955, Congressional Action, Jan. 1-31, 1937). A 1937 memorandum from the NAACP's archives shows that civil-rights leader William H. Hastie was assigned the task of collaborating with two individuals on antilynching legislation: Felix Frankfurter and Charles F. Boots. Memorandum from the National Association for the Advancement of Colored People Addressed to Messrs. Charles H. Houston, Arthur B. Spingarn, and William H. Hastie (Jan. 11, 1937) (on file with Libr. of Cong., Papers of the NAACP, Part 7: The Anti-Lynching Campaign, 1912-1955, Congressional Action. Jan. 1-31, 1937).

571. Letter from Walter White to H.H. Elders, *supra* note 570, at 1; *see also* Letter from Walter White to Drew Pearson, *supra* note 570 ("The bill was written and gone over in great detail by Senators Costigan and Wagner. They sought and secured the aid and advice of lawyers like Charles F. Boots of the Senate Legislative Drafting Bureau, Karl Llewellyn of the Columbia University Law School, Dean Charles H. Houston, Arthur Garfield Hays, and others.").

572. Memo No. 72, *supra* note 47, at 1, 9.

the enactment of a state antilynching law.[573] Newspaper reports from the period also appear to show that Deneen viewed antilynching legislation favorably.[574] Deneen, therefore, was probably seeking an opinion that would have exonerated the Dyer Bill of any constitutional doubts.

All the same, the Senate OLC concluded that almost all of the Dyer Bill was hopelessly unconstitutional.[575] The resulting opinion relied on the Supreme Court's narrowing of the Reconstruction Amendments in the *Civil Rights Cases*.[576] The opinion's author, Charles F. Boots—the same man consulted on the antilynching legislation—wrote that the Fourteenth Amendment only reached state action.[577] For Boots, the law could not reach a state official's involvement in lynching cases where the state actor lacked some meaningful level of discretion. This conclusion flowed from the idea that if a state actor *without* discretion failed to vindicate the state's law, that was *not* state action within the reach of the Fourteenth Amendment.[578]

Having addressed the constitutionality of the initial provisions of the Dyer Bill, Boots dispensed with the remaining ones in quick order:

> Apparently, it is to be implied that the deaths are attributable to the acts or omissions of State officers. If the conclusion that such acts or omissions of State officers are not State action in the constitutional sense, is correct, and that, therefore, the Federal Government can not legislate to penalize those who commit such acts or are responsible for such omissions, it follows that the Federal Government can not legislate to punish as State action within the meaning of the Fourteenth Amendment, conspiracies in connection with such acts or omissions and that the Federal

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573. *See* Ellen Tucker, *The Fight for a Federal Anti-Lynching Law*, Teaching Am. Hist. (Mar. 14, 2023), https://teachingamericanhistory.org/blog/the-fight-for-a-federal-anti-lynching-law [https://perma.cc/4834-GR5B] ("[Ida B. Wells-Barnett] and other civil rights leaders in Chicago persuaded Governor Charles Deneen to draft a set of anti-lynch laws that were enacted in 1905.").

574. *See Report Refused on Anti-Lynching Bill*, Pittsburgh Courier, May 22, 1926, at 1, 1 (referencing Deneen's support for Senator William B. McKinley's antilynching legislation).

575. *See* Memo No. 72, *supra* note 47, at 9 ("It is the opinion of this Office that the provisions of H.R. 5540, other than section 7, would, if enacted into law, be unconstitutional.").

576. *See, e.g.*, *id.* at 3-5 (citing The Civil Rights Cases, 109 U.S. 3, 17 (1883)).

577. *See id.* at 3, 6 ("If, however, no discretion is vested in the State officer and his acts or omissions are not in the execution of an authority vested in him by State law, a contrary conclusion is reached, namely, that the acts or omissions of the officer are not State action in the constitutional sense.").

578. *Id.* at 3, 7.

> Government can not legislate to hold counties liable for the results of such acts or omissions.[579]

Boots's opinion was extremely short and failed to engage with any of the arguments put forward by groups like the NAACP. Its brevity stands in sharp contrast to many of the other opinions produced in the 1920s. Around the same time, the Senate OLC was putting out magisterial opinions and memoranda that synthesized entire areas of law.[580] The paper-thin antilynching opinion is incongruent, to say the least. Furthermore, the author's findings show that the congressional OLCs were intimately familiar with the NAACP's constitutional arguments. Indeed, one of the authors behind the antilynching opinions and memoranda was the NAACP's sought-after draftsman in the Senate OLC.[581]

The best way to understand the Senate OLC's actions on antilynching legislation is by reference to congressional time. While it appears that the Office worked behind the scenes to advance the formulation of antilynching legislation, it simultaneously wrote hackneyed opinions casting doubt on the project. Because opinions and memoranda were centrally preserved and available to lawmakers, it appears that the Senate OLC feared losing the support of Southern Democrats. An opinion in the 1920s spelling out support for the constitutionality of the Dyer Antilynching Bill would likely have disrupted the Senate OLC's relations with important lawmakers.

This analysis is not meant to excuse the Senate OLC's actions. Instead, antilynching efforts help us better understand the limitations of the opinions-drafting practice. Whatever the congressional bureaucrats' priors and their commitment to vindicating Congress's prerogatives, certain positions were off the menu because of the allocation of power within Congress. Because the Southern Democrats were accruing power rapidly in the 1920s and 1930s, the congressional bureaucrats were hemmed in on efforts that would have undermined the realities of Jim Crow. Just as congressional time helps us understand how the Columbia Triumvirate was able to successfully launch the congressional OLCs, it also helps us understand the limitations practically imposed by dynamics within Congress.

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579. *Id.* at 8.

580. *See generally, e.g.*, *The Turney Memo*, *supra* note 553 (reprinting and discussing a memorandum on the constitutionality of the Secretary of Commerce's regulatory authority under the Air Commerce Act).

581. Memo No. 72, *supra* note 47, at 9 (reflecting Boots's signature, "CB").

F. Vindicating Congress's Constitution

A significant portion of the opinions-drafting practice is focused on what Josh Chafetz has called "Congress's Constitution."[582] He has argued that scholars should refocus on lawmakers' means of successfully engaging in constitutional politics. "Political institutions," he tells us, "are involved in constant contestation, not simply for the substantive outcomes they desire, but also for the authority to determine those outcomes."[583] In this never-ending contest, "the branch that most successfully engages the public will accrete power over time."[584] Chafetz provides us with a taxonomy for understanding how Congress engages the public in constitutional politics. Congress's "hard" powers include "the power of the purse, the personnel power, and the contempt power."[585] Congress's "soft" powers include "the freedom of speech or debate, the disciplinary powers over members, and the cameral rulemaking power."[586]

The opinions-drafting practice shows how new bureaucratic institutions within Congress contributed to the writing of Congress's Constitution. Congress created its nascent bureaucracy and legitimated the practice when it set the congressional OLCs to work on opinions and memoranda that explicated Congress's hard and soft powers. This makes sense. Chafetz presents the development of Congress's hard and soft powers as a historically contingent story stretching back to Parliament.[587] Congress worked out these powers as it interacted with new challenges. In keeping with Chafetz's themes of contingency, the opinions-drafting practice shows that increasing Congress's bureaucratic resources allows it to compete successfully with other branches in the deployment of its hard and soft powers.

The opinions-drafting practice helped Congress institutionalize these powers. As Chafetz's history suggests, hard and soft powers evolve in the face of new challenges. In the early to mid-twentieth century, many challenges led lawmakers to solicit opinions and memoranda from the congressional OLCs. Because the deployment of hard and soft powers implicates constitutional values, lawmakers reached for their expert constitutional advisors when new issues arose. The opinions-drafting practice helped build up an internal memory on the legal questions that are bound to arise in the legislative process.

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582. *See* CHAFETZ, *supra* note 32, at 3 (referring to Congress's hard and soft powers in his book entitled *Congress's Constitution*).

583. *Id.* at 18.

584. *Id.* at 14.

585. *Id.* at 3.

586. *Id.*

587. *See id.* at 4-5.

One of the most frequently discussed hard powers was the personnel power—that is, "Congress's role in appointing, removing, and impeaching officials in the other branches."[588] Just discussing the portion of these opinions and memoranda written by Frederic P. Lee would be a law-review article unto itself.[589]

One opinion provides a salient example. In *Myers v. United States*, the Supreme Court ruled in President Wilson's favor and struck down a statute that had purported to restrict his ability to fire a postmaster.[590] Chief Justice Taft's opinion was an unprecedented swipe at Congress's ability to insulate Article II

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588. *Id.* at 78. For opinions and memoranda on the personnel power, see generally, for example, Memorandum in re Restrictions upon the Appointive Power of the President from Frederic P. Lee, Off. of the Legis. Couns., U.S. House of Representatives (1922) (on file with Nat'l Archives, Ctr. for Legis. Archives, Rec. Grp. 46, Ops. of the Off. of the Legis. Couns. for the U.S. Senate, Memo No. 14); Memorandum in re Authority to Make Appointments in Absence of Specific Provision of Law from Frederic P. Lee, Off. of the Legis. Couns., U.S. Senate (1925) (on file with Nat'l Archives, Ctr. for Legis. Archives, Rec. Grp. 46, Ops. of the Off. of the Legis. Couns. for the U.S. Senate, Memo No. 26); Memorandum in re Method of Appointment of Chiefs of the Bureau from Frederic P. Lee, Off. of the Legis. Couns., U.S. Senate (1926) (on file with Nat'l Archives, Ctr. for Legis. Archives, Rec. Grp. 46, Ops. of the Off. of the Legis. Couns. for the U.S. Senate, Memo No. 38); Memorandum in re Constitutional Basis of Power of Congress to Impose Reasonable Restrictions upon Appointment of Officers from Frederic P. Lee, Off. of the Legis. Couns., U.S. Senate (1926) (on file with Nat'l Archives, Ctr. for Legis. Archives, Rec. Grp. 46, Ops. of the Off. of the Legis. Couns. for the U.S. Senate, Memo No. 39); Memorandum in re Constitutionality of Provisions of H.R. 8550 Creating National Board for Promotion of Rifle Practice from Frederic P. Lee, Off. of the Legis. Couns., U.S. Senate, to Sen. Smith W. Brookhart (April 26, 1928) [hereinafter Memo No. 74] (on file with Nat'l Archives, Ctr. for Legis. Archives, Rec. Grp. 46, Ops. of the Off. of the Legis. Couns. for the U.S. Senate, Memo No. 74); Memorandum in re Power of Congress to Designate Appointees from Clayton E. Turney, Law Assistant, Off. of the Legis. Couns., U.S. Senate, to Sen. Cyrus Locher (May 21, 1928) (on file with Nat'l Archives, Ctr. for Legis. Archives, Rec. Grp. 46, Ops. of the Off. of the Legis. Couns. for the U.S. Senate, Memo No. 75); Memorandum upon Constitutionality of Legislation Vesting in Congress the Power of Appointment and Removal of Members of the United States Tariff Commission from Frederic P. Lee, Off. of the Legis. Couns., U.S. Senate, to Sen. Robert M. La Follette, Jr. (May 22, 1928) [hereinafter Memo No. 76] (on file with Nat'l Archives, Ctr. for Legis. Archives, Rec. Grp. 46, Ops. of the Off. of the Legis. Couns. for the U.S. Senate, Memo No. 76); and Memorandum in re Legislative Precedents Under Which Congress Has Designated Appointees by Name from Barnes, Assistant Couns., Off. of the Legis. Couns., U.S. Senate, to Rep. Franklin W. Fort (1928) [hereinafter Memo No. 84] (on file with Nat'l Archives, Ctr. for Legis. Archives, Rec. Grp. 46, Ops. of the Off. of the Legis. Couns. for the U.S. Senate, Memo No. 84). Memo No. 14 was lacking some of the normal details associated with the opinions-drafting practice, such as authorship and date. To fill in these missing details, I referred to an index on the front of the first roll of microfilm reproductions in the National Archives.

589. *See generally* sources cited *supra* note 588 (providing a number of memoranda and opinions written by Frederic P. Lee).

590. 272 U.S. 52, 163-64 (1926).

officials from presidential removal.[591] *Myers* provoked a flurry of activity in the congressional OLCs.

In the spring of 1928, Congress passed H.R. 8550, establishing a "National Board for Promotion of Rifle Practice."[592] Section 2 provided that the members of the new Board would include individuals from several different groups: (1) federal officials like the Assistant Secretary of War; (2) "one member" from each state "to be designated by the governor of the State"; (3) a single member from the District of Columbia "to be designated by the Commanding General, District of Columbia"; and (4) "one member from the National Rifle Association of America to be designated by the executive committee thereof."[593] The bill also provided that "[m]embers of said board shall hold office during the pleasure of the appointing power."[594] Senator Smith Brookhart (R-IA) solicited the Senate OLC's advice, apparently with *Myers* in mind. Importantly, the memorandum appears to have been solicited after the bill's passage in the Senate, which tends to indicate that Brookhart was probing the law's constitutionality ahead of a potential presidential veto.[595]

In a memorandum, Lee analyzed the bill. He used the opportunity to advise the Senate pragmatically on *Myers*'s implications. Lee's opinion did what the congressional OLCs were designed to do: it put forward arguments that limited *Myers* and offered an expansive conception of congressional power.

First, Lee told Brookhart that there was no constitutional difficulty in assigning new responsibilities to existing federal officeholders like the Assistant Secretary of War.[596] He wrote: "With respect to these individuals, no new office is created to be filled by an exercise of the appointing power and so the section does not provide for attempted exercise of appointing power by Congress or a deprivation by the President of any of his constitutional powers of appointment."[597] Second, Lee found that Congress could allow states to designate individuals "under State authority to exercise the Federal function."[598] For Lee, this individual was merely an *existing* state officer with new federal powers.

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591. *See* Katz & Rosenblum, *supra* note 173, at 2188-89 (arguing both that *Myers* was an unprecedented opinion and that it does not support contemporary presidentialism).

592. H.R. 8550, 70th Cong. (1928), *reprinted in* 69 CONG. REC. 7411 (1928).

593. Memo No. 74, *supra* note 588, at 1.

594. *Id.*

595. The *Senate Journal* shows that the bill passed the Senate and was engrossed on April 16, 1918, J. SENATE, 70th Cong., 1st Sess. 350 (1927), ten days before the date that appears on the resulting memorandum, Memo No. 74, *supra* note 588, at 5.

596. Memo No. 74, *supra* note 588, at 2.

597. *Id.*

598. *Id.* at 3.

Third, Lee admitted to Brookhart that the portion of the Board allocated to the District of Columbia may involve "the creation of a new office."[599] Here, too, Lee provided arguments for the bill's constitutionality. While the President "is commander in chief of the militia of the District of Columbia," he had delegated authority to his appointee, the Commanding General of the District of Columbia.[600] Lee admitted that "the power of designating or appointing the member from the District of Columbia is . . . within the control of the commander in chief" but nonetheless concluded that the "commanding general is presumed to act within the authority of his command in chief, the president."[601] To secure this portion of the bill, Lee emphasized that the bill had a "geographical limitation" on the appointment, "namely, that the member must come from the District of Columbia."[602] He highlighted the precedent for and volume of geographically limited restrictions on the appointment power and argued that nothing in *Myers* expressly rebuked this practice.[603]

Finally, Lee tackled the fourth class of Board membership — appointees from the National Rifle Association of America.[604] Lee did not take seriously any dilemma flowing from this private appointment. "There is," he wrote," "nothing in the Constitution . . . that says that executive functions need necessarily be vested in constitutional officers of the United States."[605] He cited numerous precedents: that the Federal Reserve Board Advisory Council was selected or appointed by the boards of the different federal reserve banks; that "directors of Federal land banks and intermediate credit banks are elected by the local associations and borrowers through agencies"; and that seven members of the National Home for Disabled Volunteer Soldiers are "elected by Congress."[606]

Here, the Senate OLC offered precedent-based rationales for the bill's constitutionality. Two days later, President Coolidge vetoed the legislation because his Attorney General advised him that the bill's methods of appointment were unconstitutional violations of Article II.[607] Short on details and analysis,

599. *Id.*

600. *Id.*

601. *Id.* at 3-4.

602. *Id.* at 4.

603. *See id.* ("As to the member from the District of Columbia, section 2 obviously provides for a geographical limitation upon the appointing authority, namely, that the member must come from the District of Columbia.").

604. *Id.*

605. *Id.*

606. *Id.* at 4-5.

607. H.R. Doc. 70-251, at 1 (1928).

Coolidge's veto message argued that the "creation of a board charged with the duties prescribed in this bill is a wide departure from present law."[608]

After *Myers*, Congress had every incentive to minimize the opinion's reach. Lawmakers' anxiety and eagerness to protect the scope of congressional power was visible on the face of Lee's memorandum. Meanwhile, incumbent Presidents were incentivized to rely on executive-branch legal opinions to protect a strong reading of *Myers*, as Coolidge's veto message demonstrates. The timing of the memorandum, after passage but before veto, tends to suggest that lawmakers were using the opinions-drafting practice for separation-of-powers purposes. In other words, the memorandum was not used to assess the constitutionality of pending legislation before a vote. It was a tool in post-passage institutional struggle between the political branches.

The congressional OLCs were designed to serve as "shock troops"—as one journalist later put it—in this kind of institutional struggle.[609] Despite the setback with H.R. 8550, the Senate OLCs spent the next decade pushing a narrow reading of *Myers*. In May 1928, Senator La Follette solicited an opinion of the Office from the Senate OLC on the post-*Myers* landscape.[610] Specifically, he asked whether Congress could vest in itself the power to appoint and remove members of the U.S. Tariff Commission.[611] Within a few weeks of President Coolidge's veto of H.R. 8550, an undeterred Lee argued that Congress could limit the President's power to remove members of the Commission.[612] He argued that the "powers of the Tariff Commission are solely investigative."[613] The Commission's investigations were, Lee argued, meant to furnish Congress with information.[614] "Power of investigation to aid Congress for legislative purposes are," he wrote, "not executive powers but are incidental legislative powers."[615]

Events followed this script throughout the existence of the opinions-drafting practice. The Court under Chief Justice Taft engaged in judicial self-aggrandizement at Congress's expense.[616] The President, newly emboldened, asserted his office's interests. Congressional OLCs were designed to protect Article I, and

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608. *Id.* at 2.

609. *See supra* note 479 and accompanying text.

610. Memo No. 76, *supra* note 588, at 1.

611. *Id.*

612. *Id.* at 3.

613. *Id.*

614. *Id.* at 4.

615. *Id.*

616. *See generally* Sumrall & Baumann, *supra* note 146 (discussing judicial self-aggrandizement in the Taft era).

they did so in numerous opinions on the personnel power across the 1920s, 1930s, and 1940s.

And it wasn't just the personnel power. The opinions-drafting practice is populated with numerous opinions and memoranda discussing Congress's hard and soft powers. By Chafetz's account, these powers develop organically as Congress fights for power against the executive and the judiciary. The congressional OLCs played a new role in this contest, pushing an expansive view of Congress's power and helping build useful precedents. Across the decades, the congressional OLCs and the opinions-drafting practice came to vindicate "Congress's Constitution."

V. THE DECLINE OF THE OPINIONS-DRAFTING PRACTICE

> "Congressional institutions typically develop through an accumulation of innovations that are inspired by competing motives, which engenders a tense layering of new arrangements on top of preexisting structures. . . . While each individual change is consciously designed to serve specific goals, the layering of successive innovations results in institutions that appear more haphazard than the product of some overarching master plan."
>
> — Eric Schickler[617]

Despite the influence and prestige that the congressional OLCs had obtained in the 1920s, 1930s, and 1940s, the opinions-drafting practice declined in the 1950s and then collapsed in 1969. The death of Middleton Beaman was a blow from which the congressional OLCs had difficulty recovering. In 1970, Congress invested tremendous new resources in CRS, which began issuing more sophisticated memoranda. Although I have found no evidence suggesting that Congress *meant* to kill off the opinions-drafting practice, the enactment of the Legislative Reorganization Act of 1970 and the arrival of a new secular cycle (the ascent of new generations of congressional bureaucrats who had no connection to the Progressive Era) combined to ensure the end of the Columbia Triumvirate's vision. As this Part's epigraph suggests, this is a classic example of disjointed pluralism, of an important practice falling victim to a new Congress layering new institutional developments on top of old ones haphazardly.[618] Because CRS's memoranda differ materially from the opinions-drafting practice, the

617. SCHICKLER, *supra* note 62, at 15.

618. *Id.*

change described in this Part has had an outsize impact on Congress's constitutional culture.

A. What Happened to the Opinions-Drafting Practice?

1. From Congress's Counselors to Congress's Drafters

The most important force that killed the opinions-drafting practice was congressional bureaucrats themselves. It bears emphasizing that there is no evidence that lawmakers turned on the practice. More important was a changing of the guard. Middleton Beaman retired in 1949 and died in 1951.[619] Joseph P. Chamberlain and Thomas I. Parkinson died in the next several years.[620] These deaths deprived the bureaucrats of their connection to the congressional OLCs' Progressive roots, to say nothing of the LDRF and the academy. Increasingly, the new generation of bureaucrats looked at Beaman's program in horror.

Regardless of Beaman's successes, the opinions-drafting system exceeded the congressional OLCs' statutory mandate. This newer class of congressional bureaucrats wanted to live the nonpartisan mantra that Beaman had adopted. From that perspective, the opinions-drafting practice was an ideological project that endangered the congressional OLCs' survival in an increasingly tumultuous Congress.

This changing of the guard generated something like paranoia. A young political scientist named Kenneth Kofmehl was conducting surveys of congressional capacity in the 1950s when he came across the congressional OLCs.[621] Kofmehl interviewed a group of six drafters from the Offices.[622] Kofmehl apparently had heard of the opinions-drafting practice and asked them about it.

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619. Cummings & Swirski, *supra* note 122, at 5 (noting that Beaman retired in 1949); *House Office of the Legislative Counsel: Middleton Goldsmith Beaman*, BUDGET COUNS. REFERENCE DIRECTORY, https://budgetcounsel.com/%C2%A7051-office-of-legislative-counsel-house/%C2%A7051-01-holc-middleton-beaman [https://perma.cc/A4ZW-H3SU] (noting that Beaman died in 1951).

620. *Joseph Chamberlain, Law Ex-Professor*, N.Y. TIMES, May 22, 1951, at 31, 31; *Thomas I. Parkinson Is Dead; Ex-Head of Equitable Life, 77*, N.Y. TIMES, June 18, 1959, at 31, 31.

621. *See generally* KOFMEHL, *supra* note 503 (presenting the findings of these surveys). Kenneth Kofmehl's book was based on his 1956 dissertation. *See* Kenneth Theodore Kofmehl, Congressional Staffing, with Emphasis on the Professional Staff (1956) (Ph.D. dissertation, Columbia University) (ProQuest). The information presented in Kofmehl's book was gleaned from research conducted on Capitol Hill as far back as the early 1950s. *Id.* at 33, 41, 82, 124.

622. *See* KOFMEHL, *supra* note 503, at 273 (listing Charles F. Boots, Dwight J. Pinion, John H. Simms, Robert L. Cardon, Ward M. Hussey, and Allan H. Perley as the interviewed members of the congressional OLCs).

The congressional bureaucrats played down the scope of the practice. Instead of the many hundreds of opinions they had generated, the bureaucrats told Kofmehl that there were only but "a limited number of legal memoranda" focused on constitutional law.[623] This led Kofmehl to mention the idea of legal memoranda only parenthetically, as if in passing.[624]

The drafters misled their interviewer. They told Kofmehl that the opinions-drafting practice had been shut down at some prior date and exported to the entity that would soon become CRS.[625] Because of the archival materials I have uncovered, we now know this to be inaccurate. The congressional bureaucrats—including the drafters interviewed—drafted opinions, memoranda, and briefs for another decade.[626]

The evidence shows that the post-Beaman congressional OLCs were increasingly populated by drafters who were uncomfortable with any public awareness of the opinions-drafting practice and, more generally, with the Columbia Triumvirate's vision of congressional counselors. Their discomfort led them slowly to transition the work of the practice to what would become CRS. The last document produced by the opinions-drafting practice, John C. Herberg's *Proposed Law to Take the Profit Out of Assassinations*, was produced on July 30, 1969.[627] This memo offered advice to lawmakers reeling from the assassinations of the 1960s. Herberg analyzed legislation providing that the government could appropriate the assets of the assassins of public officials and anyone who profited from their murders.[628] In a telling demonstration of the congressional OLCs' trajectory,

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623. *Id.* at 190.

624. *Id.*

625. *Id.*

626. For example, John H. Simms continued drafting opinions and memoranda for over a decade after being interviewed by Kofmehl. *See, e.g.*, Memorandum in re Requirement of Consent of the Senate for the Giving of Testimony by Former Employees of the Senate from John H. Simms, Assistant Couns., Off. of the Legis. Couns., U.S. Senate (Jun. 22, 1966) (on file with Nat'l Archives, Ctr. for Legis. Archives, Rec. Grp. 46, Ops. of the Off. of the Legis. Couns. for the U.S. Senate, Memo No. 461). Memo No. 461 has an erroneous "467" written on its front page. The memoranda were indexed before a National Archives staffer attempted to number them. That individual periodically "lost the count." I have chosen to keep with the memo number assigned on the index at the front of each microfilm roll to help future researchers understand the chronological order of the memoranda.

627. Memorandum in re Proposed Law to Take the Profit Out of Assassinations from John C. Herberg, Off. of the Legis. Couns., U.S. Senate, to Sen. Ralph Yarborough (July 30, 1969) [hereinafter Memo No. 466] (on file with Nat'l Archives, Ctr. for Legis. Archives, Rec. Grp. 46, Ops. of the Off. of the Legis. Couns. for the U.S. Senate, Memo No. 466). As was the case with Memo No. 461, Memo No. 466 has an erroneous number "472" scrawled on the front page. *See Appendix*, *supra* note 30, at 71 (listing Memo Number 466 as the final entry).

628. Memo No. 466, *supra* note 627, at 1-3.

Herberg heaped skepticism on the legislation and concluded that its constitutional issues needed to be resolved by the courts.[629]

The death of the opinions-drafting practice was silent. Nothing internal to the Offices commemorated its destruction. And nothing in the Legislative Reorganization Act of 1970 expressly prohibited the practice. The end of the opinions-drafting practice seems to have been brought, more than anything else, by the increasing distance between the congressional bureaucrats and the Columbia Triumvirate's vision. Removed from the Triumvirate's constitutional politics, their moment in congressional time, and their unique era of bureaucratization, the congressional bureaucrats of later years simply shirked the legacy they inherited. They turned inward rather than embracing the Triumvirate's vision.

2. *The Concomitant Rise of the Congressional Research Service*

The congressional OLCs still exist today as Congress's lead statute drafters.[630] Their internal operations are defined by specialization and an aversion to politics.[631] The literature suggests that the Columbia Triumvirate's vision of drafters who understood entire bodies of extant public law has been lost. Today, the congressional OLCs lack a working familiarity with basic doctrines of statutory interpretation.[632] The Offices no longer perform any function like the opinions-drafting practice. The new generations' avoidance of the Triumvirate and their legacy is so complete that even experts in the congressional bureaucracy seem unaware of the practice's existence.[633]

One factor that eased the decline of the opinions-drafting practice was the rise of CRS. Recall that Beaman had opposed the creation of a separate legislative drafting bureau in the Library of Congress.[634] He wanted information gathering

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629. *See id.* at 7 ("For the foregoing reasons, it is believed that enactment of the proposed bill would present substantial questions concerning the constitutional power of the Congress which would require ultimate resolution by the courts.").

630. Cross & Gluck, *supra* note 20, at 1563; *see* Shobe, *supra* note 18, at 821 ("House legislative counsel said that 'essentially all' legislation passes through the offices.").

631. *See* Cross & Gluck, *supra* note 20, at 1618-20, 1653-54 (discussing the specialized knowledge of different drafters); *id.* at 1621 ("Legislative Counsel will not judge the merits of any statute but will express views about the best way to phrase language or provisions that should be added.").

632. *See* Gluck & Bressman, *supra* note 94, at 906-07 (reporting the results of an empirical survey of congressional drafters, including the congressional OLCs).

633. As discussed above, the opinions-drafting practice does not appear in the contemporary literature on the congressional bureaucracy. *See supra* note 18 (collecting sources that characterized the early OLCs as weak institutions). In interviews with alumni of the congressional OLCs, almost all the drafters conveyed a complete lack of awareness of the practice's history.

634. *See supra* Part III.

and bill drafting to be collected under the same roof—all under his purview. Beaman's opposition seems like prophecy in the century that followed. For the first several decades of its existence, the entity that we today call CRS operated exactly as intended, as a legislative reference service.[635] In Beaman's time, these services performed an important and specific function: compiling and presenting information to lawmakers. The early CRS closely tracked its Progressive origins. It was meant to compile information on foreign systems while digesting state-level data.[636] And before CRS was started, there were hopes that it would also compile data collected through administrative agencies. This is, in short, exactly what the proto-CRS did for decades.[637]

As time went on, however, the specific notion of what a reference service was meant to accomplish became blurry. The proto-CRS was increasingly called on to do more high-profile work that raised the institution's prestige.[638] By the mid-1970s, the rechristened CRS provided legal advice to lawmakers through the American Law Division.[639] Johnny Killian and Mort Rosenberg authored some

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635. *See* DANIEL P. MULHOLLAN, CONG. RSCH. SERV., ANNUAL REPORT OF THE CONGRESSIONAL RESEARCH SERVICE OF THE LIBRARY OF CONGRESS FOR FISCAL YEAR 1996, at 1 (1997) (listing, among other things, CRS's work product for the first few decades of its existence).

636. ABA SPECIAL REPORT, *supra* note 324, at 2.

637. *See* MARGARET A. LYNCH ET AL., MAJOR STUDIES & ISSUE BRIEFS OF THE CONGRESSIONAL RESEARCH SERVICE: 1916-1989 CUMULATIVE INDEX, at vii (1989) ("From 1914 to 1946 the [proto-CRS] . . . was essentially a library operation, with its staff primarily engaged in reference work—locating and transmitting to congressional offices material that could be retrieved from the library's collections . . . .").

638. A key example is the Civil Rights Reports from 1958. The Civil Rights Act of 1957 established a Commission on Civil Rights, which turned to the Legislative Reference Service (LRS) to understand the civil-rights-law context of the late 1950s. Civil Rights Act of 1957, Pub. L. No. 85-315, § 101(a), 71 Stat. 634, 634. The resulting reports collected an awesome amount of information and provided fresh legal analysis on extant civil-rights issues. *See generally* AM. L. DIV., LIBR. OF CONG., CIVIL RIGHTS PROJECT—REPORT U.S. NO. 1 (1958) (collecting and analyzing the relevant law surrounding civil rights). The reports may have helped boost LRS's profile. But, importantly, LRS's analysis was not overly concerned with vindicating congressional power or—for the most part—checking the judiciary. (LRS was the precursor to CRS. *See supra* notes 343-344 and accompanying text.)

639. *See generally, e.g.*, AM. L. DIV., LIBR. OF CONG., 95TH CONG., THE FOREIGN AGENTS REGISTRATION ACT (Comm. Print 1977) (providing the Senate Committee on Foreign Relations with information on the Foreign Agents Registration Act); AM. L. DIV., LIBR. OF CONG., 95TH CONG., CONSTITUTIONAL RIGHTS OF CHILDREN (Comm. Print 1978) (providing the Subcommittee on the Constitution of the Senate Judiciary Committee with an overview of the constitutional rights of children); AM. L. DIV., LIBR. OF CONG., 98TH CONG., ATTORNEY-CLIENT PRIVILEGE (Comm. Print 1983) (providing the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce with information on the availability of the attorney-client privilege before congressional committees).

of the institution's most legendary analyses.[640] Killian and Rosenberg both followed CRS's model for providing confidential analysis to lawmakers that often "bec[a]me part of the public record" through the *Congressional Record* or committee reports.[641] Their work product looks strikingly like the opinions-drafting practice. In a 1989 memorandum, for example, Killian advised Senator J. Bennett Johnston (D-LA) on Congress's powers over the citizenship of Puerto Ricans.[642]

But CRS's work product differs from the opinions-drafting practice—at least the practice at its heights—in that the analysts are more focused on judicial doctrine. In Killian's 1989 memorandum, he focused almost entirely on the history of judicial opinions touching on the citizenship status of Puerto Ricans.[643] The memorandum is comprehensive and informative. But it exemplifies CRS's work in that nothing on the face of the documents evidences an interest in vindicating Article I—if anything, it reinforces the primacy of Article III.

To be clear, much of CRS's other analysis avoids judicial doctrine by design. CRS's oversight manual—a magisterial document that summarizes the "procedural, legal, and practical issues" that flow from congressional oversight[644]—only cites the Supreme Court for innocuous propositions like the idea that the "power of [the] Congress to conduct investigations is inherent in the legislative process."[645] It is elsewhere, when CRS is asked to opine on the constitutionality of legislation or agency actions, that the service's juricentric orientation becomes clear. Unlike the earliest aspirations of the congressional OLCs, CRS became a mirror for our own increasingly juristocratic legal system.

Regardless, CRS shoulders much of the weight that used to be carried by the opinions-drafting practice. This is no accident. The American Law Division's memoranda became more like the congressional OLCs' work right as the latter practice died. This likely reflects a key insight of this Article: legislatures are natural generators of constitutional questions. Lawmakers *need* expert legal advice

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640. Louis Fisher, *Constitutional Analysis by Congressional Staff Agencies*, *in* CONGRESS AND THE CONSTITUTION 64, 68 (Neal Devins & Keith E. Whittington eds., 2005).

641. *Id.* at 69.

642. Memorandum in re Discretion of Congress Respecting Citizenship Status of Puerto Ricans from Johnny H. Killian, Senior Specialist, Am. Const. L., Cong. Rsch. Serv., to Sen. Bennett Johnston (Mar. 9, 1989), https://puertoricoreport.com/wp-content/uploads/2022/10/PR_CRS_Citizenship_2PuertoRicoPoliticalStatu_81_1999.pdf [https://perma.cc/6E89-6D9Q].

643. *Id.* at 81-85.

644. CONG. RSCH. SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL, at ii (2022). CRS has been publishing the oversight manual since 1978. *Id.* at 1. It exemplifies the degree to which CRS stepped into the opening left by the opinions-drafting practice in the 1970s. Whereas the congressional OLCs used the practice to preserve information about Congress's hard and soft powers until 1970, CRS now provides some of those same services in its reports.

645. *Id.* at 8 (quoting Watkins v. United States, 354 U.S. 178, 187 (1957)).

for drafting and for the conduct of ordinary business, like committee hearings.[646] When the opinions-drafting practice fell to the wayside, lawmakers took their questions elsewhere.[647]

This is an important observation for the literature on the congressional bureaucracy. Political scientists have developed ways of studying institutional displacement, the rearrangement of authority relations in and between institutions.[648] They start from the premise that displacement is always "negotiated against prior arrangements of government and typically substitutes one form of authority for another."[649] From a focus on the congressional OLCs, the death of the opinions-drafting practice might appear like the "dismantling" of an institutional practice.[650] But from lawmakers' perspectives, the displacement here involved the "replacement" of one program in the congressional OLCs with another in CRS.[651] This is not to suggest, however, that lawmakers intentionally abandoned the pro-Congress standard from the congressional OLCs.

The replacement of the opinions-drafting practice with CRS's legal advice is a consequential case study in displacement within the congressional bureaucracy. The change appears to have been wrought by the passage of secular time—the emergence of a new generation within the congressional OLCs. But constitutional time moved as well. CRS's work product reflects a juristocratic separation of powers that would have been unrecognizable to the Columbia Triumvirate.[652] By evaluating displacement with the tools this Article has pioneered, scholars can better understand institutional development within the congressional bureaucracy.

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646. *See supra* Section IV.F (discussing the ways in which the opinions-drafting practice was generated by and bolstered Congress's hard and soft powers).

647. Here, we see a trend in the congressional bureaucracy: insatiable demand-side pressure from lawmakers leads Congress to develop "fixes" that belie any overarching, long-run institutional strategy. *See generally, e.g.*, Bridget C.E. Dooling, *Into the Void: The GAO's Role in the Regulatory State*, 70 AM. U. L. REV. 387 (2020) (telling a story about the rise of GAO legal opinions driven by lawmakers' need for advice on the Congressional Review Act).

648. *See, e.g.*, Karen Orren & Stephen Skowronek, *Pathways to the Present: Political Development in America*, *in* THE OXFORD HANDBOOK OF AMERICAN POLITICAL DEVELOPMENT 27, 29 (Richard Valelly, Suzanne Mettler & Robert C. Lieberman eds., 2016).

649. *Id.* at 30.

650. *Id.*

651. *Id.*

652. *See generally* Bowie & Renan, *supra* note 188 (juxtaposing a "juristocratic" understanding of the separation of powers unfavorably with a republican one that gives more space for the political branches).

B. Consequences

In 2017, Professor Neal Devins assessed why Congress has acquiesced to judicial supremacy.[653] Devins argues that "[t]oday's Congress . . . lacks both the will and the way to assert a strong view of congressional power to either the courts or the executive."[654] Along with the usual culprits—for example, polarization[655]—Devins argues that Congress's institutions do not lend themselves to contesting judicial supremacy. He describes both the contemporary congressional OLCs and CRS as "court-centric"[656] because their organizational structures and norms "do not facilitate pro-Congress views of the law."[657] The thrust of Devins's points is best illustrated by comparing our current situation to the opinions-drafting practice.

The downfall of the opinions-drafting practice has left Congress without a voice bent on vindicating Article I power. This is why so many scholars have noted the lack of any congressional equivalent to DOJ's Office of Legal Counsel.[658] While CRS provides commendable legal analysis, it has nothing like the Columbia Triumvirate's Thayer-like standard. CRS is not out to vindicate any vision of congressional power in its legal analysis.[659] As Devins concluded, neither CRS nor the congressional OLCs have any "mechanism" for developing or adhering to "legal theories that advance Congress's institutional interest in either statutory or constitutional cases."[660]

The consequences for the congressional OLCs and the congressional bureaucracy are even starker. The Columbia Triumvirate envisioned Congress's drafters as generalists who would seamlessly integrate new statutes into existing law.[661]

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653. Neal Devins, *Why Congress Does Not Challenge Judicial Supremacy*, 58 Wm. & Mary L. Rev. 1495, 1497-1501 (2017).

654. *Id.* at 1502.

655. *Id.* at 1499.

656. *Id.* at 1498.

657. *Id.* at 1529.

658. *See supra* note 22 and accompanying text.

659. *See* Devins, *supra* note 653, at 1526 ("[The congressional OLCs and the American Law Division of CRS] are not bound by internal pro-Congress precedent nor do they have any institutional incentive to assert broad legislative authority to the courts.").

660. *Id.* at 1529.

661. *See* Beaman, *supra* note 142, at 66 (arguing that the important first step to good drafting was "a careful study of the existing [bodies of] law" that a statute would have to be integrated into).

Indeed, the ability of Beaman and Parkinson to draft with judicial doctrine in mind was a key selling point behind the opinions-drafting practice.[662]

Today, the scholarship around the contemporary congressional OLCs paints a conflicted picture. On the one hand, alumni of the congressional OLCs claim that the Offices still engage with doctrine through drafting manuals that discuss the relevant canons of interpretation and construction. But according to a survey performed by Lisa Schultz Bressman and Abbe R. Gluck, the congressional OLCs lack specialized knowledge of judicial tools like canons of interpretation.[663] As Victoria F. Nourse and Jane S. Schacter have explained: "While staffers are well aware of the general principles of statutory interpretation . . . they do not spend substantial time anticipating or attempting to research the judicial application of particular interpretive law on the bill being drafted."[664] Without adjudicating this apparent conflict in the literature, it would have been unfathomable to the Columbia Triumvirate that Congress's professional drafters would ignore extant bodies of law.[665] Their entire theory of drafting began with the drafter's ability to integrate new statutes into existing law and to draft around a retrenched judiciary.[666]

Today, Congress is facing an increasingly self-aggrandizing judiciary—not unlike the judiciary that the Columbia Triumvirate was attempting to curb. The Roberts Court has deployed tools like the major-questions doctrine in a way that many think functionally limits congressional power.[667] Although scholars have advocated various workarounds,[668] Congress has not yet legislated against the major-questions doctrine. It may be relevant that the congressional OLCs no longer serve their original functions. The congressional OLCs now operate more

662. *See supra* Section III.B (describing Parkinson's role as an advisor on constitutional law and Beaman's approach to "legislative constitutionalism," which became incorporated into drafting practices).

663. *See* Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 744 (2014) ("[C]ontrary to . . . expectations about Legislative Counsel's expertise, the Legislative Counsels we interviewed had no greater knowledge of most of the canons than the other respondents.").

664. Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 600 (2002).

665. *See* Beaman, *supra* note 142, at 66.

666. *Id.*

667. *See* Josh Chafetz, *The New Judicial Power Grab*, 67 ST. LOUIS U. L.J. 635, 648-52 (2023) (arguing that the judiciary has deployed the major-questions doctrine to limit the power of the political branches).

668. *See generally* Christopher J. Walker, *A Congressional Review Act for the Major Questions Doctrine*, 45 HARV. J.L. & PUB. POL'Y 773 (2022) (advocating for a workaround for the major-questions doctrine that is modeled on the Congressional Review Act).

narrowly, strictly providing drafting advice. The vision of the Columbia Triumvirate was much more expansive.

With the absence of a figure like Middleton Beaman, there is little coordinating the drafting of statutes in Congress.[669] As Gluck and Bressman lamented years ago, the congressional OLCs have drifted apart from one another and developed separate practices.[670] This is to say nothing of the divergent practices between the congressional OLCs and the standing committees.[671] The opinions-drafting practice did not *just* interpret and construct constitutional meaning. The practice also helped memorialize interoffice precedent in a way that could be communicated to lawmakers. With the end of the practice, there is little that coordinates the congressional OLCs' practices in service of some overarching substantive commitment.

Why does coordination matter? My findings suggest that one ballast of support that made the opinions-drafting practice consequential was the mutually reinforcing relationship of the opinions and the Offices' important drafting of statutes. The Offices' competent statute drafting made the congressional OLCs indispensable and respected so that they could exceed their statutory mandate. The opinions provided a background law that could help guide the drafting of competent statutes. For example, and as discussed above, the opinions provided drafting conventions that could help drafters circumvent judicial doctrine. Coordination between the Senate OLC and the House OLC is important, on this account, because it provided a single background law for statute drafting. In the absence of coordination, outside actors may have difficulty grasping Congress's drafting conventions because they would be emanating from two different sets of drafters. With the decline of the opinions-drafting practice, no body within Congress has provided the same kind of coordinated background law.

In sum, Congress has never recovered from the collapse of the opinions-drafting practice.

CONCLUSION

In 1975, Paul Brest published *The Conscientious Legislator's Guide to Constitutional Interpretation*, arguably the most influential piece of legal scholarship about legislative constitutionalism.[672] Brest made two elegant points. First, legislators

669. *See* Gluck & Bressman, *supra* note 94, at 1024 ("[T]here is currently no mechanism for coordinating drafting behavior.").

670. *Id.*

671. *Id.*

672. Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975).

should regard themselves as duty-bound to review the constitutionality of pending legislation.[673] Second, when conducting that review, legislators ought to do more than predict how courts should respond.[674] Here, Brest argued that legislators' different institutional positioning negated all the prudential reasons for courts' deference to legislatures.[675] For example, courts sometimes defer to legislatures because of the difficulties in attributing tainted animus to a multimember body. A lawmaker is not similarly situated; because of her proximity to legislative politics, she can reach a more trustworthy decision about whether a bill has been tainted by unconstitutional animus.[676] In this writing, Brest provided the core normative defense for an independent legislative constitutionalism—something that has found new life in the present renaissance of scholarship on legislative constitutionalism.[677]

However, the problem is obvious: Brest's work was aspirational. He never told us how to "build" the conscientious legislator.[678] That was the problem that preoccupied the Columbia Triumvirate, and proponents of legislative constitutionalism are rediscovering it today. Nikolas Bowie and Daphna Renan, for instance, recently offered a historical narrative suggesting that the rise of a juristocratic reconceptualization of our constitutional order in the interwar period dramatically changed Congress's role in the separation of powers.[679] Bowie and Renan critique this juristocratic turn, but they have not provided a roadmap for

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673. *Id.* at 587.

674. *Id.* at 588-89 ("If a legislator were not bound to apply the Constitution himself, a 'Legislator's Guide' would merely assist him in predicting whether the courts would uphold a measure if and when it were challenged. In other words, the legislator's view of judicial doctrine would be that of Holmes' 'bad man,' who cares only for the material consequences which such knowledge enables him to predict.").

675. Paul Brest ticked through the conventional reasons that judges ought to defer to legislatures: courts should show "respect for the decisions of a coordinate branch of the federal government," courts are unable to "separate constitutional questions from related empirical issues beyond its competence," and courts are unable to "ascertain how the legislative process has actually worked in a particular case." *Id.* at 586. After listing these reasons, Brest concluded that "[n]one of these considerations suggests that the legislature should exercise restraint in assessing the constitutionality of its own product." *Id.*

676. *Cf. id.* (using a similar example from Supreme Court precedent).

677. *See, e.g.*, Bowie & Renan, *supra* note 188, at 2032-82 (documenting the decline of a "republican separation of powers" in favor of a juristocratic one in the twentieth century); Maggie Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, 132 YALE L.J. 2205, 2274-81 (2023) (exploring the distinctive role played by Congress in constitutional lawmaking with a focus on federal Indian law).

678. *See* Brest, *supra* note 672, at 601 ("I have not addressed the practical problems that confront a legislator whose constitutional obligations conflict with the political demands of his office.").

679. *See generally* Bowie & Renan, *supra* note 188 (providing this narrative).

returning to the more normatively attractive "republican separation of powers" of the past.[680]

On this point, the Columbia Triumvirate's turn toward an implicit governing paradigm (the opinions-drafting practice) is instructive. Sociologists have long suggested that bureaucrats are institutionally situated so that their worldviews are influenced by norms, ideas, and procedures.[681] More recently, scholars in the law-and-political-economy (LPE) movement have resuscitated this move to show how neoliberalism infected law and bureaucracies across the twentieth century.[682] They use the idea of an implicit governing paradigm to show how actors have used ostensibly neutral norms, ideas, and procedures to cement and replicate a neoliberal trajectory in American institutions.

Like the neoliberals of the 1970s and 1980s, juristocrats and their allies have reified judicial power through institutions and legal doctrine.[683] The Columbia Triumvirate was a community of progressive opponents of the juristocratic turn described by Bowie and Renan. Anticipating Brest by decades, the Triumvirate emphasized the independent constitutional role of legislators.[684] With the *Lochner* era as impetus and the psychic wound of the *Ives* decision, the triumvirs established a nonpartisan procedure for interpreting and constructing constitutional meaning. While nonpartisan, this procedure was far from neutral. As detailed throughout this Article, the opinions-drafting practice depended on a Thayer-like standard designed to aggrandize legislative power.[685] This *neutral-seeming* procedure, bolstered as it was by the congressional OLCs' drafting

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680. The final part, "Reconstructing the Republican Separation of Powers," of Nikolas Bowie and Daphna Renan's article is devoted to fleshing out the *content* of an alternative, rather than providing specific steps for achieving and institutionalizing this alternative. *Id.* at 2107-25. For example, the authors propose a supercharged deference standard but do not explain why judges would accept a diminishment in their own power. *Id.* at 2113.

681. *See generally* SELZNICK, *supra* note 43 (launching a new approach to analyzing leadership that focused on the sociology of bureaucracy).

682. *See, e.g.*, Britton-Purdy et al., *supra* note 59, at 1792-1800.

683. Here, the extensive existing literature on judicial self-aggrandizement is illustrative. *E.g.*, Josh Chafetz, *Corruption and the Supreme Court*, 36 YALE J.L. & HUMANS. (forthcoming 2025) (manuscript at 2), https://ssrn.com/abstract=4971946 [https://perma.cc/Y9M8-SZEC] (arguing that the Justices' rhetorical moves when describing corruption aggrandize judicial power); Josh Chafetz, *Nixon/Trump: Strategies of Judicial Aggrandizement*, 110 GEO. L.J. 125, 129-44 (2021) (outlining the Court's strategies of judicial aggrandizement); Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 111-15 (2022) (arguing that the Court's 2020s cases are not unified by any traditional philosophy or mode of interpretation, but rather by a "central theme" of "centraliz[ing] power in the Supreme Court").

684. *See supra* Section III.B.2 (illustrating how Parkinson's role in the child-labor fight reflected the Columbia Triumvirate's view of Congress's constitutional role).

685. *See supra* Section III.B.2 (describing the Thayer-like standard).

prowess, offered a subtle thumb on the scale that could offset the juristocratic slide of the American constitutional system.

The spirit of the Columbia Triumvirate is what is most worth rediscovering. This Article is not meant to suggest that a minute replication—or "transplant"[686]—of the opinions-drafting practice would be feasible. That would likely be foolhardy to attempt. Today, the congressional bureaucracy is a much more thickly articulated set of institutions with a variety of path dependencies. More to the point, the Columbia Triumvirate's efforts were compromised from the beginning in ways that have been detailed in this Article. It is not clear that they had any real theory of democracy. Instead, the Columbia Triumvirate replicated many of the same issues commonly associated with Thayerism itself.[687]

This Article's true importance lies in connecting the literature on legislative constitutionalism to a productive emphasis on institution building and institutional practice. Bowie, Renan, and Maggie Blackhawk have done an excellent job in recent years of emphasizing the normative upside of a Congress-centered paradigm over a juristocratic separation of powers.[688] But these works do not focus on the contingent institutional developments *within* Congress that have driven paradigm shifts in the extant governing regime or in Capitol Hill's constitutional culture. This Article joins the work of Josh Chafetz and Alexander Zhang in refocusing legislative constitutionalism on the minutiae of institutional norms, ideas, and practices.[689]

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686. The notion of "transplants" is borrowed from Robert A. Kagan. ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 6 (2d ed. 2019) ("The goal of the comparative analysis, let me re-emphasize, is not to recommend specific transplants from other political and legal systems.").

687. Thayerism is "radically incomplete." Cass R. Sunstein, *Thayerism*, 91 U. CHI. L. REV. ONLINE *8 (Feb. 19, 2024), https://lawreview.uchicago.edu/sites/default/files/2024-02/Sunstein_ESSAY_v91_Online.pdf [https://perma.cc/VM76-VFF4]. Thayer would have had courts defer to legislative determinations unless constitutional errors were plain beyond a reasonable doubt. *Id.* at *1-2, *5. But you need a theory of interpretation to understand when a legislature's errors exceed the scope of Thayerian deference. *See id.* at *8. Because Thayerism does not come packed with its own epistemics, error beyond a reasonable doubt is in the eye of the beholder. An even more pressing problem emanates from Thayerism's call for neutrality. A Thayerian court would defer to legislatures on issues coded as conservative or liberal. *See id.* at *10 ("Suppose that a state prohibited abortion or same-sex marriage, required affirmative action, or imposed the death penalty. Thayerians would uphold those actions."). But few judges have adopted a Thayerian neutrality across the board. *See id.* at *10-11. The problem, then, is that Thayer had a theory of power that failed to specify the institutional mechanisms that would sustain it.

688. *See supra* note 677.

689. *See generally* CHAFETZ, *supra* note 32 (providing a thick history of the centuries-long development of Congress's "hard" and "soft" powers); Alexander Zhang, *Legislative Statutory*

This work is just as beneficial for the new jurisprudential communities. LPE scholars' focus on administration and (more recently) juristocracy have reaped new insights. This Article shows that legislators, like bureaucrats, are institutionally situated. Their worldview is informed by norms, ideas, and practices—by what LPE scholars call implicit governing paradigms.[690] This Article shows that LPE scholars and others interested in governing institutions can add richness to their analyses by focusing on the implicit governing paradigms that impact legislative procedure and politics.

Future work will elaborate on the takeaways for Congress's efforts to establish a congressional counterweight to DOJ's Office of Legal Counsel. But as a preliminary matter, it seems obvious that lawmakers should focus on counteracting the pull of juristocracy in addition to counteracting presidentialism. These efforts should start from the premise that Congress has been trapped between the twin scissor blades of presidentialism and juristocracy, two alternative governing regimes that are now deeply embedded in our national culture. Reformers could turn toward an implicit governing paradigm that privileges Article I, like the Columbia Triumvirate's creation of the opinions-drafting practice. But lawmakers should learn from history; they must guard against the challenges of congressional time and secular cycles. Whatever Congress creates, the Columbia Triumvirate's successes and failures should form the basis for lawmakers' work.

Interpretation, 99 N.Y.U. L. Rev. 950 (2024) (describing a lost history of expository legislation that allowed legislators to interpret the statutes they enacted); Alexander Zhang, *Externalist Statutory Interpretation*, 134 Yale L.J. 447 (2024) (emphasizing statutory interpretation by marginalized peoples).

690. *See supra* note 68 and accompanying text.