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FOREWORD

Testing Textualism's "Ordinary Meaning"

*Tara Leigh Grove**

ABSTRACT

The statutory interpretation literature has taken an empirical turn. One recent line of research surveys the public to test whether textualist opinions reached the "right answer" in specific cases—that is, whether textualist judges correctly identified the "ordinary meaning" of federal statutes. This Foreword uses this literature as a jumping off point to explore the concept of "ordinary meaning." The Foreword challenges two central assumptions underlying this empirical scholarship: first, that "ordinary meaning" should be viewed primarily as an empirical concept, and, second, that textualists themselves view "ordinary meaning" in empirical terms. As the Foreword shows, "ordinary meaning" can be understood as a legal concept, not simply as an empirical fact. Moreover, the Foreword demonstrates that many prominent textualists have long treated "ordinary meaning" as a legal concept—one that must be elucidated through the understanding of a hypothetical reasonable reader (although, as the Foreword discusses, textualists debate how well-informed such a reasonable reader should be). This analysis complicates recent efforts to test empirically whether textualists have reached the "right answer" in specific cases. For many textualists, like many other interpretive theorists, statutory analysis is primarily a normative, not an empirical, enterprise.

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TABLE OF CONTENTS

INTRODUCTION

Scholarship on statutory interpretation has taken an empirical turn. Much, albeit not all, of this literature seeks to "test" textualism—calling into question the assumptions and practices of the method. Some scholarship examines textualists' assumptions about the legislative process.[1] Other work examines textualists' reliance on dictionaries[2] or corpus linguistic methods.[3] Recently, a third line of

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1 Scholars have interviewed congressional staffers to get a sense of the legislative drafting process. *See* 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, 906–07, 919, 949–50, 956–60, 968 (2013) (drawing on a survey of 137 congressional staffers responsible for drafting legislation and calling into question textualists' reliance on some canons and textualists' refusal to consider legislative history); 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, 784–85 (2014) ("[O]ur study calls into question the conclusion that text is always the best evidence of the [legislative bargain]."); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 576–78, 600–05 (2002) (drawing on interviews with sixteen Senate Judiciary Committee staffers). One concern about this work is that the authors were not able to interview members of Congress themselves. *See* John F. Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911, 1936 n.151 (2015).

2 *See, e.g.*, Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 280–81 (1998) (arguing that "textualists are selective and inconsistent in when and how they use dictionary definitions"); James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 488–94 (2013) (concluding, based on an empirical and doctrinal

empirical work has emerged. This work aims to test whether textualists have gotten the "right answer" in specific cases and controversies—that is, whether judges have correctly identified the "ordinary meaning" of a law.[4]

This new line of empirical work surveys "ordinary people" to see if their responses to statutory questions map onto the conclusions of textualist judicial opinions.[5] Some of this scholarship examines admin-

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analysis, that "dictionaries add at most modest value to the interpretive enterprise, and that they are being overused and often abused by the Court"); Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726, 734 (2020) (using a novel survey method "to test dictionaries and legal corpus linguistics" and finding that "the way people understand ordinary terms and phrases . . . varies systematically from what a dictionary definition or relevant legal corpus linguistics' usage data would indicate about the meaning"); *see also* Gluck & Bressman, *supra* note 1, at 907 (finding that legislative staffers "do not consult dictionaries when drafting").

3 "Corpus linguistics" involves the use of datasets to study linguistic phenomena, including searching databases to determine the frequency with which a word appears alongside other words in a given time period. *See* Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 792, 828–30 (2018) (describing and advocating for the method); *see also* Stefan Th. Gries & Brian G. Slocum, *Ordinary Meaning and Corpus Linguistics*, 2017 BYU L. REV. 1417, 1423–24, 1440–42, 1470–71 (2017) (arguing that interpreters should rely on corpora, but also recognizing the limits of the approach, and suggesting that judges may need to rely on experts). For criticisms of the approach, see Carissa Byrne Hessick, *Corpus Linguistics and the Criminal Law*, 2017 BYU L. REV. 1503, 1505, 1514–15 (2017) (arguing that "corpus linguistics represents a radical break from current interpretive theories" and should "not be adopted as an interpretive theory for criminal laws"); Matthew Jennejohn, Samuel Nelson & D. Carolina Núñez, *Hidden Bias in Empirical Textualism*, 109 GEO. L.J. 767, 770–71 (2021) (arguing that the corpus of Historical American English, "one of the primary corpora that is used in legal interpretation, reflects structural gender bias"); Tobia, *supra* note 2, at 734; *see also* Anya Bernstein, *Democratizing Interpretation*, 60 WM. & MARY L. REV. 435, 444 (2018) (asserting that although corpus linguistics is "certainly interesting, and might be productive, in the legal context[,] empiricism cannot resolve normative questions" about, for example, "the boundaries of the speech community that determines what a word means"); Kevin Tobia & John Mikhail, *Two Types of Empirical Textualism*, 86 BROOK. L. REV. 461, 463 (2021) ("Legal corpus linguistics is importantly limited by the collection of evidence in the relevant database. For example, only published writing is normally part of the corpus, but that reflects only a tiny fraction of actual language use during a given time period."). One possibility is that interpreters can use dictionaries and corpus linguistics as "checks" on one another. *See* Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 285 (2017) (noting that when different "techniques converge on a single hypothesis . . . we would have strong evidence in favor of that meaning").

4 *See infra* notes 6–8 and accompanying text; *see also infra* Part II.

5 To be sure, not all recent survey work has this goal. Kevin Tobia, for example, has used surveys to question the use of dictionaries and corpus linguistics methods. *See* Tobia, *supra* note 2, at 734. In another important paper, Tobia, along with Brian Slocum and Victoria Nourse, find that survey participants understand *rules* differently from other language. *See* Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Statutory Interpretation from the Outside*, 122 COLUM. L. REV. 213, 224–25 (2022). For a general survey of empirical work on not only statutory interpretation but also common law concepts, see Kevin Tobia, *Experimental Jurisprudence*, 89 U. CHI. L. REV. 735 (2022).

istrative and criminal cases,[6] while other work explores the issue raised in *Bostock v. Clayton County*[7]: whether the disparate treatment of a gay, lesbian, or transgender employee qualifies as "discriminat[ion] . . . because of such individual's . . . sex" under Title VII of the Civil Rights Act of 1964.[8]

This Foreword uses this literature as a jumping off point to explore the concept of "ordinary meaning." The Foreword raises questions about two central assumptions underlying much of this scholarship. First, and most fundamentally, scholars assert that "ordinary meaning" is an empirical concept.[9] Second, commentators further claim that textualists treat "ordinary meaning" as an empirical fact—thereby justifying efforts to test textualism.[10]

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6 *See* Shlomo Klapper, Soren Schmidt, & Tor Tarantola, *Ordinary Meaning from Ordinary People*, U.C. IRVINE L. REV. (unpublished manuscript) (on file with author) (using surveys to examine the question in Muscarello v. United States, 524 U.S. 125, 126–27 (1998), which involved whether an individual "'carries a firearm'" when the firearm is in "the locked glove compartment or trunk of a car," and MCI v. AT&T, 512 U.S. 218, 220 (1994), which involved whether the Federal Communications Commission's authority to "'modify'" tariff requirements allowed it to make only modest changes or allowed for broader changes, such as making the tariff filing optional for certain carriers); *infra* Part II.A (discussing the *MCI* case).

7 140 S. Ct. 1731 (2020).

8 42 U.S.C. § 2000e-2(a)(1); *see* James A. Macleod, *Finding Original Public Meaning*, 56 GA. L. REV. 1, 8–10 (2021) (using a new "applied-meaning-experiment" method, which asked participants to "read short vignettes describing an instance of, e.g., workplace sexual-orientation discrimination, after which they were asked, among other things, whether the employer fired the employee 'because of' the employee's 'sex'" and finding that "[t]he results favored the *Bostock* majority's interpretation," particularly with respect to transgender individuals). Kevin Tobia and John Mikhail also surveyed individuals about the issue in *Bostock* but offer more qualified conclusions. *See* Tobia & Mikhail, *supra* note 3, at 483–85 (finding some support for the *Bostock* majority while noting that the results varied based on the questions asked, and thus "call[ing] into question any uncritical reliance on simple, one-dimensional survey methods to ascertain the meaning of complex legal language").

9 *See* Tobia & Mikhail, *supra* note 3, at 461 ("There is significant debate about the meaning of 'ordinary meaning,' but there is general agreement that it is an *empirical* notion, closely connected to facts about how ordinary people understand language . . . . [O]rdinary meaning is derived from, or perhaps equated with, the general public's understanding of the text."); *infra* notes 10, 85.

10 *See* Macleod, *supra* note 8, at 4–6 (asserting that textualists themselves view the inquiry into "original public meaning" as "factual and empirical, not normative"); Tobia, *supra* note 2, at 801 (asserting that there is "a core assumption of textualist and originalist theories that use dictionaries and legal corpus linguistics: there is an empirical *fact* about ordinary meaning, grounded in what language communicates to ordinary people"); *see also* William N. Eskridge Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718, 1763 (2021) ("Textualists claim to be empirical, not normative."). Some scholars recognize that the textualist literature is more nuanced. *See* Mitchell N. Berman & Guha Krishnamurthi, Bostock *Was Bogus: Textualism, Pluralism, and Title VII*, 97 NOTRE DAME L. REV. 67, 97 (2021) ("[C]ommitted textualists have often insisted

This Foreword challenges both assumptions. As the Foreword explains, "ordinary meaning" can be understood as a legal concept, serving in part as a legal term of art to distinguish a less technical understanding of statutory terms from a more technical or specialized use.[11] Moreover, many prominent textualists have long treated "ordinary meaning" as a legal concept and have thus urged interpreters to use legal tools, such as the construct of a hypothetical reasonable person, to identify the "ordinary meaning" of statutory terms and phrases.[12] As the Foreword discusses, self-proclaimed textualists disagree about how well-informed this reasonable reader presumptively should be; that is, they disagree about which contextual evidence should factor into the statutory analysis. But all such textualists treat "ordinary meaning" as primarily a legal concept, not simply as an empirical fact.

The Foreword proceeds as follows: Part I explores how "ordinary meaning" can be understood as a legal concept, and how textualists have long viewed "ordinary meaning" in that way, albeit without much theorizing on the topic. Part II examines the recent empirical literature, raising further questions about the capacity of empirical surveys to test the conclusions of textualist judicial opinions. Part III offers some thoughts on the implications of a legalistic conception of "ordinary meaning." The Foreword suggests that, to the extent interpreters treat "ordinary meaning" as a legal concept—as many do—they should grapple with the legal and normative questions surrounding how jurists should identify the "ordinary meaning" of laws.

I. "Ordinary Meaning" as a Legal Concept

Judges often say that they seek the "ordinary meaning" of a federal statute.[13] But what is the ordinary meaning of a law? That turns

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that ordinary meaning is not an entirely empirical inquiry, but rather a partially normalized or idealized one," and thus seek the views of a hypothetical reasonable reader.).

11 *See infra* Part I. To be sure, other commentators have observed that an ordinary meaning of a word is different from a technical meaning. *See, e.g.*, John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1, 107 (2001) (textualists "recognize that statutory terms may have specialized (rather than ordinary) meanings"); Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Ordinary Meaning and Ordinary People*, 171 U. Pa. L. Rev. (forthcoming 2023) (describing the ordinary meaning of a word as "not technical meaning"); *see also* Smith v. United States, 508 U.S. 223, 242, 244–45 (1993) (Scalia, J., dissenting) ("In the search for statutory meaning, we give nontechnical words and phrases their ordinary meaning."). But scholars do not often describe "ordinary meaning" as a legal concept that must be elucidated through legal analysis.

12 *See infra* Part II.

13 *E.g.*, BP P.L.C. v. Mayor and City Council of Baltimore, 141 S. Ct. 1532, 1537 (2021)

out to be a conceptual puzzle. The term "ordinary meaning" does, at first glance, appear to describe an empirical concept. One might assume that the *ordinary* meaning of statutory language is the most common or the most popular usage of that language. On this view, ordinary meaning is an empirical fact.

That is, however, not the only way to understand ordinary meaning. An alternative conception is that "ordinary meaning" is a legal concept, serving in part as a legal term of art that distinguishes a less technical understanding of statutory terms or phrases from a more "technical meaning," one that draws on a particular trade, science, or other specialty. Importantly, prominent textualist jurists and scholars have long treated ordinary meaning as a legal concept. These textualists have thus employed legal constructs (such as the hypothetical reasonable reader) to discern the ordinary meaning of a statutory term or phrase.

A. Ordinary v. Technical Meaning

Years ago, I told my (non-lawyer) mother that I was writing an article about "standing." She paused, stared at me oddly for a while, then said finally, "Okay. And your next paper will be on 'sitting' . . . and then 'walking' . . . ?" Lawyers, of course, know that "standing" has a technical legal meaning, referring to one requirement for launching a suit in federal court.[14] My mom's reply reminded me that "standing" also has a very ordinary meaning—one that made my planned paper topic seem rather odd (and dull!) to a lay audience.

Early jurists and scholars often described "ordinary meaning" as distinct from a more "technical meaning."[15] For example, in his 1839

("When called on to interpret a statute, this Court generally seeks to discern and apply the ordinary meaning of its terms at the time of their adoption."); Artis v. District of Columbia, 138 S. Ct. 594, 603 (2018) ("In determining the meaning of a statutory provision, 'we look first to its language, giving the words used their ordinary meaning.'" (quoting Moskal v. United States, 498 U.S. 103, 108 (1990))).

14 Under current Article III standing doctrine, a private party must demonstrate a concrete injury that was caused by the defendant and that can be redressed by the requested relief. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

15 *See*, *e.g.*, United States v. Stone & Downer Co., 274 U.S. 225, 245–46 (1927) ("If Congress had intended that the words 'clothing wool' should have their commercial designation, it would simply have used the words without qualification or it would have said 'commercially known as.' It would not have used the phrase '*commonly known as*.' The phrase indicates . . . that clothing wool is used in its ordinary or non-expert meaning."); Union Pacific R.R. Co. v. Hall, 91 U.S. 343, 347 (1875) ("The words 'on the boundary of Iowa' are not technical words; and therefore they are to be taken as having been used by Congress in their ordinary signification."); JAMES KENT, COMMENTARIES ON AMERICAN LAW 521 (10th ed. 1826) ("The words of a statute . . . are to be taken in their natural, plain, obvious, and ordinary signification

treatise, Francis Lieber stated: "According to the character of the text before us, we are obliged to take words, either in their common adaptation in daily life, or in the peculiar signification which they have in certain arts [or] sciences."[16] An 1871 treatise likewise stated that "when technical terms are used" in a statute, "they are to be taken in a technical sense . . . . In other cases, words are to be taken in their ordinary sense."[17]

A few cases illustrate this distinction. *Maillard v. Lawrence* (1853)[18] involved whether shawls were "wearing apparel" under the Tariff Act of 1846.[19] If the shawls were "wearing apparel," they would be subject to a higher tariff; otherwise, they would qualify for a lower tariff as products "of which silk shall be a component material, not otherwise provided for."[20] Some evidence suggested that "in a mercantile sense," shawls were not "wearing apparel."[21] But the Court relied on "the ordinary and received acceptation" of the term, concluding that a "shawl" was "a familiar, every day and indispensable part of wearing apparel."[22]

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and import . . . and if technical words are used, they are to be taken in a technical sense."); SIR FORTUNATUS DWARRIS, A GENERAL TREATISE ON STATUTES 179 n.1, 215 (1871) ("[W]hen technical terms are used, they are to be taken in a technical sense . . . . In other cases, words are to be taken in their ordinary sense."); FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS 100 (1839) ("According to the character of the text before us, we are obliged to take words, either in their common adaptation in daily life, or in the peculiar signification which they have in certain arts, sciences, sects, provinces, &c., in short, we have to take words according to what is termed *usus loquendi*."); SIR PETER BENSON MAXWELL, ON THE INTERPRETATION OF STATUTES 2 (1875) ("The first and most important rule of construction is, that it is to be assumed in the first instance, that the words and phrases are used in their technical meaning if they have acquired one, and in their popular meaning if they have not."); J. G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 327 (1891) ("[I]n the absence of anything in the context to the contrary—common or popular words are to be understood in a popular sense . . . and technical words, pertaining to any science, art or trade, in a technical sense."); *infra* notes 16–26 and accompanying text.

16 LIEBER, *supra* note 15, at 100.

17 DWARRIS, *supra* note 15, at 215.

18 57 U.S. (16 How.) 251 (1853).

19 *See id.* at 256–57.

20 Walker Tariff Act of 1846, 1846 Stat. 42, 44–46 (showing that Schedule C imposed a 30% tariff on "clothing ready made, and wearing apparel of every description, of whatever material composed, made up or manufactured wholly or in part by the tailor, sempstress, or manufacturer," among other items, while Schedule D imposed a 25% duty on "manufactures of silk, or of which silk shall be a component material, not otherwise provided for," among other items).

21 *Maillard*, 57 U.S. (16 How.) at 257.

22 *Id.* at 260–61; *see id.* at 261 ("In instances in which words or phrases are novel or obscure, as in terms of art . . . it may be proper to explain or elucidate them by reference to the art or science to which they are appropriate" but, here, the "language [was] familiar to all classes and grades and occupations.").

McCaughn v. Hershey Chocolate Company (1931)[23] involved whether chocolate qualified as "candy" under the Revenue Acts of 1918 and 1921, and thus could be taxed at a higher rate as a "luxury."[24] The Hershey Company argued that chocolate was "food," not "candy," asserting that "candy" had a specialized industry definition limited to "confectionery, made principally of sugar or molasses, with or without the addition of coloring or flavoring matter."[25] The Court acknowledged that "the word 'candy' . . . may be used in this narrower and more restricted sense," but found that, in the context of the Revenue Acts, it was used "in a popular and more general sense" and embraced Hershey chocolate.[26]

Nix v. Hedden (1893)[27] also embodies this distinction, though the case is more nuanced than commentators often presume. *Nix* involved whether "tomatoes" should be classified as "vegetables" under the Tariff Act of 1883, and thus subject to a tariff, or as "fruit" exempt from any payment.[28] At the outset, the Court ruled out one potential technical meaning, finding "no evidence that the words 'fruit' and 'vegetables' have acquired any special meaning in trade or commerce."[29] One might expect that the debate was then between what many take to be the botanical understanding (tomatoes as fruit) and a

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23 283 U.S. 488 (1931).

24 The two revenue statutes were precisely the same, except that candy was subject to a 3% luxury tax under the 1918 Act and a 5% tax under the 1921 Act. *See* Revenue Act of 1918, Pub. L. No. 65-254, § 900, 40 Stat. 1057, 1122 (1919) ("That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased— . . . (9) Candy, 5 per centum."); Revenue Act of 1918, Pub. L. No. 67-98, § 900, 42 Stat. 227, 292 (1921); *see also McCaughn*, 283 U.S. at 489–90.

25 *McCaughn*, 283 U.S. at 490–91 (1931) ("Respondents rest their case mainly upon differences in composition of sweet chocolate from that of confectionery, made principally of sugar or molasses, with or without the addition of coloring or flavoring matter, which, it is urged, is alone described by the word 'candy.' They assert that chocolate is food and candy is not, and hence chocolate cannot be properly described as candy.").

26 *Id.* at 491.

27 149 U.S. 304 (1893).

28 *Id.* at 306 ("The single question in this case is whether tomatoes, considered as provisions, are to be classed as 'vegetables' or as 'fruit,' within the meaning of the Tariff Act of 1883."); *see* An Act to Reduce Internal-Revenue Taxation, and For Other Purposes, Pub. L. No 47-121, 22 Stat. 488, 503–04, 517, 519 (1883) (stating, under Schedule G Provisions, that there would be a tax on "[v]egetables, in their natural state, or in salt or brine, not specially enumerated or provided for in this act, ten per centum ad valorem," while listing, under "Sundries," which were untaxed, "[f]ruits, green, ripe, or dried, not specially enumerated or provided for in this act").

29 *Nix*, 149 U.S. at 306 ("There being no evidence that the words 'fruit' and 'vegetables' have acquired any special meaning in trade or commerce, they must receive their ordinary meaning.").

more ordinary understanding (tomatoes as vegetables).[30] But, interestingly enough, the remainder of the case was a debate over "ordinary meanings." The plaintiffs in *Nix*, who argued that the term "fruit" encompassed tomatoes, disclaimed any reliance on technical meaning.[31] Instead, the plaintiffs emphasized that "the statutory term to be construed is 'fruits'—not tomato," and insisted that the ordinary meaning of "fruit"—an edible plant with seeds—encompassed tomatoes.[32] The government countered that the ordinary meaning of "vegetables" was broad enough to include tomatoes.[33] In this battle over ordinary meanings, the Court sided with the government, stating that although tomatoes are "[b]otanically speaking . . . the fruit of a vine, just as are cucumbers, squashes, beans, and peas . . . in the common language of the people, whether sellers or consumers of provisions, all these are vegetables."[34]

Importantly, in each of these cases, the Court's selection of the ordinary meaning, rather than the technical meaning, did not change the legal nature of the inquiry. The Court had to interpret the terms

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30 That is how the case is often described in law school casebooks. See LISA SCHULTZ BRESSMAN, EDWARD L. RUBIN, & KEVIN M. STACK, THE REGULATORY STATE 163 (3d ed. 2020) ("[I]t would have made all the difference in the *Nix* case had the Court adopted the technical, botanical meaning of tomato as opposed to the ordinary one."); JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION: CASES AND MATERIALS 149 (3d ed. 2017) ("*Nix* illustrates the difficulties that may arise when words and phrases have both ordinary and specialized meanings. . . . A botanist may (correctly) assert that a tomato is a fruit, while a chef might (correctly) assert that it's a vegetable."). Of course, as some casebook authors have recognized, the story is more complicated because botanists may describe a tomato as *both* a fruit *and* a vegetable. *See id.* (noting that "botanists define a vegetable as any edible part of a plant other than the flower").

31 *See* Plaintiff's Brief, at 13–14, 16, Nix v. Hedden, 149 U.S. 304 (1893) (No. 137) ("The meaning of 'fruits' for which we contend is seen to be that given in every dictionary and popular cyclopaedia, and the sense in which it is used in common speech" and insisting "[m]anifestly, the impression [in the lower court decision] that the definitions upon which we relied were botanical, or in any respect technical, was misleading . . . . As the word is not used technically, it must embrace everything in fact 'fruits' . . .").

32 *Id.* at, at 10–11, 20 ("It must constantly be borne in mind, that *the statutory term to be construed is* 'FRUITS'—not tomato. . . . We believe it impossible to adopt any fair, reasonable, general definition of the word *'fruits'* which, when it comes to be applied, will not include the tomato. . . . In Webster's new 'International,' this is the applicable meaning;— 2. *(Hort.)* The pulpy, edible seed-vessels of certain plants, especially *those grown on branches above ground*, as apples, oranges, grapes, melons, berries, etc.").

33 Brief for the Defendant in Error, at 3, Nix v. Hedden, 149 U.S. 304 (1893) (No. 137) ("The definition of *vegetable* given in the Century Dictionary is adequate and satisfactory, namely: 'A herbaceous plant used wholly *or in part* for culinary purposes, or for feeding cattle, sheep, or other animals, as cabbage, cauliflower, turnips, potatoes, spinach, pease, and beans. The whole plant may be so used, or its tops or leaves, or its roots, tubers, etc., or its fruit or seed.'").

34 *Nix*, 149 U.S. at 307.

"wearing apparel," "candy," "fruit," and "vegetables" in the context of the federal statute at issue. As part of this inquiry, the Court had to address certain legal questions. One set of questions involved the type(s) of evidence relevant to determining the ordinary meaning. In *Nix*, for example, the parties relied on competing dictionary definitions,[35] and the government further emphasized a report from the Tariff Commission describing tomatoes as "vegetables."[36] The Court had to decide, as a matter of law, which sources to consider and how to weigh the evidence before it.

The Court also had to consider the import of the statutory structure. To use *Nix* again as an example, the Tariff Act did tax certain specified fruits, such as dates and plums, while leaving untaxed "fruits . . . not otherwise provided for."[37] The plaintiffs pointed to this structure to argue that the statutory term "fruits" must be very broad.[38] But there were competing structural arguments. The government relied on a provision that was equally broad, taxing "[v]egetables, in their natural state, or in salt or brine, not specially enumerated or provided for in this act."[39] Moreover, as the plaintiffs themselves acknowledged, some dictionary definitions of "fruit" were broad enough to "cover everything," including many plants that are

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35 *See supra* notes 31–33. The Court did not appear to find this dictionary battle to be particularly informative. *See Nix*, 149 U.S. at 306 ("The passages cited from the dictionaries define the word 'fruit' as the seed of plants, or that part of plants which contains the seed, and especially the juicy, pulpy products of certain plants, covering and containing the seed. These definitions have no tendency to show that tomatoes are 'fruit,' as distinguished from 'vegetables,' in common speech, or within the meaning of the Tariff Act.").

36 *See* Brief for the Defendant in Error, at 3–4, Nix v. Hedden, 149 U.S. 304 (1893) (No. 137) (noting that the Tariff Commission in 1882 had published a statement discussing "potatoes, tomatoes, and other green or fresh vegetables" and stating "[w]ith such evidence before them as to the proper classification of tomatoes, we may safely assume that if it had been the intention to admit them free of duty Congress could hardly have expected them to be classified as fruits, but would have exempted them by name").

37 22 Stat. at 504, 517, 519 (taxing "[d]ates, plums, and prunes, one cent per pound" and "[f]ruits, preserved in their own juices, and fruit-juice, twenty per centum ad valorem," while listing, under "Sundries," which were untaxed, "[f]ruits, green, ripe, or dried, not specially enumerated or provided for in this act").

38 *See* Plaintiff's Brief, at 16, Nix v. Hedden, 149 U.S. 304 (1893) (No. 137) ("From all unprovided-for and non-enumerated vegetable products, the act segregates and excepts all classes of specified and unspecified fruits. This exception itself precludes giving the widest meaning which can be embraced within the term 'vegetable' . . . but leaves the most comprehensive sense . . . to be assigned to the word 'fruits' . . . . As the word is not used technically, it must embrace everything in fact 'fruits,' though only dealt in by their several names, as 'mangoes,' 'alligator-pears,' etc., etc. . . . . ").

39 22 Stat. at 503–04 (1883) (stating, under Schedule G Provisions, that there would be a tax on "[v]egetables, in their natural state, or in salt or brine, not specially enumerated or provided for in this act, ten per centum ad valorem").

often described as "vegetables."[40] Yet the Tariff Act clearly differentiated most "fruits" from most "vegetables" in tax treatment—a structure that could suggest the Act did not adopt the most expansive dictionary definition of "fruit."[41]

My goal is not to say whether the Court in *Nix* (or *Maillard* or *McCaughn*) correctly interpreted the relevant statutory language. The important point, for present purposes, is that these questions—e.g., what evidence is relevant to a statutory interpretive inquiry, and what to make of the surrounding statutory structure—are questions of law. To determine the ordinary meaning of a term or phrase in a federal statute, the Court must conduct a legal analysis. Accordingly, there is a strong basis for treating "ordinary meaning" as primarily a legal concept.

To be clear, I do not claim that the search for ordinary meaning (or technical meaning, for that matter) is entirely legal and normative, and not at all empirical. Language of course depends on conventions that one learns in using the language over time. To refer back to my initial example of the distinction between ordinary and technical meaning: It is a convention that speakers of English refer to the upright position as "standing" rather than, say, using something more similar to the French term "debout." It is likewise a convention that lawyers refer to one requirement for getting into court as "standing" rather than calling it, say, "courting" or "complainting." The well-accepted nature of many conventions of language likely explains why we do not see legal disputes over, for example, whether chocolate is a "vegetable" or tomatoes are "candy." But as this section shows, when legal disputes arise, a good deal of the search for "ordinary meaning" will depend on legal considerations.

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40 *See* Plaintiff's Brief at 2, Nix v. Hedden, 149 U.S. 304 (1893) (No. 137) (declining to rely on one dictionary definition, which was listed *first* in that dictionary, because it was so "general" as to "cover[] everything").

41 *Cf.* MANNING & STEPHENSON, *supra* note 30, at 150 (asking students to consider whether, in *Nix*, one might "have reasoned from the structure of the statute that Congress could not have had the botanical definitions in mind, because botanically the category 'fruit' is a subset of the category 'vegetable,' such that the use of the botanical definitions would be inconsistent with the tariff statute's use of 'fruits' and 'vegetables' as separate, presumably exclusive categories?"); Richard M. Re, *Clarity Doctrines*, 86 U. CHI. L. REV. 1497, 1500 (2019) ("[T]he choice to care about clarity or unclarity, as well as how to go about finding it, would still be governable by law.").

B. Textualists' Use of Legal Rules to Select the "Ordinary Meaning"

How have textualists treated the concept of "ordinary meaning"? The literature on textualism does not appear to have theorized much about this concept, but prominent textualists have clearly treated the concept as one having legal content. After all, if one views "ordinary meaning" as a legal concept, one should adopt legal rules to choose *which* ordinary meaning is preferable. Many prominent textualists have adopted such an approach, interpreting statutory language through the lens of a hypothetical reasonable reader.

Justice Scalia, Justice Gorsuch, Judge Easterbrook, and John Manning all focus on "the understanding of the objectively reasonable person."[42] For example, Justice Gorsuch has written that "the task in any case is to interpret and apply the law" from the standpoint of "a

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42 Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988) ("We should look at the statutory structure and hear the words as they would sound in the mind of a skilled, objectively reasonable user of words . . . . The meaning of statutes is to be found not in the subjective, multiple mind of Congress but in the understanding of the objectively reasonable person."); *see* ANTONIN SCALIA, A MATTER OF INTERPRETATION 17 (1997) ("We look for a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*."); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 15–16 (2012) (advocating a "return to the oldest and most commonsensical interpretive principle: [i]n their full context, words mean what they conveyed to reasonable people at the time they were written—with the understanding that general terms may embrace later technological innovations. . . . The exclusive reliance on text when interpreting text is known as *textualism*."); *infra* notes 43–45 and accompanying text; *see also* Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2200–04 (2017) (noting that textualists such as Justice Scalia and Judge Easterbrook focus on the hypothetical reasonable reader, although also observing that "Scalia was not always clear about whether the prototypical reader is an ordinary member of the public or a lawyer"). This also appears to be the approach of some originalists in constitutional interpretation. *See* Gary Lawson, *No History, No Certainty, No Legitimacy . . . No Problem: Originalism and the Limits of Legal Theory*, 64 FLA. L. REV. 1551, 1554 (2012) (noting that "the form of originalism that is increasingly emerging among sophisticated adherents" is "a form in which meaning is determined by the hypothetical understandings of a fictitious reasonable observer"); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1132 (2003) (describing "*original, objective-public-meaning textualism*" as an effort to determine how the Constitution "would have been understood by a hypothetical, objective, reasonably well-informed reader"); John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371, 1373 (2019) (noting that original public meaning originalism "posits that the object of interpretation is the text as reasonably understood by a well-informed reader at the time of the provision's enactment," though advocating original methods originalism); *see also* Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 245 (2009) ("[S]everal of the most prominent academic proponents of originalism" look to the understanding of "a *hypothetical*, objective, reasonably well-informed reader.").

reasonable and reasonably well-informed citizen."[43] In their 2012 treatise *Reading Law*, Justice Scalia and Bryan Garner envision a highly sophisticated "reasonable reader":

> The interpretive approach we endorse is that of the "fair reading": determining the application of a governing text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued. The endeavor requires aptitude in language, sound judgment, the suppression of personal preferences regarding the outcome, and, with older texts, historical linguistic research.[44]

John Manning also argues that "textualists interpret statutory language by asking how 'a skilled, objectively reasonable user of words' would have understood the statutory text, as applied to the problem before the judge."[45] As both Manning and Justice Barrett have observed, "the statutory meaning derived by textualists" is thus "a construct."[46] On this view, textualists aim for the reading of a reasonable person or legislator, not the view of any actual person or legislator.

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43 NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 51 (2019) ("[T]he task in any case is to interpret and apply the law as a reasonable and reasonably well-informed citizen might have understood when it engaged in the activity at issue in the case or controversy—not to amend or revise the law in some novel way."); *id.* at 55–56 (arguing that the judge should try to "answer the same narrow question—What might a reasonable person have thought the law was at the time?"); Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RSRV. L. REV. 905, 910 (2016) (emphasizing the vantage point of "a reasonable and reasonably well-informed citizen").

44 SCALIA & GARNER, *supra* note 42, at 33 (stating that the context includes "(1) a word's historical associations acquired from recurrent patterns of past usage, and (2) a word's immediate syntactic setting—that is, the words that surround it in a specific utterance"). The writers also state that such a reasonable reader can consider purpose but only as derived from the text itself. *Id.* (asserting that the reasonable reader should have an "ability to comprehend the *purpose* of the text, which is a vital part of its context. But the purpose is to be gathered only from the text itself, consistently with the other aspects of its context.").

45 John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2458 (2003) (quoting Easterbrook, *supra* note 42, at 65).

46 John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 83 (2006) ("[T]he statutory meaning derived by textualists is a construct. Textualists do not (and, given their assumptions about actual legislative intent, could not) claim that a constitutionally sufficient majority of legislators *actually* subscribed to the meaning that a textualist judge would ascribe to a hypothetical reasonable legislator conversant with the applicable social and linguistic conventions."); *see* Barrett, *supra* note 42, at 2200–04, 2211 (arguing that surveys of congressional staffers do not properly test textualism, because "textualists use the construct of a hypothetical *reader*," not "the construct of a hypothetical *writer* of a statute," and noting that textualists have "identified their construct as a skilled user of language, typically familiar with legal conventions"). In her academic writing, Justice Barrett has suggested that empirical work might inform whether linguistic canons track general patterns of speech. *See id.* at 2203–04 ("[T]he linguistic canons are designed to capture the speech patterns of ordinary English speak-

C. Debates Over the Hypothetical Reasonable Reader

There are important debates among textualists about this legal test. Textualists disagree about how "well-informed" this reasonable reader should be—that is, which evidence may be presumptively considered in conducting a statutory analysis. Some textualist opinions apply a more formal textualism, focusing on the surrounding text and structure (semantic context) and declining to consider past public understandings (social context) or the practical consequences of a decision. Other textualist opinions endorse a more flexible textualism that looks beyond semantic context to social and policy context as well as practical consequences.[47] The Court's recent decision in *Bostock v. Clayton County* illustrates this divide.

I explore the divisions within textualism (and the *Bostock* decision) in more detail in separate work.[48] For now, I mention this divide because it is a debate about legal rules—what one might call the proper "law of interpretation."[49] Textualists are engaged in a kind of evidentiary debate, disagreeing about the contextual evidence that may be considered by the hypothetical reasonable reader. As I have argued, the choice between these approaches may be difficult; it depends in part on one's views about the proper judicial role and how much discretion judges should have in statutory interpretation. But whatever one views as the proper approach to textualism—or interpretation more generally—the choice depends on normative values, not empirical calculations.

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ers and, in some cases, of the subclass of lawyers. . . . Whether the canons actually capture patterns of ordinary usage is an empirical question. If they do not track common usage, then the textualist rationale for using them is undermined."). But Justice Barrett clearly understands "ordinary meaning" as a largely legal concept—as illustrated by her recognition that textualists focus on the construct of the hypothetical reasonable reader. *Id.* at 2200–04, 2211. Justice Barrett also identifies an underexamined legal question: whether textualists should "use . . . the perspective of the 'ordinary lawyer' or the ordinary English speaker." *Id.* at 2022, 2209–10; *see also id.* at 2022 ("It is not clear to me that textualists must pick a single perspective applicable across all statutes.").

47 *See* Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 265–71, 279–90 (2020) (describing the divide between "formalistic" and "flexible" textualism).

48 *See id.*; Tara Leigh Grove, *The Misunderstood History of Textualism*, 117 Nw. U. L. REV. (forthcoming 2023).

49 William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1082 (2017); *see* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1907–18 (2011) (exploring "the legal status of statutory interpretation methodology"); Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation:* Erie *for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 757 (2013) (suggesting that "statutory interpretation methodology is some kind of judge-made law").

1. Formal Textualism's Constrained Reasonable Reader

Bostock involved whether discrimination against a gay, lesbian, or transgender employee qualifies as "discriminat[ion] . . . because of such individual's . . . sex" under Title VII of the Civil Rights Act of 1964.[50] Notably, the majority and dissenting opinions—all of which purported to be textualist—agreed on certain foundational principles. The Justices all concluded that their job was to "determine the ordinary public meaning" at "the time of the statute's adoption."[51] The Justices also agreed that this "ordinary meaning" should be determined from the perspective of the reasonable reader. But the Justices debated the contextual evidence that such a reasonable reader could examine.

Justice Gorsuch wrote the majority opinion, which employed the more formal approach to textualism that focuses on semantic context and downplays other contextual evidence. To identify the law's "ordinary meaning,"[52] the Court carefully parsed the statutory language[53] and found that, "taken together," the phrase "discriminat[ion] . . . because of such individual's . . . sex" prevents an employer from "intentionally treat[ing] a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex."[54]

The Court then applied this statutory principle to the disparate treatment of a gay, lesbian, or transgender individual. Justice Gorsuch reasoned that if an employer terminates a male employee "for no rea-

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50 42 U.S.C. § 2000e-2(a)(1).

51 Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738 (2020) (stating that to "determine the ordinary public meaning of Title VII's command . . . . we orient ourselves to the time of the statute's adoption, here 1964"); *id.* at 1755 (Alito, J., dissenting) ("[O]ur duty is to interpret statutory terms to 'mean what they conveyed to reasonable people *at the time they were written*.'" (quoting SCALIA & GARNER, *supra* note 42, at 16)) (emphasis added by Justice Alito); *id.* at 1828 (Kavanaugh, J., dissenting) ("[T]his Court has repeatedly emphasized that common parlance matters in assessing the ordinary meaning of a statute, because courts heed how 'most people' 'would have understood' the text of a statute when enacted." (quoting New Prime Inc. v. Oliveira, 139 S. Ct. 532, 538–39 (2019)).

52 *Id.* at 1750 (stating "the law's ordinary meaning at the time of enactment usually governs" and the Court should look to ordinary meaning, not literal meaning).

53 The Court assumed that the term "sex" in 1964 referred to "biological distinctions between male and female." *Id.* at 1739. The Court thereby avoided debates about alternative conceptions of sex and sexuality (and whether those meanings existed in 1964). *Cf.* Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 900, 974–75 (2019) (exploring "what American law would look like if it took nonbinary gender seriously"). The Court then found that "discriminat[ion]" referred to intentional differences in treatment, and that "because of" meant that "sex" had to be a but-for cause of the employer's decision. *Bostock,* 140 S. Ct. at 1739–40.

54 *Bostock*, 140 S. Ct. at 1739–40.

son other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in [a] female colleague."[55] Likewise, if an employer "fires a transgender person who was identified as a male at birth but who now identifies as a female," and yet "retains an otherwise identical employee who was identified as female at birth . . . . the individual employee's sex plays an unmistakable and impermissible role in the discharge decision."[56]

The Court was unmoved by the possibility that its analysis of ordinary meaning might not map onto the way in which people talk in ordinary conversation. In dissent, Justice Kavanaugh argued that, if an employer terminated men who were romantically attracted to men, the employees would say "[i]n common parlance" that they "were fired because they were gay, not because they were men."[57] Justice Gorsuch responded that "these conversational conventions do not control Title VII's legal analysis, which asks simply whether sex was a but-for cause" of the employment decision.[58]

As further evidence of its formalistic approach, the *Bostock* majority clarified that other contextual considerations should *not* be part of the analysis.[59] The Court would not "displace the plain meaning of the law" simply because of the social context of 1964—that many individuals at that time may not have expected Title VII to protect gay, lesbian, or transgender individuals.[60] Nor would the Court entertain "naked policy appeals" claiming that applying the statute's "plain language" could lead to "any number of undesirable policy consequences," such as changes to sex-segregated bathrooms or dress codes.[61] Such an inquiry into practical consequences, the Court admonished, was not appropriate for textualists.[62]

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55 *Id.* at 1741.

56 *Id.* at 1741–42.

57 *Id.* at 1828 (Kavanaugh, J., dissenting).

58 *Id.* at 1745. The dissents did not take issue with the Court's causation analysis. For commentary on that point, see Berman & Krishnamurthi, *supra* note 10; Katie Eyer, *The But-for Theory of Anti-discrimination Law*, 107 VA. L. REV. 1621 (2021); Benjamin Eidelson, *Dimensional Disparate Treatment*, 95 S. CAL. L. REV. (forthcoming 2022).

59 *Id.* at 1750 (rejecting the contention that "because few in 1964 expected today's *result*, we should not dare to admit that it follows ineluctably from the statutory text").

60 *Id.*; *see also* Katie R. Eyer, *Statutory Originalism and LGBT Rights*, 54 WAKE FOREST L. REV. 63, 65–69 (2019) (critically analyzing in the litigation leading up to *Bostock* the focus on "subjective expectations").

61 *Bostock*, 140 S. Ct. at 1753. Justice Gorsuch did hint that the Court might opt to protect religious liberty, in the event of a conflict. *See id.* at 1753–54.

62 *Id.* at 1753–54.

2. *Flexible Textualism's Reasonable Reader*

The dissenting opinions in *Bostock* argued that a good deal more than semantic context should factor into the "ordinary meaning" of Title VII. In the dissenters' view, to determine "what [statutory terms] conveyed to reasonable people at the time they were written," the Court must look at "the social context in which a statute was enacted."[63] In the "social context" of 1964, Justice Alito insisted, "ordinary Americans reading the text of Title VII would not have dreamed that discrimination because of sex meant discrimination because of sexual orientation, much less gender identity."[64] Accordingly, "[t]he *ordinary meaning* of discrimination because of 'sex' was discrimination because of a person's biological sex, not sexual orientation or gender identity."[65] Along the same lines, Justice Kavanaugh argued that "ordinary meaning" depended on "common parlance"—that is, "how 'most people' 'would have understood' the text of a statute when enacted."[66] He insisted that "few in 1964 (or today) would describe a firing because of sexual orientation as a firing because of sex."[67] Accordingly, "[t]o a fluent speaker of the English language—then and now— . . . discrimination 'because of sex' is not *reasonably*

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63 *Id.* at 1755 (Alito, J., dissenting) ("[O]ur duty is to interpret statutory terms to 'mean what they conveyed to reasonable people *at the time they were written*.'" (quoting SCALIA & GARNER, *supra* note 42, at 16)) (emphasis added by Justice Alito); *id*. at 1767 ("[W]hen textualism is properly understood, it calls for an examination of the social context in which a statute was enacted because this may have an important bearing on what its words were understood to mean at the time of enactment . . . . For this reason, it is imperative to consider how Americans in 1964 would have understood Title VII's prohibition of discrimination because of sex.").

64 *Id.* at 1767 ("Suppose that, while Title VII was under consideration in Congress, a group of average Americans decided to read the text . . . . What would these ordinary citizens have taken "discrimination because of sex" to mean? Would they have thought that this language prohibited discrimination because of sexual orientation or gender identity? . . . The answer could not be clearer. In 1964, ordinary Americans reading the text of Title VII would not have dreamed that discrimination because of sex meant discrimination because of sexual orientation, much less gender identity.").

65 *Id.* ("The possibility that discrimination on either of these grounds might fit within some exotic understanding of sex discrimination would not have crossed their minds.").

66 *Id.* at 1828 (Kavanaugh, J., dissenting) (quoting New Prime Inc. v. Oliveira, 139 S. Ct. 532, 538–39 (2019)).

67 *Id.* ("On occasion, it can be difficult for judges to assess ordinary meaning. Not here. Both common parlance and common legal usage treat sex discrimination and sexual orientation discrimination as two distinct categories of discrimination—back in 1964 and still today. As to common parlance, few in 1964 (or today) would describe a firing because of sexual orientation as a firing because of sex.").

understood to include discrimination based on sexual orientation, a different immutable characteristic."[68]

Both dissenting opinions also urged that the Court should consider the practical consequences of its decision. Justice Kavanaugh was concerned about unfair surprise to employers,[69] while Justice Alito argued that the Court's decision would have "far-reaching consequences," transforming the interpretation of "[o]ver 100 [other] federal statutes" that also "prohibit discrimination because of sex" and "threaten[ing] freedom of religion, freedom of speech, and personal privacy and safety."[70] Justice Alito described "[t]he Court's brusque refusal to consider the consequences of its reasoning" as "irresponsible."[71]

D. Normative Choices

The competing opinions in *Bostock* clearly disagreed on the bottom line: whether Title VII bars the disparate treatment of gay, lesbian, and transgender employees. Nevertheless, the self-proclaimed textualists on the Court all treated "ordinary meaning" as a largely legal inquiry, which depended on the vantage point of the *reasonable* reader.[72] Thus, even the dissenting opinions focused on "what [the statutory terms] conveyed to *reasonable* people at the time they were written"[73] and whether "discrimination 'because of sex' is . . . *reasonably* understood to include discrimination based on sexual orientation."[74] The *Bostock* majority and dissenting opinions reached different conclusions because they were divided over what evidence should factor into the assessment of "ordinary meaning." That is, they

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68 *Id.* at 1833 (emphasis added) (quoting Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 363 (7th Cir. 2017) (Sykes, J., dissenting)).

69 *Id.* at 1828 (asserting that the Court's "literalist approach . . . disrespects ordinary meaning and deprives the citizenry of fair notice of what the law is"); *id.* at 1824 ("Under this literalist approach, sexual orientation discrimination automatically qualifies as sex discrimination, and Title VII's prohibition against sex discrimination therefore also prohibits sexual orientation discrimination—and actually has done so since 1964, unbeknownst to everyone.").

70 *Id.* at 1778 (Alito, J., dissenting); *id.* at 1778–83 (discussing, among other things, debates over bathroom usage, athletics, religious employers, and how the Court's interpretation of Title VII might impact equal protection cases); *see also id.* at 1791–96 (Appendix C) (listing the statutes).

71 *Id.* at 1778.

72 I discuss below in Section II.B. the possibility that the dissenters' analysis in *Bostock* was based in part on empirical assumptions.

73 *Bostock*, 140 S. Ct. at 1755, 1766 (2020) (Alito, J., dissenting) (emphasis added) (quoting SCALIA & GARNER, *supra* note 42, at 16).

74 *Id.* at 1833 (Kavanaugh, J., dissenting) (emphasis added) (quoting Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 363 (7th Cir. 2017) (Sykes, J., dissenting)).

disagreed over how well-informed the hypothetical reasonable reader should presumptively be.

For those drawn to textualism of some kind,[75] one can certainly debate which approach to textualism is preferable. Some scholars advocate a more flexible version, contending that judges should have the discretion to look beyond semantic context to social context—the original public understandings or expectations[76]—or to the practical consequences of a decision.[77] Advocates of this approach may point to *King v. Burwell*,[78] where the Court interpreted the phrase "an Exchange established by the State" in the Affordable Care Act to encompass a *federal* exchange, and thereby avoided a decision on the availability of tax credits that could have had severe consequences for the health insurance market.[79] As Ryan Doerfler has suggested, it could be seen as irresponsible for a judge to set aside such practical

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75 Here, I focus on debates within textualism, because so much of the recent empirical research has sought to "test" textualism. Many jurists and scholars, of course, reject textualism of any variety. The arguments in this Foreword should still be beneficial to those readers as a more general comment on the (seemingly growing) divide between normative and empirical approaches to the interpretive enterprise.

76 *See, e.g.*, Nelson Lund, *Unleashed and Unbound: Living Textualism in* Bostock v. Clayton County, 21 FEDERALIST SOC'Y REV. 158, 162 (2020) (arguing that the Court paid insufficient attention to how "because of sex" would "have been understood in 1964"); John O. McGinnis, *Errors of Will and of Judgment*, LAW & LIBERTY (June 25, 2020), https://lawliberty.org/errors-of-will-and-of-judgment/ [https://perma.cc/4YBW-3VAX] (arguing that the Court's analysis was "a conceivable interpretation of the [statutory] words in some world" but "certainly not" the best interpretation given "the world in which Title VII was enacted").

77 *See* Ryan D. Doerfler, *High-Stakes Interpretation*, 116 MICH. L. REV. 523, 527–28 (2018) (urging that "it is more difficult to 'know' what statutes mean in high-stakes cases").

78 576 U.S. 473 (2015).

79 *See id.* at 487–98 (noting that "it might seem that a Federal Exchange cannot fulfill this requirement" of being "'established by the State,'" but holding that "when read in context, 'with a view to [its] place in the overall statutory scheme,' the meaning of the phrase 'established by the State' is not so clear") (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)); 42 U.S.C. § 18024(d) (defining "State" in the Affordable Care Act to mean the fifty states and Washington, D.C.); *see also* Doerfler, *supra* note 77, at 562 (noting that the challenge in *King* could have led "a huge number" of individuals to be "exempt from the individual mandate on grounds of financial hardship," which could have kept many healthy people out of the insurance risk pool); Kevin M. Stack, *The Enacted Purposes Canon*, 105 IOWA L. REV. 283, 300–03 (2019). Scholars have recognized that *King v. Burwell* applied a more relaxed version of textualism. *See* Abbe R. Gluck, *Justice Scalia's Unfinished Business in Statutory Interpretation: Where Textualism's Formalism Gave Up*, 92 NOTRE DAME L. REV. 2053, 2075 (2017) (observing that *King* was "a rational, forgiving reading of the statute, but using textualist tools"); Stephanie Hoffer & Christopher J. Walker, *Is the Chief Justice a Tax Lawyer?*, 2015 PEPP. L. REV. 33, 37 (describing the Court's approach in *King* as "contextualism"); Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1853–54 (2016) (noting that *King* was not "a stringent form of textualism"); *see also* Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2D 407, 407–09, 416–17 (2015) (describing the approach as "purposivist," although acknowledging that it could be classified as a brand of textu-

considerations and instead to zero in on the semantic context of the law.[80]

In past work, I have advocated the more formal version of textualism, largely on Article III-based grounds.[81] Judges should, I have argued, focus on semantic context and attempt to minimize the influence of (often politically contested and divisive) consequentialist arguments. That is, judges should opt to tie themselves to the mast of the text. Such an approach, I have suggested, could help promote judicial legitimacy—the public reputation of the Supreme Court as a whole.[82] In our politically polarized environment, a Justice is expected to rule in salient cases in accordance with the preferences of the President who nominated her.[83] But with a formal approach to textualism, a Justice may be more difficult to predict in such ideological terms; she may issue some statutory decisions (such as *Bostock*) that please progressive forces, and others that may satisfy more conservative or libertarian voices. Such a politically mixed and surprising jurisprudence in statutory cases could help bolster the Supreme Court's legitimacy. It seems worth noting that public perceptions of the Court improved considerably in the wake of Justice Gorsuch's opinion in *Bostock*.[84]

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alism, because "text continues to play a meaningful role. . . . If a reading has no textual support, then no amount of pragmatism or purpose can carry the day.").

80 *See* Doerfler, *supra* note 77, at 528 (urging that "it is more difficult to 'know' what statutes mean in high-stakes cases"); *id.* at 529–30 (recognizing that judges may need to rely on an "apparent subjective evaluation" about which cases count as "high stakes").

81 Grove, *supra* note 47, at 296–307 (arguing that formalistic textualism can help to promote judicial legitimacy); *see also* Grove, *supra* note 48 (suggesting that the more formal version of textualism has a firm historical basis).

82 *See* RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 21 (2018).

83 *See* NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP 2–3, 121–28, 132–40, 150–57 (2019) (noting that the Justices are often perceived to be on partisan "teams").

84 *See* Sarah Elbeshbishi, *Gallup Poll Finds Highest Supreme Court Approval Rating Since 2009*, USA TODAY (Aug. 5, 2020, 4:12 PM), https://www.usatoday.com/story/news/politics/2020/08/05/gallup-poll-finds-highest-supreme-court-approval-rating-since-2009/3301010001/ [https://perma.cc/4HTA-LBUX] (noting that a Gallup poll in July 2020 "found that 58% of Americans approve of the job being done by the Supreme Court," and noting considerable support among Republicans, Independents, and Democrats). The Court's public approval rating later went down in 2021 in the wake of disputes over a Texas abortion law, and remained low in 2022 after the Court overruled *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). *See* Meghan Roos, *Supreme Court Approval Hits Record Low in Gallup Poll Done After Texas Abortion Law Upheld*, NEWSWEEK (Sept. 24, 2021, 6:41 PM), https://www.newsweek.com/supreme-court-approval-hits-record-low-gallup-poll-done-after-texas-abortion-law-upheld-1632623/ [https://perma.cc/AC37-CND4]; Mohamed Younis, *Democrats' Approval of Supreme Court at Record-Low 13%*, GALLUP (Aug. 2, 2002), https://news.gallup.com/poll/395387/democrats-approval-supreme-court-record-low.aspx [https://perma.cc/L8KW-DWV7] (noting that

My goal is not to resolve this debate here. Instead, I mention these arguments to underscore that these debates over interpretive method—such as what context a hypothetical reasonable reader may consider—depend largely on normative considerations, not an empirical investigation.

II. "ORDINARY MEANING" AS AN EMPIRICAL FACT?

But do we need to make these difficult normative choices? In recent years, some scholars have suggested that "ordinary meaning" is *not* a legal concept, but an empirical fact.[85] On this view, to determine *the* ordinary meaning of a statute, one should identify empirically the use of a term or phrase that is the most common or popular.

To be sure, not all empirical work goes so far as to proclaim that statutory analysis can be entirely data-driven. Some scholars assert that empirical methods, such as corpus linguistics or surveys, provide useful information about possible meanings of statutory terms.[86] These claims accord with the longstanding attitude of many textualists toward dictionaries.[87] Such tools provide some evidence of the *range* of meanings, but a judge should not presume that a dictionary pro-

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"the U.S. Supreme Court's overall job approval rating is 43%, statistically unchanged from last year's 40% reading," but that there were "big swings among partisans, with Republicans' approval rating rising 29 percentage points to 72% and Democrats' falling 23 points to 13%").

85 *See* Lee & Mouritsen, *supra* note 3, at 813–14, 818 (noting that "[l]egal scholarship posits a range of conceptions of ordinary meaning," including "the 'reasonable' or 'imputed' meaning attributed to 'hypothetical, reasonable legislators'" but arguing that "a search for 'objectified intent'" "has nothing to do with actual communicative content" and arguing that, "to the extent our search for ordinary meaning is aimed at protecting" "reliance interests and the avoidance of unfair surprise," "we should seek to assess the public's understanding of the law at the time it was passed" and advocating corpus linguistics in part on this ground); Macleod, *supra* note 8, at 4–6 (asserting that textualists themselves view the inquiry into "original public meaning" as "factual and empirical, not normative"); Lawrence B. Solum, *Disaggregating* Chevron, 82 OHIO ST. L.J. 249, 265 (2021) (suggesting that the communicative content of a statute is an empirical fact); Tobia & Mikhail, *supra* note 3, at 461 ("There is significant debate about the meaning of 'ordinary meaning,' but there is general agreement that it is an *empirical* notion, closely connected to facts about how ordinary people understand language. . . . [O]rdinary meaning is derived from, or perhaps equated with, the general public's understanding of the text.").

86 Tobia & Mikhail, *supra* note 3, at 464, 485 (suggesting some sympathy for "evidential pluralism," the idea that "dictionaries, legal corpus linguistics, legislative histories, and empirical surveys can all provide some evidence of the ordinary meaning of legal texts" and "call[ing] into question any uncritical reliance on simple, one-dimensional survey methods to ascertain the meaning of complex legal language"); *see also* Solum, *supra* note 3, at 285 ("In practice, multiple techniques can all be employed, with each acting as a kind of check on the others. . . . When all these techniques converge on a single hypothesis . . . we would have strong evidence in favor of that meaning. When the techniques do not converge, then we would look for explanations for divergence.").

87 *See, e.g.*, Manning, *supra* note 45, at 2456–57 ("Although textualists (like other inter-

vides *the* meaning of a word, as used in the context of a statute. Consider *Nix v. Hedden*. The term "fruit" was quite broad according to some dictionary definitions,[88] but that did not necessarily determine what the term meant in federal tariff legislation.[89]

Some recent scholarship, however, seems to go further and to assert that the "ordinary meaning" of statutory language can be determined via a survey of the broader public. This approach picks up on a comment that Chief Justice Roberts made at a recent oral argument. The Chief Justice suggested that, given that "our objective is to settle upon the most natural meaning of the statutory language to an ordinary speaker of English . . . the most probably useful way of settling all these questions would be to take a poll of 100 ordinary . . . speakers of English and ask them what it means."[90] Recent survey experiments have sought to do something along those lines. One assumption of this approach appears to be that the "ordinary meaning" of a federal statute, as applied to a particular context, is the one favored by a majority (or perhaps a supermajority) of respondents.[91]

This Foreword's primary goal is to challenge this scholarship's assumption that "ordinary meaning" should be understood in empirical terms. As I have shown, ordinary meaning can be understood primarily as a legal concept.[92] On this view, it makes sense for interpreters to use legal tools—such as the hypothetical reasonable reader and evidentiary rules about relevant contextual evidence—to select among

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preters) frequently consult dictionaries as historical records of social meanings that speakers have attached to words, they do not (and could not) stop there.").

88 *See supra* note 40 and accompanying text.

89 *See* Nix v. Hedden, 149 U.S. 304, 306 (1893) ("The passages cited from the dictionaries define the word 'fruit' as the seed of plants, or that part of plants which contains the seed, and especially the juicy, pulpy products of certain plants, covering and containing the seed. These definitions have no tendency to show that tomatoes are 'fruit,' as distinguished from 'vegetables,' in common speech, or within the meaning of the Tariff Act.").

90 Transcript of Oral Argument at 51–52, Facebook, Inc. v. Duguid, 141 S. Ct. 1163 (2021) (No. 19-511) (statement of Chief Justice Roberts) (wondering whether, if "our objective is to settle upon the most natural meaning of the statutory language to an ordinary speaker of English," "the most probably useful way of settling all these questions would be to take a poll of 100 ordinary—ordinary speakers of English and ask them what it means, right? That's—that would be the most useful rule of construction?").

91 To be sure, there are some practical challenges for any survey method. First, are we confident that a given survey reached out to a representative sample of the public? Second, how "common" or "popular" must a use of language be? Do we need a majority or a supermajority of respondents to select a given understanding for it to be the "ordinary meaning"? If a supermajority, how large a supermajority? 60 percent? 90 percent? And there are of course challenges in how a survey is worded and so on. I will presume, for present purposes, that such issues could be worked out.

92 *See supra* Part I.A.

plausible ordinary meanings.[93] That is how prominent textualists have long treated the search for ordinary meaning.

In this Part, I also raise some related theoretical and practical concerns about the survey approach. First, I consider the relevant audience for a particular statute. Some laws may be targeted at a more sophisticated audience, such that the relevant reader of the statute may be particularly well-informed and, thus, not well represented by a survey of the general public. Second, most textualists are interested in the ordinary meaning of a statute at the time it was enacted. This temporal issue may make it challenging to test via a present-day survey whether textualist opinions have gotten the "right answer" to questions about federal statutes from the distant (or even not so distant) past.

A. The Statutory Audience

Scholarship that relies on survey methods appears to assume that the "ordinary meaning" of a statutory provision depends on the views of the general public. But the broader public may not be the target audience for some statutes. Instead, some laws may be aimed at, for example, federal agencies and regulated parties.[94] An "ordinary meaning" to a federal agency or regulated entity may not match that of the general public. This point, I suggest, is another reason to treat ordinary meaning as a legal concept rather than as an empirically testable notion; the hypothetical reasonable reader can be adjusted to comport with the statute at issue.

Consider *MCI v. AT&T*,[95] which involved the authority of the Federal Communications Commission to "modify" certain filing requirements for carriers.[96] The statute provides that "[e]very common carrier . . . shall . . . file with the Commission . . . schedules showing all charges," but also states that "[t]he Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section . . . ."[97] The FCC decided to exempt nondominant carriers, including MCI, from the filing requirement en-

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93 *See supra* Part I.B.

94 *See* David S. Louk, *The Audiences of Statutes*, 105 CORNELL L. REV. 137, 141 (2019) ("Not all statutes communicate to their respective audiences in the same manner: some statutes establish specific rules that regulate the conduct of lay audiences like the general public, while other statutes set out broad mandates to specialized government audiences, who implement them through subsequent regulation and enforcement.").

95 MCI Telecomms. Corp. v. Am. Tel. & Tel. Co. 512 U.S. 218 (1994).

96 *Id.* at 220.

97 47 U.S.C. § 203(a), (b)(2).

tirely, leaving AT&T as the sole carrier that was required to file its rates with the FCC.[98]

In an opinion by Justice Scalia, the Court held that the FCC exceeded its statutory authority.[99] The Court found that the statutory term "modify" enabled the agency to make only "modest" changes, not "basic and fundamental changes," such as the elimination of filing requirements for most carriers.[100] In dissent, Justice Stevens insisted that the FCC's "detariffing orders" fell "squarely within its power to 'modify any requirement'" of the statute.[101]

Some recent scholarship sought to test the decision in *MCI* by surveying a "random sample of English-speaking adults in the United States."[102] The survey gave participants some basic background on the law, including that the FCC had the power to "modify any requirement," and asked whether the FCC's decision to "make tariff filing optional for certain nondominant cell phone companies" was "allowed under the law."[103] The scholars found that the responses were split down the middle, with a bare majority (fifty-two percent) agree-

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98 *See MCI*, 512 U.S. at 221–23 (noting the FCC "distinguished between dominant carriers (those with market power) and nondominant carriers—in the long-distance market, this amounted to a distinction between AT&T and everyone else . . . .").

99 *See id.* at 234 (concluding that the FCC introduced "a whole new regime of regulation (or of free-market competition), which may well be a better regime but is not the one that Congress established").

100 *Id.* at 225–30 ("Virtually every dictionary we are aware of says that 'to modify' means to change moderately or in minor fashion. . . . 'Modify,' in our view, connotes moderate change. . . . [T]he Commission's permissive detariffing policy can be justified only if it makes a less than radical or fundamental change in the Act's tariff-filing requirement.").

101 *Id.* at 239–40 (Stevens, J., dissenting) ("In my view, each of the Commission's detariffing orders was squarely within its power to 'modify any requirement' of § 203. Section 203(b)(2) plainly confers at least some discretion to modify the general rule that carriers file tariffs, for it speaks of '*any* requirement.'"); *see id.* at 235 (accusing the Court of applying "a rigid literalism that deprives the FCC of the flexibility Congress meant it to have in order to implement the core policies of the Act in rapidly changing conditions").

102 Klapper, et al., *supra* note 6, at 5, 25–26 (manuscript on file with author) (using a survey to examine *MCI*).

103 *Id.* at 26 ("We posed a slightly modified version of this question to 534 participants: 'The law requires cell phone companies to file a "tariff" with the government. A tariff is simply a document describing the rates, fees, and charges that the company offers for its services. For example, AT&T could file a tariff describing a plan that included unlimited talking, texting, and data for $40 per month. However, in addition to requiring telecommunications tariffs and describing their requirements, the law also authorizes the Federal Communications Commission to "modify any requirement made by or under" that law.' Suppose the Federal Communications Commission decides to make tariff filing optional for certain nondominant cell phone companies—which are all companies but one. How much do you agree with the following statement: '*The Federal Communications Commission's action is allowed under the law*.'").

ing with Justice Stevens's dissenting opinion that the FCC's decision was permissible.[104]

My concern here is not whether the majority or the dissent in *MCI* had the better of the argument. Instead, I want to raise questions about what we can learn from a "random sample" of the public "testing" the *MCI* decision. For present purposes, I put to one side whether fifty-two percent is a substantial enough majority to determine the "right answer" in the case.[105] First, one might wonder whether it makes sense to ask a "random sample" of the general public a legal question, such as whether a federal agency violated a statutory requirement. As Bryan Garner stated in response to Chief Justice Roberts's suggestion that the Court just survey the public, "ordinary speakers or readers" would often "be a little bit befuddled by the legal language. They just would."[106]

Second, the primary audience for these provisions of the Federal Communications Act would seem to be the agency itself and the carriers. Such entities would have some background "understanding . . . of the Commission's efforts to regulate and then deregulate the telecommunications industry"—knowledge that, Justice Scalia suggested, was important to grasp the legal issues in the case.[107] That is, the "ordinary readers" of these provisions may be highly sophisticated and especially well-informed. Thus, a survey of the general public may not tell us much about the relevant "ordinary meaning" of this federal regulatory statute.[108]

This discussion suggests that, in determining "ordinary meaning," judges face another legal question: whether "ordinary meaning" should be determined from the vantage point of a more sophisticated

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104 *Id*.

105 *See supra* note 91.

106 Transcript of Oral Argument at 52, Facebook, Inc. v. Duguid, 141 S. Ct. 1163 (2021) (statement of counsel Bryan Garner) ("Well, Your Honor, the difficulty with having ordinary speakers or readers try to read a—a legislative definition like this is immediately people would be a little bit befuddled by the legal language. They just would.").

107 *MCI*, 512 U.S. at 220.

108 At one point, the authors of the study seem to acknowledge this concern. *See* Klapper, et al., *supra* note 6, at 45 ("Experts in rate regulation would view 'modify' differently than would ordinary people because they know and understand the complexities of the statutory and regulatory schemes governing the telecommunications industry."). Yet in other parts of the analysis, the authors assert that the survey method is a valuable way of answering questions of administrative law, such that both the FCC and litigants might survey the public to determine the meaning of words like "modify." *See id.* at 42 ("In *MCI Telecommunications*, the FCC could have conducted a survey on the ordinary meaning of 'modify' in their authorizing statute before making the decision to largely abolish tariff requirements. And when MCI brought their challenge, they could have used survey evidence to make their case.").

reasonable reader or from that of a less-well-informed reader. That may not be an easy analysis, and it is one that could vary from statute to statute. But, for present purposes, the important point is that the response to that question depends on legal and normative principles, not empirical inquiry.

B. The Temporal Issue

There is another complication. Most textualists aim to discern the ordinary meaning of a statute at the time of enactment.[109] To be sure, there is some debate over this theoretical point. Fred Schauer has recently suggested that textualists should focus on present-day meanings.[110] But most textualists emphasize the original meaning of statutory terms. That raises a challenge for survey methods: how can one determine by surveying the public in 2022 the meaning of a statute enacted in, say, 1871, 1920, or 1964?

Scholars assert that they may still be able to test the results of textualist opinions that interpret statutes from earlier eras if it appears that the meaning of the statutory words has not changed dramatically over time. For example, in his work on Title VII, James Macleod states that the Justices in *Bostock* conceded that the meaning of the relevant terms was the same in 1964 as it is today.[111] Accordingly, he argues, survey methods can determine whether the Court in *Bostock* got the answer "right," when it held that Title VII's prohibition on sex discrimination encompasses the disparate treatment of gay, lesbian, and transgender employees.[112]

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109 *See* Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 367 (2005) ("[T]he typical textualist judge seeks to unearth the statutes' *original* meanings . . . .").

110 Schauer focuses on constitutional interpretation but also advocates an "unoriginal" textualist approach to statutory interpretation. Frederick Schauer, *Unoriginal Textualism*, 90 GEO.WASH. L. REV. 825, 828–29 (2022) ("[T]extualism might be understood as committed to interpretation on the basis of what the relevant statutory language means *now*, not to what that language meant at some point in the past, and not to what the drafters of that language intended.") (citations omitted); *id* at 829 n.11. This approach finds some support in the work of Philip Bobbitt, who suggested that a textualist interpretation of the Constitution would draw on the "present sense of the words." PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 7, 26–32 (1982) (defining "*textual argument*" as "argument . . . drawn from a consideration of the present sense of the words of the provision" and associating that approach with Justice Black).

111 Macleod, *supra* note 8, at 18–19, 28 (asserting that "all of the Justices (along with all of the circuit court judges in the related en banc proceedings) explicitly *agreed*[] . . . that the 'ordinary public meaning' of the relevant statutory words and phrases has not changed since their enactment").

112 *See id.* at 28.

But this assertion seems to overlook the nature of the Justices' search for "ordinary meaning." The majority opinion in *Bostock* treated "ordinary meaning" as a legal concept, concluding that the phrase "discriminat[ion] . . . because of such individual's . . . sex" prevents an employer from "intentionally treat[ing] a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex."[113] That general principle was the meaning that the Court said had gone unchanged since 1964. But the Court did not claim that a majority of individuals in 1964 (or any other time) would necessarily apply the statutory language to the disparate treatment of a gay, lesbian, or transgender employee. In fact, the Court found such an inquiry to be irrelevant.[114] In the Court's view, a *reasonable* statutory reader would conclude that terminating a male employee who is romantically attracted to men, or dismissing a female employee after she announces her transition from male to female, is discrimination because of such individual's sex. And that reasonable interpretation, in the view of the *Bostock* majority, was the "ordinary meaning" that mattered.

The dissenting opinions in *Bostock*, at first glance, seem more susceptible to empirical evaluation. Most notably, Justice Kavanaugh stated that "few in 1964 (or today) would describe a firing because of sexual orientation as a firing because of sex."[115] Perhaps the assertion about people today could be tested via a survey of the public.

But that was not the focus of either Justice Kavanaugh's or Justice Alito's dissent. As discussed, the dissenters emphasized how "reasonable people" in 1964 would have interpreted Title VII.[116] The dissenting opinions did at times conflate "reasonable people" with the dissenters' assumptions about actual people. But the focus was still the social context of 1964—whether the public *at that time* would have understood or expected Title VII to protect gay, lesbian, or transgender individuals.[117] The dissenting opinions insisted that the answer

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113 Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1739–40 (2020).

114 *See id.* at 1750 (rejecting the contention that "because few in 1964 expected today's result, we should not dare to admit that it follows ineluctably from the statutory text") (emphasis omitted).

115 *Id.* at 1828 (Kavanaugh, J., dissenting); *see also id.* at 1755 (Alito, J., dissenting) (asserting that "[e]ven as understood today, the concept of discrimination because of 'sex' is different from discrimination because of 'sexual orientation' or 'gender identity,'" but adding that "in any event, our duty is to interpret statutory terms to 'mean what they conveyed to reasonable people *at the time they were written*'" (quoting SCALIA & GARNER, *supra* note 42, at 16)) (emphasis added by Justice Alito).

116 *Id.* at 1755 (Alito, J., dissenting); *supra* Part I.C.2.

117 *Bostock*, 140 S. Ct. at 1755 (Alito, J., dissenting); *id.* at 1828 (Kavanaugh, J., dissenting)

was "no." Indeed, Justice Alito was confident as to how the results of a 1964 survey would have come out: "If every single living American had been surveyed in 1964, it would have been hard to find any who thought that discrimination because of sex meant discrimination because of sexual orientation—not to mention gender identity, a concept that was essentially unknown at the time."[118] It would certainly be interesting to test Justice Alito's assertion. But it is not possible to test via a survey to twenty-first-century Americans what the public in 1964 might have understood or expected.

One can extend the examples beyond *Bostock*. Today, most of us would take for granted that firing a woman because she gets married, or has young children, or rebuffs her supervisor's sexual advances, qualifies as "discrimination . . . because of such individual's . . . sex."[119] Indeed, I suspect that many judges and lawyers would view these as textbook examples of sex discrimination.

These assumptions, however, would not have been widespread in 1964. In the 1960s, some officials assumed that employers *could* reject female workers who got married or had young children; such actions were found to be distinctions on the basis of marriage or parenthood, not "sex"; moreover, they were viewed as reasonable employment decisions, because—under the thinking of the time—women who had such familial obligations would not be able to do the job.[120] Likewise,

("[T]his Court has repeatedly emphasized that common parlance matters in assessing the ordinary meaning of a statute, because courts heed how 'most people' 'would have understood' the text of a statute when enacted." (quoting New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539 (2019))); *see also* William N. Eskridge Jr., Brian G. Slocum & Stefan Th. Gries, *The Meaning of* Sex*: Dynamic Words, Novel Applications, and Original Public Meaning*, 119 MICH. L. REV. 1503, 1532 (2021) (noting that "the interpretive question posed by the dissenting opinions in *Bostock*" was "[h]ow would the terms of a statute have been understood and applied by ordinary people at the time of enactment?," which was "an empirical-public-meaning approach . . . that sought to determine the extensional meaning of Title VII as it existed in 1964").

118 *Bostock*, 140 S. Ct. at 1755 (Alito, J., dissenting).

119 42 U.S.C. § 2000e-2(a)(1).

120 *See* Cooper v. Delta Air Lines, Inc., 274 F. Supp. 781, 782–83 (E.D. La. 1967) (holding there was no Title VII violation when the airline had a policy of firing female flight attendants upon marriage, and stating "[t]he discrimination lies in the fact that the plaintiff is married—and the law does not prevent discrimination against married people in favor of the single ones"); Phillips v. Martin Marietta Corp., 411 F.2d 1, 4 (5th Cir. 1969) (finding no "Congressional intent to exclude absolutely any consideration of the differences between the normal relationships of working fathers and working mothers to their pre-school age children" nor a requirement that "an employer treat the two exactly alike" in its hiring policies); *see also* Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. L. REV. 995, 1026 (2014) (discussing how the EEOC initially approved the airlines' practice of firing female flight attendants upon marriage). The Supreme Court vacated the *Phillips* decision, though it left room for the employer to show that hiring only men with young children was a "bona fide occupational qualification." Phillips v. Martin Mari-

almost no one in 1964 would have seen sexual harassment as sex discrimination.[121] Accordingly, even as to issues that today seem obvious, a 1964-era survey would likely provide a much more sobering response.

This temporal complication is another reason to treat "ordinary meaning" as a legal concept, rather than simply as an empirical fact. One can certainly debate on normative grounds what contextual evidence should be relevant to evaluating a statute such as Title VII. Scholars (myself included) have argued that social context—original understandings or expectations—should not factor into the statutory analysis.[122] Other scholars insist that such historical information is vital to understanding a statute.[123] But the debate is a normative one and cannot be settled by an empirical investigation.

III. Implications for Interpretive Debates

This Foreword seeks primarily to question the assumption that "ordinary meaning" is an empirical concept. The Foreword argues that ordinary meaning can be understood as a legal concept and, moreover, that is how textualists have long treated the search for ordinary meaning. To the extent that ordinary meaning is a legal concept, it is not easily susceptible to an empirical evaluation.

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etta Corp., 400 U.S. 542, 543–44 (1971); *see also* Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 Harv. L. Rev. 1307, 1356 (2012) ("'what the Court gave [in *Phillips*], it then took away" because "'family obligations, if demonstrably more relevant to job performance for a woman than for a man,' could justify" a bona fide occupational qualification).

121 *See* Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 161–64 (D. Ariz. 1975); Franklin, *supra* note 120, at 1309–10 (noting the early rejection of sexual harassment claims); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale L.J. 1683, 1701 (1998) (stating that early courts "reason[ed] that the women's adverse treatment occurred because of their refusal to engage in sexual affairs with their supervisors and not 'because of sex'"). The view that sexual advances in the workplace were problematic, much less unlawful discrimination, did not begin to be accepted until the 1970s. *See id.* at 1696–1705 (detailing this history, and noting that a 1977 court of appeals decision "ushered in the new legal paradigm"); *see also* Anita Bernstein, *Law, Culture, and Harassment*, 142 U. Pa. L. Rev. 1227, 1240 (1994) ("Sexual harassment claims [under Title VII involving a hostile work environment] began to be brought in the late 1970s, with the first successes occurring in 1980 and 1981."); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 Stan. L. Rev. 691, 706–07 (1997) (noting that plaintiffs had some success with *quid pro quo* harassment claims beginning in the late 1970s).

122 *See* Grove, *supra* note 47, at 290–307 (advocating formalistic textualism); Eyer, *supra* note 60, at 65–69 (emphasizing that "politically unpopular applications of the law will rarely be within the original expectations of the public"); Andrew Koppelman, Bostock, *LGBT Discrimination, and the Subtraction Moves*, 105 Minn. L. Rev. Headnotes 1, 26 (2020) (urging that a focus on "original cultural expectations" tends to "defeat" "statutes that aim at broad social transformation").

123 *See supra* note 42.

Nevertheless, this notion that ordinary meaning is a legal concept also raises some important questions. I have already touched on one set of issues. If ordinary meaning is a legal concept, then one should use legal tools to discern that ordinary meaning. But as discussed, there are some serious—and, until recently, rarely examined—disputes among textualists about those legal tools. Although prominent textualists agree that one should look to the perspective of a hypothetical reasonable person, they disagree about how well-informed that reasonable person should be. The debate is largely an evidentiary one, with some textualists favoring a more formal approach that focuses on semantic context and others advocating a more flexible version of textualism that looks beyond semantic context to social context and practical consequences. Going forward, textualists should aim to justify their preferred approach on normative grounds.

There is a related issue. If "ordinary meaning" is a legal concept, rather than an empirical claim about common or popular speech, one might wonder about the prevalent use of what William Eskridge and Victoria Nourse have dubbed "homey examples" in statutory analysis.[124] Justice Scalia famously used one such "homey example" in his dissent in *Smith v. United States*.[125] The case involved whether John Smith had "'use[d]' . . . a firearm 'during and in relation to . . . [a] drug trafficking crime'"[126]—and thus was eligible for a sentencing enhancement—after he offered to trade an automatic MAC–10 for two ounces of cocaine.[127] In an opinion by Justice O'Connor, the Court relied on the "ordinary or natural meaning" of the term "use" to find a statutory violation.[128] Dissenting, Justice Scalia insisted that the Court had botched the ordinary meaning analysis:[129]

> To use an instrumentality ordinarily means to use it for its intended purpose. When someone asks, "Do you use a cane?," he is not inquiring whether you have your grandfa-

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124 Eskridge & Nourse, *supra* note 10, at 1728, 1781–82.

125 508 U.S. 223 (1993).

126 *Id.* at 225–27 (third and fourth alterations in original); *see* 18 U.S.C. § 924(c)(1).

127 *Smith*, 508 U.S. at 225–26. Smith made the offer to an undercover police officer. *See id.*

128 *Id.* at 225, 228–29, 241 ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning. . . . Surely petitioner's treatment of his MAC–10 can be described as 'use' within the everyday meaning of that term.") (citations omitted); *see also id.* at 239–40 (concluding that the rule of lenity did not apply because the statute was not ambiguous).

129 *Id.* at 242, 244–45 (Scalia, J., dissenting) ("In the search for statutory meaning, we give nontechnical words and phrases their ordinary meaning. . . . We are dealing here not with a technical word or an 'artfully defined' legal term . . . but with common words that are, as I have suggested, inordinately sensitive to context.") (citations omitted).

> ther's silver-handled walking stick on display in the hall; he wants to know whether you *walk* with a cane. Similarly, to speak of "using a firearm" is to speak of using it for its distinctive purpose, *i.e.*, as a weapon.[130]

The example is vivid. But is it relevant? Justice Scalia may have been absolutely right about how one speaks of using a cane. But that does not necessarily tell us what "use a firearm" means in a federal statute addressing sentencing enhancements. Nor did Justice Scalia need to rely on this homey example to justify his reading of the statute. Instead, one can look to the surrounding statutory text and structure (that is, the semantic context). Under the statute, "the sentence to be imposed on the defendant" "var[ied] with the nature of the firearm."[131] The more deadly the firearm at issue, the higher the sentence. Thus, the "use" of a short-barreled rifle came with a minimum ten-year prison term, while the "use" of a machine gun triggered a thirty-year prison term.[132] As Michael Geis has argued, this "linguistic context . . . provides strong support for the view" that Congress was focused on not just *any* use of a firearm, but rather on the "use [of] a firearm as a weapon."[133]

As Eskridge and Nourse observe, Justice Scalia was hardly alone; many interpreters use these homey examples.[134] But to the extent that ordinary meaning is a legal concept, judges should at least exercise caution in relying on examples from ordinary conversation to resolve the underlying legal questions.[135] Indeed, in *Bostock*, Justice Gorsuch criticized such a move in one of the dissents. As noted, Justice Kava-

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130 *Id.* at 242 (Scalia, J., dissenting).

131 Michael L. Geis, *The Meaning of* Meaning *in the Law*, 73 WASH. U. L.Q. 1125, 1138 (1995) ("[T]he language of section 924(c)(1) provides that the sentence to be imposed on the defendant must vary with the nature of the firearm. . . . The nature of the sentence to be imposed seems to be a function of the deadliness of the firearm ('semiautomatic assault weapon' versus 'machine gun') and its efficacy in criminal activities (use of silencers can reduce the chance of being observed engaging in the crime).").

132 *See* 18 U.S.C. § 924(c)(1)(B) ("If the firearm possessed by a person convicted of a violation of this subsection—(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or (ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.").

133 Geis, *supra* note 131, at 1137.

134 Eskridge & Nourse, *supra* note 10, at 1728, 1777, 1780–82 (observing that "Justice Scalia was famous for his own homey examples" but that other members of the Court—including Justices Breyer, Ginsberg, Sotomayor, and Kagan—have used homey examples based on "hypothetical ordinary readers").

135 *See* Mark Greenberg, *Legal Interpretation and Natural Law*, 89 FORDHAM L. REV. 109, 122–23 (2020) ("The assumption that legal interpretation should be modeled on the interpreta-

naugh insisted that a male employee who was terminated for being romantically attracted to men would say "[i]n common parlance" that he "[was] fired because [he was] gay," not because he was a man.[136] Justice Gorsuch countered that "these conversational conventions do not control Title VII's legal analysis."[137]

At a deeper level, some readers might wonder about the implications of this Foreword's argument for notions of "fair notice." Some scholars have suggested that treating "ordinary meaning" as an empirical concept helps promote the value of fair notice and, more generally, the democratic legitimacy of an interpretive method.[138] If judicial opinions map onto the way "ordinary people" expect the law to apply, the law provides "fair notice." As Kevin Tobia and John Mikhail suggest, "[t]he law should be publicly available to ordinary people" and "enable members of the public to rely upon and form reasonable expectations about it."[139] Conversely, if interpreters treat ordinary meaning as primarily a legal concept—and if interpreters thereby reach conclusions that differ from how the general public would ex-

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tion of ordinary conversation is problematic. Lawmaking has very different goals, presuppositions, and circumstances from ordinary conversation.").

136 Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1828 (2020) (Kavanaugh, J., dissenting) ("As to common parlance, few in 1964 (or today) would describe a firing because of sexual orientation as a firing because of sex. . . . In common parlance, Bostock and Zarda were fired because they were gay, not because they were men.").

137 *Id.* at 1745.

138 *See* Tobia & Mikhail, *supra* note 3, at 461–62, 470 ("Underpinning this conception of 'empirical textualism' is a set of observations about the relationship between ordinary meaning and ordinary language users. . . . [I]nterpreting a legal text in line with its ordinary meaning promotes rule of law values like publicity and fair notice. The law should be publicly available to ordinary people, in other words, and it should enable members of the public to rely upon and form reasonable expectations about it. Ordinary meaning analysis is thus often taken to promote democracy; as such, its focus is naturally placed on the understanding of the demos."); *see also* Klapper, et al., *supra* note 6, at 49 (arguing that textualist opinions do not map on to survey results and asserting that "[w]hen using the modern ordinary-meaning toolkit, courts are in fact *not* implementing the law in ways that are predictable to ordinary people. This erodes legitimacy and undermines the principle of fair notice."); Macleod, *supra* note 8, at 69–72 ("The ideal of 'fair notice'—already tenuously connected to the modern world of voluminous, often technical, law—becomes especially strange if it is conceptualized as notice *to someone without any particular course of action or event in mind . . . or without a particular law they are consulting* . . . . And indeed, the very notion of 'reliance interests' implies agents who have considered the relevant law and its application to a contemplated course of action or event . . . ."); Tobia, Slocum, & Nourse, *supra* note 5, at 282 ("Many textualists articulate normative justifications for the ordinary meaning doctrine—such as fair notice, reliance, and democratic values—that are tied to facts about how ordinary people actually understand language.").

139 Tobia & Mikhail, *supra* note 3, at 461.

pect a statute to apply—that could undermine the value of "fair notice."[140]

A full exploration of the concept of "fair notice" is beyond the scope of this Foreword. But I sketch out here a few points that warrant further analysis. First, "fair notice" is itself a legal concept. Our legal system does not equate "fair notice" with *actual* notice. After all, "ignorance of the law" is generally not a defense to a legal violation.[141] Accordingly, it may be that fair notice is provided when judges interpret the law in accordance with how a *reasonable* reader would have understood the statutory text. Indeed, this legalistic vision of fair notice is suggested by Tobia and Mikhail's argument that "[t]he law . . . should enable members of the public to rely upon and form *reasonable* expectations about it."[142] Interestingly, a recent empirical study by Kevin Tobia, Brian Slocum, and Victoria Nourse suggests that a legalistic approach may *better* accord with public expectations; according to the authors, members of the public understand that the law is a special language and are inclined to defer to legal experts on statutory interpretive questions.[143]

Moreover, to build on earlier points, "fair notice"—that is, what notice is due—may depend on the statutory context and the statutory audience. What qualifies as "fair notice" in the context of a statute regulating agency action, as in *MCI*, may differ dramatically from "fair

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140 *Cf.* Eskridge & Nourse, *supra* note 10, at 1727–28 (arguing that "[t]he new textualist orthodoxy . . . claims to be democracy-enhancing by emphasizing public meaning: how 'We the People' would have received the statutory language" and that "[t]he late Justice Scalia, for example, invoked 'ordinary meaning' when defending the legitimacy of his method, but interpretations discussed in his treatise and judicial opinions overwhelmingly turned on legal terms of art, precedents, and judicial canons inaccessible to ordinary folks," and insisting that "there is no evidence that ordinary citizens read statutory texts the way judges do"). Interestingly, textualists have rarely focused on "fair notice" as a justification for the method (although one thoughtful student note endeavored to do so). *See* Note, *Textualism as Fair Notice*, 123 HARV. L. REV. 542, 542–43, 557–58 (2009). That may be because, as Caleb Nelson has pointed out, all interpretive methods aim to provide "fair notice." *See* Nelson, *supra* note 109, at 352–53 (observing that textualism is often associated with an effort to "enforc[e] the 'reader's understanding'" of a statute and thereby to serve goals of fair notice but also asserting that "[t]extualists and intentionalists alike give every indication of caring . . . about the need for readers to have fair notice").

141 *See* Cheek v. United States, 498 U.S. 192, 199 (1991) ("The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system.").

142 Tobia & Mikhail, *supra* note 3, at 461 (emphasis added).

143 *See* Tobia, Slocum & Nourse, *supra* note 11, at 7 (asserting that "ordinary people understand legal texts to contain terms with technical meanings and intuitively defer to experts for the meanings of those terms"). The authors assert that is true, even when statutory language contains terms used in ordinary conversation, such as "intent" or "because of." *Id.*

notice" in the criminal realm, as in *Smith*. Judges may need to use legal tests that are calibrated to the specific context—either a particularly sophisticated hypothetical reasonable reader, or one with less presumed background knowledge—to get closer to "fair notice."

Finally, a legalistic understanding of "fair notice"—one that can be satisfied if judges look to the perspective of a hypothetical reasonable reader—seems to be the only one that would enable reform legislation.[144] Any major reform, such as the Civil Rights Act of 1964, will come with surprises. As discussed, some employers in the 1960s and 1970s would have been shocked to learn that—simply because Congress had enacted an employment discrimination law—they could no longer terminate a woman who got married or had young children or refused her supervisor's sexual advances. And yet when Congress enacts a revolutionary law such as Title VII, one might quite reasonably assume that employers are on "*fair* notice" that there will be big changes to the employment sector, even if they are surprised by the particulars.[145]

This Foreword does not seek to resolve these questions surrounding "ordinary meaning." My hope is to raise issues that textualists and other interpreters should address going forward, to the extent that they assume—as many do—that "ordinary meaning" is a legal concept. In my view, the recent empirical literature on "ordinary meaning" has considerable value by helping to bring some of these considerations to the surface. If "ordinary meaning" is a legal concept rather than simply an empirical fact, textualists should more carefully define the legal tools and normative values that get us there.

CONCLUSION

The term "ordinary meaning" seems, at first glance, to refer to an empirical concept: the most common or popular use of a word or phrase. But as this Foreword shows, "ordinary meaning" can be un-

144 Scholars have raised related concerns about an approach to textualism that would give substantial weight to past public expectations or understandings. *See* Koppelman, *supra* note 122, at 26 ("When it is applied to statutes that aim at broad social transformation, the original cultural expectations move has a conservative bias. Its tendency is to defeat the very laws it purports to interpret . . . laws that aim to counteract prejudice, by their nature, press against the background culture."); *see also* Eyer, *supra* note 60, at 65–69 (emphasizing that "politically unpopular applications of the law will rarely be within the original expectations of the public").

145 *Cf.* Felipe Jiménez, *Some Doubts About Folk Jurisprudence: The Case of Proximate Cause*, U. CHI. L. REV. ONLINE (Aug. 23, 2021), https://lawreviewblog.uchicago.edu/2021/08/23/jimenez-jurisprudence/ [https://perma.cc/2URX-PRLG] ("[W]hether the values of the rule of law and democracy are best served in a regime under which lay conceptions are perfectly reflected in law, and legal concepts just reflect ordinary concepts, is an open question.").

derstood as a legal concept and, moreover, that is how prominent textualists have long treated ordinary meaning. Thus, textualists use legal tools, such as the construct of the hypothetical reasonable reader, to select among plausible ordinary meanings. This analysis complicates recent efforts to test empirically whether textualists have reached the "right answer" in specific cases and controversies. For many textualists, like many other interpretive theorists, statutory analysis is primarily a normative, not an empirical, enterprise.

The New Separation of Powers Formalism and Administrative Adjudication

Robert L. Glicksman & Richard E. Levy***

ABSTRACT

The Supreme Court has entered a new era of separation of powers formalism. Others have addressed many of the potentially profound consequences of this return to formalism for administrative law. This Article focuses on an aspect of the new formalism that has received less attention—its implications for the constitutionality of administrative adjudication. The Court has not engaged in an extensive discussion or reformulation of its separation of powers jurisprudence concerning administrative adjudication since its highly functionalist decision in Commodity Futures Trading Commission v. Schor *more than three decades ago, but recent opinions of individual Justices show signs that such a doctrinal restatement may be on the horizon.*

Despite the current lack of doctrinal clarity, administrative adjudication is generally valid under current law either because Congress may vest the determination of so-called "public rights" in non-Article III tribunals or because administrative agencies adjudicate cases as adjunct factfinders for the courts. The foundation for the emergent Article III formalism has been advanced most prominently by Justice Gorsuch in a pair of cases involving the legality of administrative adjudication of patent validity. His approach relies on a categorical rule that Article III requires an independent judiciary to have decisional authority in adjudications that affect private property and other protected rights, in much the same way that the unitary executive principle requires Presidential control over matters within the executive branch. Under this view, however, the judicial power is subject to a formalistic, historically defined exception for matters of public rights, which can be adjudicated without the involvement of the judiciary. This approach may be gaining traction as part of the broader resurgence of separation of powers formalism.

Justice Gorsuch's approach is flawed because it does not account for the structural role of the Article III judiciary. Although the cases have long recognized that Article III has both structural and individual rights components, separation of powers is ordinarily understood primarily in structural terms.

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Article III analysis therefore must account for the structural role of the courts and protect the structural interests of the federal judiciary. Focusing on structure highlights the importance of the status and character of the non-Article III tribunal for separation of powers analysis and the essential role of judicial review as a means to enforce the rule of law even when an adjudication does not implicate any individual right to an Article III court. This Article argues that most administrative adjudication is fully consistent with separation of powers formalism because the initial implementation of statutory provisions by agencies using quasi-judicial procedures is executive in character. It is the availability and scope of judicial review that determine the extent of any encroachment on the exercise of judicial power under Article III.

Table of Contents

INTRODUCTION

There can be little doubt that the United States Supreme Court has entered a new era of separation of powers formalism, even if the precise contours and implications of this formalistic approach are still unfolding. Prominent decisions invalidating statutory provisions governing appointment and removal of officers of federal administrative agencies reflect a strong formalistic flavor.[1] So do calls to reinvigorate the nondelegation doctrine[2] and to repudiate "*Chevron* deference" by federal courts to agency interpretations of ambiguous statutes.[3] If the resurgence of separation of powers formalism was unclear before, the appointment of Justices Gorsuch, Kavanaugh, and Barrett seals its current status as the dominant separation of powers approach on the Court.[4]

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1 *See*, *e.g.*, United States v. Arthrex, Inc., 141 S. Ct. 1970, 1985–87 (2021) (holding that administrative patent judges whose decisions were not subject to review by Director of the Patent and Trademark Office (PTO) were principal officers who must be appointed by the President with Senate consent, but allowing Director to make final decision on *inter partes* challenges to the validity of existing patents so that judges would qualify as inferior officers); Collins v. Yellen, 141 S. Ct. 1761, 1783 (2021) (holding that for-cause removal restrictions on single Director of the Federal Housing Finance Agency (FHFA) violated the President's inherent power to remove executive officers at will); Seila L. L.L.C. v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2188 (2020) (holding that for-cause restriction on removal of the Bureau's single Director violated the President's inherent power to remove executive officers at will); Lucia v. SEC, 138 S. Ct. 2044, 2055 (2018) (holding that the Commission's administrative law judges (ALJs) are "Officers of the United States" within the meaning of the Appointments Clause and therefore cannot be appointed by someone other than the President, the head of a department, or the courts of law); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 492 (2010) (holding that a statute that created two layers of for-cause removal protection for executive branch official interfered with the President's duty to "take care" that the laws are faithfully executed).

2 *See* Gundy v. United States, 139 S. Ct. 2116, 2130–31 (2019) (Alito, J., concurring in the judgment) (discussing willingness to reconsider nondelegation doctrine principles in place for more than eighty years); *id.* at 2131–48 (Gorsuch and Thomas, JJ., and Roberts, C.J., dissenting) (arguing for reinvigoration of the nondelegation doctrine); *see also* Paul v. United States, 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J., respecting the denial of certiorari).

3 *See* Michigan v. EPA, 576 U.S. 743, 760–64 (2015) (Thomas, J., concurring) (advancing separation of powers objections to *Chevron* deference); *cf.* SAS Inst. v. Iancu, 138 S. Ct. 1348, 1358 (2018) (Gorsuch, J.) (stating that "whether *Chevron* should remain is a question we may leave for another day").

4 Both Justices Gorsuch and Kavanaugh are staunch separation of powers formalists, as reflected in noteworthy opinions they wrote as judges of the United States Courts of Appeals. *See*, *e.g.*, PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 164–200 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting) (concerning the constitutionality of statutory restrictions on presidential power to remove the single head of an independent agency), *abrogated by* Seila L. L.L.C. v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring) (questioning the legality of judicial deference to agency statutory interpretations); De Niz Robles v. Lynch, 803 F.3d 1165, 1171 (10th Cir. 2015) (Gorsuch, J.) (same); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 537 F.3d 667, 685–715 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (concerning the constitutionality

These developments are a feature, not a bug, of the longstanding efforts to appoint "conservative" judges and justices to the federal bench.[5] Although the reinvigoration of separation of powers so as to constrain the modern administrative state may receive less attention than issues such as overturning *Roe v. Wade*,[6] it has always been one of the principal objectives of the effort over the last several decades to reshape the courts.[7] Separation of powers formalism is the logical ju-

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of restrictions on presidential removal of "Officers of the United States"), *aff'd in part, rev'd in part, and remanded*, 561 U.S. 477, 514 (2010).

Justice Barrett did not have occasion to address these issues as a judge on the United States Court of Appeals for the Seventh Circuit and has not yet authored any significant separation of powers opinions as a Supreme Court justice, so her views on separation of powers are less clear. But she joined the majority opinions in *Collins* and *Arthrex*. *See Collins,* 141 S. Ct. at 1761; *Arthrex*, 141 S. Ct. at 1970. Thus, it seems reasonably clear that she will embrace a more formalist view of separation of powers than her predecessor, Justice Ginsburg. It is too soon to tell, however, whether she will join with the strictest separation of powers formalists on the Court in a dramatic repudiation of the modern administrative state.

5 In this context, the authors use the term "conservative" as it is commonly used in reference to the judiciary and not in its partisan political sense. Although the meaning of the term varies with time and context, for purposes of this Article it means a judicial philosophy that favors "small government" and "traditional" rights. Conservative constitutional jurisprudence thus seeks to constrain the authority of government, especially the federal government, by reinvigorating the structural constraints of federalism and separation of powers. At the same time, conservative jurisprudence takes a predominantly historical approach to the recognition and protection of individual rights. Conservative judges and justices tend to favor formalistic approaches to constitutional law, such as textualist and originalist approaches to constitutional interpretation that produce categorical rules. Liberal or progressive judges and justices, by way of contrast, tend to take the opposite position on these matters, favoring a more evolutionary approach that empowers the government to improve social and economic conditions and to promote constitutional values by extending rights protections to marginalized communities. Of course, these generalizations oversimplify the reality that every judge or justice, regardless of ideological or political leaning, has a unique approach and perspective on constitutional issues.

6 410 U.S. 113 (1973). The Supreme Court overruled *Roe* in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

7 *See*, *e.g.*, PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014) (arguing that the modern administrative state violates separation of powers); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994) (same); Craig Green, *Deconstructing the Administrative State*: Chevron *Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619, 622 (2021) (discussing links between conservatives' shifting approach to *Chevron* and efforts to "deconstruct" the administrative state); *see generally* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2014); RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT 34, 39 (2014).

The Federalist Society has been instrumental in advancing doctrinal separation of powers arguments, such as the nondelegation doctrine and the unitary executive theory, to limit the authority of the administrative state. *See* Peter M. Shane, *Legislative Delegation, the Unitary Executive, and the Legitimacy of the Administrative State*, 33 HARV. J.L. & PUB. POL'Y 103, 103 (2010). For discussion of the Federalist Society's role in reshaping the judiciary to promote such libertarian conservative values, see MICHAEL AVERY & DANIELLE MCLAUGHLIN, THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS (2013); AMANDA

risprudential tool to accomplish that objective because conservative justices generally favor a formalistic mode of analysis and because administrative agencies with broad regulatory authority and discretion are difficult to square with a formalistic reading of the separation of powers.[8] The Court's new separation of powers formalism therefore has already begun to reshape administrative law, with profound implications for the modern administrative state. [9] This Article will consider the implications of the new separation of powers formalism for administrative adjudication, which has been the focus of some of this Article's authors' recent scholarship.[10]

The distinction between formalism and functionalism as an approach to legal analysis in general, and separation of powers in particular, has been the subject of much attention.[11] For purposes of this Article, the authors understand *formalism* to be an approach to legal analysis that relies on categorical reasoning; i.e., bright-line rules that produce automatic outcomes (e.g., per se rules) attached to defined legal categories.[12] In the separation of powers context, this means that

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HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION (2015).

8 *See* Ilan Wurman, *Constitutional Administration*, 69 STAN. L. REV. 359, 361 (2017) (describing a "school of formalists" who take the position that "although the doctrine pretends that agencies are merely executing the law, agencies are in fact routinely exercising legislative and judicial power as well, undermining the constitutional separation of powers").

9 *See infra* Part III; Richard E. Levy & Robert L. Glicksman, *Restoring ALJ Independence*, 105 MINN. L. REV. 39 (2020) [hereinafter Levy & Glicksman, *ALJ Independence*] (arguing that the Supreme Court's recent decisions granting the President control over the appointment and removal of ALJs hampers ALJs' independence and advocating the creation of a federal central panel as a means to promote independence without violating the separation of powers).

10 *See generally* Levy & Glicksman, *ALJ Independence*, *supra* note 9 (exploring the implications of the Court's unitary executive precedents for the fairness and impartiality of ALJs).

11 *See*, *e.g.*, William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21 (1998); Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346 (2016); Ronald J. Krotoszynski, Jr., *Transcending Formalism and Functionalism in Separation-of-Powers Analysis: Reframing the Appointments Power After* Noel Canning, 64 DUKE L.J. 1513 (2015); Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 225–35 (1991) [hereinafter Merrill, *Principle*] (analyzing how the holding in *NLRB v. Noel Canning* on the recess-appointments power decreased the salience of traditional formalism and functionalism); Burt Neuborne, *Formalism, Functionalism, and the Separation of Powers*, 22 HARV. J.L. & PUB. POL'Y 45 (1998); Bijal Shah, *Judicial Administration*, 11 U.C. IRVINE L. REV. 1119 (2021); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987); David Zaring, *Toward Separation of Powers Realism*, 37 YALE J. ON REG. 708, 714–15 (2020) (advocating that current formalist and functionalist separation of powers doctrines should be replaced with a new modern understanding).

12 *See* M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L.

there are three distinct categories of governmental power—legislative, executive, and judicial—each of which is subject to bright-line rules concerning its scope and the manner in which it is exercised. By way of contrast, *functionalism* as we understand it eschews rigid categories and bright-line rules in favor of a flexible analysis that examines the circumstances of each case in relation to the values or purposes that underlie the law.[13] In the separation of powers context, a functional approach focuses on the purposes of separation of powers to allocate authority among three distinct branches that will check each other so as to prevent any faction from gaining control of the entire government and promote the rule of law.[14]

In practice, the rise of functionalist separation of powers analysis in the New Deal era was an essential prerequisite for the growth of the administrative state during the Twentieth Century. [15] Independent

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REV. 1127, 1138 (2000) [hereinafter Magill, *Real Separation*] ("For the formalist, questions of horizontal governmental structure are to be resolved by reference to a fixed set of rules and not by reference to some purpose of those rules."); Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 Nw. U. L. REV. 591, 663 (1998) (linking formalism and categorical reasoning); Peter L. Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789, 804 (1983) (describing shift from formalism to functionalism in separation of powers analysis as a move away from "'air-tight' categories"); *see also* Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568, 587 (1985) (O'Connor, J.) (agreeing that "practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III").

13 *See, e.g.*, Eskridge, *supra* note 11, at 21–22 (noting that functionalist reasoning "promises adaptability and evolution" and "emphasiz[es] pragmatic values like adaptability, efficacy, and justice in law"); Joshua B. Fischman, *Politics and Authority in the U.S. Supreme Court*, 104 CORNELL L. REV. 1513, 1585 (2019) ("Authority formalists have sought clear, textually based boundaries on delegated authority, while authority functionalists have argued for flexible boundaries that better serve social purposes."); Elad D. Gil, *Totemic Functionalism in Foreign Affairs Law*, 10 HARV. NAT'L SEC. J. 316, 325 (2019) ("In general, functionalist reasoning provides greater room for balancing formulas and flexible standards . . . .").

14 *See* Mario Loyola, *The Concurrence of Powers: On the Proper Operation of the Structural Constitution*, 13 N.Y.U. J.L. & LIBERTY 220, 258 (2020) (stating that for functionalists, "as long as the three functions of government are carried out with some checks and balances, it shouldn't raise too many concerns when those functions get mixed within a single branch"); Magill, *Real Separation*, *supra* note 12, at 1142–43 (describing the "ultimate purpose" of functionalist analysis as being able "to achieve an appropriate balance of power among the three spheres of government"); Matthew James Tanielian, *Separation of Powers and the Supreme Court: One Doctrine, Two Visions*, 8 ADMIN. L.J. AM. U. 961, 967 (1995) (citing Merrill, *Principle*, *supra* note 11, at 232) (stating that for functionalists, "[t]he goal of the separation of powers should be to ensure that each branch retains enough power to continue to act as a check upon the power of the other branches").

15 *See* Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 398–400 (1987) (describing the Supreme Court's accommodation of agency authority through relaxation of separation of powers).

agencies with broad authority to issue binding rules, to investigate and prosecute violations, and to adjudicate cases[16] are nearly impossible to square with a formalistic view of separation of powers.[17] During the so-called "*Lochner* era," when the Supreme Court relied on various doctrines to invalidate government regulatory programs,[18] formalistic separation of powers analysis was one tool that the Court deployed to invalidate New Deal legislation.[19] Even before the Court's dramatic repudiation of its antiregulatory precedents in the aftermath of the "switch in time that saved nine,"[20] however, there were signs of a more functionalist analysis.[21] In the decades that followed the New Deal, functionalism became the dominant approach[22] and separation of powers seemed to impose few, if any, limits on the administrative

16 Many of these agencies were created during the New Deal. *See* Daniel J. Gifford, *The Emerging Outlines of a Revised* Chevron *Doctrine: Congressional Intent, Judicial Judgment, and Administrative Autonomy*, 59 ADMIN. L. REV. 783, 790–91 (2007) ("In the New Deal era when regulation proliferated, its administration was repeatedly entrusted to independent agencies.").

17 *See*, *e.g.*, Lawson, *supra* note 7.

18 Richard E. Levy, *Escaping* Lochner*'s Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 336 (1995).

19 *See id*. (observing that federalism and separation of powers "imposed significant barriers to federal economic regulation during the *Lochner* era, but the Court essentially abandoned them along with substantive due process in the late 1930s and early 1940s"). The most prominent example of this approach is *ALA Schechter Poultry Corp. v. United States*, in which the Court famously applied the nondelegation doctrine to invalidate the National Industrial Recovery Act. 295 U.S. 495 (1935).

20 *See* John Q. Barrett, *Attribution Time: Cal Tinney's 1937 Quip, "A Switch in Time'll Save Nine*,*"* 73 OKLA. L. REV. 229, 230 (2020) (describing "'the switch in time' that 'saved nine'" as "the quip that everyone learns in law school, if not earlier"); Daniel A. Crane & Adam Hester, *State-Action Immunity and Section 5 of the FTC Act*, 115 MICH. L. REV. 365, 371 (2016) (noting that after the "switch in time," the Supreme Court, having repudiated substantive due process, "was reluctant to permit anti-regulatory challenges under other legal theories"); Dina Mishra, *Child Labor as Involuntary Servitude: The Failure of Congress to Legislate Against Child Labor Pursuant to the Thirteenth Amendment in the Early Twentieth Century*, 63 RUTGERS L. REV. 59, 103 (2010) (discussing "the growing number of cases in which [the Court] had overruled its previous anti-regulatory precedents" after the "switch in time").

21 *See, e.g.*, Humphrey's Ex'r v. United States, 295 U.S. 602, 631–32 (1935) (upholding imposition of for-cause removal restrictions on members of the FTC); Crowell v. Benson, 285 U.S. 22, 50–65 (1932) (analyzing the degree to which Article III courts must retain the ability to review administrative adjudications of private rights). It is, perhaps, telling that *Humphrey's Executor* prevented President Roosevelt from removing a member of the FTC who opposed enforcement of the antitrust laws. *See* PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 170 (2018) (en banc) (Kavanaugh, J., dissenting) (describing *Humphrey's Executor* as "an unexpected decision that incensed President Roosevelt and helped trigger his ill-fated court reorganization proposal in 1937").

22 *See* Peter P. Swire, Note, *Incorporation of Independent Agencies into the Executive Branch*, 94 YALE L.J. 1766, 1767–68 (1985) (describing *Humphrey's Executor* as "part of a major shift to functionalism after 1935," which became the dominant mode of separation of powers analysis).

state, which experienced phenomenal growth during the Twentieth Century.[23]

Thus, the current resurgence of separation of powers formalism represents a serious challenge to administrative law as we know it. Some manifestations of this new separation of powers formalism have garnered significant attention. For example, the effort to rein in broad delegations to administrative agencies and the related attack on *Chevron* deference have been front and center in the administrative law and separation of powers literature.[24] Likewise, the Court's embrace of the strong unitary executive theory, as reflected in recent separation of powers cases that include *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,[25] *Lucia v. SEC*,[26] *Seila Law, L.L.C. v. Consumer Financial Protection Bureau (CFPB)*,[27] *United States v. Arthrex, Inc.*,[28] and *Collins v. Yellen*,[29] has garnered considerable scholarly attention.[30] Notwithstanding important pronouncements in *Stern v. Marshall*[31] and a pair of recent decisions involving administrative adjudication of challenges to patents,[32] however, the implications of

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23 *Cf.* Ronald J. Krotoszynski, Jr., *Constitutional Flares: On Judges, Legislatures, and Dialogue*, 83 MINN. L. REV. 1, 9 (1998) (arguing that "the growth of the modern administrative state required the reconceptualization of the delegation doctrine and separation of powers doctrine" based on functionalist analysis, "largely in order to realize the benefits and efficiencies associated with agency expertise"). Nonetheless, unlike other aspects of its *Lochner* era antiregulatory jurisprudence, such as its narrow reading of federal legislative power and substantive economic due process, the Court did not overrule or repudiate *Schechter Poultry*. Instead, it consistently distinguished the case by finding very open-ended standards sufficient to meet the nondelegation doctrine's "intelligible principle" test. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–75 (2001) (distinguishing *Schechter Poultry* and listing broad statutory standards that have been upheld as sufficient to satisfy the intelligible principle test).

24 *See*, *e.g.*, Gillian E. Metzger, *The Roberts Court and Administrative Law*, SUP. CT. REV. 1, 42–43 (2019); Gillian E. Metzger, *The Supreme Court 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 3–7 (2017) [hereinafter Metzger, *Redux*]; Magill, *Real Separation*, *supra* note 12, at 1141–42.

25 561 U.S. 477 (2010).

26 138 S. Ct. 2044 (2018).

27 140 S. Ct. 2183 (2020).

28 141 S. Ct. 1970 (2021).

29 141 S. Ct. 1761 (2021).

30 *See*, *e.g.*, Timothy G. Duncheon & Richard L. Revesz, Seila Law *as an Ex Post, Static Conception of Separation of Powers*, 2020 U. CHI. L. REV. ONLINE 97; Levy & Glicksman, *ALJ Independence*, *supra* note 9; Richard W. Murphy, *The DIY Unitary Executive*, 63 ARIZ. L. REV. 439 (2021); Cass R. Sunstein & Adrian Vermeule, *Presidential Review: The President's Statutory Authority over Independent Agencies*, 109 GEO. L.J. 637, 638 (2021).

31 564 U.S. 462, 482–503 (2011) (invalidating adjudication of traditional common law defamation claim by bankruptcy courts).

32 *See* Thryv, Inc. v. Click-to-Call Techs., L.P., 140 S. Ct. 1367 (2020); Oil States Energy Servs., L.L.C. v. Greene's Energy Grp., 138 S. Ct. 1365 (2018). For further discussion of these decisions, see *infra* notes 258–73 and accompanying text.

the new separation of powers formalism for administrative adjudication have received less attention in the commentary.[33]

This Article seeks to contribute to a more robust scholarly discussion of separation of powers and administrative adjudication. The Court has not engaged in an extensive discussion or reformulation of its separation of powers jurisprudence concerning administrative adjudication since its highly functionalist decision in *Commodity Futures Trading Commission v. Schor*[34] more than three decades ago. Recent opinions of individual Justices, however, show signs that such a doctrinal restatement may be on the horizon.[35] The authors wish to emphasize that this Article is not intended to endorse the new separation of powers formalism or advocate for its adoption. Instead, this Article takes the Court's embrace of this approach as a given and seeks to explore its implications for administrative adjudication.

The Article's core thesis is that, properly understood, most administrative adjudication is fully consistent with separation of powers formalism because it involves the execution of the law by officials within the executive branch. The Article develops this thesis in three steps. Part I of the Article provides our definition of formalism and

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33 *But cf*. William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511 (2020) (considering the justifications for non-Article III adjudication); Michael S. Greve, *Why We Need Federal Administrative Courts*, 28 GEO. MASON L. REV. 765, 775 (2021) (noting "enduring doubts" about the current model of administrative adjudication that "arise from separation-of-powers concerns"). Some of the Court's appointment and removal power cases have involved administrative adjudicators, and so have clear implications for administrative adjudication. *See infra* notes 302–06 and accompanying text. Although several of these decisions acknowledged that administrative adjudication presents distinctive issues, *e.g.*, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 507 n.10 (2010), none offered any extended analysis of separation of powers or administrative adjudication. There has also been a spate of recent articles focusing on the historical understanding of "public rights." *See infra* note 292 (citing examples). These articles, however, do not offer a larger account of administrative adjudication.

34 478 U.S. 833, 847–48 (1986) (declaring that "the constitutionality of a given congressional delegation of adjudicative functions to a non-Article III body must be assessed by reference to the purposes underlying the requirements of Article III" and that "[t]his inquiry, in turn, is guided by the principle that 'practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III'" (quoting Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 587 (1985))). The Court's more recent forays into the field have acknowledged doctrinal uncertainty without attempting to revisit the doctrine. *See generally infra* Part II (discussing the Court's separation of powers jurisprudence concerning non-Article III adjudication). Justice Gorsuch, however, has signaled some dissatisfaction with the *Schor* test. *See Thryv*, 140 S. Ct. at 1388–89 (Gorsuch, J., dissenting) (arguing that foreclosure of judicial review of the decision by the Director of the PTO to initiate *inter partes* review of previously awarded patents impermissibly infringed upon the judicial power).

35 *See infra* notes 97–107 and accompanying text (discussing growing criticisms within the Court of various deference doctrines); *infra* Section III.A.1 (discussing Justice Gorsuch's emerging Article III formalism).

functionalism, discusses the reemergence of formalism as the predominant mode of separation of powers analysis, and describes the manifestations of the new separation of powers formalism in the Court's cases involving the parameters of legislative, executive, and judicial power. Part II explores the development of traditional doctrines governing adjudication by tribunals whose decisionmakers lack life tenure and salary protections, which we refer to as non-Article III adjudication. This discussion focuses on the Supreme Court's early cases upholding Article I courts and on the importance of the distinction between public and private rights. Part II concludes that although the current doctrine concerning administrative adjudication is confusing and poorly defined, administrative adjudication is generally valid under that doctrine either because Congress may vest the determination of so-called "public rights" in non-Article III tribunals or because administrative agencies adjudicate cases as adjunct factfinders for the courts.

Finally, Part III develops our approach to administrative adjudication. It begins with an examination of the emergent Article III formalism advanced by Justice Gorsuch, which focuses on an historical inquiry into the application of the public rights doctrine. This Article argues that this approach is flawed because it does not account for the structural role of the Article III judiciary. Building on a structural perspective, the Article offers an approach under which the initial implementation of statutory provisions by agencies using quasi-judicial procedures is executive in character and then relates this understanding to the public rights doctrine that has long governed the constitutionality of administrative adjudication. Finally, the Article emphasizes that the critical separation of powers question for administrative adjudication is the availability and scope of judicial review, rather than the propriety of initial administrative adjudication. That is the appropriate focus because the availability and scope of judicial review determine the extent of any encroachment on judicial power.

I. The New Separation of Powers Formalism

This Part of the Article identifies, defines, and describes the "new separation of powers formalism" reflected in the Supreme Court's recent separation of powers decisions. The purpose here is not merely to describe the leading cases, but also to connect the dots so as to clarify its core premises and their implications for the broader jurisprudence of separation of powers as it relates to administrative adjudication. The discussion begins with a general description of formalism and

functionalism as modes of legal analysis, with particular reference to the separation of powers. It then examines the formalistic approach reflected in recent Supreme Court opinions, sketching out the core premises of that approach.

A. Formalism and Functionalism

Although the concepts of formalism and functionalism as styles of legal reasoning will be familiar to readers, this Part of the Article begins by explicitly stating the authors' understanding of formalism and functionalism and the implications of these approaches for separation of powers doctrine. Given that they are styles of legal reasoning,[36] formalism and functionalism can appear with respect to any type of law (e.g., statutory interpretation, common law, or constitutional law) and in any substantive field of law (e.g., torts, environmental regulation, or individual rights).[37] Regardless of the context, however, formalism and functionalism reflect certain key features, often captured by the distinction between "rules" and "standards" or "principles."[38]

1. Formalism

As a style of legal reasoning, formalism is focused on categorical analysis. Categorical analysis dictates relatively clear and specific outcomes based upon the assignment of a particular case to a particular category. Accordingly, formalism favors bright-line, per se rules based on mutually exclusive categories, even if the imperfection of language and the human aspects of the law make perfect attainment of these goals impossible.[39] The essential premise of formalism is that bright-

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36 *See* Thomas B. Nachbar, *Twenty-First Century Formalism*, 75 U. MIAMI L. REV. 113, 118 (2020) (emphasis omitted) (proposing an understanding of modern formalism as "a commitment to form in legal thinking").

37 *See* Daniel Farber, *The Ages of American Formalism*, 90 NW. U. L. REV. 89, 91 (1995) ("Formalists believe that certainty, stability, and logic are the primary values to be sought by judges, but admit that in practice these values cannot be attained completely. To implement these values, they embrace formalist methods, such as textualism as a system for interpreting statutes, adherence to established doctrine in common-law cases, and originalism as a method of constitutional interpretation.").

38 *See* Tanielian, *supra* note 14, at 967 ("The relationship between categorical separation and checks and balances, on one hand, and formalism and functionalism on the other, is strikingly congruent with the methodological contrast between rules and standards."); *see generally* Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985) (exploring and critiquing the conventional distinction between rules and standards); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (highlighting differences among the Justices as fueled in part by the choice between rules and standards and considering possible explanations for these divisions).

39 *See, e.g.*, Jeffrey M. Shaman, *On the 100th Anniversary of* Lochner v. New York, 72

line rules provide clear guidance to those who are subject to the law and limit the ability of judges or other officials to determine outcomes based on personal preferences, as opposed to the law.[40] In formalistic analysis, everything depends on assigning the case to the proper category, which necessarily dictates the outcome because strict rules attach as a result of that categorization.[41] Accordingly, characterizing the facts as placing the case in a particular category, as defined by text and precedent, is the key to formalistic analysis.[42] At least in the current era, formalism is generally associated with conservative judges, but it is not always or inevitably so.[43]

TENN. L. REV. 455, 468 (2005) (citing *Lochner* as an example of "a highly formalistic way of thinking that conceived of reality in terms of mutually exclusive black and white categories").

40 *See*, *e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989) (distinguishing between "a discretion-conferring approach" and "a general rule of law," as well as arguing that having clear rules as opposed to individual discretion provides guidance for lower courts, increases predictability, and promotes public confidence in the judiciary by producing consistent results).

41 *See* Magill, *Real Separation*, *supra* note 12, at 1139–40.

42 *See* Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853, 857–58 (1990) (explaining that "[f]ormalists treat the Constitution's three 'vesting' clauses as effecting a complete division of . . . federal governmental authority" and that "[a]ny exercise of governmental power, and any governmental institution exercising that power, must either fit within one of the three formal categories thus established or find explicit constitutional authorization for such deviation").

43 For example, textualist and originalist modes of interpretation, frequently championed by conservative Justices and scholars, are highly formalistic. *See, e.g.*, Nachbar, *supra* note 36, at 116–17 (footnotes omitted) (explaining that Justice Scalia's formalism "is commonly associated with textualism or originalism (or both)"); Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 349 (2005) (arguing that the central divide between textualists and intentionalists is the propensity of textualists to favor "rules" and of intentionalists to favor "standards"). Interestingly, however, Justice Scalia—a renowned formalist—championed *Chevron* deference, a functionalist doctrine that is now in the crosshairs of separation of powers formalists. *See* City of Arlington v. FCC, 569 U.S. 290 (2013) (rejecting an exception to *Chevron* deference for "jurisdictional" issues); *cf.* Gil, *supra* note 13, at 326 ("[U]nder a functionalist reading of *Chevron*, . . . judicial deference to executive agencies' statutory interpretations is appropriate because they have more expertise in ascertaining the meaning of laws they are charged with administering and are better situated to reflect democratic preferences."); Dawn Johnsen, *"The Essence of a Free Society": The Executive Powers Legacy of Justice Stevens and the Future of Foreign Affairs Deference*, 106 Nw. U. L. REV. 467, 492 (2012) (footnote omitted) ("The *Chevron* Court explained the justifications for deference in terms of functionalism and democratic theory: 'Judges are not experts in the field, and are not part of either political branch of the Government,' while the administering agencies possess superior expertise and political accountability by virtue of serving an elected President."); Kimberly L. Wehle, *Defining Lawmaking Power*, 51 WAKE FOREST L. REV. 881, 903 (2016) ("*Chevron* step one requires courts to give effect to clear congressional directives and, for functionalists, to scour legislative history and purpose to identify Congress's intent.").

An excellent example of formalistic reasoning in a separation of powers context is *INS v. Chadha*,[44] which invalidated a statutory "legislative veto" provision authorizing either the House of Representatives or the Senate to nullify agency action by simple resolution.[45] The analysis began with the premise that legislative power must be exercised in accordance with the requirements of bicameralism and presentment.[46] Thus, the key question was whether the legislative veto was a legislative act—i.e., whether it fit within the category to which bicameralism and presentment requirements attach. The Court offered three reasons for concluding that the legislative veto was a legislative act: (1) because a part of the legislature, the House of Representatives, exercised the veto; (2) because the veto altered legal rights by revoking a deportable alien's asylum; and (3) because the veto effectively reclaimed authority Congress had delegated to the Attorney General by statute.[47] Once the Court concluded that the veto was a legislative act, it was necessarily invalid because it was not adopted in compliance with bicameralism and presentment procedures.[48]

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44 462 U.S. 919 (1983).

45 *See id.* at 951 ("The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility."); *id.* at 946 ("The very structure of the Articles delegating and separating powers under Arts. I, II, and III exemplifies the concept of separation of powers . . . .").

46 *Id.* at 951 ("It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.").

47 *See id.* at 952–55. In the authors' view, none of these explanations are entirely convincing. First, the fact that the veto was exercised by the House of Representatives is a starting point, but cannot be sufficient, as the Court in *Chadha* acknowledged. *Id.* at 952. That the action altered Chadha's legal status cannot explain why the act was legislative as opposed to executive or judicial, insofar as both the executive action of the Attorney General and the judicial decision of the Supreme Court also altered Chadha's legal status. Finally, it is simply incorrect to suggest that the legislative veto reversed the statutory delegation of authority to the Attorney General. That delegation of authority was always subject to and limited by the House of Representatives' exercise of the veto, which did not alter or amend the underlying statute in any way. *See* E. Donald Elliot, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506, 514–15 (1989) (advancing similar criticisms). These points do not mean that *Chadha* was wrongly decided—there are alternative rationales for the outcome. Indeed, from a formalist perspective it does not matter what category of power the veto falls into—if it is legislative, it violates bicameralism and presentment; if it is executive, it violates Article II; and if it is judicial, it violates Article III. *See* Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 274–76 (1991) (reasoning that agency controlled by Congress violated separation of powers if its actions were executive because Congress cannot control the exercise of executive power and if its actions were legislative because it violated bicameralism and presentment).

48 *See Chadha*, 462 U.S. at 958 ("To accomplish what has been attempted by one House of

As a mode of analysis, formalism may be attractive because bright-line rules lead to clear and objective outcomes.[49] This virtue, however, may also be its vice. To the extent that formalism dictates outcomes, it may produce results that seem wrong—whether as a matter of justice, the purposes of a rule, or the ideological preferences of a judge.[50] When confronted with such an outcome, courts may be inclined to adapt the rule through devices such as the alteration or manipulation of categories, the recognition of categorical exceptions, and the use of legal fictions.[51] To the extent that the categorization of a case can be manipulated by this sort of judicial reasoning, however, the outcome is neither clear nor objective.[52] Manipulation of catego-

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Congress in this case requires action in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President."). The line-item veto case is another example of formalistic separation of powers reasoning. *See* Clinton v. City of New York, 524 U.S. 417, 438 (1998) (invalidating statute that authorized President to "cancel" budgetary items after signing an appropriation statute into law because the President "[i]n both legal and practical effect . . . has amended two Acts of Congress by repealing a portion of each" without following bicameralism and presentment). Professor Bradford Clark suggested that the Court has taken a more formalistic approach to separation of powers when legislative action is involved because the legislative process was tightly constrained to promote principles of federalism. *See* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1391–93 (2001). Although this observation may have been true at the time, the Court's subsequent cases involving executive power indicate that the new separation of powers formalism is not confined to the legislative power. *See infra* Section I.B.2 (discussing the Court's recent cases involving executive power).

49 *See* Ofer Raban, *The Fallacy of Legal Certainty: Why Vague Legal Standards May Be Better for Capitalism and Liberalism*, 19 B.U. PUB. INT. L.J. 175, 175–77 (2010) (gathering and quoting sources that claim "that bright-line rules allow people to better predict the consequences of their actions as compared to vague legal standards" and advancing a thesis that this common assumption is a fallacy).

50 *Cf.* Pierre Schlag, *Formalism and Realism in Ruins (Mapping the Logics of Collapse)*, 95 IOWA L. REV. 195, 205–07 (2009) (describing critiques of formalism as arbitrary, inefficacious, dogmatic, and incoherent, and noting that "[t]o its critics, formalism seems to be detached from both normative and political values as well as the ostensible realities in the social and economic sphere. Accordingly, formalism is routinely described as mechanical, wooden, rigid, authoritarian, and generally out of touch.").

51 *See*, *e.g.*, Aviam Soifer, *Reviewing Legal Fictions*, 20 GA. L. REV. 871, 892 (1986) (describing a host of Supreme Court holdings that "eviscerat[ed] civil rights protections" and extensions of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), and contract law principles as examples "of the triumph of fictions over facts, formalism over realism"); Wurman, *supra* note 8, at 366 (describing "the two formalist fictions that mask the administrative state's unconstitutional foundations"); *see also* Robert E. Scott, *Chaos Theory and the Justice Paradox*, 35 WM. & MARY L. REV. 329, 337 (1993) ("The formalist creation of fictions and artificial categories ultimately led to the rejection of formalism and the emergence of Legal Realism.").

52 *See* Scott, *supra* note 51, at 337 (attributing the decline of formalism to "the creative use of legal fictions," which masked a failure to address specific contexts); Schlag, *supra* note 50, at 205–07 (discussing criticisms of formalism as arbitrary, inefficacious, dogmatic, and incoherent).

ries, moreover, tends to mask the true reasons for a result, leading to decisions that are often disingenuous and lacking in transparency.[53]

2. Functionalism

As a style of reasoning, functionalism is focused on producing decisions that further the underlying interests, purposes, or values served by the law.[54] Accordingly, the functionalist approach favors open-ended rules that allow the courts to consider the circumstances of each case in light of those interests, purposes, and values.[55] In place of bright-line rules, functionalists favor standards or principles, balancing tests, ends-means scrutiny, and multifactored "all-the-circumstances" frameworks.[56] Thus, the essential premise of functionalism is that the law is a system of social ordering that serves a purpose and should be applied accordingly.

In the separation of powers context, functionalism contemplates that legislative, executive, and judicial powers will overlap and intermingle, and is therefore relatively unconcerned with the characterization of an action as legislative, executive, or judicial in character.[57] Functionalist separation of powers analysis focuses instead on the extent to which a particular institutional arrangement preserves the essential functions of each branch and a balance of control among the

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53 *See, e.g.*, Cass R. Sunstein, *What Judge Bork Should Have Said*, 23 CONN. L. REV. 205, 215–16 (1991) (arguing that originalism "is merely the latest version of formalism in the law," and that it reflects "the pretense that one can decide hard cases in law by reference to value judgments made by someone else. Those who indulge in that pretense usually end up not by abandoning value judgments but by making them covertly.").

54 *See*, *e.g.*, Allison H. Eid, *Federalism and Formalism*, 11 WM. & MARY BILL RTS. J. 1191, 1197 (2003) (stating that "a formalist is more likely to follow a rule without regard to the values that underlie it; a functionalist is more likely to look just at the values at stake").

55 *See* Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. PA. L. REV. 209, 214 (1993) (arguing that "functionalist debates over government structure are often notably open-ended").

56 *See*, *e.g.*, Eid, *supra* note 54, at 1197. The intelligible principle test for the nondelegation doctrine is an example of a functionalist approach to separation of powers. Under that test, when Congress delegates decision-making authority to agencies, it must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928). The test is designed to ensure that core legislative functions are performed by Congress, pursuant to the bicameralism and presentment requirements, but it is open-ended and flexible. *See* ROBERT L. GLICKSMAN & RICHARD E. LEVY, ADMINISTRATIVE LAW: AGENCY ACTION IN LEGAL CONTEXT 111–12 (3d ed. 2020) (describing the function of the intelligible principle test and identifying "a number of factors that may affect the specificity of the statutory standards needed to satisfy" the test).

57 *See* Linda D. Jellum, *"Which Is to Be Master," the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 861 (2009) (footnote omitted) ("[T]he functionalist approach posits that overlap beyond the core functions is practically necessary and even desirable.").

branches.[58] At least in the current era, functionalism is generally associated with liberal or progressive judges, but is not always or inevitably so.[59]

Morrison v. Olson,[60] in which the Court upheld a good-cause restriction on the removal of an independent counsel appointed under the Ethics in Government Act,[61] provides an excellent example of functionalistic separation of powers reasoning. The Court rejected the formalistic argument that, because the independent counsel was an executive officer engaged in quintessentially executive actions of investigation and prosecution, the President, as head of a unitary executive branch, must be able to remove the independent counsel "at will."[62] Instead, the Court inquired whether the independence afforded the independent counsel by good-cause removal protections would interfere with the essential functions of the President.[63] Because the independent counsel was a temporary appointee tasked with a single investigation and lacked any policy authority, the Court con-

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58 *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 689–90 (1988); M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 611 (2001) (noting that functionalists "tolerat[e] the exercise of 'judicial' or 'legislative' power by an administrative agency—as long as a 'core' function of the department in question was not jeopardized"). This approach requires the Court to determine what the essential functions of each branch are, a matter that is hard to specify and subject to potential manipulation. *See id.* at 613 n.24 (citing E. Donald Elliot, INS v. Chadha: *The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 134–35 (1983)).

59 *See, e.g.*, Victoria F. Nourse & John P. Figura, *Toward a Representational Theory of the Executive*, 91 B.U. L. REV. 273, 291 (2011) (reviewing STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008)) ("Functionalism has been considered a liberal version of the separation of powers on the theory that it presumes that Congress may alter the balance of power as long as it does not offend major textual provisions."); Justin Desautels-Stein, *Pragmatic Liberalism: The Outlook of the Dead*, 55 B.C. L. REV. 1041, 1059 (2014) (associating "legal functionalism with the modern liberal tendency to emphasize foreground rules over background rules" that focus on the purposes of government action and the nature of the social problem being addressed). Indeed, as noted above, *Humphrey's Executor*—a quintessentially functionalist decision permitting independent agencies—was handed down by a conservative court as a means of insulating agencies from the control of a liberal President. *See supra* note 21 and accompanying text.

60 487 U.S. 654 (1988).

61 *Id.* at 691–93. The Act expired pursuant to its "sunset" provision in 1999 and was not renewed. *See*, *e.g.*, Michael B. Rappaport, *Replacing Independent Counsels With Congressional Investigations*, 148 U. PA. L. REV. 1595, 1595 (2000).

62 *Morrison*, 487 U.S. at 689–90 (footnote omitted) ("The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II.").

63 *See id.* at 691 ("[W]e cannot say that the imposition of a 'good cause' standard for removal by itself unduly trammels on executive authority.").

cluded that the good-cause limitation did not interfere with the President's essential functions.[64] Therefore, the good-cause limitation did not violate separation of powers.[65]

As a mode of analysis, functionalism may be attractive because it offers the flexibility to achieve just outcomes in each case.[66] This virtue, however, may also be its vice. To the extent that functionalism uses open-ended tests that weigh competing considerations in light of all the circumstances, there is no objectively correct outcome.[67] Functionalism invites judges to make subjective judgments based on their personal values and ideological preferences. Because judges attach different weights to such factors, just outcomes are in the eye of the beholder and functionalism offers little certainty or predictability for parties who seek to adapt their behavior to the law.[68] As a result, functionalistic regimes may be less likely to produce just outcomes than they appear to be at first glance.[69]

Of course, formalism and functionalism are not absolutes, but rather represent the opposite ends of a spectrum of reasoning styles.[70] No court or judge is entirely formalist or entirely functionalist, and courts and judges may take more or less formalistic or functionalistic approaches in different cases.[71] Nonetheless, the choice between a more formalistic or more functionalistic separation of powers jurisprudence matters for administrative law.[72] Indeed, as described in the fol-

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64 *See id.* at 691–93.

65 *Id.* at 693.

66 *See supra* note 13 and accompanying text.

67 *See* Keith Werhan, *Normalizing the Separation of Powers*, 70 TUL. L. REV. 2681, 2685–86 (1996) ("The open-ended interest balancing that separation-of-powers functionalists typically favor risks incoherency where there is no agreed-upon scale of values by which to measure the risk and reward of a government practice.").

68 *See* Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 712 (1995) ("Because of the inherently subjective and unpredictable nature of all variants of the functionalist model, it is simply impossible to predict a decision on the constitutionality of particular legislative or executive invasions of the judicial province when employing a functionalist standard.").

69 *See id.*

70 *See* Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 486 (1987) (referring to "the methodological continuum running from legal formalism to functionalism").

71 Indeed, *INS v. Chadha* (1983) and *Morrison v. Olson* (1988), discussed above as paradigmatic examples of formalistic and functionalist reasoning, respectively, were decided by the Supreme Court within five years of each other. Perhaps paradoxically, the Court's composition had, if anything, become more conservative between *Chadha*, the formalistic case, and *Morrison*, the functionalistic case, with the appointment of Justices Scalia and Kennedy. *See* Morrison v. Olson, 487 U.S. 654 (1988); INS v. Chadha, 462 U.S. 919 (1983).

72 *See*, *e.g.*, Ronald J. Krotoszynski, Jr., *Cooperative Federalism, the New Formalism, and*

lowing Section, the adoption of a more formalistic approach to separation of powers threatens many doctrines that accommodate the modern administrative state.

B. The Return of Formalism

In recent cases, the Court's conservative justices have embraced a formalistic approach to separation of powers under which there are three distinct categories of governmental power exercised by three distinct branches of government in accordance with three distinct sets of constitutional requirements.[73] As developed in this Section, this approach has implications for the legislative, executive, and judicial powers as they relate to administrative agencies. First, the legislative power to "make the law" must be exercised by Congress pursuant to bicameralism and presentment, which supports reinvigoration of the nondelegation doctrine and undercuts a core rationale for *Chevron* deference.[74] Second, administrative agencies are necessarily engaged in (and limited to) the execution of the laws, which means that the President must be able to control them under a strong unitary executive principle.[75] Third, only the Article III judiciary has the authority to "say what the law is"[76] and resolve cases and controversies, which further undermines *Chevron* deference and has unresolved implications for administrative adjudication.[77]

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the Separation of Powers Revisited: Free Enterprise Fund *and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 DUKE L.J. 1599 (2012) (documenting the rise of formalist separation of powers analysis in the Supreme Court's decisions and suggesting that these decisions raise constitutional concerns about "cooperative federalism" programs in which states implement federal programs).

73 The first of these cases, *Free Enterprise Fund*, emphatically proclaimed this approach in its very first sentence: "Our Constitution divided the 'powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial.'" 561 U.S. 477, 483 (2010) (quoting *Chadha*, 462 U.S. at 951).

74 These views have been espoused by individual Justices in concurring and dissenting opinions, but the chorus is growing, and it appears that major changes in these doctrines may be in the offing. *See infra* notes 84–107 and accompanying text.

75 Like *Free Enterprise Fund*, most of the recent decisions embracing formalism to invalidate provisions of agency statutes on separation of powers grounds concern the appointment, removal, and oversight of officers in the executive branch. *See infra* notes 108–19 and accompanying text.

76 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

77 This principle is less prominent in the cases but appears to be gaining momentum. *See infra* notes 131–40 and accompanying text.

1. Legislative Power

The formalist conception of the *legislative* power to "make the law" insists that important public policy decisions must be made by Congress through the enactment of statutes in conformity with bicameralism and presentment requirements.[78] Formalist critics charge that current administrative law doctrine permits Congress to delegate essential policy decisions, and hence the legislative power, to the executive branch. The exercise of legislative power by the executive branch is, of course, incompatible with separation of powers in general and the requirements of bicameralism and presentment in particular.[79] The essential premise of this critique is the characterization of particular executive actions as falling within the legislative power.[80] Although this sort of argument depends on some clear understanding of what makes a particular government action legislative in character, advocates of this critique have not to this point advanced such an understanding.

In general terms, the nondelegation doctrine reflects a formalistic premise that the legislative power itself, having been vested in Congress, cannot be delegated. The intelligible principle test is a means of determining whether a particular delegation of authority violates this rule, on the theory that the lack of standards means that Congress has vested legislative power in the executive branch.[81] Conversely, the incorporation of meaningful statutory standards indicates that Congress made the antecedent legislative policy choice and that subsidiary policy choices pursuant to those standards are executive actions to implement the statute.[82] Notwithstanding its formalist premise, because the

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78 *See generally supra* notes 44–48 and accompanying text (discussing *Chadha* and *Clinton v. City of New York*).

79 *See* Clinton v. City of New York, 524 U.S. 417, 438 (1998) (concluding that power to amend statutes could not be vested in the President, even pursuant to standards that might satisfy the nondelegation doctrine).

80 *See*, *e.g.*, NFIB v. Dep't of Labor, 142 S. Ct. 661, 669 (2022) (per curiam) (Gorsuch, J., concurring) (explaining that "if the statutory subsection the agency cites really did endow OSHA with the power [to impose a vaccine mandate on employers], that law would likely constitute an unconstitutional delegation of legislative authority").

81 *See, e.g.*, United States v. Chi., Milwaukee, St. Paul, & Pac. R.R. Co., 282 U.S. 311, 324 (1931) ("Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard."); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

82 *See* INS v. Chadha, 462 U.S. 919, 953 n.16 (1983) ("Executive action under legislatively delegated authority that might resemble 'legislative' action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does

intelligible principle test is quite open-ended and accommodates broad administrative discretion, it operates as a functional accommodation for the delegation of substantial policy discretion and authority to agencies.[83]

Justice Thomas has long argued that the Court has abdicated its duty to enforce the prohibition against delegation of the legislative power and failed to "adequately reinforce the Constitution's allocation of legislative power."[84] More recently, in *Gundy v. United States*,[85] other Justices seemed to endorse this critique. Justice Gorsuch, in a dissenting opinion joined by the Chief Justice and Justice Thomas, criticized "the intelligible principle misadventure" that had allowed "delegations of legislative power that on any other conceivable account should be held unconstitutional."[86] He characterized the Court's application of the intelligible principle doctrine as inconsistent with the Framers' delegation to the courts of "the job of keeping the legislative power confined to the legislative branch."[87] Indeed, Justice Gorsuch has even questioned the legitimacy of the Court's precedents "allowing executive agencies to issue legally binding regulations to govern private conduct."[88]

A majority of the justices may be prepared to reinvigorate the nondelegation doctrine. Chief Justice Roberts and Justice Thomas joined Justice Gorsuch's dissent in *Gundy*.[89] Justice Alito, who authored a brief concurring opinion in *Gundy*, also signaled a willingness

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not so require. That kind of Executive action is always subject to check by the terms of the legislation that authorized it. . . ."); Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 685–86 (1980) (Rehnquist, J., concurring in the judgment) (explaining that the nondelegation doctrine ensures that Congress makes "important choices of social policy," that Congress provides an "'intelligible principle' to guide the exercise of the delegated discretion," and "that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards").

83 *See*, *e.g.*, Caring Hearts Pers. Home Servs. v. Burwell, 824 F.3d 968, 969 (10th Cir. 2016) ("Executive agencies today are permitted not only to enforce legislation but to revise and reshape it through the exercise of so-called 'delegated' legislative authority.").

84 Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 77 (2015) (Thomas, J., concurring in the judgment). Justice Thomas argued that the grants of different types of power to the three branches of government "are exclusive." *Id.* at 67.

85 139 S. Ct. 2116 (2019).

86 *Id.* at 2140–41 (Gorsuch, J., dissenting).

87 *Id.* at 2135; *see also* West Virginia v. EPA, 142 S. Ct. 2587, 2618 (2022) (Gorsuch, J., concurring) (noting that "many States have robust nondelegation doctrines designed to ensure democratic accountability in their state lawmaking processes").

88 Kisor v. Wilkie, 139 S. Ct. 2400, 2438 n.84 (2019) (Gorsuch, J., concurring in the judgment).

89 *Gundy*, 139 S. Ct. at 2131 (Gorsuch, J., dissenting).

to reconsider the Court's approach to the nondelegation doctrine.[90] Justice Kavanaugh did not participate in the *Gundy* case, but he has signaled his support for Justice Gorsuch's critique.[91] Justice Barrett's position on the nondelegation doctrine is unclear,[92] but her conservative leanings may indicate that she would support the reinvigoration.[93] In the meantime, however, lower courts for the most part continue to reject nondelegation challenges to federal statutes.[94]

Likewise, the new formalist objections to *Chevron* deference rest in part on the argument that *Chevron* countenances the exercise of legislative power by executive branch agencies.[95] A central premise of

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90 *See id.* (Alito, J., concurring in the judgment) ("If a majority of this Court were willing to reconsider the approach [to the nondelegation doctrine] we have taken for the past 84 years, I would support that effort.").

91 *See* Paul v. United States, 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J., respecting the denial of certiorari) (writing separately "because Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases"). Before joining the Court, Justice Kavanaugh signaled his discomfort with broad delegations of rulemaking authority. *See* U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 417–26 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc) (relying on separation of powers to argue that *Chevron* did not apply in determining the legality of the net neutrality rule and that the delegation of authority to promulgate major rules must be explicit).

92 As noted previously, Justice Barrett did not author any opinions on these issues while on the United States Court of Appeals for the Seventh Circuit. *See supra* note 4.

93 *See* Adam Liptak, *Barrett's Record: A Conservative Who Would Push the Supreme Court to the Right*, N.Y. TIMES (Nov. 2, 2020), https://www.nytimes.com/article/amy-barrett-views-issues.html [https://perma.cc/W9EM-95H3] (reporting Justice Barrett as having similar conservative political and judicial leanings as Justice Scalia); Jason Windett, Jeffrey J. Harden, Morgan L.W. Hazelton, & Matthew E.K. Hall, *Amy Coney Barrett Is Conservative. New Data Shows Us How Conservative*, WASH. POST (Oct. 22, 2020), https://www.washingtonpost.com/politics/2020/10/22/amy-coney-barrett-is-one-most-conservative-appeals-court-justices-40-years-our-new-study-finds/ [https://perma.cc/Z8FC-W3BS] (same).

94 For recent lower court decisions rejecting nondelegation challenges, see Doe #1 v. Trump, 984 F.3d 848, 855 (9th Cir. 2020) (holding that statute authorizing the President to suspend immigration or impose on aliens "any restrictions he may deem appropriate" upon finding that the entry of aliens "would be detrimental to the interests of the United States," contains a sufficient intelligible principle), *vacated sub nom.* Doe #1 v. Biden, 2 F.4th 1284 (9th Cir. 2021); Big Time Vapes, Inc. v. FDA, 963 F.3d 436 (5th Cir. 2020) (rejecting claim that statute authorizing regulation of listed tobacco products and of "any other tobacco products that the Secretary of [Health and Human Services] by regulation deems to be subject to [the statute]" violates the nondelegation doctrine) (alterations in original) (footnote omitted), *cert. denied*, 141 S. Ct. 2746 (2021). *But see* Jarkesy v. Sec. & Exch. Comm'n, 34 F.4th 446, 461–62 (5th Cir. 2022) (holding that a statutory delegation to the SEC of authority to choose between administrative and judicial enforcement of alleged violations of the securities laws lacked an intelligible principle and therefore violated the nondelegation doctrine).

95 As discussed *infra* notes 136–40 and accompanying text, the primary argument against *Chevron* is that judicial deference to agency interpretations is inconsistent with the vesting of the judicial power in the federal courts.

Chevron is that statutory ambiguity constitutes an implicit delegation of authority to the agency to resolve that ambiguity.[96] Justice Thomas has charged that this sort of naked policy authority is, in effect, legislative in character.[97] This point is quite similar to the argument for reinvigorating the nondelegation doctrine insofar as it argues that Congress must be the body to make fundamental policy choices and delegation of those choices to executive branch officials is improper.[98] Indeed, as described more fully below,[99] the Court's conservative justices drew an explicit connection between judicial review of the scope of an agency's statutory authority and the nondelegation doctrine in the decision blocking an Occupational Safety and Health Administration ("OSHA") standard designed to combat the spread of COVID-19 in the workplace.[100] As a practical matter, moreover, repudiation of *Chevron* deference, or the adoption of other means to override agency interpretations of their organic statutes, would further empower the judiciary to narrow the scope of delegated agency authority.[101]

The new formalist critique of legislative delegation seeks a more restrictive and bright-line rule to ensure that only Congress exercises

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96 *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) ("Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

97 *See*, *e.g.*, Michigan v. EPA, 576 U.S. 743, 762 (2015) (Thomas, J., concurring) (citation omitted) ("[I]f we give the force of law to agency pronouncements on matters of private conduct as to which Congress did not actually have an intent, we permit a body other than Congress to perform a function that requires an exercise of the legislative power.").

98 *Compare id.* at 761–62 (arguing that *Chevron* is inconsistent with separation of powers) *with* Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 77–87 (2015) (Thomas, J., concurring in the judgment) (arguing that the intelligible principle test as applied by the Court is inadequate to prevent improper delegations of legislative power).

99 *See infra* notes 147–62 and accompanying text.

100 NFIB v. Dep't of Labor, 142 S. Ct. 661 (2022) (per curiam).

101 The need for the judiciary to police agency authority was central to Chief Justice Roberts' dissent in *City of Arlington v. FCC*, 569 U.S. 290, 312–28 (2013) (Roberts, C.J., dissenting), in which he argued for an exception to *Chevron* deference when an agency is construing the scope of its own authority. *See id.* at 317 ("But before a court may grant [*Chevron*] deference, it must on its own decide whether Congress . . . has in fact delegated to the agency lawmaking power over the ambiguity at issue."). Paradoxically, perhaps, this position was forcefully rejected by Justice Scalia, a separation of powers formalist, who authored the majority opinion in *Arlington*. *See id.* at 297–98 (arguing that because agency authority is prescribed by Congress, "when [agencies] act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires"). Chief Justice Roberts apparently got the last laugh, however, as his opinion in *King v. Burwell*, 576 U.S. 473 (2015), carved out an exception to *Chevron* deference for major questions of statutory construction. *See id.* at 485–86 (2015); *see also* West Virginia v. EPA, 142 S. Ct. 2587, 2619–20 (2022) (Gorsuch, J., concurring) (linking the nondelegation doctrine and the major questions doctrine); *infra* notes 141–46 and accompanying text.

the legislative power.[102] The precise nature of that approach, however, is elusive. Both Justice Thomas and Justice Gorsuch have focused on historical practices at the founding to identify categories of permissible delegation, including limited authority to fill in the details of a statute, conditioning the application of a statutory rule on executive factfinding, and areas of shared legislative and executive authority.[103] Thus, one might imagine a formalistic doctrine in which the Court sought to determine the original public meaning of the "legislative power" that cannot be delegated.[104] Other possible outcomes might include a doctrine that focuses on particular types of policy decisions that must be made by Congress,[105] that identifies nondelegable enu-

102 *See*, *e.g.*, Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 77 (2015) (Thomas, J., concurring in the judgment) ("Although the Court may never have intended the boundless standard the 'intelligible principle' test has become, it is evident that it does not adequately reinforce the Constitution's allocation of legislative power.").

103 *See, e.g.*, *Gundy*, 139 S. Ct. 2136–37 (Gorsuch, J., dissenting) (describing these three historical categories of permissible delegation); *Ass'n of Am. RRs.*, 575 U.S. at 77–81 (Thomas, J., concurring in the judgment) (offering a similar historical account of the nondelegation doctrine).

104 Justice Thomas, Justice Gorsuch, and the Chief Justice appear to favor this approach, insofar as all three joined Justice Gorsuch's *Gundy* dissent. *Gundy*, 139 S. Ct. at 2131 (Gorsuch, J., dissenting). On the other hand, a balanced historical analysis might suggest that the original public meaning of Article I does not support the nondelegation doctrine. *See* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 280 (2021) ("In fact, the Constitution at the Founding contained no discernable, legalized prohibition on delegations of legislative power, at least so long as the exercise of that power remained subject to congressional oversight and control.").

105 *Cf.* Indus. Union Dep't, AFL–CIO v. Am. Petroleum Inst., 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring in the judgment) ("As formulated and enforced by this Court, the nondelegation doctrine . . . ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will.").

merated powers,[106] or that rejects or limits agency authority to issue binding legislative rules.[107]

Ultimately, the key point is that a new formalist reinvigoration of the nondelegation doctrine would be focused on defining the legislative power more clearly. Such a clear definition is necessary to support a categorical rejection of particular delegations. Depending on the final form of this doctrine, it could be used to reject or limit countless statutory delegations of rulemaking authority.

2. Executive Power

The new formalist perspective on the executive power is the most firmly ensconced component of the Supreme Court's separation of powers jurisprudence. In a series of five decisions handed down between 2010 and 2021, the Court has embraced a formalistic conception

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106 To this point, however, there is little support for such a rule. In *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212 (1989), the Court rejected the suggestion that the power to tax was subject to stricter rules against delegation. *See id.* at 220–21 ("We discern nothing in this placement of the Taxing Clause [as the first among the enumerated powers] that would distinguish Congress' power to tax from its other enumerated powers . . . in terms of the scope and degree of discretionary authority that Congress may delegate to the Executive in order that the President may 'take Care that the Laws be faithfully executed.'"). Some cases have suggested that delegation of the power to define criminal offenses violates the nondelegation doctrine, but the status of this idea is unclear. *See* Touby v. United States, 500 U.S. 160, 165–66 (1991) (citing Fahey v. Mallonee, 332 U.S. 245, 249–50 (1947); Yakus v. United States, 321 U.S. 414, 423–27 (1944); and United States v. Grimaud, 220 U.S. 506, 518, 521 (1911)) (acknowledging that "[o]ur cases are not entirely clear as to whether more specific guidance" is required "when Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions," but concluding that it was unnecessary to resolve that issue because the statutes in question would meet even this heightened requirement); *cf.* United States v. Melgar-Diaz, 2 F.4th 1263, 1266 (9th Cir. 2021) (relying on *Touby* in holding that statute criminalizing an alien's entry into the United States "at any time or place other than as designated by immigration officers," 8 U.S.C. § 1325(a)(1), did not violate the nondelegation doctrine).

107 Justice Gorsuch suggested that he might support this view in *Kisor v. Wilkie*, 139 S. Ct. 2400, 2438 n.84 (2019) (Gorsuch, J., concurring in the judgment) ("To be sure, our precedent allowing executive agencies to issue legally binding regulations to govern private conduct may raise constitutional questions of its own." (citing Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 66 (2015) (Thomas, J., concurring in judgment))). Before joining the Court, Justice Kavanaugh also suggested that any delegation of authority to promulgate "major rules" must be explicit. *See* U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 417–26 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc); *see generally* Michael Sebring, Note, *The Major Rules Doctrine: How Justice Brett Kavanaugh's Novel Doctrine Can Bridge the Gap Between the* Chevron *and Nondelegation Doctrines*, 12 N.Y.U. J.L. & LIBERTY 189 (2019) (arguing that this doctrine is an appropriate response to the separation of powers concerns presented by the delegation of authority to promulgate binding legislative rules). The Court's decision in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), which adopted the "major question doctrine" as a strong clear statement rule that limits agencies' authority to promulgate regulations, appears to be a significant step in this direction. *See infra* note 155.

of the executive power derived from the unitary executive theory.[108] Under this doctrine, the President must be able to control the exercise of executive power by all officers within the executive branch, including administrative agencies:

- In *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,[109] the Court invalidated the good-cause removal limitation on the members of the Public Company Accounting Oversight Board, located within the SEC, on the ground that two layers of good-cause removal protections interfered with the President's duty to take care that the laws are faithfully executed.[110]
- In *Lucia v. SEC*,[111] the Court held that ALJs of the SEC qualify as "Officers of the United States" whose appoint-

108 The strong unitary executive theory is not the only possible formalistic view of the executive power. Aside from the President's independent constitutional authority, executive power is derived from statutes. In the absence of a textual basis in the Constitution for the President's removal power, a formalist view of the executive power might emphasize legislative supremacy and postulate that the President's removal power is defined by statute. *See*, *e.g.*, Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 612–13 (1838) (rejecting the suggestion that the President may direct officers to violate duties imposed by law). This kind of approach appears to apply in relation to congressional control over the jurisdiction of the federal courts, which permits Congress to alter the law or strip the courts of jurisdiction, provided that it does not dictate the outcome in a particular case. *See* Patchak v. Zinke, 138 S. Ct. 897, 905 (2018) (citation omitted) ("The simplest example [of an encroachment on the judicial power] would be a statute that says, 'In *Smith v. Jones*, Smith wins.' At the same time, the legislative power is the power to make law, and Congress can make laws that apply retroactively to pending lawsuits, even when it effectively ensures that one side wins."); Bank Markazi v. Peterson, 578 U.S. 212, 226–32 (2016) (concluding that although Congress may not direct the courts to achieve a particular result under old law, it may alter the law in such a manner that it effectively compels that result).

109 561 U.S. 477 (2010).

110 *See id.* at 484; *see also id*. at 495 (stating that the Sarbanes-Oxley Act "not only protects Board members from removal except for good cause, but withdraws from the President any decision on whether that good cause exists. That decision is vested instead in other tenured officers—the Commissioners—none of whom is subject to the President's direct control. The result is a Board that is not accountable to the President, and a President who is not responsible for the Board."). *Free Enterprise Fund* suggested in a footnote that the prohibition against two layers of good cause restrictions might not apply to ALJs working for independent agencies. *See id.* at 507 n.10. In *Jarkesy v. Sec. & Exch. Comm'n*, 34 F.4th 446 (5th Cir. 2022), however, the court held that the statutory removal restrictions for SEC ALJs were unconstitutional under *Free Enterprise Fund* because they involve at least two layers of protection against removal. *Id.* at 464. The court interpreted *Free Enterprise Fund* as "merely [having] identified that its decision does not resolve the issue presented here." *Id.* at 465. It concluded that the insulation stemming from protection of ALJs through multiple for-cause removal restrictions improperly impedes the President's power to remove ALJs based on their exercise of delegated discretionary adjudicatory authority. *Id*.

111 138 S. Ct. 2044 (2018).

ment by subordinate officers within the SEC violated the Appointments Clause.[112]

- In *Seila Law, L.L.C. v. Consumer Financial Protection Bureau*,[113] the Court relied on a strong unitary executive theory to hold that the imposition of good-cause restrictions on the President's removal of the single Director of the Consumer Financial Protection Bureau ("CFPB") violated Article II.[114]
- In *United States v. Arthrex, Inc.*,[115] the Court held that Administrative Patent Judges ("APJs") could not be responsible for final decisions concerning patent validity unless they were principal officers appointed by the President with the consent of the Senate.[116]
- In *Collins v. Yellen*,[117] the Court followed *Seila Law* and held that good-cause restrictions on the President's authority to remove the Director of the Federal Housing

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112 *Id.* at 2049, 2055. Not surprisingly, Justice Kagan's *Lucia* opinion was less formalistic than the other decisions discussed here. Instead of relying on the unitary executive theory, the Court relied on *Freytag v. Comm'r*, 501 U.S. 868 (1991), in which it had held that special trial judges who had been appointed by the Chief Judge of the Tax Court were inferior officers whose appointment had to conform to the Appointments Clause. *See Lucia*, 138 S. Ct. at 2052–53 ("*Freytag* says everything necessary to decide this case."). Nonetheless, *Lucia* is certainly consistent with the strong unitary executive theory and does not Challenge the formalistic approach taken in the other cases.

113 140 S. Ct. 2183 (2020).

114 *Id*. at 2197 ("We hold that the CFPB's leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers."); *see* Duncheon & Revesz, *supra* note 30, at 98 ("In his majority opinion in *Seila Law*, Chief Justice John Roberts embraces formalism, arriving at an apparently bright-line rule that a for-cause removal restriction on a single-headed agency with executive power violates Article II."); Howard Schweber, *The Roberts Court's Theory of Agency Accountability: A Step in the Wrong Direction*, 8 BELMONT L. REV. 460, 461 (2021) ("[Chief Justice Roberts'] majority opinion in *Seila Law* . . . uncritically adopts an 18th century understanding of political accountability and applies that understanding in a formalistic and ultimately self-defeating way to the conditions of modern politics.").

115 141 S. Ct. 1970 (2021).

116 *Id.* at 1985. The patent holder argued that the appointment of APJs by the Secretary of Commerce violated the Appointments Clause because APJs were principal officers, and the Court agreed. *Id.* at 1973. Rather than invalidate the appointment, however, the Court's remedy was to convert APJs into inferior officers, so that their appointment was valid, by permitting the Director of the PTO—an Officer appointed by the President with Senate consent—to review APJ decisions. *See id.* at 1987 ("In sum, we hold that 35 U.S.C. § 6(c) is unenforceable as applied to the Director insofar as it prevents the Director from reviewing the decisions of the PTAB on his own. The Director may engage in such review and reach his own decision. When reviewing such a decision by the Director, a court must decide the case 'conformably to the constitution, disregarding the law' placing restrictions on his review authority in violation of Article II." (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803))).

117 141 S. Ct. 1761 (2021).

> Finance Agency ("FHFA") violated the separation of powers.[118]

At the core of these decisions is a formalistic theory of the unitary executive under which the power of administrative agencies must be controlled through the accountability of agency officials to the President and the President's accountability to the people.[119]

It follows from this theory that any action by administrative agencies to implement statutory requirements—whether to enforce the law, promulgate regulations, or adjudicate cases—is executive in character. Under a formalistic view of separation of powers, agencies must be part of the executive branch because they are neither Congress nor courts and the existence of governmental entities that are not part of any of the three branches is unacceptable.[120] As part of the executive

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118 *Id.* at 1784. Although *Seila Law* had distinguished the FHFA when rejecting it as an historical precedent for the CFPB, *Collins* concluded that those distinctions were immaterial. *See id.* at 1784–87 (rejecting various possible grounds for distinguishing the FHFA from the CFPB). This extension of *Seila Law* prompted objections from Justices Kagan and Sotomayor. *See id*. at 1800–01 (Kagan, J., concurring in part and concurring in the judgment in part) ("My second objection is to the majority's extension of *Seila Law*'s holding . . . . Any 'agency led by a single Director,' no matter how much executive power it wields, now becomes subject to the requirement of at-will removal."); *id*. at 1804 (Sotomayor, J., concurring in part and dissenting in part) ("Never before, however, has the Court forbidden simple for-cause tenure protection for an Executive Branch officer who neither exercises significant executive power nor regulates the affairs of private parties.").

119 This theory does not appear in *Lucia*. *See* Lucia v. SEC, 138 S. Ct. 2044, 2051–55 (focusing narrowly on the question whether ALJs are "Officers of the United States," as opposed to mere employees, for purposes of the Appointments Clause). But it features prominently in *Free Enterprise Fund*, *Seila Law*, *Arthrex*, and *Collins*. *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 496 (invalidating dual good-cause removal provisions because the President "can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith"); *Arthrex*, 141 S. Ct. at 1979 (alteration in original) ("James Madison extolled this 'great principle of unity and responsibility in the Executive department,' which ensures that 'the chain of dependence [will] be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.'" (quoting 1 ANNALS OF CONG. 499, 499 (1789) (Joseph Gales ed., 1834))); Seila L. L.L.C. v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2197 (2020) (emphasizing that "lesser officers must remain accountable to the President, whose authority they wield"); *Arthrex*, 141 S. Ct. at 1979 (reasoning that the power exercised by executive officers "acquires its legitimacy and accountability to the public through 'a clear and effective chain of command' down from the President, on whom all the people vote" (quoting *Free Enter. Fund*, 561 U.S. at 498)); *Collins*, 141 S. Ct. at 1784 (reasoning that the President's removal power "is essential to subject Executive Branch actions to a degree of electoral accountability" (quoting *Free Enter. Fund*, 561 U.S. at 497–98)).

120 *See Seila Law*, 140 S. Ct. at 2197 ("The entire 'executive Power' belongs to the President alone. But because it would be 'impossib[le]' for 'one man' to 'perform all the great business of the State,' the Constitution assumes that lesser executive officers will 'assist the supreme Magistrate in discharging the duties of his trust.' 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939)").

branch, agencies must exercise executive power and cannot exercise legislative or judicial power.[121] Thus, for example, *Seila Law* cast doubt on *Humphrey's Executor's* functionalist analysis, under which the FTC was deemed to act "as a legislative or as a judicial aid" that "occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President."[122]

Under the strong unitary executive principle reflected in the cases, three conclusions inevitably follow from the premise that agencies wield executive power. First, as officers of the United States, agency officials are subject to the Appointments Clause, which contemplates an essential role for the President in the appointment of officers.[123] Second, the President's role as the head of the executive

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121 *See Arthrex*, 141 S. Ct. at 1982 ("While the duties of APJs 'partake of a Judiciary quality as well as Executive,' APJs are still exercising executive power and must remain 'dependent upon the President.'" (quoting 1 ANNALS OF CONG. 611–612 (1789) (Joseph Gales ed., 1834))); *Collins*, 141 S. Ct. at 1785 ("In deciding what it must do, what it cannot do, and the standards that govern its work, the FHFA must interpret the Recovery Act, and '[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law.'" (quoting Bowsher v. Synar, 478 U.S. 714, 733 (1986))).

122 *See Seila Law*, 140 S. Ct. at 2198 ("Rightly or wrongly, the Court [in *Humphrey's Executor*] viewed the FTC (as it existed in 1935) as exercising 'no part of the executive power.'"); *id.* at 2199 (characterizing the Court in *Morrison v. Olson* as "[b]acking away from the reliance in *Humphrey's Executor* on the concepts of 'quasi-legislative' and 'quasi-judicial' power"); *see also id.* (emphasis added) ("In short, *Humphrey's Executor* permitted Congress to give for-cause removal protections to a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was *said* not to exercise any executive power."). To be sure, there are formalistic elements to the analysis in *Humphrey's Executor*, insofar as the Court focused on characterizing the nature of the power being exercised to determine whether the President's removal power attached. *See Humphrey's Ex'r*, 295 U.S. 602, 628 (1934). Nonetheless, the notion that the FTC could exercise "quasi-legislative" or "quasi-judicial" powers as a legislative or judicial aid that is not squarely within the executive branch is distinctively functionalist. *See supra* notes 57–58 and accompanying text.

123 *See Lucia*, 138 S. Ct. at 2051 (citing U.S. CONST. art. II, § 2, cl. 2) ("The Appointments Clause prescribes the exclusive means of appointing 'Officers.' Only the President, a court of law, or a head of department can do so."). The Appointments Clause permits the appointment of inferior officers without presidential involvement. *See* U.S. CONST. art. II, § 2, cl. 2; *Lucia*, 138 S. Ct. at 2051 n.3 (acknowledging the distinction between principal and inferior officers). Most clearly, vesting appointment in the courts eliminates any presidential role in appointments, which is not entirely consistent with the strong unitary executive principle reflected in the recent cases.

In *Morrison v. Olson*, 487 U.S. 654 (1988), the Court rejected the suggestion that it would violate the separation of powers to vest the appointment of executive officers in the courts of law. *See id.* at 673 ("On its face, the language of this 'excepting clause' [for inferior officers] admits of no limitation on interbranch appointments. Indeed, the inclusion of 'as they think proper' seems clearly to give Congress significant discretion to determine whether it is 'proper' to vest the appointment of, for example, executive officials in the 'courts of Law.'"). *Morrison* is a highly functionalist decision. *See supra* notes 60–65 and accompanying text. As a result, the

branch with the duty to take care that the laws be faithfully executed means that the President generally must be able to remove executive branch officials at will.[124] Third, *Arthrex* indicates that any final decision by an executive branch agency must be controlled by the principal officer in charge of that department, who in turn would be subject to appointment and (likely) removal at will by the President.[125]

In this manner, the Court's recent executive power precedents contemplate that the President must directly control any final decision made by executive officers.[126] Ultimately, these principles are simply incompatible with independent agencies, whose continued viability is in serious doubt.[127] Indeed, *Arthrex's* pronouncement that any final executive action must be under the control of a principal officer appointed by the President with Senate consent, taken together with the recent removal power cases, would seem to lead to the inevitable con-

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current Court might reject this broad language and require presidential control over the appointment of executive officers. For the time being at least, it is also possible for Congress to limit presidential involvement in the appointment of inferior officers by vesting their appointment in an independent agency, as the head of a department, as in *Lucia*. Nonetheless, independent agencies may soon be on the chopping block. In any event, President Trump relied on *Lucia* to insist that agency heads must be given free rein when appointing ALJs by exempting them from civil service merit hiring protocols. *See* Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 13, 2018) ("As evident from recent litigation, *Lucia* may also raise questions about the method of appointing ALJs, including whether competitive examination and competitive service selection procedures are compatible with the discretion an agency head must possess under the Appointments Clause in selecting ALJs.").

124 *See*, *e.g.*, *Seila Law*, 140 S. Ct. at 2192 (emphasis added) ("Our precedents have recognized only two exceptions to the President's *unrestricted* removal power.").

125 *See Arthrex*, 141 S. Ct. at 1985 ("Only an officer properly appointed to a principal office may issue a final decision binding the Executive Branch in the proceeding before us.").

126 *See supra* notes 109–19 and accompanying text. Under current doctrine, the President is still unable to control the final decisions of independent agencies, which highlights their incompatibility with the new separation of powers formalism. *See supra* note 121 (collecting language in recent cases indicating that the President must have at will removal power to ensure the political accountability of agency officials).

127 Indeed, it is possible that the Court will invalidate any good-cause limitations on officers who wield executive power, including inferior officers, which is the logical endpoint of its broad pronouncements on the removal power. *See* Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 STAN. L. REV. 175, 193 (2021) ("Unitarians come in many flavors, but most assert that the Constitution requires the President to have the ability to remove all executive officers—principal or inferior—at will."). The recent cases, however, seem less critical of the "exception" to at will removal for inferior officers. *Seila Law*, for example, omitted the sort of veiled criticism of this exception that the Court directed toward *Humphrey's Executor*. *See Seila Law*, 140 S. Ct. at 2199 (discussing exception to at-will removal for inferior officers). Indeed, *Arthrex* implicitly approved good-cause removal provisions for inferior officers as it left good-cause restrictions on removal of APJs intact after it converted them into inferior officers by allowing the Director of the PTO to make the final decision in *inter partes* review cases. *See Arthrex*, 141 S. Ct. at 1986–87; *supra* note 116.

clusion that the President must be able to control the actions of all principal officers by removing them at will.[128] This would seem to include multimember independent agencies, who qualify as heads of departments under *Lucia* and who have no superior other than the President. As discussed more fully below, the Court's recent executive power decisions therefore have important implications for administrative adjudication.[129]

3. Judicial Power

Under the formalist conception of separation of powers, the *judicial* power is the power of the courts to resolve cases and controversies within their jurisdiction, including the power to "say what the law is."[130] This power includes the authority, in a proper case or controversy, to review the actions of the legislative and executive branches for compliance with the law.[131] Insofar as administrative agencies are part of the executive branch and act pursuant to law, the judicial power includes the power to review their actions—in a proper case or controversy.

These principles are at the core of formalist critiques of doctrines that require courts to defer to agencies on legal issues, including *Chevron* deference to agency interpretations of the statutes they administer[132] and "*Auer* deference" to agency interpretations of their own regulations.[133] Although these critiques have yet to ripen into a majority decision repudiating deference to agencies on these matters, there has already been substantial erosion of both doctrines and their for-

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128 *See supra* note 119.

129 *See infra* notes 303–06 and accompanying text (discussing presidential oversight of administrative adjudication).

130 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

131 *See id.* (asserting judicial authority to review the actions of the Secretary of State for compliance with the law and of Congress for compliance with the Constitution).

132 The Court in *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), held that courts are required to defer to any permissible interpretation of an ambiguous statute by the agency with authority to implement that statute. Insofar as *Chevron* rests on the concept of implicit delegation of policy choices to administrative agencies, it is vulnerable to the argument that it represents an improper delegation of legislative power. *See supra* notes 95–101 and accompanying text. Here the focus is on the contention that deference to agencies on matters of law is an abdication of the judicial power.

133 Auer v. Robbins, 519 U.S. 452 (1997); *see* Kisor v. Wilkie, 139 S. Ct. 2400, 2437 (2019) (Gorsuch, J., concurring in the judgment) (arguing that *Auer* deference compromises judicial independence in violation of Article III by allowing the executive branch to "say what the law is"). For further discussion of *Kisor*, see *infra* notes 163–71 and accompanying text (discussing *Kisor* and criticism of *Auer* deference).

mal repudiation may only be a matter of time.[134] In addition, there are some recent decisions that reflect a formalistic approach to the adjudication of cases by tribunals that are not Article III courts.[135]

In recent years, separation of powers formalists have criticized *Chevron* as inconsistent with separation of powers.[136] One of the Court's earliest and most vocal *Chevron* critics has been Justice Thomas. He has argued that deference to an agency's interpretive authority infringes on the judicial power, which "as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws."[137] According to Justice Thomas, by precluding judges from exercising that judgment, *Chevron* "wrests from Courts the ultimate interpretative authority to 'say what the law is' and hands it over to the Executive."[138] In one of his last opinions before retiring, Justice Kennedy likewise deemed it "necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron*" because "[t]he proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary."[139]

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134 The Justices have not had occasion to address comprehensively the implications of this vision of judicial power for other issues, such as the validity of non-Article III adjudication. *See infra* notes 241–54 (discussing the Court's recent decisions applying the public/private rights distinction without comprehensively addressing non-Article III adjudication). Justice Gorsuch, in particular, has expressed his dissatisfaction with the Court's current approach to this issue. *See infra* notes 258–73 (discussing Justice Gorsuch's dissenting opinions in *Oil States Energy Servs., L.L.C. v. Greene's Energy Grp.*, 138 S. Ct. 1365 (2018), and *Thryv, Inc. v. Click-To-Call Techs., L.P.*, 140 S. Ct. 1367 (2020)).

135 *See Oil States*, 138 S. Ct. at 1373, 1378 (relying on the public rights doctrine to uphold administrative determination of patent claims); Stern v. Marshall, 564 U.S. 462 (2011) (invalidating adjudication of traditional common law defamation claim by bankruptcy courts).

136 *See, e.g.*, Marla D. Tortorice, *Nondelegation and the Major Questions Doctrine: Displacing Interpretive Power*, 67 BUFF. L. REV. 1075, 1076 (2019) ("Justice Gorsuch, among others, argues that the current administrative state—specifically post-*Chevron*—violates the separation of powers as the Framers intended."); *see also supra* notes 95–101 and accompanying text (discussing formalist critique of *Chevron* as improperly delegating legislative power to agencies). Paradoxically, perhaps, Justice Scalia, a noted conservative separation of powers formalist, was one of *Chevron's* staunchest defenders. He consistently objected to efforts to limit its scope, most recently in *City of Arlington v. FCC*, 569 U.S. 290, 296–305 (2013) (rejecting exception to *Chevron* deference for agency interpretations of their own authority or jurisdiction). *See supra* note 101*; see also* INS v. Cardoza-Fonseca, 480 U.S. 421, 453–55 (1987) (Scalia, J., concurring in the judgment) (objecting to the Court's refusal to apply *Chevron* deference to an agency's statutory interpretation on a pure question of law).

137 Michigan v. EPA, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) (quoting Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 119 (2015) (Thomas, J., concurring in the judgment)).

138 *Id.* (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

139 Pereira v. Sessions, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring). The Court

Citing Justice Kennedy's plea, Justice Gorsuch has agreed that "there are serious questions" about whether *Chevron* "comports with the . . . Constitution."[140]

Although the Court has not yet repudiated *Chevron* altogether, recent decisions have greatly narrowed its scope.[141] Of particular significance in this regard is the so-called "major questions" doctrine advanced by Chief Justice Roberts in *King v. Burwell*.[142] As enunciated in that case, the doctrine precludes application of *Chevron* deference to an agency on a statutory interpretation issue that involves "a question of deep economic and political significance that is central to [the] statutory scheme [such that] had Congress wished to assign that question to an agency, it surely would have done so expressly."[143] Formulated in that way, the major questions doctrine gives courts discretion to decline deference and resort to de novo review of a statute's meaning by characterizing statutory issues as sufficiently "major," thus negating *Chevron*'s assumption that statutory ambiguity reflects an implicit delegation of gap-filling authority to the agency charged with administering the statute.[144] All of this casts considerable doubt about

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did not apply *Chevron* deference in *Pereira* because it concluded that the statute was clear and unambiguous. *See id*. at 2113. In the same case, Justice Alito called *Chevron* an "increasingly maligned precedent." *Id*. at 2121 (Alito, J., dissenting).

140 Kisor v. Wilkie, 139 S. Ct. 2400, 2446 n.114 (2019) (Gorsuch, J., concurring in the judgment). As an appellate court judge, Gorsuch went further, opining that *Chevron* "appears . . . to qualify as a violation of the separation of powers." Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1154 (10th Cir. 2016).

141 *See generally* GLICKSMAN & LEVY, *supra* note 56, at 318–25 (discussing the emergence of various "non-*Chevron*" issues of statutory interpretation). Notably, in some recent decisions involving judicial review of agency statutory interpretations, the Court has engaged in de novo review without citing either *Chevron* or any other deference doctrine. *See, e.g.*, Babcock v. Kijakazi, 142 S. Ct. 641, 645–47 (2022) (holding that, based on statutory plain meaning, those employed as "dual-status military technicians" do not qualify for exception under the Social Security Act, 42 U.S.C. § 415(a)(7)(A)(III), from the general requirement that benefits be reduced for retirees who receive payments from separate pensions based on employment not subject to Social Security taxes). For a critical assessment of these developments, see Tortorice, *supra* note 136, at 1076 (arguing that efforts by separation of powers formalists such as Justice Gorsuch to eliminate *Chevron* deference reflects the judges' "own policy orientation and goals" and "it serves to reject the growth of the administrative state").

142 576 U.S. 473 (2015).

143 *Id.* at 485–86 (quoting Utility Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)); *see generally* Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 ADMIN L. REV. 445 (2016) (discussing implications of the doctrine).

144 *See*, *e.g.*, Catherine M. Sharkey, *Cutting in on the* Chevron *Two-Step*, 86 FORDHAM L. REV. 2359, 2413 (2018) (claiming that the major questions exception "represents a distinct form of a retreat from *Chevron*, one that could readily be deployed in service of a broader project to tighten the bounds on the ever-inflating administrative state"); Abigail R. Moncrieff, *Reincarnating the "Major Questions" Exception to* Chevron *Deference as a Doctrine of Noninterference (or*

the continuing viability of *Chevron*,[145] which is significant given that "*Chevron* is the most-cited administrative law case of all time."[146]

More recently, the Court's decision in *National Federation of Independent Business v. Department of Labor* ("*NFIB*")[147] transformed the major questions doctrine into a clear statement rule that affirmatively limits agency regulatory authority. Under this approach, an agency's delegated regulatory authority does not include the authority to resolve major questions unless there is an explicit statutory grant of authority to do so.[148] In *NFIB*, the Court upheld a stay blocking an emergency temporary standard issued by OSHA in response to the COVID-19 pandemic.[149] The standard required businesses that employed at least 100 workers to require their employees to either be vaccinated against COVID-19 or take a weekly COVID-19 test and wear a mask at work.[150]

Why Massachusetts v. EPA *Got It Wrong)*, 60 ADMIN. L. REV. 593, 596–98 (2008) (describing the major questions doctrine as a *Chevron* step zero inquiry concerning whether an agency's interpretation "deserves any deference at all").

145 Kristin E. Hickman & Aaron L. Nielson, *The Future of* Chevron *Deference*, 70 DUKE L.J. 1015, 1015–17 (2021) (concluding that the future of *Chevron* "may be the most significant question right now in all of administrative law").

146 Jonathan H. Choi, *Legal Analysis, Policy Analysis, and the Price of Deference: An Empirical Study of* Mayo *and* Chevron, 38 YALE J. ON REG. 818, 820 (2021) (citing Peter M. Shane & Christopher J. Walker, *Foreword:* Chevron *at 30: Looking Back and Looking Forward*, 83 FORDHAM L. REV. 475, 475 (2014)). For a defense of *Chevron*'s constitutionality, see Craig Green, Chevron *Debates and the Constitutional Transformation of Administrative Law*, 88 GEO. WASH. L. REV. 654 (2020).

147 142 S. Ct. 661 (2022) (per curiam). On the same day it issued its decision in *NFIB*, in another per curiam opinion, the Court, by a 5–4 vote, refused to grant a stay sought by litigants claiming that an interim final rule issued by the Department of Health and Human Services that required health care facilities participating in Medicare or Medicaid to ensure that their covered staff are vaccinated against COVID-19 was beyond the Department's statutory authority. *See* Biden v. Missouri, 142 S. Ct. 647, 652–54 (2022) (per curiam). More recently, the Court confirmed that the major questions doctrine is a strong clear statement rule that limits statutory delegations of regulatory authority. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2614 (2022); for further discussion of *West Virginia*, see *infra* notes 155, 159.

148 *See, e.g.*, Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 477 (2021) (footnotes omitted) (describing a "strong version" of the doctrine that "operates as a clear statement principle, in the form of a firm barrier to certain agency interpretations"); Cass R. Sunstein, *The American Nondelegation Doctrine*, 86 GEO. WASH. L. REV. 1181, 1203 (2018) ("[T]he major questions doctrine, understood as a nondelegation canon, has fully arrived."). Justice Kavanaugh was a proponent of this strong version of the doctrine when he sat on the D.C. Circuit. *See* U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 421–22 (D.C. Cir. 2017) (en banc) (Kavanaugh, J., dissenting from the denial of reh'g en banc).

149 *See NFIB*, 142 S. Ct. at 670.

150 COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402, 61552 (2021) (codified at 29 C.F.R. § 1910.501(d)) (providing that an "employer must establish, implement, and enforce a written mandatory vaccine policy," but exempting employers from this requirement "if the employer establishes, implements, and enforces a written policy

In a per curiam opinion, the Court in *NFIB* reversed the Sixth Circuit's refusal to stay the standard, concluding that the parties challenging the standard were likely to prevail on their claim that OSHA lacked the authority to issue it.[151] In particular, because OSHA sought "to exercise powers of vast economic and political significance,"[152] it lacked authority unless the statute "plainly authorizes" the mandate.[153] Although this Article will not delve into the details of the interpretive question, because OSHA's standard would seem to fall comfortably within the statutory text,[154] the majority's conclusion that it did not highlights just how powerful this clear statement rule is.[155]

The implications of the strong version of the major questions doctrine for separation of powers jurisprudence are spelled out at greater length in Justice Gorsuch's concurring opinion, joined by Justices Thomas and Alito. Justice Gorsuch explained that the federal govern-

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allowing any employee not subject to a mandatory vaccination policy to choose either to . . . be fully vaccinated . . . or provide proof of regular testing . . . and wear a face covering"); *see also NFIB*, 142 S. Ct. at 671 (Breyer, J., dissenting) (charging that the majority "obscured" the option the standard gave employers of insisting that all employees either be vaccinated or test regularly and wear masks "by insistently calling the policy 'a vaccine mandate'").

151 *NFIB*, 142 S. Ct. at 663.

152 *Id.* at 665 (quoting Ala. Ass'n of Realtors v. Dep't of Health and Hum. Servs., 141 S. Ct. 2485, 2489 (2021)); *see also id.* (stating that "[t]his is no 'everyday exercise of federal power.' It is instead a significant encroachment into the lives—and health—of a vast number of employees" (quoting *In re* MCP No. 165, 20 F.4th 264, 272 (6th Cir. 2021) (Sutton, C. J., dissenting))).

153 *Id.*

154 Under 29 U.S.C. § 655(c)(1), OSHA may issue temporary emergency standards if "employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards," and the "emergency standard is necessary to protect employees from such danger." The majority did not attempt to deny that these conditions were met.

155 *See NFIB*, 142 S. Ct. at 665. The majority's principal interpretive argument was that the OSHA Act authorizes workplace health and safety standards, not standards to address "the hazards of daily life." *Id.* The standard was "strikingly" different from "the workplace regulations that OSHA has typically imposed" because it "cannot be undone at the end of the workday." *Id*.

The Court removed any doubts about the status and operation of the major questions doctrine in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), which the Court decided shortly before this Article went to press. In *West Virginia*, the Court invoked the doctrine to reject an attempted exercise of EPA's authority under the Clean Air Act to regulate greenhouse gas emissions from existing electric power plants. *Id.* at 2616. The Court made it clear that the doctrine does not simply negate the applicability of *Chevron*. Instead, it requires a reviewing court to begin its statutory interpretation analysis by applying a strong presumption that Congress did not want the agency to have the authority it claims. The agency may not rebut that presumption simply by providing a "plausible textual basis" for its assertion of authority. *Id.* at 2609. Rather, "both separation of powers principles and a practical understanding of legislative intent" require that the agency "point to 'clear congressional authorization' for the power it claims." *Id*. (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

ment must exercise its limited powers in a manner consistent with the Constitution's separation of powers.[156] He identified "at least one firm rule" that ensures that it does so—the major questions doctrine, which requires Congress to "speak clearly" if it wishes to assign to an executive agency decisions "of vast economic and political significance."[157] Justice Gorsuch explicitly linked the major questions doctrine to the nondelegation doctrine, emphasizing that "[i]t ensures that the national government's power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people's elected representatives."[158] "In this respect," he explained, "the major questions doctrine is closely related to what is sometimes called the nondelegation doctrine."[159] Justice Gorsuch reasoned that the major questions doctrine "guard[s] against unintentional, oblique, or otherwise unlikely delegations of the legislative power," provides "'a vital check on expansive and aggressive assertions of executive authority,'"[160] and blocks agencies from seeking to "exploit" statutory gaps or ambiguities to assume responsibilities not intended by Congress.[161] This concern with administrative agencies run amok is also evident in Justice Gorsuch's opinions on the separation of powers implications of agency adjudication, as we describe below.[162]

The Supreme Court's reliance on separation of powers principles to prevent agencies from interpreting their regulatory powers broadly has not been limited to the major questions doctrine. A number of

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156 *Id.* at 667 (Gorsuch, J., concurring).

157 *Id.* (quoting *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489).

158 *Id.* at 668.

159 *Id.*; *see also id.* at 668–69 ("Both [the major questions doctrine and the nondelegation doctrine] are designed to protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic processes that the Constitution demands."); *id*. at 669 ("The nondelegation doctrine ensures democratic accountability."). Justice Gorsuch relied even more heavily on the nondelegation doctrine in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), in which he argued that employment of the nondelegation doctrine is necessary "to vindicate the Constitution," and explained that "while we all agree that administrative agencies have important roles to play in a modern nation, surely none of us wishes to abandon our Republic's promise that the people and their representatives should have a meaningful say in the laws that govern them." *Id.* at 2624 (Gorsuch, J., concurring).

160 *NFIB*, 142 S. Ct. at 669 (quoting U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of reh'g en banc)).

161 *Id.* Quoting the late Justice Scalia, Justice Gorsuch described both the major questions and nondelegation doctrines as serving "to prevent 'government by bureaucracy supplanting government by the people.'" *Id*. (quoting Antonin Scalia, *A Note on the* Benzene *Case*, AM. ENTER. INST. J. ON GOV'T & SOC'Y 25, 27 (1980)).

162 *See* Thryv, Inc. v. Click-To-Call Techs., L.P., 140 S. Ct. 1367, 1387 (2020) (expressing concern over "unfettered executive power over individuals, their liberty, and their property"); *infra* Section III.A.1.

Justices have criticized deference to agency interpretations of their own regulations under *Auer v. Robbins*.[163] In *Kisor v. Wilkie*,[164] a narrow majority of the Court declined to overturn *Auer*, rejecting the litigants' argument that *Auer* deference violates separation of powers by "usurping the interpretive role of courts."[165] Justice Kagan's plurality opinion, which reflected her functionalist approach to separation of powers, rejected concerns about a "supposed commingling of functions" and concluded that there was no separation of powers violation because "courts retain a firm grip on the interpretive function."[166]

Nonetheless, the plurality set forth a number of limitations that greatly limit the scope of *Auer* deference,[167] a point that Chief Justice Roberts emphasized in his separate concurrence.[168] After *Kisor*, *Auer* deference applies only if (1) the regulation is "genuinely ambiguous" after exhausting "all the 'traditional tools' of construction"; (2) the agency construction is "reasonable" and "within the zone of ambiguity"; and (3) "the character and context of the agency interpretation entitles it to controlling weight," because (a) it is "the agency's 'authoritative' or 'official position'"; (b) it implicates the agency's "substantive expertise"; and (c) it "reflect[s] 'fair and considered judgment.'"[169] Like the major questions doctrine and other emerging limits on *Chevron* deference, these restrictions limit the scope of *Auer* deference and provide an easy way for courts to refuse to apply it.

Justice Gorsuch authored a lengthy concurrence in *Kisor*, joined by Justice Thomas and in part by Justices Kavanaugh and Alito, argu-

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163 519 U.S. 452 (1997). Although it is often referred to as *Auer* deference, that decision actually confirmed the approach to judicial review of regulatory interpretations taken previously in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). *Id.* at 461.

164 139 S. Ct. 2400 (2019).

165 *Id.* at 2421. Justice Kagan's opinion was joined by Justices Breyer, Ginsburg, and Sotomayor in its entirety and in part by Chief Justice Roberts. Four Justices—Gorsuch, Thomas, Kavanaugh, and Alito—indicated their support for overruling *Auer*. *Id.* at 2425 (Gorsuch, Thomas, Kavanaugh, and Alito JJ., concurring in the judgment). Given Justice Barrett's replacement of Justice Ginsburg, there may now be five votes for overturning *Auer*.

166 *Id*. at 2421–22; *see also id.* at 2422 (quoting City of Arlington v. FCC, 569 U.S. 290, 304–05 (2013)) ("That sort of mixing is endemic in agencies, and has been 'since the beginning of the Republic.'"). Because these statements were included in a portion of the opinion that Chief Justice Roberts declined to join, only a plurality of the Justices signed onto them.

167 *Id.* at 2414–18.

168 *See id.* at 2424 (Roberts, C.J., concurring in part) ("The majority catalogs the prerequisites for, and limitations on, *Auer* deference: The underlying regulation must be genuinely ambiguous; the agency's interpretation must be reasonable and must reflect its authoritative, expertise-based, and fair and considered judgment; and the agency must take account of reliance interests and avoid unfair surprise.").

169 *Id.* at 2415–17.

ing that *Auer* should be overruled.[170] Of particular relevance here, Justice Gorsuch took the view that *Auer* deference compromises judicial independence in violation of Article III by allowing the executive branch to "say what the law is," thereby improperly "denying the people their right to an independent judicial determination of the law's meaning."[171] The current status of *Auer* deference thus closely parallels that of *Chevron* deference. Both have been attacked as incompatible with Article III. Although neither has been overruled, both have been greatly eroded and may not long survive.

These developments, taken together with the other manifestations of a new separation of powers formalism, suggest that the time is ripe for a more formalist analysis of another separation of powers issue—that is, the extent to which administrative agencies may engage in adjudication. Before considering the contours of what such a new Article III formalism might look like, in the following Section we examine the evolution and status of the current doctrine on agency adjudication.

II. Non-Article III Adjudication

The focus of this Part is on how separation of powers formalism may affect agency authority to adjudicate cases, which the Court's recent decisions have not yet addressed in any comprehensive fashion.[172] To lay the foundations for the analysis of this question, this Part begins with a review of the current doctrine on "non-Article III adjudication."[173] Article III vests the judicial power in an independent

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170 *See id.* at 2425–48 (Gorsuch, J., concurring in the judgment). Justice Gorsuch argued first that *Auer* is inconsistent with the Administrative Procedure Act, which directs the reviewing court to "decide all relevant questions of law" and "determine the meaning or applicability of the terms of an agency action," 5 U.S.C. § 706, and requires agencies to follow notice and comment procedures when they want to change a regulation. *See id.* at 2432–35. He then contended that *Auer* deference violates Article III, which is the part of the opinion relevant here. *See id.* at 2437–41. In addition, Justice Gorsuch challenged the plurality's policy justifications for *Auer* and its reliance on *stare decisis*. *See id.* at 2441–47.

171 *Id*. at 2441; *accord id.* at 2440. This view, which this Article explores further *infra* notes 266–68 and accompanying text, is central to Justice Gorsuch's formalist approach to non-Article III adjudication, which we discuss in Part III of the article. *See infra* Section III.A.1.

172 Nonetheless, there are some signs of dissatisfaction, such as Justice Gorsuch's dissent in *Thryv, Inc. v. Click-To-Call Techs., L.P.*, 140 S. Ct. 1367, 1388–89 (2020) (Gorsuch, J., dissenting). Likewise, the appointment and removal power cases, such as *Free Enterprise Fund*, *Lucia*, *Arthrex*, and *Collins*, have enhanced at least to some degree presidential power over the appointment and removal of agency adjudicators. *See supra* Section I.B.2.

173 This Article uses this term generically to refer to adjudication by tribunals whose adjudicatory officials lack life tenure and salary protections, including administrative adjudication, adjudication by Article I—or legislative—courts, and adjudication by adjuncts to the federal

judiciary, as reflected in its structural separation from the legislative and executive branches[174] and Article III's provisions giving judges life tenure and salary protection.[175] Notwithstanding these structural safeguards, current doctrine permits adjudication by various tribunals whose members lack life tenure and salary protections.[176] This doctrine is convoluted and obscure, but ultimately reflects a functional accommodation that broadly permits non-Article III adjudication, provided that Article III courts retain the essential attributes of judicial power. Nonetheless, many aspects of this doctrine are poorly explained and make little sense, which suggests that it may be ripe for a formalist reassessment.

A. The Early Cases

Like much of the law, the law of non-Article III adjudications has been path-dependent in the sense that early decisions and doctrinal choices have shaped its subsequent development. Of particular importance here are two concepts that continue to shape the analysis: (1) the concept of Article I or legislative courts that may exercise some judicial power outside the confines of Article III; and (2) a distinction between public rights that may be freely assigned to non-Article III tribunals and private rights for which non-Article III tribunals may only act as adjuncts to the Article III courts. Both of these doctrines are poorly explained and frequently misunderstood. To lay the foundations for an alternative account of non-Article III adjudication, the Article begins with an overview of the origins and evolution of both doctrines.

1. Article I (Legislative) Courts

In two important pre-Civil War decisions, *American Insurance Co. v. Canter*[177] and *Dynes v. Hoover*,[178] the Supreme Court upheld

courts—such as magistrates and bankruptcy courts. In using this term, the authors do not mean to imply that adjudication by all these tribunals necessarily takes place outside of Article III.

174 *See generally* U.S. CONST. art. I; U.S. CONST. art. II.

175 *Id*. art. III, § 1 (providing that "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

176 These tribunals include not only administrative agencies, but also Article I courts of various kinds and other judicial adjuncts, such as magistrates and special masters. *See infra* Section II.A.1.

177 26 U.S. (1 Pet.) 511, 546 (1828) (upholding territorial courts staffed by judges without life tenure or salary protections).

adjudication by territorial courts and military tribunals. These cases introduced the concept of Article I or legislative courts exercising judicial power that was created by Congress rather than Article III itself, and therefore did not have to be exercised by the Article III judiciary.[179] Whatever the merits of this concept in relation to territorial or military courts, however, its extension to other kinds of Article I courts is problematic and largely unexplained.[180]

In *Canter*, the Court upheld the adjudication of cases by territorial courts whose judges lacked life tenure or salary protections.[181] This arrangement did not violate Article III even though the territorial courts exercised jurisdiction over matters, such as common law civil actions and criminal prosecutions, that qualified as judicial in nature. Chief Justice Marshall explained:

> [The territorial courts] are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States.[182]

The core idea appears to be that Congress exercises the general authority to govern the territories that would otherwise be exercised by states, including the power to provide for the adjudication of cases and controversies outside of Article III.[183] The Court followed a simi-

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178 61 U.S. (20 How.) 65, 79 (1857) (upholding military courts staffed by judges without life tenure or salary protections).

179 *See Canter*, 26 U.S. (1 Pet.) at 534; *Dynes*, 61 U.S. (20 How.) at 79. The designation of such tribunals as "Article I courts" or "legislative courts" is unfortunate because it is inaccurate and misleading. Article I courts are clearly not part of the legislative branch and are not congressional agencies. Nonetheless, we will continue to use the conventional terminology.

180 As the Article discusses more fully below, the authors think that a better explanation for these cases might be that these judicial functions are properly considered part of the executive power to administer territories in the possession of the United States and to command the military. *See infra* note 188 and accompanying text.

181 *See Canter*, 26 U.S. (1 Pet.) at 534.

182 *Id.* at 546.

183 *See id.* ("Although admiralty jurisdiction can be exercised in the states in those Courts, only, which are established in pursuance of the 3d article of the Constitution; the same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of the general, and of a state government."). The same reasoning supports the constitutionality of local courts for the District of Columbia staffed by non-Article III judges. *See* Palmore v.

lar rationale in *Dynes* to uphold the creation of military courts that operate outside of Article III.[184]

Although these early decisions establish historical precedents for non-Article III tribunals, their reasoning is problematic in several respects. Legislative or Article I courts are created by Congress to adjudicate disputes arising under federal laws,[185] but that does not distinguish them from any other lower federal courts. More fundamentally, these courts cannot be part of the legislative branch or derive their authority from Article I because Congress cannot exercise judicial powers under any approach to the separation of powers.[186] Conversely, these courts cannot be exercising legislative power because they are not Congress and do not follow bicameralism and presentment procedures.

Nor does it make sense to say that a part of the judicial power operates outside of Article III, which vests the federal judicial power in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[187] If what these courts exercise is judicial power, then separation of powers would seem to require that they must be part of the judicial branch.[188] Nonetheless,

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United States, 411 U.S. 389, 400–04 (1973) (analogizing local courts in the District of Columbia to other non-Article III tribunals, including territorial courts and courts martial).

184 *See Dynes*, 61 U.S. (20 How.) at 79 ("Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations; and . . . the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other."); *see also* O'Callahan v. Parker, 395 U.S. 258, 261 (1969) ("[T]he exigencies of military discipline require the existence of a special system of military courts in which not all of the specific procedural protections deemed essential in Art. III trials need apply."); U.S. *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955) ("[T]he Constitution does not provide life tenure for those performing judicial functions in military trials."). The War Powers Clauses, U.S. CONST., art. I, § 8, "supply Congress with ample authority to establish military commissions and make offenses triable by military commission." Bahlul v. United States, 840 F.3d 757, 761 (D.C. Cir. 2016) (Kavanaugh, J., concurring).

185 *See supra* notes 177–84 and accompanying text.

186 *See supra* Section I.A.

187 U.S. CONST. art. III, § 1. That some cases and controversies within the federal judicial power might be resolved by state courts represents a fundamentally different question than the adjudication of cases and controversies by federal courts that lack life tenure and salary protections.

188 *See*, *e.g.*, Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 67 (2015) (Thomas, J., concurring in the judgment) ("[T]he Constitution identifies three types of governmental power and, in the Vesting Clauses, commits them to three branches of Government . . . . These grants are exclusive."). An alternative theory that might validate territorial and military courts would be that even the resolution of common law cases or criminal disputes can be considered executive in character when it is integral to the administration of the territories and the military. *See* Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 388 (1989); *see also*

this sort of reasoning and the designation of such tribunals as Article I or legislative courts stuck and it continues to shape current doctrine in unfortunate ways. The characterization of territorial and military courts within the separation of powers context is not material to this Article's analysis of administrative adjudication, but the reliance on these cases to create and approve of other kinds of "Article I courts" is.[189]

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infra note 321 and accompanying text (suggesting that criminal prosecutions in general represent the vindication of public rights). *But see* Baude, *supra* note 33, at 1569 ("Territorial courts . . . do exercise judicial power rather than executive power.").

Justice Scalia regarded territorial courts as exercising neither federal judicial nor executive power. *See* Freytag v. Comm'r, 501 U.S. 868, 913 (1991) (Scalia, J., concurring in part and concurring in the judgment) (emphases omitted) (stating that territorial courts "do not exercise the national executive power—but neither do they exercise any national judicial power. They are neither Article III courts nor Article I courts, but Article IV courts—just as territorial governors are not Article I executives but Article IV executives."). To support that characterization, he relied on Chief Justice Marshall's opinion in *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828), in which Marshall stated that territorial courts are not "constitutional Courts," but instead are "legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of [the Property Clause, U.S. CONST. art. IV, § 3, cl. 2,] which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States." *Freytag*, 501 U.S. at 913 (Scalia, J., concurring in part and concurring in the judgment); *see also* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 64 (1982) (recognizing the "exceptional" nature of territorial courts in that "the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers"); Mark D. Rosen, *The Radical Possibility of Limited Community-Based Interpretation of the Constitution*, 43 WM. & MARY L. REV. 927, 944 (2002) ("Congress has utilized the Property Clause to create 'territorial courts' (also known as Article IV courts) in the U.S. territories."). In other contexts, congressional reliance on the Property Clause may excuse noncompliance with obligations normally attached to the exercise of a given form of governmental power. *See, e.g.*, Robert L. Glicksman, *Severability and the Realignment of the Balance of Power Over the Public Lands: The Federal Land Policy and Management Act of 1976 After the Legislative Veto Decisions*, 36 HASTINGS L.J. 1, 51–64 (1984) (considering whether reliance on the Property Clause to enact legislation governing the public lands eliminates the need to comply with bicameralism and presentment requirements but concluding that it probably does not). Nevertheless, some proponents of the unitary executive have argued that even though territorial courts are created pursuant to powers vested in Congress under the Property Clause, "those courts must conform to the dictates of Article III" in that they are "inferior Courts" whose judges must "have tenure during good behavior and guarantees against diminishment in salary while in office." Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1035 (2007) (emphasis omitted). This Article does not take a position on whether territorial courts exercise power that is not judicial in the Article III sense.

189 *See* Williams v. United States, 289 U.S. 553, 566 (1933) (upholding the Article I Court of Claims because "legislative courts possess and exercise judicial power—as distinguished from legislative, executive, or administrative power—although not conferred in virtue of the third article of the Constitution"). Whatever the merits of the Court's analysis of territorial and military courts, the reasoning of *Williams* is difficult to square with Article III.

2. *Public and Private Rights*

A second concept that shapes current doctrine is the distinction between public and private rights. Under this distinction, although public rights are the proper subjects of a case or controversy, Congress may freely assign their adjudication to Article I courts or administrative agencies.[190] In contrast, private rights are at the core of the judicial power and Congress may not assign their adjudication to non-Article III tribunals unless the Article III courts retain the essential attributes of judicial power.[191]

The court introduced this distinction in *Murray's Lessee v. Hoboken Land & Improvement Co.*,[192] another pre-Civil War decision. The case involved a tax collector who had absconded with his collected taxes rather than hand them over to the government. Under the applicable statutes, an administrative official audited the accounts and, upon the determination of a deficiency, the Secretary of the Treasury issued a distress warrant authorizing the seizure and sale of the tax collector's property.[193] The case involved a suit by the collector's creditors against the party who had purchased the collector's property at the distress sale. The creditors argued that the seizure and sale—which involved a determination by officials in the executive branch, rather than by an Article III court—violated due process and Article III.[194]

In a lengthy, confusing, and poorly understood opinion that established certain key principles,[195] the Court rejected these claims.[196] First, it acknowledged that there is an overlap between executive and judicial power, observing that the auditing of a receiver of public funds "may be, in an enlarged sense, a judicial act," but so, too, were many administrative actions that "involve[] an inquiry into the existence of facts and the application to them of rules of law."[197] Thus, "it is not sufficient to bring such matters under the judicial power, that

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190 James F. Pfander & Andrew G. Borrasso, *Public Rights and Article III: Judicial Oversight of Agency Action*, 82 OHIO ST. L.J. 493, 501–02 (2021).

191 *Id.* at 545.

192 59 U.S. (18 How.) 272 (1855) (upholding administrative determination of tax collector liability for deficiencies).

193 *See id.* at 274–75.

194 *See id.* at 275–76.

195 *See* Charles Jordan Tabb, *The Bankruptcy Reform Act in the Supreme Court*, 49 U. PITT. L. REV. 477, 489 n.61 (1988) (listing *Murray's Lessee* as one of a number of "confusing" and hard to reconcile decisions); Pfander & Borrasso, *supra* note 190, at 496–97 (referring to the confusion stemming from varying interpretations of *Murray's Lessee*).

196 *Murray's Lessee*, 59 U.S. (18 How.) at 284.

197 *Id.* at 280.

they involve the exercise of judgment upon law and fact."[198] Second, in a famous and oft-quoted passage, the Court further distinguished between public and private rights:

> To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.[199]

In subsequent cases, the Court relied on the public rights doctrine to uphold non-Article III adjudication of public rights by both Article I courts and administrative agencies.[200]

The Court in *Murray's Lessee* did not clearly explain the distinction between public and private rights, leading to many different and conflicting perspectives on these concepts. [201] Because the opinion stated broadly that "the United States may consent to be sued, and may yield this consent upon such terms and under such restrictions as it may think just,"[202] subsequent decisions often linked the concept of public rights to sovereign immunity.[203] Other decisions, however, have

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198 *Id.*

199 *Id.* at 284.

200 Thus, for example, although *Murray's Lessee* involved an administrative determination, the Court relied on the public rights doctrine to uphold the adjudication of a tariff dispute by an Article I court in *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929) (reasoning that legislative courts may be used "to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it," and stating broadly that "[t]he mode of determining matters of this class is completely within congressional control").

201 For further discussion of the meaning of public rights, see *infra* notes 308–21 and accompanying text (concluding that public rights are rights belonging to the public whose assertion is a proper executive function).

202 *Murray's Lessee*, 59 U.S. (18 How.) at 283.

203 *See*, *e.g.*, *Ex parte* Bakelite, 279 U.S. at 452 (describing claims against the United States as "[c]onspicuous" examples of public rights and explaining that claimants do not "have any right to sue on them unless Congress consents; and Congress may attach to its consent such conditions as it deems proper, even to requiring that the suits be brought in a legislative court specially created to consider them"); *see also* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 67–68 (1989) (Scalia, J., concurring) (describing "the device of waiver of sovereign immunity" as

drawn the sovereign immunity rationale for public rights into question by extending the public rights doctrine to cases in which the government is not a party.[204] The Court's most recent decisions have generally relied on the public rights doctrine, defined historically, to resolve cases involving non-Article III adjudication.[205]

A final piece of the historical puzzle was added decades after *Murray's Lessee* in *Crowell v. Benson*,[206] which upheld the administrative determination of compensation for injured maritime workers. Because the claim arose between private parties, the Court concluded that its public rights precedents did not apply.[207] Nonetheless, Congress could vest the initial factual determinations of compensation claims in an administrative agency, whose function was similar to special masters and other "adjunct factfinders" who may assist the courts without violating Article III.[208] Critically, however, *Crowell* indicated that when non-Article III tribunals decide matters of private rights under this adjunct theory, Article III courts must retain the "essential attributes of the judicial power."[209] In particular, the Court indicated that courts must conduct de novo review of questions of law and of determinations of jurisdictional and constitutional facts.[210]

After *Crowell v. Benson*, the doctrine of non-Article III adjudication included both formal and functional elements. The distinction be-

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"central" to the reasoning of *Murray's Lessee*). As will be developed more fully below, the authors think this view misinterprets *Murray's Lessee* and the public rights doctrine, which is better understood as reflecting the view that the enforcement of rights on behalf of the public is an executive act. *See infra* notes 314–31 and accompanying text; *see also* Richard E. Levy & Sidney A. Shapiro, *Government Benefits and the Rule of Law: Toward a Standards-Based Theory of Judicial Review*, 58 ADMIN. L. REV. 499 (2006) [hereinafter Levy & Shapiro, *Standards-Based Theory*] (advancing similar view); Pfander & Borrasso, *supra* note 190 at 550 (rejecting claim that *Murray's Lessee* turned on a waiver of sovereign immunity).

204 *See infra* notes 239–40 (discussing the expansion of public rights in *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985), and *Granfinanciera*, 492 U.S. 33 (1989)).

205 *See infra* Section II.C. (discussing re-emergence of the public rights doctrine); *infra* Section III.A.1. (discussing Justice Gorsuch's approach to non-Article III adjudication).

206 285 U.S. 22 (1932).

207 *Id*. at 51 ("The present case does not fall within the categories [of public rights] just described but is one of private right, that is, of the liability of one individual to another under the law as defined.").

208 *Id.* (reasoning that in private rights cases "there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges").

209 *Id.*

210 *See id.* at 54 ("[T]he reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases."); *id.* at 63 (construing the statute to allow a federal court to "determine for itself the existence of . . . fundamental or jurisdictional facts").

tween public and private rights was a bright-line rule that permitted non-Article III adjudication of certain categories of public rights. When the categorical allowance for non-Article III adjudication of public rights did not apply because a claim involved private parties, the adjunct theory provided for a functional inquiry into whether Article III courts retained the essential attributes of judicial power. In practice, the combination of these two doctrines permitted most forms of non-Article III adjudication.

B. The Functionalist Transformation

After *Crowell v. Benson*, the doctrine remained relatively stable until the 1980s, when a series of decisions reframed the doctrine in functionalist terms. This functionalist approach involved an open-ended balancing of multiple factors, such as the non-Article III tribunal's jurisdiction and powers, the scope of review by Article III courts, and the nature of the rights involved. It also merged the public rights doctrine and the adjunct theory as part of a broader inquiry into whether adjudication outside of Article III impermissibly encroached upon the judicial power.

The transformation of the doctrine began with *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[211] which held that the bankruptcy courts' broad jurisdiction to resolve private claims in bankruptcy proceedings violated Article III. First, the plurality concluded that the adjudicatory authority of the bankruptcy courts could not be sustained under cases upholding territorial courts, courts martial, or adjudication of public rights by legislative courts and administrative agencies.[212] The plurality began by observing that although "[t]he distinction between public rights and private rights has not been definitively explained[,][213] . . . a matter of public rights must at a minimum arise 'between the government and others.'. . . .'"[214] On the other hand, the plurality continued, "'the liability of one individual to another under the law as defined' is a matter of private rights."[215] The plurality reasoned further that "*only* controversies [involving public rights] may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination."[216]

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211 458 U.S. 50 (1982).

212 *Id.* at 65–70.

213 *Id.* at 69 (citing Crowell v. Benson, 285 U.S. 22, 51 (1932)).

214 *Id.* (quoting *Ex parte* Bakelite Corp., 279 U.S. 438, 451 (1929)).

215 *Id.* at 69–70 (citation omitted) (quoting *Crowell*, 285 U.S. at 51).

216 *Id.* at 70.

Second, the plurality also declined to uphold bankruptcy courts as "adjuncts" to the federal district courts, distinguishing *Crowell v. Benson*.[217] In particular, unlike *Crowell*, the bankruptcy courts' jurisdiction was not limited to legislatively created rights but rather extended to traditional common law rights.[218] More fundamentally, to pass muster under the adjunct theory, "the functions of the adjunct must be limited in such a way that 'the essential attributes' of judicial power are retained in the Art. III court."[219] After reviewing the statutory provisions concerning the jurisdiction, authority, and district court review of bankruptcy courts, the Court concluded that the statute "impermissibly removed most, if not all, of 'the essential attributes of the judicial power' from the Art. III district court, and . . . vested those attributes in a non-Art. III adjunct."[220]

The decision in *Northern Pipeline* cast doubt on other adjudications by Article I courts and administrative agencies, but the Court acted quickly to remove those doubts. In *Thomas v. Union Carbide Agricultural Products Co.*,[221] the Court rejected the premise that the "public rights/private rights dichotomy of *Crowell* and *Murray's Lessee* . . . provides a bright-line test for determining the requirements of Article III."[222] The Court in *Thomas* also stated that the right of a pesticide registrant to receive compensation from follow on registrants who used its data to support their request for registration under the federal pesticide regulatory statute "is not a purely 'private' right, but bears many of the characteristics of a 'public' right."[223] Accordingly, the narrow grant of jurisdiction over such claims to an arbitral panel did not deprive the Article III courts of the essential attributes of judicial power even though they retained only a very narrow scope of review.[224]

Subsequently, in *Commodity Futures Trading Commission v. Schor*,[225] the Court upheld the adjudication of common law contract counterclaims by an administrative agency. In so doing, the Court adopted a quintessentially functionalistic three-part test for adminis-

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217 *Id.* at 81.

218 *See id.* at 84–85.

219 *Id.* at 81.

220 *Id.* at 87.

221 473 U.S. 568 (1985).

222 *Id.* at 585–86.

223 *Id.* at 589.

224 *Id.* at 592–93.

225 478 U.S. 833 (1986).

trative adjudication,[226] observing that prior cases "weighed a number of factors, none of which has been deemed determinative, with an eye to the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary."[227] These factors included:

> [(1)] the extent to which the 'essential attributes of judicial power' are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, [(2)] the origins and importance of the right to be adjudicated, and [(3)] the concerns that drove Congress to depart from the requirements of Article III.[228]

Applying these factors in *Schor*, the Court elaborated further on each. First, the CFTC did not exercise the "essential attributes of judicial power."[229] In discussing this factor, the Court emphasized that the CFTC's jurisdiction was limited and that courts retained the power to review the CFTC's decisions under conventional administrative law standards of review.[230] It also noted that the CFTC did not exercise other incidental powers, such as conducting jury trials or enforcing its own subpoenas.[231] Second, the "nature of the claim" included consideration of whether a public or private right was involved, but this factor was not determinative.[232] Indeed, even though the particular claim at issue was a state common law claim "assumed to be at the 'core' of matters normally reserved to Article III courts,"[233] the Court upheld its adjudication by the CFTC.[234] Finally, the Court indicated that Congress's reason for giving the CFTC jurisdiction—to make "effective a specific and limited federal regulatory scheme"—also favored the con-

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226 Indeed, the Court began with the observation that "[i]n determining the extent to which a given congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch, the Court has declined to adopt formalistic and unbending rules." *Id.* at 851. Justice Gorsuch expressed his concerns about this approach in his dissenting opinion in *Thryv, Inc. v. Click-To-Call Techs., L.P.*, 140 S. Ct. 1367, 1388–89 (2020) (Gorsuch, J., dissenting).

227 *Schor*, 478 U.S. at 851.

228 *Id.* (enumeration added).

229 *See id.* at 851.

230 *See id.* at 852–53.

231 *See id.* at 853.

232 *Id.*

233 *Id.*

234 *Id.* at 857 ("We conclude that the limited jurisdiction that the CFTC asserts over state law claims as a necessary incident to the adjudication of federal claims willingly submitted by the parties for initial agency adjudication does not contravene separation of powers principles or Article III.").

stitutionality of the CFTC's adjudication of the claim.[235] *Schor* itself seemed to treat this three-part test as authoritative and overarching, but subsequent cases have returned to a more formalist distinction between public and private rights.

C. The Re-emergence of Public Rights

Not long after *Schor* appeared to adopt a functionalistic three-part test for non-Article III adjudication, the Court began to reintroduce the distinction between public and private rights as a formalistic bright-line rule. Even as it did so, however, the Court also appeared to expand the definition of public rights to encompass many seemingly private rights. In addition, it continued to suggest that non-Article III adjudicators may be able to decide some private rights cases, including possibly common law claims, if the Article III courts retain the essential attributes of judicial power. As a result, there are few limits, outside the bankruptcy courts, on non-Article III adjudication.

In *Granfinanciera, S.A. v. Nordberg*,[236] the Court held that adjudication of fraudulent conveyance claims by bankruptcy courts without a jury violated the Seventh Amendment. Relying on past decisions holding that adjudication of public rights without a jury did not violate the Seventh Amendment,[237] *Granfinanciera* expressly equated the concept of public rights for purposes of Article III and the Seventh Amendment.[238] At the same time, however, the Court sowed confusion concerning the definition of public rights. Stating that *Thomas v. Union Carbide* had "rejected the view that a matter of public rights must at a minimum arise between the government and others,"[239] the

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235 *Id.* at 855. The Court, however, did not indicate whether some reasons might be improper (and, if so, which ones) or otherwise weigh against the validity of non-Article III adjudication.

236 492 U.S. 33 (1989).

237 *See*, *e.g.*, Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442 (1977) (upholding adjudication of OSHA violations by the Occupational Safety and Health Review Commission against a Seventh Amendment challenge).

238 *See Granfinanciera*, 492 U.S. at 53 (stating that "if a statutory cause of action . . . is not a 'public right' for Article III purposes, then Congress may not assign its adjudication to a specialized non-Article III court . . . [a]nd if the action must be tried under the auspices of an Article III court, then the Seventh Amendment affords the parties a right to a jury trial").

239 *Id*. at 54 (citation omitted). With all due respect, however, the *Granfinanciera* Court overstated the reasoning of *Thomas*. The Court in *Thomas* rejected an absolute rule against adjudication of private rights by non-Article III tribunals. *See* Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 585–86 (1985) ("This theory that the public rights/private rights dichotomy of *Crowell* and *Murray's Lessee* . . . provides a bright-line test for determining the requirements of Article III did not command a majority of the Court in *Northern Pipeline*. Insofar as appellees interpret that case and *Crowell* as establishing that the right to an Article III forum is

Court declared that rights between private parties qualify as public rights when "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, has created a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary."[240] Because *Granfinanciera* involved a Seventh Amendment challenge, however, it was unclear whether the Court's treatment of public rights adjudications as per se valid would extend to Article III challenges.

In *Stern v. Marshall*,[241] the Court invalidated the adjudication of a common law defamation counterclaim by a bankruptcy court as a violation of Article III. In doing so, it apparently confirmed that *Granfinanciera*'*s* categorical treatment of public rights applies in the context of both Article III and Seventh Amendment challenges.[242] The adjudication of a common law defamation claim violated Article III because that claim "does not fall within any of the varied formulations of the public rights exception in this Court's cases."[243] The Court also rejected the application of the adjunct theory relied on in *Crowell v. Benson*, citing *Northern Pipeline* in concluding that "it is

absolute unless the Federal Government is a party of record, we cannot agree."). But it did not purport to redefine public rights. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69 (1982) (footnote omitted) ("The distinction between public rights and private rights has not been definitively explained in our precedents. Nor is it necessary to do so in the present cases . . . ."). Instead, *Thomas* explained that "the right created by [the Federal Insecticide, Fungicide, and Rodenticide Act] is not a purely 'private' right, but bears many of the characteristics of a 'public' right." *Thomas*, 473 U.S. at 589. Thus, although *Thomas* may represent the first step along the path toward redefining public rights, it was *Granfinanciera* that completed the journey.

Conversely, although it is often assumed that the government's status as a party is sufficient to establish that a public right is involved, *Jarkesy v. Sec. & Exch. Comm'n*, 34 F.4th 446 (5th Cir. 2022), casts doubt on that assumption. The court held that an administrative enforcement action for securities fraud initiated by the SEC violated the Seventh Amendment because it deprived the defendant of a jury trial. *Id.* at 451. Although the government was a party to the adjudication, the court regarded that fact as a necessary but not sufficient basis for characterizing the rights at issue as public rights. The rights were private rights because fraud prosecutions were regularly brought in English courts at common law, and actions seeking civil penalties are akin to special types of action in debt that sought remedies that could only be enforced at common law. *See id.* at 453–57. The court's reasoning implies that if a statutory public right overlaps with a private common law right, the Seventh Amendment requires a jury trial.

240 *Granfinanciera*, 492 U.S. at 54 (internal brackets omitted). Justice Scalia, who concurred in the judgment, rejected the majority's definition of public rights because it was incompatible with the sovereign immunity rationale for public rights. *See id.* at 67–68 (describing "the device of waiver of sovereign immunity" as "central" to the reasoning of *Murray's Lessee*).

241 564 U.S. 462 (2011).

242 *Id.* at 492–95.

243 *Id.* at 493.

still the bankruptcy court itself that exercises the essential attributes of judicial power" over the defamation claim.[244] Thus, *Stern* left open the possibility that adjudication of private rights, including common law rights, by non-Article III tribunals is valid if their jurisdiction and powers are limited so that Article III courts retain the essential attributes of judicial power. Further, the Court also suggested that the doctrine might apply differently in the context of administrative adjudications.[245]

More recently, in *Oil States Energy Services v. Greene's Energy Group*,[246] the Court relied on the public rights doctrine to uphold the administrative *inter partes* review process through which the Patent and Trademark Office ("PTO") can reconsider and cancel previously issued patents under specified circumstances. Justice Thomas's opinion for the Court acknowledged that the Court had not definitively explained the doctrine and that its precedents had not been entirely consistent, but found it unnecessary to address these problems because "[i]nter partes review falls squarely within the public-rights doctrine."[247] In particular, it was well established that the *grant* of a patent was a matter of public rights arising between the government and the patentee, and "[p]atent claims are granted subject to the qualification that the PTO has 'the authority to reexamine—and perhaps cancel—a patent claim in an inter partes review.' "[248] Thus, the majority rejected the contention that a patent, once granted, becomes a matter of private right,[249] as well as the argument that patent validity could not be withdrawn from the Article III courts because it was historically the subject of suits at common law.[250]

Justice Breyer, joined by Justices Ginsburg and Sotomayor, offered a brief concurrence for the sole purpose of emphasizing that "the Court's opinion should not be read to say that matters involving private rights may never be adjudicated other than by Article III courts, say, sometimes by agencies."[251] Justice Gorsuch, joined by Chief Justice Roberts, argued in dissent that once patents are granted,

244 *Id.* at 500.

245 *See id.* at 494 ("Given the extent to which this case is so markedly distinct from the agency cases discussing the public rights exception in the context of such a regime, however, we do not in this opinion express any view on how the doctrine might apply in that different context.").

246 138 S. Ct. 1365 (2018).

247 *Id.* at 1373.

248 *Id.* at 1374 (citation omitted).

249 *See id.* at 1375–76.

250 *See id.* at 1376–78.

251 *See id.* at 1379 (Breyer, J., concurring).

they become matters of private right and that the history of common law adjudication of patents precludes their assignment to non-Article III tribunals.[252]

In sum, the current doctrine concerning administrative adjudication is confusing and poorly defined. Nonetheless, administrative adjudication is generally valid under one of two theories. Under the first theory, administrative adjudication is broadly permissible because Congress may vest the determination of so-called "public rights" in either the Article III courts or non-Article III tribunals. The Court has not clearly explained, however, why this should be so.[253] Under the second theory, administrative agencies adjudicate cases as adjunct factfinders for the courts, by analogy to magistrates and special masters. This theory allows Congress to vest limited jurisdiction in non-Article III tribunals over specifically defined claims that may not qualify as public rights. It does not, however, save the broad jurisdiction of the bankruptcy courts, which therefore may not adjudicate private common law claims.[254]

Ultimately, notwithstanding some formalistic elements, the analysis of adjudication by non-Article III tribunals is very functionalistic in character; it tolerates Article I courts that do not clearly belong in any branch, acknowledges the mixed functions of non-Article III tribunals, and focuses primarily, as in *Schor*, on whether a particular institutional structure upsets the balance among the three branches by divesting the courts of the essential attributes of judicial power. Nonetheless, there are signs of an emerging Article III formalism. In particular, Justice Gorsuch's dissent in *Oil States*, together with his dissent in

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252 *See id.* at 1380–86 (Gorsuch, J., dissenting).

253 At one point in time, the sovereign immunity theory might have provided an explanation, but that explanation was also problematic for several reasons. First, sovereign immunity did not bar all remedies against the government; suits for injunctive relief against executive officers were permitted under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). Second, the ability to withhold consent does not in fact mean that Congress can grant sovereign immunity on whatever terms and conditions it might wish. *See*, *e.g.*, Republican Party of Minnesota v. White, 536 U.S. 765, 788 (2002) (observing that the "greater power to dispense with [judicial] elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance" in violation of the First Amendment) (alteration omitted). For example, Congress could not employ consent to suit by members of one race and deny that consent to members of other races without violating the Equal Protection Clause. Finally, even if sovereign immunity did at one time explain the doctrine, once the Court extended the definition of public rights to include rights that arise between private parties, sovereign immunity could no longer provide a justification for the doctrine. *See generally infra* notes 308–13 and accompanying text (discussing these objections).

254 *See supra* notes 236–45 and accompanying text (discussing *Granfinanciera* and *Stern v. Marshall*).

a subsequent case involving *inter partes* patent review,[255] reflects a dissatisfaction with this functionalist doctrine and sketches out his vision for a new Article III formalism that could gain traction as part of the broader resurgence of separation of powers formalism.

III. A Formalistic Reassessment of Administrative Adjudications

Given the emergence of the Court's new separation of powers formalism, it seems likely that the Court will also reassess its doctrine on non-Article III adjudication. This Part of the Article considers what such a formalistic reassessment might look like. It begins by piecing together the elements of a new Article III formalism that are reflected in the Court's recent decisions and concludes that this approach would embrace the distinction between private and public rights. Relying on that distinction, the emerging formalism would require Article III courts to determine any matter involving private rights but permit determination of public rights—historically defined—by non-Article III tribunals. After identifying the problems with this approach, this Article offers an alternative analysis focused on the availability and scope of judicial review that is consistent with separation of powers formalism and would be much more workable.

A. Article III and Separation of Powers

Although it is not yet fully formed, there are clear signs of a new formalist conception of Article III. Aspects of this conception are reflected in emerging critiques of *Chevron* and *Auer* deference[256] and in a pair of recent decisions concerning *inter partes* review of patents. This conception begins with the premise that the government cannot take away a person's rights without the involvement of the independent Article III judiciary, especially concerning the interpretation of applicable law.[257] This premise, however, is qualified by the public rights doctrine, which permits executive action to determine public rights without any judicial involvement. For other rights, this Article III formalism would appear to demand that the Article III judiciary

255 Thryv, Inc. v. Click-To-Call Techs., L.P., 140 S. Ct. 1367, 1378–89 (2020) (Gorsuch, J., dissenting); *see infra* notes 265–73 (discussing Justice Gorsuch's dissents in *Oil States* and *Thryv*).

256 *See supra* notes 136–40 and accompanying text (discussing formalist critique of *Chevron* deference); *supra* notes 163–71 and accompanying text (discussing formalist critique of *Auer* deference).

257 This principle was the starting point for Justice Gorsuch's dissents in *Oil States* and *Thryv*, discussed more below. *See infra* Section III.A.1.

must play a role, including de novo authority to interpret statutes and regulations, and to resolve other legal questions.

1. Justice Gorsuch's Private Rights Formalism

Justice Gorsuch has been the most forceful advocate of a new Article III formalism. Although elements of this view are reflected in his critiques of *Chevron* and *Auer* deference, the focus here is on a pair of dissenting opinions in two recent cases involving *inter partes* patent review: *Oil States Energy Services, L.L.C. v. Greene's Energy Group*,[258] and *Thryv, Inc. v. Click-to-Call Technologies, L.P.*[259] *Inter partes* review is a process through which parties may petition the PTO to cancel previously granted patents on specified grounds related to patentability.[260] Under current statutes, *inter partes* review is conducted by APJs within the PTO who are subject to good-cause removal protections.[261] As discussed above,[262] *Oil States* relied on the public rights doctrine to reject a patent holder's argument that "actions to revoke a patent must be tried in an Article III court before a jury."[263] In *Thryv*, the Court interpreted a provision foreclosing judicial review of the PTO's decision to institute *inter partes* review broadly so that the provision precludes judicial review of the PTO's decision to institute review based on an untimely petition.[264] The

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258 138 S. Ct. 1365 (2018).

259 140 S. Ct. 1367 (2020). Justice Gorsuch also relied on this approach in his concurring opinion in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). *See supra* notes 170–71 and accompanying text (discussing Justice Gorsuch's separation of powers critique of deference to an agency's interpretation of its own regulations).

260 *See* 35 U.S.C. § 311(a)–(b) ("[A] person who is not the owner of a patent may file with the Office a petition to institute an inter partes review of the patent [and] request to cancel as unpatentable 1 or more claims of a patent only on a ground that could be raised under section 102 or 103 and only on the basis of prior art consisting of patents or printed publications.").

261 *See generally* United States v. Arthrex, 141 S. Ct. 1970, 1977 (2021) (describing the Patent Trial and Appeal Board); *id.* at 1979–80 (describing the appointment of Administrative Patent Judges who adjudicate cases for the Board); *id.* at 1987 (describing the applicability of good cause removal requirements). The appointment and status of APJs was the issue in *Arthrex*, which permitted the Director of the PTO to review their decisions de novo so as to convert them into inferior officers. *See supra* note 115 and accompanying text.

262 *See supra* notes 246–52 and accompanying text.

263 *Oil States*, 138 S. Ct. at 1372; *cf. Thryv*, 140 S. Ct. at 1378 (Gorsuch, J., dissenting) ("Today the Court takes a flawed premise—that the Constitution permits a politically guided agency to revoke an inventor's property right in an issued patent—and bends it further, allowing the agency's decision to stand immune from judicial review.").

264 Under 35 U.S.C. § 314(d), the director's determination whether to institute an *inter partes* review is "final and nonappealable." Under 35 U.S.C. § 315(b), *inter partes* review is barred if the petition requesting it is filed more than one year after the petitioner is served with a complaint alleging infringement. *Thryv* held that § 314(d) foreclosed judicial review of a patent holder's claim that the PTO instituted *inter partes* review in violation of § 315(b). *Thryv*, 140 S.

Thryv majority did not discuss Article III or the constitutionality of foreclosing review, but rather focused solely on the interpretation of the statute that precluded review.

Justice Gorsuch dissented in both cases, articulating a broad principle that Article III courts must resolve cases and controversies involving "personal rights."[265] In Justice Gorsuch's view, moreover, once a patent has been granted, it becomes the private property of the patent holder that cannot be canceled or withdrawn without involvement of the Article III judiciary.[266] The central premise of Justice Gorsuch's objection in both *Oil States* and *Thryv* is that Article III operates as a check on executive action that interferes with life, liberty, or property:

> As the majority [in *Oil States*] saw it, patents are merely another public franchise that can be withdrawn more or less by executive grace. So what if patents were, for centuries, regarded as a form of personal property that, like any other,

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Ct. at 1385. In an earlier case, the Court interpreted § 314(d) to preclude review when a challenge to institution of *inter partes* review is based on "questions that are closely tied to the application and interpretation of statutes related to the Patent Office's decision to initiate inter partes review." Cuozzo Speed Techs., L.L.C. v. Lee, 579 U.S. 261, 275–76 (2016). *Thryv* therefore represented an extension of the preclusion of review to matters unrelated to the statutory grounds for initiating *inter partes* review.

265 *Oil States*, 138 S. Ct. at 1380 (Gorsuch, J., dissenting) ("Until recently, most everyone considered an issued patent a personal right—no less than a home or farm—that the federal government could revoke only with the concurrence of independent judges."). Justice Gorsuch was joined in his *Oil States* dissent by Chief Justice Roberts. *Id.* He was also joined in his *Thryv* dissent by Justice Sotomayor, although she did not join his harshest denunciations of the Court's functional Article III analysis. *Thryv*, 140 S. C.t at 1387 (Gorsuch, J. dissenting).

266 In both dissents, Justice Gorsuch analogized the grant of a patent to the acquisition of a homestead, emphasizing that once a homesteader had satisfied the conditions for a patent in land, the homestead became private property subject to the full measure of constitutional protection. *See Oil States*, 138 S. Ct. at 1385 (internal citations omitted) ("[W]hile the Executive has always dispensed public lands to homesteaders and other private persons, it has never been constitutionally empowered to withdraw land patents from their recipients (or their successors-in-interest) except through a judgment of a court."); *see also Thryv*, 140 S. Ct. at 1387 (Gorsuch, J., dissenting) ("Much like an inventor seeking a patent for his invention, settlers seeking these governmental grants had to satisfy a number of conditions. But once a patent issued, the granted lands became the recipient's private property, a vested right that could be withdrawn only in a court of law."). The majority, however, emphasized that the grant of a patent, unlike the grant of a homestead, is conditioned on the possibility that it may be withdrawn using *inter partes* review. *See Oil States*, 138 S. Ct. at 1374 (concluding that the distinction between the initial grant of a patent and *inter partes* review after it has been granted "does not make a difference" because "[p]atent claims are granted subject to the qualification that the PTO has 'the authority to reexamine—and perhaps cancel—a patent claim' in an inter partes review") (quoting *Cuozzo*, 579 U.S. at 267); *see also* Assiniboine & Sioux Tribes v. Nordwick, 378 F.2d 426, 429 (9th Cir. 1967) (noting that in public land law, a "disposal" of land by the United States pursuant to a statute such as the Homestead Act refers to a "final and irrevocable act").

> could be taken only by a judgment of a court of law. So what if our separation of powers and history frown on unfettered executive power over individuals, their liberty, and their property. What the government gives, the government may take away—with or without the involvement of the independent Judiciary.[267]

In effect, Justice Gorsuch advocated a categorical rule that Article III requires an independent judiciary to review agency decisions that affect private property, and other protected rights, in much the same way that the unitary executive principle requires Presidential control over matters within the executive branch.[268]

This formalistic rule, however, is subject to a formalistic exception for matters of public rights, which can be decided without the involvement of the judiciary.[269] Thus, neither of Justice Gorsuch's dissents challenged the public rights doctrine itself, but rather disputed the conclusion in *Oil States* that patents remain public rights after they have been granted. Both the majority and the dissent in *Oil States*, moreover, focused on the historical treatment of patents to determine whether they are public rights. [270] In *Thryv*, Justice Gorsuch also expressed his disdain for the more functionalistic aspects of the Court's Article III jurisprudence, particularly the *Schor* test, disparaging Justice Breyer's view "that agencies should be allowed to withdraw even private rights if 'a number of factors'—taken together, of course—suggest it's a good idea."[271] Justice Gorsuch's view of administrative

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267 *Thryv*, 140 S. Ct. at 1387.

268 Justice Gorsuch's concurrence in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), relied on a similar premise. *See id.* at 2440 ("The judicial power has always been understood to provide the people with a neutral arbiter who bears the responsibility and duty to 'expound and interpret' the governing law, not just the power to say whether *someone else's* interpretation, let alone the interpretation of a self-interested political actor, is 'reasonable.'"); *id*. at 2441 (arguing that *Auer* "den[ies] the people their right to an independent judicial determination of the law's meaning").

269 This exception apparently reflects the view that "public rights" are not rights at all, but rather may be allocated in the discretion of government. *See* Kent Barnett, *Due Process for Article III—Rethinking* Murray's Lessee, 26 GEO. MASON L. REV. 677, 678 (2019) (arguing that "extending the public-rights exception, in general, only to matters concerning privileges or benefits . . . is best"); Thomas W. Merrill, *Fair and Impartial Adjudication*, 26 GEO. MASON L. REV. 897, 906, 914–15 (2019) [hereinafter Merrill, *Impartial*] (calling the public rights exception "nebulous" and arguing that the exception should apply "only to discretionary government benefits, such as entitlement programs, subsidy programs, immigration rights, and government employment"). This approach would reinstitute the rights-privilege distinction and subject many critically important governmentally created interests to, in Justice Gorsuch's terms, "unfettered executive power." *See infra* notes 281–83 and accompanying text.

270 *See Oil States*, 138 S. Ct. at 1375–78 (majority opinion); *id.* at 1381–85 (Gorsuch, J., dissenting).

271 *Thryv*, 140 S. Ct. at 1389 (Gorsuch, J., dissenting) (referencing *Schor* and Justice

adjudication in *inter partes* review cases resonates with his recent Article III criticism of *Chevron* and *Auer* deference.[272] Both rest on the core premise that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[273]

2. Analytical Concerns Associated with Article III Formalism

Although the authors agree with the core premise that Article III requires the involvement of the independent judiciary in the resolution of cases or controversies, they believe that it would be a mistake for the Court as a whole to adopt Justice Gorsuch's approach to determining the limits of administrative adjudicatory authority. This Part of the Article considers that approach, highlighting its focus on an individual right to Article III adjudication. This approach, the authors conclude, does not adequately account for the structural component of Article III within the larger separation of powers framework. As a result, it would permit Congress to transfer all but a narrow band of traditional common law private rights claims to the unreviewable discretion of administrative agencies. Conversely, it would also commit the courts to an extensive historical inquiry in determining the validity of many administrative adjudications. Ultimately, as is developed in Sections III.B and III.C, there is an alternative understanding of administrative adjudication that is consistent with Article III formalism, protects the role of an independent Article III judiciary in the structure of government, and is workable in practice.

One striking feature of Justice Gorsuch's analysis is his characterization of Article III adjudication as involving "personal rights."[274] Although the cases have long recognized that Article III has both structural and individual rights components, separation of powers is ordinarily understood primarily in structural terms.[275] To be sure, sep-

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Breyer's concurring opinion in *Oil States*); *see also id.* (emphasis omitted) (citations omitted) ("These 'factors' turn out to include such definitive and easily balanced considerations as the 'nature of the claim,' the 'nature of the non-Article III tribunal,' and the 'nature and importance of the legislative purpose served by the grant of adjudicatory authority to a tribunal with judges who lack Article III's tenure and compensation protections.' In other words, Article III promises that a person's private rights may be taken only in proceedings before an independent judge, unless the government's goals would be better served by a judge who isn't so independent.").

272 *See supra* notes 136–40 and accompanying text (discussing formalist critique of *Chevron* deference); *supra* notes 163–71 and accompanying text (discussing formalist critique of *Auer* deference).

273 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

274 *See supra* note 265 and accompanying text.

275 Thus, for example, the Court in *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986) described its task as "determining the extent to which a given congressional decision

aration of powers is a structural arrangement that protects individual rights and liberties,[276] but it does so indirectly by preventing the concentration of power and promoting the rule of law.[277] Even if individual private parties have standing to raise separation of powers challenges when government action in violation of separation of powers requirements causes them an injury, the doctrine does not ordinarily characterize these claims in terms of individual rights, such as an individual right to bicameralism and presentment or to presidential oversight.[278]

Of course, Article III may be different insofar as the jurisdiction of the Article III judiciary to decide cases and controversies is necessarily attached to the interests of individual litigants. Nonetheless, any individual right to an Article III court also sounds in due process, and might be better understood in those terms.[279] When the federal government deprives people of protected interests in life, liberty, or property, the process due in at least some cases arguably includes the involvement of the Article III judiciary. There is a clear overlap between Article III and due process, especially in the context of the pub-

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to authorize the adjudication of Article III business in a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch." *Id.* at 851. In addition, the Court addressed this question even though the party challenging adjudication by an administrative agency had waived any personal right to an Article III court. *See id.* at 849 ("In the instant cases, Schor indisputably waived any right he may have possessed to the full trial of Conti's counterclaim before an Article III court.").

276 *Cf.* Clinton v. City of New York, 524 U.S. 417, 497 (1998) (Breyer, J., dissenting) (arguing that because statutory provisions creating a line-item veto "compl[ied] with separation-of-powers principles," they did not "threaten the liberties of individual citizens").

277 *See id.* at 450 (Kennedy. J., concurring) ("Separation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty.").

278 Parties may, of course, raise separation of powers challenges to government actions that injure them, such as claims that officers of the United States were improperly appointed. Although some of the cases in which the Court has agreed to resolve such challenges, such as *Lucia*, suggest that parties have the right to the determination of their claims by properly appointed officers, the primary focus of the unitary executive theory is structural. *See supra* notes 108–09 and accompanying text. By the same token, the Court's legislative power cases focus primarily on structure. *See, e.g.*, *Clinton*, 524 U.S. at 450 (Kennedy, J., concurring) ("So convinced were the Framers that liberty of the person inheres in structure that at first they did not consider a Bill of Rights necessary."); *see* INS v. Chadha, 462 U.S. 919, 946 (1983) ("The very structure of the Articles delegating and separating powers under Arts. I, II, and III exemplify the concept of separation of powers . . . .").

279 The same could be said for the Seventh Amendment, which is an explicit specification of one core element of fair procedures. *See* U.S. CONST. amend. VII.

lic rights doctrine, insofar as *Murray's Lessee* dealt with both due process and Article III claims.[280]

Understanding Justice Gorsuch's analysis in due process terms highlights its correlation with the traditional right-privilege distinction that the Court repudiated for purposes of due process in *Goldberg v. Kelly*.[281] In particular, Justice Gorsuch accepted the premise that the initial award of a patent was a matter of executive discretion (a mere privilege), but argued that once awarded, a patent becomes private property that is therefore protected by Article III (a right).[282] Insofar as the Court's due process jurisprudence is designed to protect individual rights, any individual right to an Article III tribunal might be addressed more coherently under the Due Process Clause.[283]

The more important point for present purposes, however, is that Article III analysis must account for the structural role of the Article III courts and protect the structural interests of the federal judiciary. Focusing on the structural issues raised by non-Article III adjudication highlights the importance of a critically important factor that is often ignored in the cases: the status and character of the non-Article III tribunal.[284] When Congress allocates jurisdiction to the bankruptcy courts, which were the focus of *Marathon*, *Granfinanciera*, and *Stern v. Marshall*, the structural interests of the judiciary are only minimally implicated because bankruptcy courts are adjuncts of the district court and bankruptcy judges are removable by the courts for good cause.[285]

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280 Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 275–80, 283–86 (1855).

281 397 U.S. 254 (1970).

282 *See* Thryv, Inc. v. Click-to-Call Techs., L.P., 140 S. Ct. 1367, 1387 (2020) (Gorsuch, J., dissenting) (criticizing the Court's decision as treating patents as "merely another public franchise that can be withdrawn more or less by executive grace"); Oil States Energy Servs., L.L.C. v. Greene's Energy Grp., 138 S. Ct. 1365, 1385 (2018) (Gorsuch, J., dissenting) ("Just because you give a gift doesn't mean you forever enjoy the right to reclaim it. And, as we've seen, just because the Executive could *issue* an invention (or land) patent did not mean the Executive could *revoke* it.").

283 It should not be surprising that the Court's conservative majority might seek to reinstitute the right-privilege distinction. This Article does not take a position on that issue, other than to suggest that such a course of action should be undertaken directly and explicitly, rather than through the "back door" of the public rights doctrine.

284 Although the Court has occasionally adverted to the potential differences between adjudication by the bankruptcy courts and adjudication by administrative agencies, *see, e.g.*, Stern v. Marshall, 564 U.S. 462, 487 (2011), the cases tend to treat adjudication by Article I courts and administrative agencies indiscriminately. *See supra* Sections II.B–C.

285 *See* 28 U.S.C. § 151 ("In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district."); *See* 28 U.S.C. § 152(e) ("A bankruptcy judge may be removed during the term for which such bankruptcy judge is appointed, only for incompetence, misconduct, neglect of duty,

Granting jurisdiction to the bankruptcy courts may dilute the power of the Article III judiciary, but it does not give away any judicial power to another branch of government.[286] By way of contrast, administrative agencies are squarely part of the executive branch,[287] so legislation that takes part of the judicial power and gives it to administrative agencies raises much more serious structural concerns.[288]

Equally important, as the Court underscored in *Schor*, the structural interests of the federal courts may be implicated even when the adjudication of a matter does not implicate any individual right to an Article III court.[289] This is particularly true regarding the courts' role in protecting the rule of law—which applies even when executive action does not deprive anyone of a private right.[290] By focusing solely on the individual rights perspective and the public rights doctrine, Justice Gorsuch's approach would permit Congress to bar judicial review of a broad array of executive actions on the theory that Congress may remove matters involving public rights entirely from the purview of the courts. This outcome would be incompatible with Article III and the rule of law.

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or physical or mental disability and only by the judicial council of the circuit in which the judge's official duty station is located.").

286 In addition, given these provisions, it is appropriate to consider the bankruptcy courts, like magistrate judges and special masters, as adjuncts of the Article III judiciary. Similarly, because bankruptcy adjudications do not raise serious structural issues, it makes sense to permit private parties to consent to the jurisdiction of the bankruptcy courts.

287 *See supra* Section I.B.3. Leaving bankruptcy courts aside, it is not entirely clear whether Article I courts are part of the legislative, executive, or judicial branch, or perhaps belong somewhere else in the structure of government. *See supra* notes 177–89 and accompanying text (discussing precedents dealing with Article I courts). Thus, for example, the Supreme Court treated the Tax Court as a "court" for purposes of the Appointments Clause in *Freytag v. Comm'r*, 501 U.S. 868, 888–90 (1991), while the Court of Appeals for the District of Columbia Circuit rejected a challenge to the President's authority to remove Tax Court judges on the ground that the Tax Court was part of the executive branch and thus, in effect, an administrative agency in *Kuretski v. Comm'r*, 755 F.3d 929, 939 (D.C. Cir. 2014) (concluding that it was unnecessary to address the validity of interbranch removal of Tax Court judges by the President because "the Kuretskis have failed to persuade us that Tax Court judges exercise their authority as part of any branch other than the Executive").

288 For this reason, this Article questions the applicability of the "adjunct" theory to administrative adjudication. It is one thing to permit adjuncts that are attached to, and controlled by, the Article III judiciary to adjudicate as adjuncts to the courts; it is another thing entirely to treat executive branch officials controlled by the President as adjuncts to the courts.

289 *See supra* note 275 and accompanying text (discussing the waiver of any Article III objection to CFTC adjudication of common law breach of contract counterclaims).

290 *See generally* Levy & Shapiro, *Standards-Based Theory*, *supra* note 203 (arguing that judicial review of executive action must be available whenever legal standards govern executive action).

Focusing on structure also underscores another important point. From a structural perspective, what matters is the availability and scope of judicial review—not whether an initial decision has been made using a process that resembles adjudication.[291] As this Article develops more fully in the following Section, this sort of initial determination ordinarily fits comfortably within the concept of executive power and does not threaten the Article III judiciary. By focusing on the public rights doctrine in connection with the initial determination of a matter by the executive branch, then, the new Article III formalism threatens to embroil the courts in a largely unnecessary historical excavation concerning the proper characterization of any matter determined by means of administrative adjudication. The historical understanding of public rights is elusive and contested.[292] In *Oil States*, for example, both Justice Thomas's majority opinion and Justice Gorsuch's dissent engaged in an extensive historical analysis of whether patents, once granted, became private rights, but reached fundamentally different conclusions.[293]

Following the path of public rights formalism to evaluate initial executive branch decisions that use quasi-adjudicatory procedures would therefore commit the courts to a complex and inconclusive historical analysis of the nature of rights adjudicated by each agency.

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291 We elaborate more fully on this point below. *See infra* Section III.C.

292 *See*, *e.g.*, Gregory Ablavsky, *Getting Public Rights Wrong: The Lost History of the Private Land Claims*, 74 STAN. L. REV. 277, 285 (2022) ("To the extent that the Court is looking to the past to guide its jurisprudence, . . . the history of private land claims demonstrates that the administrative adjudication of rights, including to property, is on firmer historical footing than current critics argue."); Jack M. Beermann, *Administrative Adjudication and Adjudicators*, 26 GEO. MASON L. REV. 861, 881, 889 (2019) (arguing that "[t]here are six categories of public rights cases, each of which present slightly different issues concerning the propriety of this assignment" and that "[t]here are three categories of private rights, each of which presents different considerations concerning the propriety of allocating them to a non-Article III tribunal"); John Harrison, *Public Rights, Private Privileges, and Article III, 54* GA. L. REV. 143, 149 (2019) (arguing that public rights represent "the proprietary interests of the government"); Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 565 (2007) [hereinafter Nelson, *Political Branches*] (defining "core private rights" as "legal entitlements that belonged to discrete individuals (rather than the public as a whole)" and concluding that as a matter of historical practice "[t]he political branches could conclusively determine various 'public matters,' but the judiciary had to be able to resolve other kinds of factual issues for itself"); Pfander & Borrasso, *supra* note 190, at 539 ("The lesson of Murray's Lessee boils down to this: Congress has discretion in assigning to agencies or to courts the authority to create new (constitutive) rights, but must preserve courts' role in resolving disputes over individual indebtedness.").

293 *See supra* notes 246–50 and accompanying text (discussing *Oil States*). This inquiry will become even more fraught and difficult if courts follow the Fifth Circuit's approach in *Jarkesy v. Sec. & Exch. Comm'n*, 34 F.4th 446 (5th Cir. 2022). *See supra* note 239 (describing *Jarkesy*'s conclusion that the administrative adjudication involved a private right even though the government was a party because fraud claims were adjudicated by courts at common law).

Even if it is ultimately the case that the vast majority of administrative adjudications would qualify under the public rights exception, this sort of historical analysis would unnecessarily consume the resources of the judiciary and private litigants without producing satisfactory answers to core questions.[294]

In addition, Justice Gorsuch's public-private rights dichotomy appears to assume that administrative adjudication involves a bilateral dispute between the government and some private entity. Administrative adjudication is not always so simple, however. Often it involves contesting private interests in the resolution of a dispute that involves government action. In ruling on an application for a permit to discharge pollutants under the Clean Water Act, for example,[295] the Environmental Protection Agency ("EPA") determines not only the interests of the permit applicant, but also the interests of downstream property owners whose lands abutting the receiving water body may be adversely affected by the discharge. The concerns of downstream landowners, moreover, may overlap with the public interests that the Clean Water Act vindicates.[296] In such cases, the same adjudication may implicate both public and private rights, and the proper characterization of some interests as public or private rights may be especially difficult.

Because of the structural and practical issues raised by Justice Gorsuch's version of Article III formalism, the Court should not venture down that road unless it is necessary to do so. Fortunately, as this Article describes in the following Section, there is an alternative approach, fully consistent with separation of powers formalism, that offers a better way to resolve these issues.

B. Administrative Adjudication, Executive Action, and Public Rights

This Article's approach rests on the recognition that there is an essential difference between the issues raised by an initial administra-

294 *Cf.* Ablavsky, *supra* note 292, at 347–48 (quoting ROBERT W. GORDON, TAMING THE PAST: ESSAYS ON LAW IN HISTORY AND HISTORY IN LAW 7 (2017)) (referring to "the 'subversive tendencies of historicism'" in distinguishing between public and private rights). Professor Ablavsky favors "an anti-formalist line of reasoning about public rights . . . that focuses more on congressional intent and entanglement with a 'public regulatory scheme' than on strict categorization." *See id.* at 348 (footnote omitted).

295 *See* 33 U.S.C. §§ 1311(a), 1342(a) (prohibiting the discharge of pollutants but providing an exception for discharges authorized by a permit issued by the EPA or a state authorized by EPA to administer the permit program).

296 *See id.* § 1251(a) (setting forth the statutory goals, including elimination of pollutant discharges and, in the interim, achievement of fishable-swimmable waters).

tive determination that uses quasi-judicial procedures and those raised by limitations on the availability and scope of judicial review.[297] Both the current doctrine and Justice Gorsuch's Article III formalism ignore this difference, which creates unnecessary confusion. In the authors' view, initial determinations are, in most cases, a permissible executive function that can be performed by administrative agencies.[298] The real Article III issue is the extent to which judicial review can be limited or foreclosed altogether. This approach is fully consistent with separation of powers formalism and would bring much needed coherence to the analysis.

1. Initial Administrative Adjudication as Execution

To illustrate the differing issues raised by initial agency adjudication and limits on judicial review, consider a simple example. Suppose a statute provides for administrative adjudication in a case involving traditional private rights, such as property rights. It also provides that an adversely affected party who is dissatisfied with that administrative adjudication can obtain a de novo trial in an Article III court. It is hard to see how such an arrangement would implicate the structural concerns that animate Article III, even though an agency makes the initial determination. This sort of arrangement is not unprecedented. The FCC, for example, uses a similar process when imposing civil asset forfeiture, in which it issues a notice of apparent liability, followed by a de novo judicial determination if the party contests liability.[299]

To be sure, the individual right to an Article III tribunal might be compromised if the administrative decision results in an immediate deprivation of rights and there is an excessive delay prior to the de novo trial before an Article III tribunal. This problem, however, is

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297 This Article's coauthor, Professor Levy, has previously advanced many of the points in the following discussion in an article he coauthored with the authors' friend and colleague, Sid Shapiro. *See* Levy & Shapiro, *Standards-Based Theory*, *supra* note 203, at 519–25.

298 From this perspective, the public rights doctrine can explain why initial adjudication by administrative agencies is constitutionally permissible, but it also highlights some potential issues for Article I courts, whose location within the branches of government is unclear. To the extent that Article I courts are considered to be part of the executive branch, they are the functional equivalent of administrative agencies. *See* Kuretski v. Comm'r, 755 F.3d 929, 939 (D.C. Cir. 2014) (concluding that Tax Court judges exercise their authority as part of the executive branch). Article I courts that are part of the judiciary, such as the bankruptcy courts, present distinctive separation of powers issues that are beyond the scope of this Article, as is the unique status of the territorial courts.

299 *See generally* GLICKSMAN & LEVY, *supra* note 56, at 989 (describing process). Similarly, in Kansas, where Professor Levy lives, statutes provide for an administrative revocation or suspension of a driver's license for specified grounds, followed by a de novo trial. *See* KAN. STAT. ANN. 8-259.

primarily an issue of due process, as reflected in numerous decisions addressing the extent to which due process requires a pre- or post-deprivation hearing.[300] In some cases, due process may require an Article III remedy before the administrative action can affect a deprivation of protected rights.[301] But the initial administrative determination of most matters relating to the implementation of a statute is no different than the decision to initiate a prosecution or bring a civil action on behalf of the government. Thus, the initial determination of such matters would not encroach on the independent judiciary's Article III power.

Put simply, the initial determination by an administrative agency implementing a federal statute does not violate separation of powers or Article III because such a determination is an executive function properly vested in administrative agencies that are part of the executive branch.[302] This premise is reflected in the Court's recent appointment and removal cases, which treat administrative adjudicators as officers of the United States who must be accountable to the President.[303] *United States v. Arthrex, Inc.*,[304] is particularly instructive, insofar as it is another case, like *Oil States* and *Thryv*, involving *inter partes* review. *Arthrex* emphasized that "[o]nly an officer properly appointed to a principal office may issue a final decision binding the Executive

300 This process might implicate individual rights, to the extent that a judicial determination of the underlying individual interests is delayed. Here again, understanding the individual rights implications of administrative adjudication in due process terms is instructive in that the question of pre- or post-deprivation remedies is a recurrent one in procedural due process challenges. *See*, *e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546–47 (1985) (concluding that due process required only minimal pretermination process for tenured teacher in large part because teacher would receive a full hearing after the termination); Mathews v. Eldridge, 424 U.S. 319, 349 (1976) (concluding that Social Security disability insurance recipient was not entitled to full hearing prior to the termination of benefits); Goldberg v. Kelly, 397 U.S. 254, 270 (1970) (holding that welfare recipients were entitled to a full hearing before the termination of their benefits); *see also* Parratt v. Taylor, 451 U.S. 527, 544 (1981) (concluding that the negligent destruction of a prisoner's private property did not violate due process because the prisoner had an adequate tort remedy under state law).

301 *Cf.* Sackett v. EPA, 566 U.S. 120, 125–28 (2012) (concluding that EPA administrative compliance orders are subject to pre-enforcement review because of their significant and immediate impact on the private property rights of landowners).

302 *See* City of Arlington v. FCC, 569 U.S. 290, 304 n.4 (2013) (citing U.S. CONST. art. II, § 1, cl. 1) ("[Agency actions] take 'legislative' and 'judicial' forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power.'").

303 *See supra* notes 109–18 and accompanying text (discussing *Free Enterprise Fund*, *Lucia*, *Seila Law*, *Arthrex,* and *Collins*).

304 141 S. Ct. 1970 (2021) (holding that APJs whose decisions were not subject to review by Director of the PTO were principal officers who must be appointed by the President with Senate consent but allowing the Director to make final decisions so that judges would qualify as inferior officers). *See supra* notes 115–16, 125 and accompanying text.

Branch," thus applying the unitary executive theory to administrative adjudication.[305] The extent to which the quasi-adjudicatory and due process implications of administrative adjudications would support a good-cause limitation on the removal of adjudicators in the executive branch, at least those who qualify as inferior officers, remains unresolved.[306]

2. Executive Power to Vindicate Public Rights

This understanding dovetails nicely with the public rights doctrine and offers a superior approach to the alternative explanations of *Murray's Lessee* conventionally advanced by courts and commentators. Those alternatives generally rely on the premise that, because Congress holds the greater power to foreclose all remedies, it has the lesser power to create remedies that do not involve the Article III judiciary.[307] This sort of rationale, however, does not stand up to careful examination, especially from a structural perspective. This Article offers an alternative, structural understanding of public rights under which initial determinations concerning public rights are executive in character.

As previously discussed, the Court traditionally linked the public rights doctrine to sovereign immunity, on the theory that when the government is a party, it cannot be sued without its consent.[308] Because Congress could prevent any remedy whatsoever by withholding consent, the theory continues, it may consent to more limited remedies before administrative agencies or Article I courts.[309] Justice Gorsuch's approach is similar, but relies on the premise that public rights are interests that do not qualify as rights and that may therefore be doled out as a matter of executive discretion without any judicial involvement. These theories, however, cannot explain the public rights doctrine because—even if Congress need not provide a remedy—any

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305 *Arthrex*, 141 S. Ct. at 1985.

306 *See generally* Levy & Glicksman, *ALJ Independence*, *supra* note 9, at 68–80 (discussing separation of powers issues surrounding good cause limits on ALJ removal); *see also supra* note 110 (discussing application of *Free Enterprise Fund's* rule against dual good cause removal provisions to ALJs in Jarkesy v. Sec. & Exch. Comm'n, 34 F.4th 446 (5th Cir. 2022)).

307 *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 67 (1982) (plurality opinion) (stating that "the public-rights doctrine also draws upon the principle of separation of powers, and a historical understanding that certain prerogatives were reserved to the political Branches of Government").

308 *See supra* notes 203–04 and accompanying text.

309 This premise is questionable because sovereign immunity would not bar all remedies against the government. *See supra* note 253; *infra* notes 348–51 and accompanying text.

remedy Congress does provide cannot ignore other constitutional requirements, including separation of powers requirements.

In this regard, the early constitutional decision in *Hayburn's Case*[310] is directly on point. The case involved the determination of veterans' benefits, a quintessential public right and one for which a remedy against the government would seem to implicate sovereign immunity.[311] Under the statute, federal judges would make an initial eligibility determination, which would be reviewed by the Secretary of War, who could confirm it or set it aside.[312] Several Justices, while riding circuit, concluded that this arrangement violated the separation of powers because it subjected a judicial determination to review and correction by officials within the executive branch.[313] If sovereign immunity or the allocation of mere privileges allows Congress to provide remedies that would otherwise infringe on the judicial power in violation of Article III, then *Hayburn's Case* was wrongly decided.

Once the idea that the greater power to deny remedies includes the lesser power to limit those remedies to non-Article III tribunals is discounted, the public rights doctrine rests on vague and largely unexplained statements that public rights determinations involve the exercise of executive power.[314] Although the Court has not fully explained it, the authors think this understanding of public rights adjudications as executive in nature makes perfect sense upon a close examination of *Murray's Lessee*, which suggests that "public rights" are best understood as rights belonging to the public.[315] The enforcement of such rights on behalf of the public is a quintessential executive function.

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310 2 U.S. (2 Dall.) 409 (1792).

311 *See id.* at 409.

312 *See id.* at 410.

313 *See* Plaut v. Spendthrift Farm, 514 U.S. 211, 218 (1995) (stating that *Hayburn's Case* "stands for the principle that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch").

314 *See, e.g.*, Oil States Energy Servs., L.L.C. v. Greene's Energy Grp., L.L.C., 138 S. Ct. 1365, 1373 (2018) ("Our precedents have recognized that the [public rights] doctrine covers matters 'which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.'"); N. Pipeline Constr. Co. v. Marathon Pipe line Co., 458 U.S. 50, 68 (1982) (quoting *Ex parte* Bakelite Corp., 279 U.S. 438, 458 (1929)) ("The public-rights doctrine is grounded in a historically recognized distinction between matters that could be conclusively determined by the Executive and Legislative Branches and matters that are 'inherently . . . judicial.'").

315 Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 283 (1855) (describing "the recovery of public dues by a summary process of distress, issued by some public officer authorized by law" as "an instance of redress of a particular kind of public wrong, by the act of the public through its authorized agents").

In an often-overlooked passage, the Court in *Murray's Lessee* stated that although "both public and private wrongs are redressed through judicial action, there are more summary extrajudicial remedies for both."[316] The Court then gave three examples: (1) "[T]he recapture of goods by their lawful owner" is an example of "extrajudicial redress of a private wrong"; (2) "the abatement of a public nuisance" is an example of extra-judicial redress "of a public wrong, by a private person"; and (3) "the recovery of public dues by a summary process of distress, issued by some public officer authorized by law, is an instance of redress of a particular kind of public wrong, by the act of the public through its authorized agents."[317]

This discussion reflects three important points. First, the distinction between public and private rights refers to whether the right belongs to a private person or to the general public.[318] Private rights are held and vindicated by private parties. Public rights are rights held by the public as a whole.[319] Second, although public rights may sometimes be vindicated by private parties, as in the abatement of a public nuisance or a *qui tam* action,[320] they are most often vindicated through government action. Third, when the government does assert public rights, it is exercising an executive function. Indeed, the ordinary process of criminal prosecution accords with this analysis: the commission of a criminal offense is not only a violation of the rights of particular victims (who may be entitled to private remedies), but also a violation of the public order.[321]

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316 *Id.*

317 *Id.*

318 *See* Nelson, *Political Branches*, *supra* note 292, at 565 (defining "core private rights" as "legal entitlements that belonged to discrete individuals (rather than the public as a whole)").

319 *See id.* at 562–63 (referring to "rights held in common by the public at large" as distinct from "an individual's core 'private rights' to life, liberty, or property"). This understanding of public rights is similar to but broader than the definition advanced by Professor Harrison, who has argued that public rights reflect a more limited set of rights that accrue to the public through "the proprietary interests of the government." *See* Harrison, *supra* note 292, at 149.

320 *See* Evan Caminker, *The Constitutionality of* Qui Tam *Actions*, 99 YALE L.J. 341, 388 (1989) (quoting Abraham Lincoln, Acceptance Speech to the Republican Convention (June 16, 1858), in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 372 (R. Basler ed. 1946)) ("Authorizing private citizens to enforce the United States' legal interests through *qui tam* actions, no less than authorizing citizens to enforce their own legislatively created interests as an indirect means of implementing public policy objectives, is within Congress' power to 'judge *what* to do, and *how* to do it.'").

321 *See* Donald H.J. Hermann, *Restorative Justice and Retributive Justice: An Opportunity for Cooperation or an Occasion for Conflict in the Search for Justice*, 16 SEATTLE J. FOR SOC. JUST. 71, 89 (2017) (stating that "the penal law has moral significance because it contributes to the maintenance of public order, which is conducive to the common good"). The vindication of this public interest is the responsibility of the executive branch, which investigates the facts and

Viewed from this perspective, it is clear that most administrative adjudications fall squarely within the executive power in the sense that they involve the vindication of the public interest in implementing federal regulatory and benefit programs.[322] This sort of action is executive in character even if it involves the determination of facts and the application of the law and even if Congress chooses to require agencies to follow quasi-judicial processes in order to act.[323] Accordingly, the proper inquiry in any case of initial administrative adjudication is whether the agency is exercising executive power by implementing a public regulatory or benefit regime. This conclusion is fully consistent with a strict and formalist view of separation of powers.

In some contexts, moreover, when it implicates the vindication of a public interest arising in the context of a regulatory or benefit regime, the determination of rights that arise between private parties could properly be characterized as executive in nature.[324] This point is most evident in the context of statutory rights created as part of a comprehensive legislative regime, which explains *Granfinanciera's* expanded definition of public rights.[325] That kind of adjudication would include the right of pesticide registrants to compensation from follow-on registrants, which was at issue in *Thomas v. Union Carbide*,[326] as well as some additional agency adjudications.[327]

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applies the law to determine whether a crime has been committed and by whom before prosecuting the offense. As this example further illustrates, the executive determination of public rights is not ordinarily final, but rather is subject to further judicial proceedings by Article III courts. The extent to which public rights determinations may be made without further judicial involvements is a separate question that we discuss below. *See infra* notes 340–54 and accompanying text.

322 Sovereign immunity is not relevant to this inquiry because such implementation does not involve suits against the government, although it may be relevant to the availability and scope of judicial review of administrative adjudications. *See infra* notes 348–51 and accompanying text.

323 *See* Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924, 1961 (2018) ("[A]ll administrative adjudication is, from the standpoint of constitutional law, an exercise of executive power, not of judicial power. Instead, administrative adjudication can be seen as the (preliminary) application of statutes to facts, a core executive task.").

324 *See supra* note 188 (suggesting that the power of territorial courts and the local courts in the District of Columbia might be characterized as executive in character because the resolution of private disputes is part of the administration of federal territories).

325 *See supra* notes 236–40 and accompanying text (discussing *Granfinanciera's* expansion of public rights to include congressionally created rights between private parties). Thus, contrary to Justice Scalia's objections in *Granfinanciera*, the expanded definition of public rights announced in that case is fully consistent with a proper understanding of those rights.

326 473 U.S. 568 (1985); *see supra* notes 221–24 and accompanying text.

327 Another example might be the certification of unions as representatives of workers

Even the determination of traditional common law rights might be considered executive in character if it is necessary to the vindication of the public interest in a comprehensive legislative regime, as in *Schor*.[328] Nonetheless, administrative adjudication of rights arising between private parties, especially traditional common law rights, would appear to be vulnerable to a separation of powers challenge.[329] If such rights are not public rights and their determination is therefore not executive in character, then adjudication by administrative agencies in the executive branch would run afoul of formalistic separation of powers principles. From a formalistic perspective, moreover, it would appear to violate separation of powers for executive branch agencies to function as adjuncts to the courts.[330]

In sum, although the new separation of powers formalism requires a rethinking of the current doctrine concerning administrative adjudication, it does not follow that most such adjudications are constitutionally impermissible or that an historical inquiry into the character of the underlying right is required. To the contrary, most administrative adjudication involves the exercise of executive power to vindicate public rights through the implementation of a legislative regime and is therefore fully consistent with the separation of powers.[331] This conclusion has important implications for statutes that limit judicial review, which we explore in the following Sections.

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under the National Labor Relations Act. *See* 29 U.S.C. § 159 (providing for certification of bargaining units, elections, and union representatives by the National Labor Relations Board).

328 Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986); *see supra* note 235 and accompanying text. This sort of reasoning would also apply to adjudication of common law rights and criminal prosecutions by territorial courts and local courts in the District of Columbia. *See supra* note 321 and accompanying text.

329 *Cf.* Craig A. Stern, *What's a Constitution Among Friends?—Unbalancing Article III*, 146 U. PA. L. REV. 1043, 1072 (1998) (footnote omitted) ("All of the judicial power must vest in the court. What is at issue is which duties render a decisionmaker a 'judge' for purposes of Article III, thereby requiring that individual to possess [Article III,] Section 1 security.").

330 *See* Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 252 (1990) ("[T]he notion that the institutional phenomenon of adjudication of disputes (public and private) by legislative courts and administrative agencies can be characterized as legitimate because these are 'adjuncts' of the courts is ludicrously inapt . . . ."). Under the unitary executive theory favored by many formalists, if agencies exercise executive power, they must be subject to the control and supervision of the president, rather than the courts, even if courts can retain the ordinary judicial review functions. *See supra* Section I.B.2. Conversely, if they exercise judicial power, they cannot be subject to the control and supervision of the president. This arrangement would not trouble a functionalist, however, because the functionalist perspective tolerates the intermingling of powers and functions provided that the balance of power among the three branches is not disturbed. *See supra* Section I.A.

331 Given the overlap between the executive and judicial powers in matters involving public

C. Judicial Review and Judicial Power

The structural recognition that administrative agencies that make initial decisions using adjudicatory procedures are executing the law has important implications for the availability and scope of judicial review.[332] Insofar as administrative adjudication involves the execution of the law, it does not and cannot constitute the final decision in a case or controversy that is within the jurisdiction of the Article III courts.[333] This is the central premise of Justice Gorsuch's Article III formalism.[334] Just as the executive decision to prosecute a crime is subject to a subsequent trial, so too are administrative adjudications subject to subsequent judicial proceedings as required by separation of powers—and due process.[335] Any statute foreclosing judicial review is valid, if at all, only if it is consistent with Article III.

At least since *Marbury v. Madison*,[336] it has been understood that the judicial power includes, in a proper case or controversy, the authority to determine whether executive officials have acted in accordance with the law.[337] Similarly, whatever power the President has to

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rights, however, these same determinations may also be made by courts wielding the judicial power. Whether those courts must be staffed by judges with life tenure and salary protections is a separate question that must be addressed in light of the adjunct theory and the relationship between so-called "Article I courts" staffed by judges lacking these protections and the Article III judiciary. As suggested by our earlier discussion, this issue is a fascinating one. *See supra* notes 284–88 and accompanying text. But it is beyond the scope of this Article, and we will resist the temptation to go down that rabbit hole.

332 Although the availability and scope of judicial review are relevant for both administrative adjudication involving the exercise of executive power and adjudication by adjudicators acting as adjuncts to Article III courts, the two situations raise different questions that should be analyzed separately. Judicial review of administrative adjudication is a question of the proper relationship between the executive and judicial branches. Judicial review of the decisions of Article I courts is relevant to the question whether Article I courts qualify as adjuncts to Article III courts.

333 *See* Sunstein & Vermeule, *supra* note 323, at 1961 (characterizing administrative adjudication as an executive function that involves the "preliminary" application of law to facts); *see generally supra* notes 322–23 and accompanying text (discussing executive character of administrative adjudication of public rights).

334 *See supra* notes 265–68 and accompanying text.

335 *See* Greve, *supra* note 33, at 778, (supporting "a judicial system that subjects government action, so far as it interferes with a sphere of ordinary private conduct, to comprehensive, genuinely legal, and independent judicial control"); *id.* at 779 (supporting a "re-constitutionalizing [of] judicial control over executive adjudication by means of entrusting that task to independent courts").

336 5 U.S. (1 Cranch) 137 (1803).

337 *See id.* at 149. To be sure, the courts have not always adhered to this premise. For example, many agency actions are not subject to judicial review. *See* GLICKSMAN & LEVY, *supra* note 56, at 1116–71 (discussing circumstances under which statutes may preclude judicial review of agency action and where action is committed by law to an agency's unreviewable discretion).

control the execution of the laws, it does not include the power to order violations of the law.[338] Nonetheless, Congress has significant discretion when it comes to the creation and determination of the jurisdictional scope of the lower federal courts, and it may prescribe some limits on both the availability and conduct of judicial review.[339] The critical separation of powers question is when, if ever, congressional limits on the availability and scope of review violate separation of powers by encroaching on the Article III judicial power.

The analysis of this question should begin with the recognition that it is a different question than whether an initial administrative adjudication is constitutional. Whether administrative adjudication is consistent with separation of powers depends on whether it involves the exercise of executive power; the extent to which Congress may limit the availability and scope of judicial review depends on whether those limits impermissibly encroach on the powers of the judicial branch.[340] To be sure, the availability of judicial review may support the understanding that administrative adjudication is executive in nature, but the availability of such review is not essential to characterizing initial adjudications as executive because some executive actions may be exempt from judicial review as a matter of separation of powers.[341]

The availability of judicial review is a critical structural question because courts cannot ensure that administrative adjudication complies with the law if they have no jurisdiction to conduct review.[342] Nonetheless, the Supreme Court has offered little clear guidance on the extent to which Congress may foreclose judicial review of agency adjudications. It has famously gone to great lengths to construe provisions apparently foreclosing review in a manner that permits judicial review of at least some issues.[343] It has also erected a general presump-

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338 Kendall v. U.S. *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 599–600 (1838) (requiring postmaster to obey judicial writ of mandamus rather than unlawful presidential directive).

339 Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1892 (2008) (acknowledging that the traditional view, "grounded in constitutional text, history, and structure," "is that Congress's power to limit the jurisdiction of the lower federal courts is plenary").

340 *See supra* Section II.B. There is also a due process element to this inquiry. *See supra* notes 279–83 and accompanying text. But our focus here is on separation of powers issues.

341 Such is the case, for example, for "political questions" that fall within the exclusive prerogatives of the President and executive branch. *See infra* note 353 and accompanying text.

342 *See*, *e.g.*, Thryv, Inc. v. Click-To-Call Techs., L.P., 140 S. Ct. 1367, 1387–89 (2020) (Gorsuch, J., dissenting) (arguing that the majority's decision upholding foreclosure of judicial review of decision to initiate *inter partes* patent review improperly abdicated judicial power).

343 *See, e.g.*, Webster v. Doe, 486 U.S. 592, 603–05 (1988); Leedom v. Kyne, 358 U.S. 184, 188–91 (1958); Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94, 107–08 (1902).

tion in favor of review that is especially powerful concerning constitutional claims.[344] Likewise, the Court's decisions on jurisdiction stripping send notoriously mixed messages.[345] Although this Article will not attempt to resolve these intractable debates here, the executive power understanding of administrative adjudication offers some insights concerning the availability and scope of judicial review.

First, Justice Gorsuch's analysis may suggest that administrative determinations that result in the deprivation of core private rights, particularly traditional common law claims, must be subject to de novo determination by an Article III court. This sort of rule would seem to apply to claims like the breach of contract counterclaim in *Schor*. If the focus is on the private right, however, it would also seem that the consent of the parties could resolve this issue, as it does when parties consent to the arbitration of common law claims with only limited judicial review.[346] Thus, for example, the authority of magistrates to resolve cases depends on consent.[347]

Second, although courts often state that matters of public rights may be resolved without any judicial involvement because sovereign

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344 *See, e.g.*, Johnson v. Robison, 415 U.S. 361, 366–374 (1974) (construing statutory provision precluding judicial review of cases arising under veterans' benefit statutes so as to permit review of constitutional challenge to denial of benefits to conscientious objectors performing alternate service but rejecting challenge on the merits).

345 *Compare Ex parte* McCardle, 74 U.S. 506 (1968) (upholding statute stripping court of jurisdiction in pending case), *with* United States v. Klein, 80 U.S. 128 (1971) (invalidating statute purporting to strip courts of jurisdiction to give effect to presidential pardon). In recent cases, the Court has struggled to determine when, if ever, a congressional statute that effectively determines the outcome in a particular case violates the judicial power. *See* Patchak v. Zinke, 138 S. Ct. 897 (2018) (upholding statute that determined outcome in land dispute with the Department of the Interior); Bank Markazi v. Peterson, 578 U.S. 212 (2016) (upholding statute that effectively determined the availability of assets for attachment); *see also* Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1045 (2010) [hereinafter Fallon, *Jurisdiction-Stripping*] ("[T]he Court has decided few cases squarely addressing the constitutionality of selective withdrawals of federal jurisdiction."); Ronald J. Krotoszynski & Atticus DeProspo, *Against Congressional Case Snatching*, 62 WM. & MARY L. REV. 791, 796–97 (2021) (criticizing the "functionalist turn" taken by the Court after *Free Enterprise Fund* and in *Patchak*, *Bank Markazi*, and *Oil States*, as a mistaken endorsement of "congressional case snatching").

346 In *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850–51 (1986), the Court concluded that a private party could not waive the structural interests of the judiciary, but Justice Gorsuch seems to regard the judiciary's role as one of protecting the personal rights of parties against the government, and those interests would seem to be waivable by consent.

347 *Compare* Gomez v. United States, 490 U.S. 858 (1989) (holding that supervision of voir dire by magistrates without the parties' consent violated Article III), *with* Peretz v. United States, 501 U.S. 923 (1991) (holding that supervision of voir dire by magistrates with the parties' consent did not violate Article III).

immunity would bar suit against the government,[348] that reading is, quite simply, wrong. It is true that sovereign immunity might prevent some remedies against the government if those remedies seek damages or their equivalent. But sovereign immunity does not preclude other remedies, such as injunctive or declaratory relief to prevent executive officers from violating the law.[349] Judicial orders setting aside or precluding enforcement of administrative adjudications do not implicate sovereign immunity unless they require the payment of damages or its equivalent.[350] At a minimum, the application of sovereign immunity as a justification for precluding any judicial involvement would have to involve a case-specific inquiry into whether sovereign immunity applies.[351]

Third, limits on the availability of judicial review for adjudication of public rights present the same sorts of separation of powers issues that limitations on review of any executive action would present. Under the rule of law, we would ordinarily expect that judicial review of executive action for compliance with the law is available in a proper case or controversy, even when the action is taken by high level officials up to and including the President.[352] To be sure, some executive actions might be exempt from review under the political question doctrine, which may explain why some public rights determinations are exempt from review.[353] Whether and to what extent Congress may divest the courts of jurisdiction, including jurisdiction to review agency adjudications, is a difficult and still unresolved constitutional question.[354] The key point for present purposes is that the answer to that

348 *See*, *e.g.*, Thomas v. Union Carbide Agric. Prod. Co., 473 U.S. 568, 589 (1985) (emphasis added) (quoting N. Pipeline Constr. Co. v. Marathon Pipe line Co., 458 U.S. 50, 68 (1982)) (stating that "the public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that '*could be conclusively determined by the Executive and Legislative Branches*,' the danger of encroaching on the judicial powers is reduced").

349 *See Ex parte* Young, 209 U.S. 123 (1908).

350 *See* Edelman v. Jordan, 415 U.S. 651 (1974).

351 Thus, for example, sovereign immunity might be implicated by actions challenging the attachment of the assets of a defalcating tax collector, as in *Murray's Lessee*. *See supra* notes 192–204 and accompanying text.

352 *See* Biden v. Missouri, 142 S. Ct. 647 (2022) (upholding rule conditioning continued receipt of Medicare and Medicaid funding on compliance with mandate that non-exempt staff be vaccinated against COVID-19); GLICKSMAN & LEVY, *supra* note 56, at 114 (citing cases involving contested statutory delegations to the President).

353 *See* Levy & Shapiro, *Standards-Based Theory*, *supra* note 203, at 540–41 (suggesting that foreclosure of review would be permissible for government benefit decisions if those decisions involve standardless political discretion).

354 *See* Fallon, *Jurisdiction-Stripping*, *supra* note 345, at 1133 ("Questions involving Con-

question concerning administrative adjudication does not depend on whether public rights are involved, but rather on whether the determination constitutes a political question.

Related considerations apply to the question of the proper scope of judicial review, as reflected in the emerging separation of powers critique of *Chevron* deference.[355] Because "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[356] courts must retain the final say on the interpretation of the law. That premise, however, does not necessarily preclude any deference to agencies on interpretive issues, provided that courts can enforce clear and unambiguous provisions and set aside agency decisions that are contrary to any permissible interpretation of the statute.[357] To the extent that statutory delegations pursuant to open-ended standards vest executive discretion in agencies, deference to the exercise of that discretion would be consistent with the proper judicial role.[358] Nonetheless, given current trends and the composition of the Court, we may expect the continued erosion of *Chevron* deference.[359]

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gress's power to strip jurisdiction from the federal and state courts are multifarious, multidimensional, and frequently complex.").

355 *See supra* notes 97–101, 136–40 and accompanying text.

356 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

357 *See, e.g.*, Akram Faizer & Stewart Harris, *Administrative Law Symposium Debate: A Conversation Between Akram Faizer and Stewart Harris of the Lincoln Memorial University's Duncan School of Law for the Belmont Law Review Symposium*, 8 BELMONT L. REV. 427, 442 (2021); Jonathan R. Siegel, *The Constitutional Case for* Chevron *Deference*, 71 VAND L. REV. 937, 942 (2018); Lawrence B. Solum & Cass R. Sunstein, Chevron *as Construction*, 105 CORNELL L. REV. 1465, 1471–72 (2020).

358 Justice Thomas has argued that such agency decisions either involve interpretation of the law, which falls within the judicial power, or legislative policy choices that must be made by Congress. *See supra* note 97 and accompanying text (referencing improper delegation of legislative power); *supra* notes 137–38 (referencing interference with judicial power). Whatever the limits on the delegation of legislative power may be, separation of powers formalism does not require the elimination of any and all executive discretion, which is quite simply impossible. Thus, even if the Court were to reinvigorate the nondelegation doctrine, some executive discretion would remain and deference to the exercise of that discretion would not violate the separation of powers. Indeed, judicial interference with the exercise of executive discretion would itself arguably violate separation of powers principles.

359 *See* GLICKSMAN & LEVY, *supra* note 56, at 325–28 (discussing potential narrowing of *Chevron* deference in the future). The present opposition to *Chevron* deference may have as much to do with opposition to regulation as it does to separation of powers functionalism. *See, e.g.*, Metzger, *Redux*, *supra* note 24, at 69–70 (discussing "contemporary judicial anti-administrativism" and opposition to *Chevron*); Daniel E. Walters, *Symmetry's Mandate: Constraining the Politicization of American Administrative Law*, 119 MICH. L. REV. 455 (2020) (arguing that courts have applied more rigorous scrutiny to allegations of agency "overreach" than "underreach"); Daniel Hornung, Note, *Agency Lawyers' Answers to the Major Questions Doctrine*, 37 YALE J. ON REG. 759, 780 (2020) (linking support for the "major questions" exception to *Chevron* deference to antiregulatory policy arguments). No less a separation of powers formalist than

For similar reasons, courts arguably must retain at least some authority to review factual determinations. The Court long ago recognized that review of legal determinations is not meaningful without some authority to review the facts.[360] At the same time, however, deferential review of agency factual findings is not necessarily inconsistent with the judicial power, provided the scope of review is sufficient to prevent pretextual factual determinations that purport to justify agency actions that are inconsistent with the agency's legal duties.[361] Nonetheless, we might expect a Court devoted to formalism in separation of powers jurisprudence to pay greater attention to these questions and perhaps reinstitute de novo review of some facts deemed essential to the proper exercise of judicial power.[362]

Ultimately, Article III formalism would not necessarily require de novo judicial determinations of legal or factual questions.[363] The executive branch, as a politically accountable and coequal branch of government, is entitled to a measure of deference when acting within the scope of its authority. The critical structural question, which this Article will not attempt to answer fully here, is when limits on judicial review interfere with judicial authority in violation of Article III. The important point is that this is the right question to ask when deciding whether administrative adjudication violates separation of powers.

Justice Scalia once championed *Chevron*, and current opposition to *Chevron* by conservative Justices largely emerged in response to increased regulation under Democratic presidents. *See* Green, *supra* note 7, at 657 ("chart[ing] the sudden transition from conservative support for *Chevron* to constitutional opposition" and finding that "resistance to *Chevron* entered mainstream politics only after Obama's reelection in 2012").

360 *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 357 (1816) (reasoning that authority to review state court judgments would be ineffective if limited to state court interpretations of federal law because federal law "may be evaded at pleasure" through appropriate findings of fact); *cf.* Merrill, *Impartial*, *supra* note 269, at 906 (arguing that "accurate determinations of fact are often critical to fair and impartial adjudication").

361 *See* Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94, 109–10 (1902) (concluding that the admitted facts could not "by any construction" support the application of statutes under which the Postmaster General could withhold delivery of the mail); *cf.* Dep't of Com. v. New York, 139 S. Ct. 2551, 2573–76 (2019) (sustaining district court's conclusion that Department of Commerce gave pretextual reasons for its decision to include a citizenship question on the census).

362 *See supra* note 210 and accompanying text (discussing de novo review of jurisdictional and constitutional facts).

363 *See, e.g.*, Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 989 (1988) (footnote omitted) ("*Crowell* placed heavy weight on a distinction between ordinary facts, concerning which limited review on the administrative record would suffice, and jurisdictional facts, which required de novo judicial fact-finding. Insofar as article III requires appellate review of ordinary facts, *Crowell's* approach seems generally appropriate. A judicial record is not necessary for the exercise of reasonably effective judicial oversight; review on an administrative record ought to suffice.").

* * *

In sum, the new separation of powers formalism is likely to extend to Article III. As things now stand, this new formalism appears to mandate that Article III courts decide matters implicating personal rights to life, liberty, and property (i.e., "private rights"), with a historically defined exception for public rights. This approach is problematic because it does not account for the structural aspects of Article III and because it focuses on initial adjudications rather than the availability and scope of judicial. There is, however, an alternative approach that offers a more workable solution. Under this account, initial determinations by administrative agencies that implement statutory provisions is an executive function, even if it takes on the trappings of adjudication. From a formalist perspective, it follows that the agencies responsible for this sort of adjudication must be subject to constitutionally required means of presidential control and subject to judicial review to ensure that the executive action has a proper basis in the law and in the facts. For some private rights, agency adjudicatory decisions may require a de novo determination by Article III courts, but in most cases review can be deferential. The foreclosure of review altogether, however, should be limited to determinations that may be constitutionally vested in the exclusive discretion of the executive branch under the political question doctrine.

CONCLUSION

Gillian Metzger has recently referred to "a resurgence of the antiregulatory and antigovernment forces that lost the battle of the New Deal."[364] This "attack on the national administrative state is also evident at the Supreme Court," where "anti-administrative voices" among the Justices have become "increasingly prominent."[365] Whether it is being driven by this antiregulatory animus or merely coincides with it, the Court's separation of powers jurisprudence has shifted from a largely functionalist approach to one that relies more heavily on formalistic reasoning. Formalism in separation of powers cases is not a novel invention,[366] but the reinvigoration of formalism has already resulted in significant and potentially disruptive changes in the operation of the administrative state.[367]

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364 Metzger, *Redux*, *supra* note 24, at 2.

365 *Id.* at 2–3.

366 *See supra* notes 44–48 and accompanying text.

367 The most prominent example is the Court's increasingly pronounced application of the unitary executive theory to invalidate good-cause limitations on the President's removal power.

The implications of this shift for the constitutionality of administrative adjudication is an open and, to date, underexplored question. More attention has been paid to the possibility, as an outgrowth of separation of powers formalism, of the Court's abandonment of *Chevron* deference[368] or of an overhaul of the nondelegation doctrine that constrains congressional authority to delegate to agencies the authority to implement regulatory and public benefit problems.[369] Either of these developments would reshape the relationships among Congress, the executive branch, and the federal courts, perhaps radically.

Application of a formalistic approach to non-Article III adjudication would be equally dramatic if, for example, it required federal courts to resolve in the first instance all of the disputes currently being addressed by the nearly 2000 ALJs and more than 10,000 administrative judges who work for federal administrative agencies.[370] Such an outcome is not inevitable, however, because administrative adjudication is not inherently incompatible with separation of powers. Nonetheless, the advent of separation of powers formalism indicates that the Court may be prepared to reconceptualize current doctrine, which is acutely in need of review and clarification.

Unfortunately, the early indications are that the formalistic approach to administrative adjudication is likely to make many of the same mistakes that plague current doctrine. To this point, at least, neither current doctrine nor Justice Gorsuch's formalistic approach to Article III has acknowledged the structural importance of the status and character of a non-Article III tribunal or the difference between an initial determination by an administrative agency and limitations on the availability and scope of review. Likewise, neither current doctrine nor the new Article III formalism has offered a coherent account of the public rights doctrine, even though that doctrine is increasingly central to the analysis.

It does not have to be that way. There is a much clearer and more coherent way to analyze administrative adjudication. The initial determination by an agency under a federal statute is, quite simply, an ex-

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See supra notes 108–29 and accompanying text (discussing *Free Enterprise Fund*, *Lucia*, *Seila Law*, *Arthrex*, and *Collins v. Yellen*).

368 *See supra* notes 95–101 and accompanying text.

369 *See supra* notes 84–94 and accompanying text.

370 Richard J. Pierce, Jr., *It's Time to Hit the Reset Button*, 28 GEO. MASON L. REV. 643, 647 n.29 (2021) (internal citations omitted) ("In contrast to the 1,931 ALJs in the federal government, agencies reported at least 10,831 non-ALJs."). Administrative judges, who lack statutory safeguards against removal or other adverse personnel actions, are highly vulnerable "to pressure from the politicians that head their agencies." *Id.* at 650.

ecutive action even if the process resembles judicial decisionmaking. Administrative adjudication is consistent with separation of powers in general and does not violate Article III in particular unless it cannot be characterized as the execution of the law. The critical question from a separation of powers perspective is whether the Article III courts retain the ability to ensure that the initial determination made by an executive agency or official complies with the law. Whether or not one finds formalism to be a more attractive approach than functionalism, it does provide an opportunity to shed light on some aspects of Article III's structural role that have confused courts and commentators and to clarify aspects of the doctrine that simply never made sense.

Statute-Focused Presidential Administration

*Bijal Shah**

ABSTRACT

When the President directs agency action, this is known as "presidential administration." Without fail, presidential administration furthers the President's own policy aims. Accordingly, this dynamic has intensified greatly in recent years, which has rendered agencies highly responsive to the President's interests.

However, agencies must be responsive also, if not primarily, to legislative directives. Furthermore, the President has a constitutional duty to execute statutes per their own aims. And yet, no one has questioned the pervasive assumption that presidential administration should be exercised for the President's purposes alone. Furthermore, neither Justice Elena Kagan's seminal work on presidential administration nor the subsequent literature on this topic considers the legitimacy of presidential agenda-setting as a means for fulfilling the Executive's fundamental responsibility to implement legislation. This Article, a contribution to the Annual Review of Administrative Law, fills that gap in the scholarship.

First, this Article illustrates that presidential influence on agency action has disrupted administrative fidelity to statutory law. Despite common views that the Trump presidency was exceptional, this dysfunction began long before and continues today. In order to pursue their own policy goals, presidents have neglected their duty to put the law above their own interests for the last thirty years, and the Biden Administration appears to be no exception.

Second, this Article argues that the motivation that underlies presidential administration—namely, the executive desire to further the President's own policy goals—should be redirected toward an interest in accomplishing the aims of the statutory scheme that the administrative agency is purporting to enforce. This Article's appeal for statute-focused presidentialism is motivated by an interest in infusing separation of powers considerations into the mix of values that drive presidential administration, which is currently overwhelmed

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by the immediate pull of political and partisan interests. Notably, however, statute-focused presidentialism would neither require curbing the scope of the President's power nor preclude presidentially directed policymaking, and may very well be consistent with a unitary executive.

But how can presidential administration be released from the clutches of the President's own policy agenda? Third, this Article proposes a blueprint to shift the incentives that underlie agency action resulting from presidential administration. More specifically, this Article proffers a framework of congressional, judicial, and even administrative oversight and intervention to encourage the President to align the administrative execution of law with the goals and thrust of legislation.

Ultimately, this Article makes three contributions. One, this Article is the first to contribute to the literature and conversation the insight that the problems of presidentialism as they relate to the lawfulness of agency action stem from the overwhelming focus of presidential administration on the President's own policy goals. Two, while most substantive or functionalist arguments in favor of checking presidential power do not gain traction with presidentialists or unitary executive theorists, this Article offers a proposal that should. After all, this Article's argument is not concerned with the scope or allocation of presidential power, but rather, with the incentives that drive presidential administration. Three, this Article offers a number of novel technical administrative interventions constructed to facilitate modest change in an era during which significant legislative action or judicial constraint of presidentialism on its face is unlikely.

TABLE OF CONTENTS

INTRODUCTION

During the Trump Administration, which had a particular interest in weakening environmental protection regulation,[1] the Environmental Protection Agency ("EPA") repealed a policy issued by the agency under President Obama; last year, the D.C. Circuit decided[2] that this constituted an unlawful *underregulation* of power plant emissions under the Clean Air Act.[3] This year, the Supreme Court reversed the D.C. Circuit.[4] Based on its evaluation of legislative intent, the Court decided that the environmental protection policy directed by President Obama—whose repeal by the Trump-era EPA the D.C. Circuit had rebuked in the decision below—constituted an unlawful *expansion* of the EPA's statutory authority.[5]

That either President Obama or President Trump seems to have directed the agency to enforce the law incorrectly might appear to be an example of President Obama's purported practice of "unilaterally implementing his legislative prerogatives by executive fiat"[6] or of the Trump Administration's "major deregulatory ambitions,"[7] depending

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1 Members of President Trump's transition team and cabinet, including successive heads of the EPA, Scott Pruitt and Andrew Wheeler, were notoriously "industry-friendly" and "persistent opponents of climate change rule-making efforts." Dana Nuccitelli, *The Trump EPA Strategy to Undo the Clean Power Plan*, YALE CLIMATE CONNECTIONS (June 21, 2019), https://yaleclimateconnections.org/2019/06/the-trump-epa-strategy-to-undo-the-clean-power-plan/ [https://perma.cc/62HV-JCAB]; John Walke, *Trump's "Affordable Clean Energy" Rule: A Dirty Lie*, NAT'L RES. DEF. COUNCIL (Jan. 28. 2019), https://www.nrdc.org/experts/john-walke/trumps-affordable-clean-energy-rule-dirty-lie [https://perma.cc/M99U-TB2P]. And as the D.C. Circuit notes, "in 2019 *President Trump's* EPA repealed the 2015 Rule and issued the Affordable Clean Energy Rule." Am. Lung Ass'n v. EPA, 985 F.3d 914, 999 (D.C. Cir. 2021) (emphasis added).

2 *Am. Lung Ass'n*, 985 F.3d.

3 *Id.* at 951–57 (interpreting the Clean Air Act, 42 U.S.C. §§ 7401–7675); *see also infra* notes 101–07 and accompanying text.

4 West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022).

5 *Id*. at 2610 (dismissing the EPA's view that it had the statutory authority to implement the Obama-era Clear Air Act policy by stating that the "EPA 'claim[ed] to discover in a long-extant statute an unheralded power' representing a 'transformative expansion in [its] regulatory authority.'") (citation omitted); *see also infra* notes 101–07 and accompanying text.

6 Robert Law, *Obama's 'Pen and Phone' Have Been Trumped When It Comes to DACA*, THE HILL (Sept. 1, 2017, 1:40 PM), https://thehill.com/blogs/pundits-blog/immigration/348871-obamas-pen-and-phone-have-been-trumped-when-it-comes-to-daca [https://perma.cc/8V8P-UECB].

7 Bethany A. Davis Noll, *"Tired of Winning": Judicial Review of Regulatory Policy in the Trump Era*, 73 ADMIN. L. REV. 353, 366, 369–70 (2021) (noting that "President Trump was criti-

on one's perspective on how best to interpret the Clean Air Act. However, these dynamics are neither new nor particular to certain Administrations. Rather, presidents have tried to alter the scope of legislation by narrowing or expanding the boundaries of an agency's statutorily delegated authority in pursuit of specific policy outcomes for the past thirty years.

Since the early 1990s, presidents have directed agencies to under- or overregulate in the areas of food and drug safety, healthcare, environmental protection, and immigration reform, among others.[8] Indeed, this Trump Administration episode is only one of a number of instances of presidential administration dating back to the Clinton presidency and exemplifies a dynamic that has existed since the Reagan era: presidentialism that is at odds with legislation.

Furthermore, this tension remains present under President Biden. On the one hand, the Biden Administration has said that it plans to reevaluate the lawfulness of agency actions in some contexts, albeit perhaps only in regard to the regulatory policies adopted under President Trump.[9] On the other hand, President Biden also "aims to go further" than previous presidents have to pursue his own regulatory goals.[10] Arguably, "he already has, simply by announcing a wider, bolder set of values to govern regulatory review."[11]

For this reason, Biden's presidentialism has come under fire in the courts. For instance, in April 2022, a federal district court struck down the Centers for Disease Control and Prevention ("CDC") mask mandate for airplanes and other public transportation,[12] implemented under President Biden to limit the spread of COVID-19, in part because "the Mask Mandate exceeds the CDC's authority under the Public Health Service Act";[13] in her decision, Judge Mizelle cites the

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cized for seeking to 'deconstruct' the administrative state through nonlegislative actions" and for "efforts to 'deliberately . . . undermine' the goals at the root of statutory legislation") (citations omitted); *see also Tracking Deregulation in The Trump Era*, BROOKINGS (Feb. 1, 2020), https://www.brookings.edu/interactives/tracking-deregulation-in-the-trump-era/ [https://perma.cc/GXX4-FZZX].

8 *See infra* Part I.

9 *See, e.g.*, *infra* notes 447–63 and accompanying text (discussing Biden directives that direct agencies to evaluate policies and rules to ensure compliance with Titles IX and X, the Fair Housing Act, the National Firearms Act, Medicaid, and the Affordable Care Act).

10 Lisa Schultz Bressman, *Flipping the Mission of Regulatory Review*, REGUL. REV. (Feb. 18, 2021), https://www.theregreview.org/2021/02/18/bressman-flipping-mission-regulatory-review/ [https://perma.cc/6YN6-C9KJ].

11 *Id.*

12 Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs, 86 Fed. Reg. 8,025 (Feb. 3, 2021).

13 42 U.S.C. §§ 201–300.

Supreme Court's understanding that "[b]ecause '[a]dministrative agencies are creatures of statute,' they 'possess only the authority that Congress has provided.'"[14] Likewise, in June 2021, the CDC issued an extension of its nationwide moratorium on evictions for qualified tenants in areas impacted by COVID-19, as directed by President Biden.[15] However, the Supreme Court blocked this agency action because the "statute on which the CDC relies does not grant it the authority it claims."[16] Another example involves President Biden's climate change directives;[17] in June 2021, a federal court granted a preliminary injunction against these directives, asserting that they violate statutory law.[18] And yet another is the Biden Administration's reprisal of Obama-era policies dictating immigration enforcement priorities[19] that a federal court struck down in July 2021.[20]

The conventional debate concerning presidential administration is whether the President's involvement in administration is constitutionally defensible as part of her authority to direct her branch.[21] Those who support presidential administration argue that because the Constitution vests in the President the executive power, executive agencies exist primarily in service of the President's agenda.[22] Put differently, this camp not only prizes a robust version of the President's constitutional authority, but also assumes that presidential directives are the most important "law" that agencies are tasked with enforcing.[23] Those who take a more moderate view of presidential power argue that agencies are beholden to legislative authority as well, and

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14 Health Freedom Def. Fund, Inc. v. Biden, No. 8:21-cv-1693 (M.D. Fla. Apr. 18, 2022), at *9 (per curiam) (citing Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 595 U.S., slip op. at 5 (Jan. 13, 2022)).

15 *See infra* notes 172–88 and accompanying text.

16 Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2485 (2021) (per curiam).

17 *See infra* notes 189–97 and accompanying text.

18 Louisiana v. Biden, 543 F. Supp. 3d 388, 419 (W.D. La. 2021).

19 *See infra* notes 133–46 and accompanying text.

20 Texas v. United States, No. 18-CV-00068, 2021 WL 3022434 (S.D. Tex. July 16, 2021); *see also infra* notes 135–43 and accompanying text.

21 *See* Cary Coglianese, *The Emptiness of Decisional Limits: Reconceiving Presidential Control of the Administrative State*, 69 ADMIN L. REV. 43, 44–45 (2017) ("The real debate over presidential directive authority concerns a president's ability to compel the head of an agency to take action consistent with the President's wishes.").

22 *See infra* note 352 and accompanying text.

23 *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2327 (2001).

that the enforcement of statutory law benefits, in some cases, when agencies are insulated from the President.[24]

However, even among critics of presidential administration, few have questioned the legitimacy of presidential administration's *focus* on the President's priorities. Certainly, the partisanship and power-gathering nature of presidentialism has garnered deep criticism for decades,[25] including critiques of presidential aggrandizement from both ends of the ideological spectrum.[26] There are also plenty of commentators appraising the wisdom of policies that result from presidential administration—for instance, whether they are laudable as a concep-

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24 *See infra* note 353 and accompanying text.

25 *See, e.g.*, BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 22 (2010) ("Broadly speaking, presidents since Roosevelt have followed this last pattern. They have governed as partisans, attempting to persuade centrist voters to move left or right, as the case may be."); Donald P. Moynihan & Alasdair S. Roberts, *The Triumph of Loyalty Over Competence: The Bush Administration and the Exhaustion of the Politicized Presidency*, 70 PUB. ADMIN. REV. 572, 572 (2010) (criticizing the attempt to "extend the politicized presidency" from the Reagan through the George W. Bush Administration). Bruce Ackerman predicted, during the early years of the Obama Administration, "the election of an increasing number of charismatic outsider types who gain office by mobilizing activist support for extremist programs of the left or the right." ACKERMAN, *supra*, at 9; *see also* John O. McGinnis & Michael B. Rappaport, *Presidential Polarization*, 3–4 (Ctr. for the Study of the Admin. State, Working Paper No. 21-42, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3788215&dgcid=EJournal_htmlemail_u.s.:administrative:law:ejournal_abstractlink [https://perma.cc/G8HG-992G] (arguing that agencies, controlled by the President, make "extreme policies"); Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REG. 549, 551 (2018) (finding in both the Obama and Trump Administrations "bold attempts to accrete executive power; presidential administration insinuating itself more and more into areas where proponents of presidentialism have cautioned against aggressive use of presidential directive authority; and the rise of organizational techniques, like policy czars and 'shadow cabinets,' that institutionalize presidential control").

26 *Compare* SAIKRISHNA BANGALORE PRAKASH, THE LIVING PRESIDENCY: AN ORIGINALIST ARGUMENT AGAINST ITS EVER-EXPANDING POWERS (2020) (arguing that originalism can constrain an increasingly self-aggrandizing executive and prevent the sidelining of Congress), *with* PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY (2009) (arguing for a multi-pronged administrative approach, including an emphasis on expertise, to constrain presidential aggrandizement).

tual or substantive matter,[27] or approved by the public[28]—as well the capacity of presidentialism to accomplish those policies.[29]

Only very recently have scholars turned to a discussion of the norms and customs surrounding presidentialism,[30] or begun to consider the repercussions of the presidential administration of agency behavior for the enforcement of statutory law.[31] And no one has articulated, let alone taken seriously, the idea of a presidential administration that exists *apart* from the President's own goals. This is so, even though "[l]aw execution [i]s the president's principal bailiwick,"[32] which indicates that the President's primary motivation for

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27 *See, e.g.*, Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2006) (arguing that the President favors business interests).

28 Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849, 870 (2012) (arguing that presidents "encourage agencies to cater to narrow special interests and . . . that the attentive public who does learn about such decisions will not have sufficient political influence to do very much about it"); Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 447–48 (2010) (finding that "there are simply no guarantees that particular presidential regulatory policies will be more closely correlated with public opinion than policies developed through ordinary agency rulemaking proceedings").

29 *See, e.g.*, Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 877 (2003); Kagan, *supra* note 23, at 2284–303 (focusing on the levers—and their effectiveness for presidential purposes—of presidents' involvement in administrative process); Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 IOWA L. REV. 1, 3 (1994) (discussing how presidential micromanagement of agency policies is "ineffective and even counterproductive").

30 *See, e.g.*, PRAKASH, *supra* note 26, at 64 (observing of the Trump Administration that "in an environment where the executive [is not bound by custom], presidents will tend to break the law in order to advance their own policies and interests."); Tara Leigh Grove, *Presidential Laws and the Missing Interpretive Theory*, 168 U. PA. L. REV. 877 (2020) (offering a theory for the interpretation of executive orders); Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743 (2019) (offering a legal framework to guide judicial review of presidential orders); Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187 (2018) (discussing how norms of presidentialism are changing); Alan Morrison, *Presidential Actions Should Be Subject to Administrative Procedure Act Review*, *in* RETHINKING ADMIN LAW: FROM APA TO Z (2019) (arguing that the President should be constrained by the Administrative Procedure Act).

31 *See, e.g.*, Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 586 (arguing that presidential administration undermines an "agency's ability to execute its statutory mandate" by "leaving agencies understaffed . . . ; marginalizing agency expertise; reallocating agency resources; occupying an agency with busywork; and damaging an agency's reputation."); David L. Noll, *Administrative Sabotage*, 120 MICH. L. REV. 753 (arguing that presidents sabotage the programs that agencies administer by choosing agency heads that attack their own agencies).

32 PRAKASH, *supra* note 26, at 20 (noting Justice Hugo Black's statement from the famous 1952 *Youngstown* case "that the president's duty to faithfully execute the law refutes that he is a lawmaker.") (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952)); *see also* PRAKASH, *supra* note 26, at 41 ("[T]he [P]resident's express duty to faithfully execute the

engaging in administration should be to hold agencies accountable to the law as envisioned by Congress.[33]

This Article, a contribution to the *Annual Review of Administrative Law*, offers a comprehensive discussion of the parameters of presidentialism as they relate to the implementation of legislation. Presidential administration exists, theoretically, on a spectrum. On one end is presidentialism deployed wholly in pursuit of the President's own policy aims. On the other end, the President's own policy interests are fully subjugated to the goal of agency conformity with statutory requirements. Currently, presidential administration exists far on the former end of the continuum. This Article argues that presidents' unflinching focus on their own policy goals, and the prevalence of presidential administration directing agencies to pursue those goals, has in some cases interfered with administrative fidelity to statutory law. Taking this state of affairs into consideration, this Article advocates for presidential administration that is somewhere in the middle

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laws, coupled with a narrow role in making federal statutes, strongly implies that the president has no unilateral lawmaking authority."); Julian Davis Mortenson, *The Executive Power Clause*, 168 U. PA. L. REV. 1269, 1270 (2020) ("It wasn't just that the use of executive power was subject to legislative influence in a crude political sense; rather, the power was conceptually an empty vessel until there were laws or instructions that needed executing."); Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2191 (2019) (suggesting that "the President as the head of the executive branch needs to follow the commands of Congress").

33 *See* RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT 247–48 (2014) (positing that the Take Care Clause extends "not only to the duties that fall upon [the president] personally in his official capacity, but also impose on him a duty of oversight to see that all lesser officials within the executive branch respect the same set of fiduciary duties that are imposed on the president"); Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1834, 1836 (2016) (noting that the Take Care Clause "seems to impose upon the President some sort of duty to exercise unspecified means to get those who execute the law, whoever they may be, to act with some sort of fidelity that the clause does not define"); Ryan J. Barilleaux & Christopher S. Kelley, *What Is the Unitary Executive?*, *in* THE UNITARY EXECUTIVE AND THE MODERN PRESIDENCY 4 (Ryan J. Barilleaux & Christopher S. Kelley eds., 2010) (arguing that the Take Care "Clause insures that the [P]resident will not only execute the law personally, but also . . . oversee the executive branch agencies to insure that they are faithfully executing the laws") (quoting Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 Cardozo L. Rev. 219, 252–53 (1993)). Arguably, statute-focused presidentialism would better uphold the antifascist intentions of the original proponents of presidential administration, who advocated for strong presidentialism that was tempered by a formal separation of powers. *See* Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration*, 122 COLUM. L. REV. 1, 38–40 (2022) (noting that the New Deal-era President's Committee on Administrative Management sought to "bring the government into compliance" with various constitutional mandates, including the Take Care Clause).

of the spectrum—that is, for a somewhat humbler form of presidentialism in service of statute.

This Article does not make a sweeping statement claiming that the presidential exercises of discretion push agencies to contravene statutes extensively,[34] nor does it make the (easy) argument that agencies should not behave unlawfully. But it also rejects the conventional argument that as long as agencies are behaving lawfully, per the barest understanding of lawfulness, they should be free to engage the President's agenda to the fullest extent possible. Rather, it asserts that agencies under political pressure sometimes "reject the sense of Congress" by failing to adequately implement legislative requirements.[35] In light of these circumstances, this Article contends that presidents and agencies should exercise discretion within boundaries set by the aims or thrust of statutory law, as discerned with the statute's own terms and intentions.

To make this argument, this Article contributes an analysis of the extent to which presidential administration results in agency actions that are at odds with statute. More specifically, it illustrates that agencies, under the influence of the President, engage in myopic statutory implementation that deprioritizes or ignores the goals of the statutory scheme at issue in favor of the President's policy interests. This analysis is based in judicial decisions that have arisen under previous presidents and the current one,[36] as well as accounts in secondary sources, including the media, and as gleaned from presidents' own missives.

Furthermore, this Article argues that presidential administration must be decoupled from its conventional pursuit of the President's policy interests and redirected toward fulfilling the executive branch's fundamental duty to implement legislation per its own purposes and on its own terms. In making this argument, this Article raises the difficult question of what it means for the executive branch to execute the

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34 *See* PRAKASH, *supra* note 26, at 221. ("While presidents (and their administrations) faithfully execute most laws, that is not the uniform practice across all laws.").

35 *Id.* at 219–20 (quoting William Symmes, Jr., an opponent of the original ratification of the Constitution who believed that the Take Care Clause would be misread to allot the President far too much discretion).

36 This includes primarily Supreme Court and circuit court decisions; the latter set of cases are focused on, but not exclusive to, the D.C. Circuit, which is known as the "second most important court in the United States" and the court most expert in administrative law matters. Aaron L. Nielson, *D.C. Circuit Review – Reviewed: The Second Most Important Court?*, YALE J. ON REG.: NOTICE & COMMENT (Sept. 4, 2015), https://www.yalejreg.com/nc/d-c-circuit-review-reviewed-the-second-most-important-court-by-aaron-nielson/ [https://perma.cc/C625-VEAL]. Sometimes, presidential intervention may be identified by courts from the ground up in the D.C. or other district courts; therefore, some cases from these jurisdictions are included as well.

aims of legislation in an administrative state that is rife with discretion and presidential efforts to engage that discretion to further their own aims. And in doing so, it asserts that administrative discretion may only be exercised within boundaries set by legislation, however these boundaries are ascertained. However, it also affirms the possibility of an executive branch that is centralized or led by a strong President yet simultaneously oriented toward the aims of statutory law.

Notably, this Article does not make a formalist argument incorporating a full-fledged analysis of the executive branch's constitutional duty to faithfully execute the law, which has been accomplished elsewhere.[37] Rather, it builds a functional argument on the assertion that "[i]t is a derogation of duty not to pursue with diligence what Congress wants executed,"[38] and grapples with how to manifest the understanding that the President's duty "requires affirmative effort on the part of the President to pursue diligently and in good faith the interests of . . . the authorizing instrument or entity."[39]

Even under this rubric, there may very well be situations in which a close administrative reading of statute may lead the executive branch to conclude that the policy should be directed by the President. This may be because the statute is vague, inconsistent, or not up to confronting new challenges.[40] Or it may be that Congress itself intended there to be a strong political role in the development of policy. There may also be tools of statutory implementation—such as prosecutorial discretion—that lead to intense presidential administration that is consistent with the President's constitutional duty to enforce the law. But in these situations, the decision to engage in directive presidentialism should happen only after careful engagement with statute, and not only to fulfil the President's policy goals.

More specifically, this Article makes a functionalist appeal for reincorporating separation of powers principles into the balance of incentives driving presidentialism, which builds on Lisa Bressman's insight that "the [Supreme] Court may be understood as mediating between two different sorts of politics, congressional and presidential,

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37 *See, e.g.*, Goldsmith & Manning, *supra* note 33; Kent et al., *supra* note 32.

38 Kent et al., *supra* note 32, at 2191.

39 *Id.* at 2190.

40 *See* Lisa Heinzerling, *The Supreme Court Is Making America Ungovernable*, THE ATLANTIC (July 26, 2022), https://www.theatlantic.com/ideas/archive/2022/07/supreme-court-major-questions-doctrine-congress/670618/ [https://perma.cc/ZHS5-RXQQ] (advocating for "[b]road statutory language, written with the aim of empowering an agency to take on new problems in new ways" and lamenting its potential demise as a result of *West Virginia v. EPA*).

rather than as vacillating between politics and procedures."[41] Currently, the merits and pull of politics and political accountability are overrepresented among the values that underlie presidentialism. And the virtues of good governance and ambitions for optimal policy outcomes, while important, are not enough to overcome the President's obligation to maintain a healthy separation of powers between the political branches. This perspective binds the legitimacy of presidential administration to the obligations of statutory execution. The goal of this Article is not to advocate for the extreme of a ministerial presidency, but rather, to urge a normative shift toward the demands of statutory law in response to the zeitgeist prioritizing presidential political accountability and responsiveness in administration above all.

That having been said, this Article's exposition might convince formalists that presidential administration in its current form may be unconstitutional in some cases, to the extent it involves an executive failure to engage in faithful execution or executive infringement on Congress's power to legislate. To be clear, this Article does not engage in the usual unitary executive debate regarding whether the President has only oversight authority, or whether she also has directive authority or can even "step into the shoes" of agency heads. In other words, this Article neither argues for limits to the scope or allocation of executive power nor advocates against centralization. Rather, the concern is with the motivations or incentives that drive presidential administration. For this reason, while most substantive or functionalist arguments in favor of constraining presidential power do not gain traction with presidentialists or unitary executive theorists, this proposal should. In fact, one could imagine a unitary executive theory that emphasizes strong, directive, and expansive presidential control over agencies wielded *in order to pursue the execution of the law for the law's own aims, demands and purposes*, as opposed to the President's policy aims alone.

Notably, the "aims," "demands," "purpose," and thrust of a statute, and the set of goals it was passed to accomplish, are determined with relation to the particular legislation and subject matter at issue. Furthermore, the aims of a statutory scheme are not necessarily best identified or furthered by purposivism. On the one hand, without taking a stand on how purposivism should be applied in regard to any particular case or issue, this Article accepts the reasonableness of

41 Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1751 (2007).

purposivism[42] and of Kevin Stack's argument that regulatory statutes may oblige agencies to implement the statutes they administer in a purposivist manner.[43] And in a few notable cases—including *West Virginia v. EPA*,[44] decided this year and *FDA v. Brown & Williamson Tobacco Corp.*,[45] decided over twenty years ago—the judiciary has condemned the results of presidential administration after engaging in a purposivist interpretation of statute.[46]

On the other hand, this Article also allows for the possibility of textualist interpretations that incorporate new meaning in a manner that engages the broader aims of a statute[47]—for instance, the possibility of pro-environmental protection policies that the Clean Air Act did not explicitly anticipate but that uphold its core intent,[48] or the potential application of the Public Health Service Act to novel challenges concerning communicable diseases.[49] Of course, no mode of statutory interpretation can adequately justify an agency action that ignores statutory evaluation altogether in favor of dogged pursuit of the President's interests, be they focused on deregulation, implementing enforcement priorities, expanding regulatory mechanisms, or accomplishing some other presidential priority.

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42 *See* Michael C. Dorf, Foreword, *The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 17 (1998) ("In defining purposivism, one might begin with the credo of the legal process school: that, regardless of the actual workings of the legislature, it should be presumed to comprise 'reasonable persons pursuing reasonable purposes reasonably.' The purposivist judge aims to infer these purposes and apply them. Beyond this goal, purposivism is somewhat more difficult to define . . . .) (citations omitted).

43 Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. 871, 871 (2015) ("To comply with [their] duty [to implement a statute], agencies must develop a conception of the purposes that the statute requires them to pursue and select a course of action that best carries forward those purposes within the means permitted by the statute; in short, agencies must take a purposivist approach.").

44 142 S. Ct. 2587 (2022).

45 529 U.S. 120, 158 (2000).

46 *See infra* notes 149–53, 232–41 and accompanying text.

47 *See, e.g.*, Frederick Schauer, *Unoriginal Textualism*, 90 GEO. WASH. L. REV. 825 (2022) (arguing that textualism can be tethered to contemporary public meaning); Deborah A. Widiss, *Proving Discrimination by the Text*, 106 MINN. L. REV. 353 (2022) (arguing for the progressive possibilities of textualism); Benjamin Eidelson, *Dimensional Disparate Treatment* 95 S. CALIF. L. REV. (forthcoming 2022) (arguing that the textualism employed by a recent Supreme Court decision justifies the outcome protecting gay and transgender workers).

48 *See, e.g.*, *infra* notes 106–13 and accompanying text (arguing that textualism may allow for the regulation of greenhouse gasses under the Clean Air Act, even though Congress did not consider these at the time of enactment, because the purpose of the statute is to allow the EPA to regulate *any* air pollutants, which are defined broadly in the text).

49 *See infra* notes 319–29 and accompanying text (arguing that both a plain language interpretation of the Public Health Service Act and one focused on legislative history substantiates the CDC's authority to issue a COVID-related eviction moratorium); *see also infra* notes 173–88.

Note, as well, that references to presidential "interests" or "aims" in this Article concern the President's policy priorities in service of the public interest, as she conceives of it. These do not include, for purposes of this discussion, entirely self-interested goals[50] like reelection[51] or full-throated "constitutional arrogance."[52] This is, of course, notwithstanding the personal benefits to the President that attach to actions that are responsive to her political base or to the public interest as she sees it.

Finally, to change the framework of little "e" and big "E" executive power over time, this Article proposes inter- and intra-branch checks on the Executive's incentives for wielding control—as opposed to the substance, scope, or even the allocation of presidential power. Like in any number of instances where one branch of government shirks its duties, it becomes the burden of the other two branches, to some extent, to guide the wayward branch. To restore legislative primacy in policymaking, and to engender transparency in the executive branch, both the legislature and the judiciary must become more aware of the potential complications and consequences of presidentialism. In addition, this Article suggests, some of the responsibility to limit executive aggrandizement must fall to the President and agencies themselves, and the executive branch itself should therefore encourage a presidential turn toward a sincere interest in law execution that focuses on statutory—as opposed to Executive—goals.

Congress and courts may be either proactive or reactive, as it suits each branch, when it comes to obliging presidentialism to better enable agencies to maintain fidelity to legislative requirements and norms. Such checks could include congressional specification of the President's administrative role, oversight, and course correction. Both Congress and courts can play a role in reconciling disputes between presidential and other sources of law. Finally, the judiciary and even agencies could harness standards of review to assist the executive branch in implementing statutes based on their own interests, despite

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50 *See* PRAKASH, *supra* note 26, at 64 (cautioning against making too much of "the powers and influence" that presidents "*personally* wield").

51 *See* Kevin M. Stack, Widener L. Commonwealth L. Sch., 14th Gedid Lecture: The President and the Rise of Partisan Administration of the Law (Oct. 1, 2020), https://www.youtube.com/watch?v-QPLHetMET38 [https://perma.cc/J7K4-B8KT] (arguing that "partisan administration" is a form of presidential administration in which the President uses "the resources and actions of the federal government to benefit the incumbent's own party's election prospects (or to harm opponents), independent from the policy merits").

52 Michael J. Gerhardt, *Constitutional Arrogance*, 164 U. PA L. REV. 1649, 1651 (2016) (suggesting that presidents engage in "constitutional arrogance" when they use "their unilateral powers to break boundaries and displace other constitutional authorities").

the pressures of the President's policymaking agenda or perhaps even as part of that agenda.

This Article proceeds in three Parts. Part I illustrates how presidential intervention has thus far negatively impacted the administrative implementation of statutory law. Presidentialism has been, at least since the 1980s through today, in tension with the aims of legislation. Section I.A considers presidential administration that has, according to courts, led to the underenforcement of statutes. Section I.B analyzes presidential efforts that courts have condemned as expansions of the scope of agencies' regulatory authority. Overall, this Part shows that presidents have interfered with administrative fidelity to the scope and requirements of several statutory mandates to such an extent that the Supreme Court and the D.C. Circuit, among other federal courts, have been forced to constrain their actions for the past three decades.

Part II argues for presidentialism that is essentially in service of the legislature's mandates, regardless of the breadth of the executive branch's discretionary authority to implement the law. In doing so, Part II advocates for a new model of presidential administration that focuses on the aims of statutory schemes above and beyond the urgencies of politics and political accountability, while also asserting that presidentialism may be both statute-focused *and* commanding. Much of this Part suggests that statute-focused presidentialism could involve a directive Executive—albeit one who pressures agencies to engage in statutory implementation that is more attentive to the nuances of statute, as opposed to the President's own goals. Section II.A suggests that a careful reading of statutory text and purpose could lead to policymaking that, in fact, is highly influenced by the President as a substantive matter. Section II.B suggests that, as a constitutional matter, the President may be empowered to apply the law selectively under certain circumstances. And Section II.C suggests that statute-focused presidentialism is even consistent with unitary executive theory.

To bring a paradigm of statute-focused presidentialism into being, Part III outlines a concerted, inter-branch approach to shaping presidential discretion so that it is more squarely oriented toward the aims of legislation. Section III.A argues that the legislature should emphasize its own goals at the outset by establishing clear administrative roles for presidents in the execution of law. Section III.B asserts that agencies themselves should execute the law by parsing the extent to which the President's influence over statutory enforcement warps the

goals of legislation. Courts can encourage this. Not only should courts continue to constrain agencies' efforts to alter their own jurisdictions, but moreover, they should begin to evaluate the legitimacy of agency action by determining whether agencies' pursuit of the President's policy goals comes at the expense of statutory aims. Per Section III.C, agencies must also engage in statutory interpretation that engages statutory schemes. To support this endeavor, courts could apply *Chevron*[53] to evaluate the President's influence on administrative statutory interpretation more closely and apply the major questions doctrine to reserve for themselves some administrative statutory interpretation that has been warped by the President. Finally, Part III.D advises that courts utilize hard look review under the arbitrary and capricious standard—a standard whose very purpose is to ensure that the agency has not relied on factors which Congress did not intend it to consider, and that the Supreme Court has recently been willing to deploy against problematic agency action—to hold administrative efforts to implement the law to standards of rationality, or even accountability, in the wake of presidential administration.

I. Conventional, Disruptive Presidentialism

In the mid-twentieth century, the Supreme Court affirmed the bedrock constitutional principle that the Executive cannot act in contravention of federal statutes.[54] About a decade later, the Court made explicit the idea that agencies may pursue presidential directives[55] as long as there is "there is no statutory limitation" that prohibits the agency from following the President's command.[56] Since then, the D.C. Circuit has approved agency actions directed by the President, as long as the agency follows the President's order only "to the extent allowed by the law."[57]

The D.C. Circuit has consistently held that presidential directives may not alter an agency's duties under its governing statutory scheme.

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53 Chevron, U.S.A., Inc. v. Nat.'l Res. Def. Council, Inc., 467 U.S. 837 (1984).

54 *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) ("[T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."); *see also supra* note 32 and accompanying text.

55 *See* Udall v. Tallman, 380 U.S. 1, 23 (1965) (holding that the agency reasonably interpreted both the executive order and the statute at issue).

56 *Id.* at 17.

57 *See* Bldg. & Constr. Trades Dep't v. Allbaugh, 295 F.3d 28, 32 (D.C. Cir. 2002) (suggesting that if an executive agency is unable to lawfully implement the President's order, then it must follow the law) (citing The Federalist No. 72, at 463 (Alexander Hamilton) (Benjamin F. Wright ed., 1961)).

For instance, the court has declared that a ratified treaty signed by a President is not "law" that changes an agency's statutory responsibilities.[58] In addition, an agency's obligations under statute may not be altered by presidential memorandum.[59] Furthermore, the court has blocked agency policies resulting from task forces if those policies do not comply with statutory requirements.[60]

These cases support an enduring intuition underlying the paradigm of presidential administration: that agencies directed by the President act only within the constraints of statutory law. As a result, so this view goes, while the fruits of presidentialism may attract criticism for its partisanship, substance, or wisdom, or calls for a more active Congress to render it unlawful, the likelihood of conflict between a presidential directive and existing legislation is minimal. And yet, the ideal that agencies directed by the President act only within the constraints of statute has been unsteady for some time.

"For decades, U.S. Presidents have sought to exert greater control over the apparatus of the administrative state, through strategies of centralizing power,"[61] as well as by exerting direct control over administrative initiatives. Note that the term "presidential administration" refers to the latter—that is, to various mechanisms by which the President may lead or direct her agencies. These include "issuing broad mandates via directed memoranda and executive orders, creating presidential councils, and guiding agencies' implementation of their statutory mandates,"[62] as well as various situations involving political influence over administrative adjudication.[63]

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58 Nat. Res. Def. Council v. EPA, 464 F.3d 1, 3, 11 (D.C. Cir. 2006) ("Because the post-ratification agreements of the parties are not 'law,' EPA's rule—even if inconsistent with those agreements—is not in violation of any domestic law within the meaning of the Clean Air Act.").

59 *See* Nat'l Fed'n of Fed. Emp., Local 1622 v. Brown, 645 F.2d 1017, 1025 (D.C. Cir. 1981) (holding that the Department of Defense acted impermissibly in capping the wages of non-appropriated fund workers solely on the basis of President Carter's anti-inflation program, issued via a memorandum to the heads of all executive departments and agencies); *id.* at 1022 (reiterating that an agency may act as the President's subordinate only "[w]ithin the range of choice allowed by statute").

60 *See* New York v. EPA, 413 F.3d 3, 40–41 (D.C. Cir. 2005) (striking down EPA safe harbor rules loosening Clean Air Act standards that were directed by Vice President Dick Cheney's Energy Task Force, as a violation of the statute).

61 Jud Mathews, *Trump as Administrator in Chief: A Retrospective*, in THE AMERICAN PRESIDENCY UNDER TRUMP 1, 2 (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3747046 [https://perma.cc/GN7G-K7TV].

62 Bijal Shah, *Executive (Agency) Administration*, 72 STAN. L. REV. 641, 687 (2020).

63 *See* Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 858–59 (2015).

As a result, the President's use of her constitutional power and execution of her constitutional responsibilities have come into conflict in a manner that is projected through the administrative agencies. The conflict manifests as follows: in the modern era, the President enters office with the support of a coalition that seeks myopically to implement its policy goals,[64] which may include sweeping deregulation.[65] As a result, the President wields heavy control over agencies' priorities and actions in pursuit of partisan policy aims, which may be in tension with the statutory aims agencies could be expected to pursue.

The President also has agents who engage in administrative intervention on her behalf,[66] sometimes through well-known and other times through underappreciated channels. "To fully exercise their constitutional and statutory duties, modern presidents rely on . . . aides—from cabinet secretaries to the lowest political appointees—[who] act in many ways like the president's extra eyes, ears, mouth, arms, and legs."[67] These players include the Vice President and the offices and agencies of the White House, including the Office of Management and Budget ("OMB") and its subcomponent, the Office of Information and Regulatory Affairs ("OIRA").[68] The Executive also employs presidential and White House councils, committees, subcommittees,

64 *See* ACKERMAN, *supra* note 25, at 9 ("I predict that [Presidents] . . . will increasingly govern through their White House staff of superloyalists, issuing executive orders that their staffers will impose on the federal bureaucracy even when they conflict with congressional mandates . . . .").

65 *See* Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1 (2014) (arguing that one of the two major parties has grown hostile to the mission of the administrative state but lacks the power to amend the legislation that has defined that mission).

66 ACKERMAN, *supra* note 25, at 7 ("The modern presidency is an institution, not only a person.").

67 PRAKASH, *supra* note 26, at 65.

68 *See generally*, Nina A. Mendelson, *Disclosing 'Political' Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127 (2010).

and task forces,[69] which may be particularly adept at weakening the legislature's influence.[70]

The intensity of presidential control over agencies, coupled with the prevailing, narrow focus of modern presidents on their own policy interests, has diluted the execution of law. As Saikrishna Bangalore Prakash notes, "Modern presidents regularly use their authority to advance their [own] policy agendas at the expense of the legislative policies of Congress,"[71] and they are at an institutional advantage to do so.[72] As Woodrow Wilson predicted, the President may "substitute his own orders for acts of Congress which he wants but cannot get."[73]

Presidents' highly centralized efforts to prioritize their own policy aims, which push against the boundaries set by Congress, began in the Reagan Administration.[74] President Reagan called for deregulation and a revamping of administrative oversight, and famously initiated a wide array of deregulation efforts coordinated through the new OMB and its subcomponent, OIRA.[75] Indeed, the Reagan Administration had an "anti- government, deregulatory agenda [that] could not be accomplished through legislative means" and that depended "on an

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69 Some have argued that presidential councils constitute "an illegal shadow government." Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 CARDOZO L. REV. 219, 226 (1993) (citation omitted) (noting this critique by a Congressperson against Vice President Dan Quayle's Council on Competitiveness, as well as the legislative view that a presidential council might problematically block an agency from adhering to its statutory duties). However, the D.C. Circuit has rejected challenges to presidential councils. *See, e.g.*, Meyer v. Bush, 981 F.2d 1288, 1298 (D.C. Cir. 1993) (rejecting a challenge to President Reagan's Task Force on Regulatory Relief); New York v. Reilly, 969 F.2d 1147, 1152 (D.C. Cir. 1992) (rejecting a challenge to agency rule that relied on the opinion of Quayle's Council on Competitiveness, finding instead that the agency "exercised its expertise").

70 *See* Joshua D. Clinton, David E. Lewis & Jennifer L. Selin, *Influencing the Bureaucracy: The Irony of Congressional Oversight*, 58 Am. J. Poli. Sci. 387 (2013).

71 PRAKASH, *supra* note 26, at 216.

72 *See* ACKERMAN, *supra* note 25, at 15 (noting that "[t]he Founders thought that Congress would be [the] most dangerous" branch, and that they thus took care to dilute its power vis-à-vis that of the President); McGinnis & Rappaport, *supra* note 25 (arguing that legislative political polarization has enabled the President to adopt changes to the law unilaterally).

73 WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 71 (1908); *see also* PRAKASH, *supra* note 26, at 20 ("Modern presidents are lawmakers.").

74 Kagan, *supra* note 23, at 2277 (noting that the "sea change" towards presidential administration "began with Ronald Reagan's inauguration"); *see also* Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 596 (1989) ("The Reagan Justice Department . . . was unusually creative, if not unusually successful, in invoking separation of powers rhetoric to defend unilateral presidential initiatives and to challenge those practices it disfavored of the other branches.").

75 *See* Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 689 (2016).

aggressive administrative strategy . . . to secur[e] its ideological goals."[76]

Whereas President Reagan sought to control the administrative state largely through OIRA review, President George W. Bush's White House inserted itself into administrative decisionmaking and rulemaking processes.[77] President Clinton likewise asserted himself in the regulatory process on a more individualized basis—via presidential directives[78]—to accomplish policy goals that were at odds with legislative intent.[79] During his terms in office, President Obama borrowed from the playbooks of these prior administrations to influence the administrative state. Like President Reagan, President Obama's centralized crisis management strategy, based on the use of domestic, subject-matter "czars," advanced policies contrary to those supported by a combative Congress.[80] And like President Clinton, President Obama announced ownership over agency-led policies, sometimes to the detriment of administrative legitimacy.[81]

Also like his predecessors, President Trump's preferred approaches to presidential administration included exercising centralized control over and claiming ownership of agency actions, in part by "forc[ing] policy change through a flurry of written orders."[82] Echoing President Reagan, President Biden suggested early in his term that OIRA, which is "a predominantly reactive agency within OMB, should have responsibility to develop regulations that advance the Administration's values."[83]

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76 Morton Rosenberg, *Congress's Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627, 628 (1989).

77 *See* Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 423–24 (2009).

78 *See* Bressman, *supra* note 10 ("Presidential directives had been around before the Clinton Administration, but President Clinton made more regular use of them. In contrast, President Ronald Reagan issued nine directives; President George H.W. Bush issued four; and President Clinton issued 107.").

79 *See* Kagan, *supra* note 23, at 2333; Watts, *supra* note 75, at 690–91.

80 Aaron J. Saiger, *Obama's "Czars" for Domestic Policy and the Law of the White House Staff*, 79 FORDHAM L. REV. 2577, 2586 (2011).

81 *See* Watts, *supra* note 75, at 710–11, 714–15.

82 Manheim & Watts, *supra* note 30, at 1744.

83 Bressman, *supra* note 10 ("Faced with a number of major, continuous, and complex national crises, President Biden is looking to OIRA to promote his goals."); *see, e.g.*, Memorandum on Modernizing Regulatory Review, 86 Fed. Reg. 7223 (Jan. 20, 2021) (directing OMB to produce recommendations that "provide concrete suggestions on how the regulatory review process can promote public health and safety, economic growth, social welfare, racial justice, environmental stewardship, human dignity, equity, and the interests of future generations").

This Part argues that via these well-known mechanisms of presidential centralization and control, presidents have pressured agencies to act outside of the boundaries or contrary to the requirements established by statutory authority. Scholars on the right[84] and the left[85] have argued that presidents will choose to undercut the law in order to respond to voters' demands. Unfortunately, "presidents deprioritize, evade, or void some subset of federal law when they believe policy or necessity demands it . . . [and] may shrink or expand laws in order to accomplish their policies."[86] Some presidential attempts to alter agencies' delegated jurisdiction have been so egregious that the judiciary itself has seen fit to rebuff them.[87]

Before proceeding, it is worth noting that in some instances, it is difficult to isolate the precise chain of events leading from the President's interests to an agency's changed actions. This difficulty exists in large part because the internal communications by which the President impresses her preferences upon agencies are generally unavailable to outsiders, which poses a significant challenge to scholars of executive norms and presidential power. That having been said, both the Supreme Court and the D.C. Circuit have been reluctant to bless Executive efforts to alter agencies' power to regulate, including those of Presidents Trump, Obama, W. Bush, Clinton and H.W. Bush.[88] Notably, the D.C. Circuit has relented to the agency in some instances,[89] but efforts by the Trump and Biden administrations are currently facing reprobation in the courts.[90]

Furthermore, relying to any extent on case law to unearth intra-executive dynamics may result in a selection bias. This problem is faced by scholars of presidentialism more generally, tasked as they are with capturing the specifics of internal branch dynamics that often

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84 *See* PRAKASH, *supra* note 26, at 64 ("[I]n a context where citizens demand policy innovation from their presidents, these presidents are more apt to gratify such demands even at the expense of the law.").

85 ACKERMAN, *supra* note 25, at 9 (predicting that presidents will "assert 'mandates from the People' to evade or ignore congressional statutes when public opinion polls support decisive action").

86 PRAKASH, *supra* note 26, at 221.

87 *See* Shah, *supra* note 62, at 683–84 (noting the "judiciary's interest in limiting agencies' opportunity to infringe on Congress's right to determine administrative jurisdiction").

88 *See id.* at 729–47 (collecting cases where the D.C. Circuit has rebuffed administrative actions directed by presidential administrations).

89 *See, e.g.*, *infra* notes 210–14 and accompanying text.

90 *See, e.g.*, *infra* notes 97–107 and accompanying text; *infra* notes 146–97 and accompanying text.

transpire with little documentation and limited transparency.[91] Then again, judicial decisions offer the most detailed description and analyses of the lawfulness of agency action.

Case law as a source of data has other benefits, too. For one, a body of research built on case law lends itself to more systematic review than intra-executive branch information gathered ad hoc. In addition, disapproving courts offer keen analyses that bolster this Part's argument that presidentialism is a problem. In any case, the bias toward justiciability exists not only in administrative law scholarship, but also among agencies themselves, who are primed to avoid litigation.

By mining examples from case law and other sources,[92] this Part illustrates that presidential influence over and intervention in agency action exists and that it may hinder agencies' adherence to statutory requirements. To do so, it considers how presidents influence agencies and the impact of this influence on agencies' execution of the law, as framed by the shortcomings of that execution raised in court. In particular, it catalogues examples of presidential intervention in agency action and evaluates whether and to what extent agency actions furthered in the wake of presidentialism adhered to judicial understandings of statutory schemes.

More specifically, this Part shows, Presidents have directed agencies either to shirk their delegated responsibilities (Part I.A) or act beyond the limits of their statutory jurisdiction (Part I.B) to achieve particular regulatory or deregulatory outcomes, further a policy scheme, or appease a stakeholder that dislikes the requirements of statute. It is not necessarily the case that an agency's reconceptualization of the scope of its authority is inconsistent with the responsibilities it shoulders or the authority it has been granted by statute, but the following cases highlight a tension between agencies' claimed scope of

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91 For instance, it is possible that case law highlights the most egregiously harmful examples of presidential influence, because it focuses on those instances of presidentialism that have led to litigation. Accordingly, it may be that situations in which the President encourages redemptive, deliberative administrative behavior take place in private, such as among the President's own counsel, although scholars have suggested otherwise. *See* ACKERMAN, *supra* note 25, at 99–101 (arguing that the Office of Legal Counsel and White House counsels in general face institutional challenges to providing nonpartisan guidance to the President and are "the last place to look for a systematic legal check on overweening presidential ambition") (emphasis omitted). That having been said, the fact that the President sometimes acts positively as a lawful leader does not bear on the assertion that *some* presidential interventions result in unlawful agency action.

92 *See supra* note 36 and accompanying text (discussing the sources of this Article's data set).

authority and courts' understanding of it. In exploring this tension, this Part brings to light a disconnect between presidents' conventional use of administrative discretion for their own policymaking purposes and the demands of statutory law that transcend the particularized policy interests of presidents. In addition, it illustrates when and articulates how presidential administration has altered agencies' enforcement of legislative mandates in favor of the President's policy aims.

One of this Part's contributions is to highlight incentives that have united presidents' drive to influence agency action, and the extent to which these incentives create administrative tension with legislation. Another is to show how presidentialism's disruptive influence transcends presidencies and political factions. A third is to illustrate that although both the executive and legislative branches have constitutional claims to administrative control, the former branch has interfered with the latter branch's authority to animate agencies.[93] Ultimately, this Part contends that Presidents seeking to exercise their power for their own purposes have done so at the expense of the executive responsibility to enforce the law, which implicates the separation of powers between the political branches.[94]

A. Underenforcement of Statutes

As both progressive and conservative scholars have noted, recent presidents have sought to underenforce legislation.[95] In some cases, the D.C. Circuit and Supreme Court have engaged with the issue of whether the resulting agency action is inconsistent with statutory aims, while other instances—namely those having to do with President Biden's interest in limiting the enforcement of certain statutes—have only just begun to make their way to the courts.

As for cases that have been resolved to some degree by the Supreme Court, each of the presidencies from George W. Bush through

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93 "[E]ven if we assume (counterfactually) that Congress somehow can perfectly control both bureaucratic drift and legislative drift, the presence of the executive, like the presence of the independent judiciary, impedes Congress's ability to control agencies . . . ." Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War over Administrative Agencies*, 80 GEO. L.J. 671, 697 (1992).

94 *See* Goldsmith & Manning, *supra* note 33, at 1838 (arguing that "the [Supreme] Court uses the Take Care Clause as a placeholder for more abstract and generalized reasoning about the appropriate role of the President in a system of separation of powers").

95 *See* Peter M. Shane, *Faithful Nonexecution*, 29 CORNELL J.L. & PUB. POL'Y 405, 405 (2019) (arguing that presidential undermining of the executive branch's enforcement of the law may be understood as a "contraven[tion of] the President's faithful execution duty"); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 784 (2013).

today offer at least one vivid example. In a case highlighted in the Introduction,[96] President Trump directed the EPA to hold the position that the Clean Air Act did not permit the agency to implement the Clean Power Plan, an Obama-era policy that "sets flexible and achievable standards that give each state the opportunity to design its own most cost-effective path toward cleaner energy sources."[97] Specifically, the agency issued the Affordable Clean Energy ("ACE") rule, which repealed the Clean Power Plan and, in its stead, required fewer emissions reductions.[98] This chain of events led to *American Lung Ass'n*, in which the D.C. Circuit decided that the EPA's limiting characterization of its authority under statute was inconsistent with the Act.[99]

The agency took a textualist approach to statutory interpretation to justify the Trump Administration's goal of underenforcing the Clean Air Act.[100] More specifically, as the court noted, "[t]he EPA explained that it felt itself statutorily compelled to [repeal the Clean Power Plan] because, in its view, 'the plain meaning' of Section 7411(d) [otherwise known as Section 111(d) of the Clean Air Act, the statute under which the EPA may regulate] 'unambiguously' limits the best system of emission reduction to only those measures 'that can be put into operation at a building, structure, facility, or installation.'"[101] Furthermore,

> [c]onsidering its authority under Section 7411 to be confined to physical changes to the power plants themselves, the EPA's ACE Rule determined a new best system of emission reduction for coal-fired power plants only. The EPA left unaddressed in this rulemaking (or elsewhere) greenhouse

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96 *See supra* notes 2–7 and accompanying text.

97 *What is the Clean Power Plan?*, NRDC (Sept. 29, 2017), https://www.nrdc.org/stories/how-clean-power-plan-works-and-why-it-matters? [https://perma.cc/V3C2-9CPY].

98 Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520 (Sept. 6, 2019), (to be codified at 40 C.F.R. 60).

99 985 F.3d 914, 995 (D.C. Cir. 2021).

100 Jonathan Masur and Eric Posner argue that the agency took this approach because their cost/benefit analysis revealed significant benefits to the Clean Power Plan that revealed the ACE to be bad policy. *See* Jonathan S. Masur & Eric A. Posner, *Chevronizing Around Cost-Benefit Analysis*, 70 DUKE L. J. 1109, 1109 (2021).

101 *Am. Lung Ass'n*, 985 F.3d at 938 (emphasis omitted) (quoting Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. at 32,523–24).

> gas emissions from other types of fossil-fuel-fired power plants, such as those fired by natural gas or oil.[102]

In response, the D.C. Circuit evaluated the EPA's reading of the Clean Air Act[103] and declared that it fell short.[104] The court confirmed that the purpose of the statute is to permit a wider array of activities than asserted by the EPA.[105] Indeed, the majority went beyond the agency's narrow analysis to consider deeply—in a 147-page decision, no less—the requirements and expectations encompassed by the Clean Air Act. In addition, it independently determined that the statute authorizes the EPA to regulate extensively.[106] Ultimately, it concluded, "[b]ecause promulgation of the ACE Rule and its embedded repeal of the Clean Power Plan rested critically on a mistaken reading of the Clean Air Act, we vacate the ACE Rule and remand to the Agency."[107]

In *West Virginia v. EPA*, the Supreme Court reversed the D.C. Circuit.[108] Importantly, scholars have argued that the Court's affirmation of the Trump EPA's interpretation of the Clean Air Act is a problematic reading of the statute.[109] However, it is possible that rather than illustrating illegitimate Trump-era underregulation of the Clean Air Act, this set of cases concern an unlawful effort by the Obama-era EPA to expand the scope of its jurisdiction.[110]

The Trump EPA's position in *West Virginia v. EPA* was similar to the agency's argument in *Massachusetts v. EPA*,[111] in which the Supreme Court held invalid the EPA's position—as directed by President W. Bush—that it was not authorized to regulate carbon dioxide and other greenhouse gases as pollutants under the Clean Air Act.[112] In *Massachusetts v. EPA*, the Court applied a textualist approach to statutory interpretation to find that the Clean Air Act "empower[s]

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102 *Am. Lung Ass'n*, 985 F.3d at 938.

103 "Even looking beyond the text does nothing to substantiate the EPA's proposed reading of Section 7411." *Id*. at 951 (proffering analysis under the heading "Statutory History, Structure, and Purpose").

104 *Id*. at 950–51 (proffering analysis under the heading "EPA's Reading Itself Falls Short").

105 *Id.* at 956–57.

106 *Id.* at 930–32; *see also id.* at 988 ("Section 7411(d) allows the EPA to regulate carbon dioxide emissions from [a variety of] power plants.").

107 *Id*. at 995.

108 West Virginia v. EPA, 142 S. Ct. 2587 (2022).

109 *See infra* notes 277–79 and accompanying text.

110 *See infra* notes 112–15 and accompanying text.

111 549 U.S. 497 (2007).

112 *Id.* (holding that the EPA contravened the Clean Air Act when it refused to regulate vehicular emissions of greenhouse gases).

the EPA Administrator to set emission standards for '*any* air pollutant,'" defined as "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air."[113] By focusing on the language of the statute, the Court embraced textualism in order to find "capacious agency authorization" under the statute.[114] Abbe R. Gluck and Lisa Schultz Bressman note that this decision is one in which the Court relied on legislative history as well.[115]

In the immigration context, courts have split on whether presidential administration is consistent with statutory law. One set of cases involves an executive order from President Biden, issued on the first day of his presidency.[116] In this order, President Biden requested that the immigration agencies engage in efforts "to protect national and border security, address the humanitarian challenges at the southern border, and ensure public health and safety."[117] In response to the executive order, the Secretary of the Department of Homeland Security ("DHS") issued a memorandum to agency directors with three specific directives, which included an immediate 100-day pause on deportations.[118] This pause would have enabled DHS to coordinate a department-wide review of policies and practices concerning immigration enforcement and to develop guidelines on matters of national, border, and public security.[119]

On the one hand, one federal district court in Florida denied a motion for a preliminary injunction against this policy.[120] The court noted that, "Notwithstanding the listing of priorities, the memo states that 'nothing in [the] memorandum prohibits the apprehension or detention of individuals unlawfully in the United States who are not

113 Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 62–63 (citing 42 U.S.C. §§ 7521(a)(1), 7602(g)).

114 *See id*. at 63.

115 *See* 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, 976 n.258 (2013).

116 Revisions of Civil Immigration Enforcement Policies and Priorities, Exec. Order No. 13,993, 86 Fed. Reg. 7051 (Jan. 20, 2021).

117 *Id.* at 7051.

118 Memorandum from David Pekoske, Acting Sec'y, DHS, to Troy Miller, Senior Off. Performing the Duties of the Comm'r, et al. (Jan. 20, 2021), https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf [https://perma.cc/C2PA-RF7P].

119 *See id*.

120 Florida v. United States, 540 F. Supp. 3d 1144, 1144 (M.D. Fla. 2021).

identified as priorities.'"[121] In other words, the court determined that these enforcement priorities are not in contravention of the statutory law governing DHS.

On the other hand, a federal district court in Texas granted a preliminary injunction against this policy based on its view that the 100-day moratorium on some deportations is not consistent with the statutory language.[122] As that court notes, the 100-day pause furthers "President Biden's Executive Order stating that the new administration will 'reset the policies and practices for enforcing civil immigration laws to align enforcement' with the 'values and priorities' the new Executive deems important."[123]

Nonetheless, and despite "all the[] detailed explanation of the Executive's seemingly unending discretion," the court declares, "the Defendants substantially undervalue the People's grant of 'legislative Powers' to Congress."[124] While the lawsuit against this policy has been dropped because "the policy expired and the Biden administration said it had no plans to extend or reinstate it,"[125] this episode nonetheless exemplifies the tension between the conventional pursuit of presidential administration and consistency with legislative ends.

Moreover, the same Texas court recently condemned President Obama's immigration directive instructing the immigration agencies to defer the deportation of various noncitizens,[126] a policy known as Deferred Action for Childhood Arrivals ("DACA").[127] DACA was considered by critics[128]—and framed by the President himself[129]—as

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121 *Id.* at 1149.

122 Texas v. United States, 524 F. Supp. 3d 598, 607 (S.D. Tex. 2021).

123 *Id*. at 653.

124 *Id*. at 651 ("Here, the Government has changed 'shall remove' to 'may remove' when [the statute] unambiguously means *must* remove. Accordingly, the 100-day pause is not an action committed to agency discretion.").

125 Daniel Wiessner, *Texas Drops Challenge to Biden Admin.'s Deportation Moratorium*, REUTERS (May 21, 2021, 2:53 PM), https://www.reuters.com/business/legal/texas-drops-challenge-biden-admins-deportation-moratorium-2021-05-21/ [https://perma.cc/GF28-M5M7].

126 Texas v. United States., No. 1:18-CV-00068, 2021 WL 3022434, at *2 (S.D. Tex. Jul. 16, 2021).

127 Memorandum from Janet Napolitano, Sec'y, Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al. (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [https://perma.cc/5Q7D-QJ2Q]. Adopted by DHS under President Obama, "the DACA Memorandum established a process and agency-wide criteria for granting 'deferred action' to certain childhood-arrivals who lack a lawful immigration status." Benjamin Eidelson, *Unbundling DACA and Unpacking Regents: What Chief Justice Roberts Got Right*, JACK M. BALKIN: BALKINIZATION (June 25, 2020), https://balkin.blogspot.com/2020/06/unbundling-daca-and-unpacking-regents.html [https://perma.cc/XP4B-NXB8].

128 *See, e.g.*, PRAKASH, *supra* note 26, at 51 ("President Obama adopted . . . a unilateral

an attempt to underenforce a statute in lieu of changing it through the appropriate mechanism for altering legislation. Notably, in a related case, the Supreme Court considered—and ultimately rejected—President Obama's assertion that his immigration policy was just narrow enough that it did not "entail 'ignoring the law.'"[130] Until recently, however, DACA remained in place due to a Supreme Court ruling that the Trump Administration's attempt to rescind the policy was illegitimate,[131] while also establishing that the DACA policy itself is subject to judicial review.[132] Since then, President Biden has directed the immigration agencies to "preserve and fortify DACA,"[133] and the agencies have begun to comply.[134]

Nonetheless, in July 2021, a district court permanently enjoined DHS from "administering the DACA program and from reimplementing DACA without compliance with" the Administrative Procedure Act ("APA").[135] Moreover, it characterized the DACA program as "illegal" because it falls outside immigration statutory schemes and congressional intent.[136] More specifically, the court determined that

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'pen-and-phone' strategy [and] . . . wielded it to remake the immigration landscape, bypassing and sidelining Congress."); Delahunty & Yoo, *supra* note 95, at 784 (arguing that President Obama's efforts to engage in prosecutorial discretion violated the Take Care Clause, which the authors declare "imposes on the President a duty to enforce *all* constitutionally valid acts of Congress in *all* situations and cases").

129 *See* Remarks on Immigration Reform and an Exchange with Reporters, 1 PUB. PAPERS 800–01 (June 15, 2012) (transcribing Rose Garden speech by President Obama declaring that under DACA, DHS will have "discretion about whom to prosecute" while still recognizing that "[DACA] is temporary, Congress needs to act."); Law, *supra* note 6 (asserting that "Obama commanded the Department of Homeland Security to announce that it was unilaterally implementing their version of the DREAM Act").

130 Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71, 122 (2017) (emphasis omitted) (discussing United States v. Texas, 579 U.S. 547 (2016)).

131 DHS v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1901 (2020); *see also infra* notes 571–74 and accompanying text (discussing the reasoning behind this decision).

132 *Regents*, 140 S. Ct. at 1906.

133 Memorandum on Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA), 86 Fed. Reg. 7,053, (Jan. 20, 2021) ("The Secretary of Homeland Security, in consultation with the Attorney General, shall take all actions he deems appropriate, consistent with applicable law, to preserve and fortify DACA.").

134 Press Release, DHS, Statement by Homeland Security Secretary Mayorkas on DACA (Mar. 26, 2021), https://www.dhs.gov/news/2021/03/26/statement-homeland-security-secretary-mayorkas-daca [https://perma.cc/6PVB-8RS9] (noting that the agency was "taking action to preserve and fortify DACA . . . in keeping with the President's memorandum"); *see also* Genevieve Douglas, *New Measures to Preserve DACA Coming Soon, USCIS Official Says*, BLOOMBERG L. (May 17, 2021, 3:28 PM), https://news.bloomberglaw.com/daily-labor-report/new-measures-to-preserve-daca-coming-soon-uscis-official-says [https://perma.cc/BX35-ARPR].

135 Texas v. United States, No. 1:18-CV-00068, 2021 WL 3022434, at *2 (S.D. Tex. July 16, 2021); 5 U.S.C. §§ 551–559.

136 Texas v. United States, 549 F. Supp. 3d 572, 604–14 (S.D. Tex. 2021).

"Congress has not granted [the agency] the statutory authority to adopt DACA";[137] that DACA contravenes statutory schemes addressing deportation,[138] work permits,[139] and humanitarian pathways to citizenship;[140] and that "DACA is not supported by historical precedent," per the court's analysis of regulatory and statutory schemes.[141] Since then, the Supreme Court has granted cert on this case, but denied a motion to stay this district court order.[142]

In response to the district court decision, President Biden has implored Congress to pass improved immigration legislation, while continuing to pledge that his Administration will pursue the DACA policy.[143] On the one hand, he states, "only Congress can ensure a permanent solution by granting a path to citizenship for Dreamers that will provide the certainty and stability that these young people need and deserve."[144] On the other hand, he asserts that the "Department of Justice intends to appeal this decision in order to preserve and fortify DACA. And, as the court recognized, the Department of Homeland Security plans to issue a proposed rule concerning DACA in the near future,"[145] which it did in September 2021.[146] In this single statement, President Biden lays out the tension between statutory requirements and his own policy goals and articulates an intention to draw on agency rulemaking to change the contours of how immigration legislation is applied.

B. Expanding Enforcement Jurisdiction

Reaching back from today to the Clinton presidency, both Democratic and Republican administrations have sought to expand agencies' authority to regulate, and the Biden Administration is no exception. Some of President Biden's new policies are already facing claims that they violate the law. For instance, as noted in the previous

137 *Id.* at 604.

138 *See id.* at 622.

139 *Id.* at 610.

140 *Id.* at 613-14.

141 *Id.* at 617.

142 United States v. Texas, 22-58 (22A17), 597 US at *1 (July 21, 2022), *cert. granted*, (setting the argument for this case in December 2022), *available at* https://www.supremecourt.gov/orders/courtorders/072122zr_7k47.pdf [https://perma.cc/D295-PUPX].

143 Presidential Statement on Deferred Action for Childhood Arrivals and Immigration Reform Legislation, 2021 DAILY COMP. PRES. DOC. 1 (July 17, 2021).

144 *Id.*

145 *Id.*

146 Deferred Action for Childhood Arrivals, 86 Fed. Reg. 53,736 (Sept. 28, 2021) (to be codified at 8 C.F.R. pts. 106, 236, 274a).

Section,[147] the Supreme Court very recently validated the Trump EPA's repeal of an environmental protection policy directed by President Obama by finding that Obama-era policy itself to be unlawful.[148] Indeed, the Court determined that the EPA had overstepped its statutory jurisdiction because it did not have "clear congressional authorization" under the Clean Air Act to establish President Obama's Clean Power Plan.[149]

While the Supreme Court reversed the D.C. Circuit, it did so by employing a purposivist analysis like the D.C. Circuit did in the decision below.[150] More specifically, the Court likewise rejected what it perceived to be textualism employed by the Obama EPA[151] and instead applied the major questions doctrine[152] based on "both separation of powers principles and [the Court's] practical understanding of legislative intent."[153] Under its own analysis, the Court determined that "Congress did not grant EPA in Section 111(d) of the Clean Air Act the authority to devise emissions caps based on the generation shifting approach the Agency took in the Clean Power Plan."[154] (Note that "generation-shifting" refers to the agency's efforts to regulate shifts in electricity production (for instance "from existing coal-fired power plants, which would make less power, to natural-gas-fired plants, which would make more") as a form of emissions control.[155])

Simply put, the Court characterizes the Obama EPA's efforts to generation shift as outside the lawful scope of the Clean Air Act because the relevant language of the Clean Air Act was "vague" and "long-extant,"[156] and lacked a "clear statement" granting the EPA the requisite authority,[157] and in doing so, authenticates President Trump's deregulatory efforts. Notably, this is in direct opposition to the D.C. Circuit's assertion that the Trump EPA's failure to require a shift to

147 *See supra* notes 108–09 and accompanying text.

148 West Virginia v. EPA, 142 S. Ct. 2587 (2022).

149 *See id*. at 2609 (citation omitted).

150 *See supra* notes 100–07 and accompanying text (rejecting the Trump EPA's textualist analysis in favor of a deep and nuanced reading of the Clean Air Act).

151 *See West Virginia v. EPA*, 142 S. Ct. at 2609 (We are "'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there. . . To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary.") (citation omitted).

152 For an explanation of the major questions doctrine, see *infra* notes 499–502 and accompanying text.

153 *West Virginia v. EPA*, 142 S. Ct. at 2609 (citation omitted).

154 *Id*. at 2595 (citation omitted).

155 *Id*. at 2593.

156 *Id*. at 2610.

157 *Id*. at 2614.

non-coal forms of energy production (such as gas or oil) as a means to reduce emissions[158] constituted an underenforcement of the Clean Air Act by the EPA.[159]

Another high-profile example of a Biden policy that led an agency to exercise authority beyond the scope of its statutory jurisdiction is a CDC mandate requiring masks on public transportation.[160] This mandate, which was part of a coalition of efforts by the Biden Administration to prevent the spread of COVID-19,[161] was initially implemented in February 2021.[162] The CDC was set to extend the mandate before it expired on April 18, 2022.[163] However, a district court judge struck the mandate down before the CDC could do so.[164]

To come to this decision, the judge evaluated the Public Health Service Act,[165] which states in relevant part:

> The Surgeon General, with the approval of the Secretary [of Health and Human Services], is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases . . . . For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary."[166]

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158 American Lung Ass'n v. EPA, 985 F.3d 914, 995 (D.C. Cir. 2021).

159 *See supra* notes 102–04 and accompanying text.

160 *See supra* notes 12–13 and accompanying text.

161 *See, e.g.*, Exec. Order No. 13,991, 86 Fed. Reg. 7045 (Jan. 20, 2021); COVID-19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,402 (Nov. 5, 2021) (to be codified at 29 C.F.R. pts. 1910, 1915, 1917–18, 1926, 1928); *see also* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 595 U.S., slip op. at 2 (Jan. 13, 2022) (per curiam). (ruling on a vaccine mandate that required a vaccinate-or-test regime for the majority of the U.S. workforce).

162 Requirement for Persons to Wear Masks While on Conveyances and at Transportation Hubs, 86 Fed. Reg. 8,025 (Feb. 3, 2021).

163 Associated Press, *Biden Administration Extends Public Transport Mask Mandate by Two Weeks*, THE GUARDIAN (Apr. 13, 2022, 12:33 AM), https://www.theguardian.com/us-news/2022/apr/13/biden-administration-extends-public-transport-mask-mandate-cdc [https://perma.cc/PHC2-N4Y3].

164 *See* Health Freedom Def. Fund v. Biden, No. 8:21-cv-1693-KKM-AEP, 2022 WL 1134138, at *1 (M.D. Fla. Apr. 18, 2022).

165 *Id.* at *9 (identifying 42 U.S.C. § 264(a) as the purported source of the CDC's authority to issue the rule requiring masks on public transportation).

166 42 U.S.C. § 264(a); *see also* 42 C.F.R. § 70.2 (delegating this authority to the CDC).

The judge applied textualism to determine that the CDC's mask mandate is not "necessary to prevent . . . communicable diseases."[167] Drawing on "corpus linguistics" to find the ordinary meaning of the term at the time the statute was written, as well as on the view that the term "sanitation" has to be narrowly defined to avoid bringing "[e]very act necessary to prevent disease spread would be possible" under its umbrella, the judge declared that the term "'sanitation" in the statute refers to measures that clean something, but not to measures that keep something clean.[168] Because the mandate to wear masks falls into the latter meaning of "sanitation," the judge concluded, it is outside the authority granted to the CDC by the statute.[169] The Biden Administration is no longer enforcing the mandate,[170] although it does appear to be appealing the decision,[171] if only to further its own interest in asserting the scope of the CDC's statutory authority.[172]

Another such policy is a CDC order extending the federal eviction moratorium in order to prevent the spread of COVID-19, which the Supreme Court has blocked.[173] The CDC issued its first eviction moratorium incident to COVID-19 relief legislation passed by Congress in March 2020.[174] "Among other relief programs, the Act im-

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167 *Health Freedom Def. Fund*, 2022 WL 1134138, at *17–20.

168 *Id.* at *17–18.

169 *Id.* at *19.

170 David Shepardson, Rajesh Kumar Singh & Jeff Mason., *U.S. Will No Longer Enforce Mask Mandate on Airplanes, Trains After Court Ruling*, REUTERS (Apr. 19, 2022, 5:22 AM), https://www.reuters.com/legal/government/us-judge-rules-mask-mandate-transport-unlawful-overturning-biden-effort-2022-04-18/ [https://perma.cc/8W92-569H].

171 Sheryl Gay Stolberg, *Justice Dept. Appeals to Reinstate Transportation Mask Mandate*, N.Y. TIMES (Apr. 20, 2022), https://www.nytimes.com/2022/04/20/us/politics/cdc-transportation-mask-mandate.html [https://perma.cc/4XHV-R8C3].

172 *See* Charlie Savage & Sharon LaFraniere, *Analysis: The U.S. Appealed to Reinstate Masks. But Is It Seeking to Win?*, N.Y. TIMES (Apr. 22, 2022), https://www.nytimes.com/2022/04/22/us/politics/biden-legal-strategy-mask-mandate.html [https://perma.cc/UP8D-K5AU] ("Legal specialists raised another possibility: The administration may instead be buying time and thinking about trying to erase the ruling — a move that would allow it to protect the powers of the Centers for Disease Control and Prevention to respond to a future crisis — but without reviving a mask mandate.").

173 *See supra* text accompanying note 16. Notably, the Court has since suggested that CDC's scope of authority is as contentious as the EPA's. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2613 (2022) ("The dissent contends that there is nothing surprising about EPA dictating the optimal mix of energy sources nationwide, since that sort of mandate will reduce air pollution from power plants, which is EPA's bread and butter. But that does not follow. Forbidding evictions may slow the spread of disease, but the CDC's ordering such a measure certainly 'raise[s] an eyebrow.'") (citation omitted).

174 Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116–136, 134 Stat. 281 (passed in March 2020 to alleviate burdens caused by the burgeoning COVID–19 pandemic).

posed a 120-day eviction moratorium for properties that participated in federal assistance programs or were subject to federally-backed loans."[175] However, "[w]hen the eviction moratorium expired in July [2020], Congress did not renew it."[176] Nonetheless, the CDC decided to extend the moratorium without congressional authorization through December 2020.[177] Furthermore, this extension "went further than its statutory predecessor, covering all residential properties nationwide and imposing criminal penalties on violators."[178]

While Congress eventually decided to extend the CDC's second moratorium through January 2021 as part of a second COVID-19 relief bill,[179] the CDC then issued a third moratorium extending relief through June 2021, months after the legislative renewal of the second moratorium ended.[180] The CDC issued this extension notwithstanding both a D.C. Circuit ruling that the agency was unlikely to overcome a challenge to the second extension,[181] and the President's own concerns about a lack of congressional authorization and constitutional authority to issue another extension.[182] Notably, however, the third morato-

175 Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2486 (2021) (per curiam) (citing Pub. L. 116–136, § 4024, 134 Stat. 281).

176 *Id.* Despite congressional efforts, a vote to renew the moratorium failed. Barbara Sprunt, *The Biden Administration Issues a New Eviction Moratorium After a Federal Ban Lapsed*, NPR (Aug. 3, 2021, 7:07 PM), https://www.npr.org/2021/08/03/1024345276/the-biden-administration-plans-a-new-eviction-moratorium-after-a-federal-ban-lap [https://perma.cc/8X4T-9QTJ].

177 *Ala. Ass'n of Realtors*, 141 S. Ct. at 2486 (citing Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020)).

178 *Id*.

179 Consolidated Appropriations Act, 2021, Pub. L. No. 116–260, § 502, 134 Stat. 2078, 2078–79 (2021).

180 *See id.* (citing Temporary Halt in Residential Evictions, 85 Fed. Reg. at 55,292).

181 Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs., No. 20-cv-03377-DLF, 2021 U.S. App. WL 2221646, at *1 (D.C. Cir. June 2, 2021).

182 *See* Krishnadev Calamur, *The Supreme Court Will Allow Evictions to Resume. It Could Affect Millions of Tenants*, NPR (Aug. 26, 2021, 10:29 PM), https://www.npr.org/2021/08/26/1024668578/court-blocks-biden-cdc-evictions-moratorium [https://perma.cc/W2W3-DYKU] ("Gene Sperling, who oversees the White House's rollout of the COVID relief, said Biden 'has double, triple, quadruple checked' on whether he could unilaterally extend the eviction moratorium, but determined it was not possible . . . [because] the Supreme Court made it clear that 'congressional authorization' was needed on the matter."); *see also* Peter M. Shane, *No, the CDC Eviction Moratorium Does Not Raise Constitutional Issues*, WASH. MONTHLY (Aug. 10, 2021), https://washingtonmonthly.com/2021/08/10/no-the-cdc-eviction-moratorium-does-not-raise-constitutional-issues/ [https://perma.cc/L6V8-Q7CB] (arguing that "Biden added to confusion about the [moratorium] when he cast his deliberations as a matter of consultation with 'constitutional lawyers' and said, 'the bulk of the constitutional scholarship says that [a moratorium] is not likely to pass constitutional muster.'"); Jack Goldsmith, *The Anatomy of a Screw Up: The Biden Eviction Moratorium Saga*, LAWFARE (Aug. 9, 2021, 9:43 AM) https://www.lawfareblog.com/anatomy-screw-biden-eviction-moratorium-saga [https://perma.cc/U8TL-W47K] (arguing that

rium was narrower than the previous extension; the previous extension applied nationwide, while the third moratorium did not apply to counties that "no longer experience substantial or high levels of community transmission."[183]

Nonetheless, the Supreme Court suggested: "It would be one thing if Congress had specifically authorized the action that the CDC has taken. But that has not happened. Instead, the CDC has imposed a nationwide moratorium on evictions in reliance on a decades-old statute . . . ."[184] The "decades-old" statute "to which the Court refers is, as in the previous example, . . . the Public Health Service Act."[185]

In its brief evaluation of this legislation, the Court states that "[r]eading both sentences together, rather than the first in isolation, it is a stretch to maintain that [the statute] gives the CDC the authority to impose this eviction moratorium."[186] As a result, the Court blocked the newest extension, declaring that "careful [statutory] review . . . makes clear that the applicants are virtually certain to succeed on the merits of their argument that the CDC has exceeded its authority."[187] The Court concludes: "It strains credulity to believe that this statute grants the CDC the sweeping authority that it asserts."[188]

Another Biden policy facing judicial reproach involves agency efforts to "pause" new oil and natural gas leases on public lands or in offshore waters,[189] per an executive order.[190] At first blush, "pausing" a lease may appear to be underenforcement of the law, in that it would disrupt a lease made pursuant to statute. However, this Part characterizes this directive as potentially expanding administrative jurisdiction because it reads into the statute additional agency authority to suspend an existing contract. As instructed by the President:

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the Biden Administration overreacted to the Supreme Court order halting the moratorium by assuming "the Supreme Court ha[d] made clear that" the option for the CDC to issue another moratorium was "no longer available.").

183 Temporary Halt in Residential Evictions in Communities with Substantial or High Transmission of COVID-19 to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 43,244, 43,250 (Aug. 6, 2021).

184 Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2486 (2021) (per curiam).

185 *See supra* notes 164–66 and accompanying text.

186 *Ala. Ass'n of Realtors*, 141 S. Ct. at 2488.

187 *Id.* at 2486.

188 *Id.*

189 *Fourteen U.S. States Sue Biden Administration Over Oil and Gas Leasing Pause*, REUTERS (Mar. 24, 2021), https://www.reuters.com/article/us-usa-biden-wyoming/fourteen-u-s-states-sue-biden-administration-over-oil-and-gas-leasing-pause-idUSKBN2BG2KG [https://perma.cc/6RAV-NLFV].

190 Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021).

> To the extent consistent with applicable law, the Secretary of the Interior shall pause new oil and natural gas leases on public lands or in offshore waters pending completion of a comprehensive review and reconsideration of Federal oil and gas permitting and leasing practices in light of the Secretary of the Interior's broad stewardship responsibilities over the public lands and in offshore waters, including potential climate and other impacts associated with oil and gas activities on public lands or in offshore waters.[191]

As of the date of writing, one district court has granted a preliminary injunction against this policy.[192] Despite the White House caveat that the Department of Interior should only exercise broad discretion in pursuit of the President's policy goals "to the extent consistent with applicable law" and "in light of the Secretary of the Interior's broad stewardship responsibilities,"[193] the court declared that the legislation at issue, which includes the Outer Continental Shelf Lands Act ("OCSLA") and the Mineral Leasing Act ("MLA"), grants neither the President nor the agency the authority to "pause" new oil and natural gas leases.[194]

The court asserted that "since OCSLA does not grant specific authority to a President to 'Pause' offshore oil and gas leases, the power to 'Pause' lies solely with Congress."[195] Furthermore, the court states that agencies cannot "cancel or suspend a lease sale . . . for no reason other than to do a comprehensive review pursuant to Executive Order 14008."[196] "Although there is certainly nothing wrong with performing a comprehensive review," the court remarks, "there is a problem in ignoring acts of Congress while the review is being completed."[197]

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191 *Id.*; *see also* Press Release, Dep't. of Interior, Fact Sheet: President Biden to Take Action to Uphold Commitment to Restore Balance on Public Lands and Waters, Invest in Clean Energy Future, (Feb. 11, 2021) (including a section entitled "Hitting Pause on New Oil and Gas Leasing"), https://www.doi.gov/pressreleases/fact-sheet-president-biden-take-action-uphold-commitment-restore-balance-public-lands [https://perma.cc/2C64-UVVZ] (including a section entitled "Hitting Pause on New Oil and Gas Leasing").

192 Louisiana v. Biden, 543 F. Supp. 3d 388, 388 (W.D. La. 2021); Joshua Partlow & Juliet Eilperin, *Louisiana Judge Blocks Biden Administration's Oil and Gas Leasing Pause*, WASH. POST (June 15, 2021, 9:47 PM), https://www.washingtonpost.com/climate-environment/2021/06/15/louisiana-judge-blocks-biden-administrations-oil-gas-leasing-pause/ [https://perma.cc/Q75K-N2E9].

193 *See* Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021).

194 Louisiana v. Biden, 543 F. Supp. 3d at 398, 413.

195 *Id.* at 398.

196 *Id.* at 410.

197 *Id.*

Another set of policies that may soon face litigation involve President Biden's issuance of a sweeping set of goals for anti-trust regulation,[198] which directs the Federal Trade Commission ("FTC") to pursue measures that might be in contravention of statutes governing the agency.[199] These allegedly problematic measures include "rescinding the bipartisan statement of policy that the FTC adopted in 2015 to interpret the FTC Act of 1914 in a manner consistent with antitrust law," and "abandon[ing] completely the rule of reason that the Supreme Court has been applying in antitrust law for over a century."[200]

In addition, President Trump—despite his alleged pursuit of deregulation—appears to have directed agencies to pursue healthcare policies outside the scope of the jurisdiction granted to them under existing legislation. These include an executive order claiming to provide healthcare coverage for those with preexisting conditions and other executive orders pledging to bring down prescription drug prices.[201] Notably, President Biden has also sought to advance the latter policy.[202] Regarding these drug initiatives, the Trump Administration noted that agency measures pursuant to these directives are likely

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198 *See* Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 9, 2021); Press Release, The White House, Fact Sheet: Executive Order on Promoting Competition in the American Economy (July 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/ [https://perma.cc/J27C-49HX] (noting that President Biden describes his anti-trust initiative as a "whole-of-government effort").

199 *See* Richard J. Pierce, Jr., *President Biden's Antitrust Agenda*, YALE J. ON REGUL.: NOTICE & COMMENT (July 12, 2021), https://www.yalejreg.com/nc/president-bidens-antitrust-agenda-by-richard-j-pierce-jr/ [https://perma.cc/L9SD-9V2W] (suggesting that at least one of President Biden's antitrust goals could be at odds with the Sherman Act).

200 Richard J. Pierce, Jr., *Fasten Your Seatbelts, the FTC Is About to Take Us on a Rollercoaster Ride*, YALE J. ON REGUL.: NOTICE & COMMENT (July 1, 2021), https://www.yalejreg.com/nc/fasten-your-seatbelts-the-ftc-is-about-to-take-us-on-a-rollercoaster-ride-by-richard-j-pierce-jr/ [https://perma.cc/Q9UB-Q54S].

201 *See* Exec. Order No. 13,948, 85 Fed. Reg. 59,649 (Sept. 13, 2020); Press Release, The White House, President Donald J. Trump's Blueprint To Lower Drug Prices (May 11, 2018), https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trumps-blueprint-lower-drug-prices/?utm_source=Twitter&utm_medium=social&utm_campaign=wh [https://perma.cc/WHU8-HHMT].

202 Exec. Order No. 14,036, 86 Fed. Reg. 36,987, (July 9, 2021) (noting that "Americans are paying too much for prescription drugs and healthcare services—far more than the prices paid in other countries" and pledging to draw on antitrust law to reduce drug prices)*; see also* Fraiser Kansteiner, *With Sweeping Executive Order, Biden Puts Drug Pricing, Anti-Competitive Strategies in the Crosshairs*, FIERCE PHARMA (July 12, 2021, 11:28 AM), https://www.fiercepharma.com/pharma/biden-order-puts-drug-pricing-anti-competitive-pharma-practices-crosshairs [https://perma.cc/D966-TE48] (noting that President Biden is "advancing a Trump-era policy" in an attempt to combat high prescription drug prices).

to be challenged as outside the scope of the agency's jurisdiction under statute.[203]

In addition, Trump issued an executive order, in pursuit of a unitary executive, that recategorized civil servants (with the exception of certain administrative adjudicators) as "Schedule F," thus rendering all of them subject to at-will removal.[204] While the Biden Administration subsequently revoked this proposal,[205] "it still bears attention,"[206] and could be reinvigorated by future administrations. Notably, "[t]he notion that professional civil servants—who perform policy roles—can be removed from office is destructive of objective and competent

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203 Health and Human Services (HHS) Secretary Alex Azur told the Senate Health, Education, Labor, and Pensions (HELP) Committee on June 26, six weeks after the [executive order] was released, that, for example, he believes his department, through the Food and Drug Administration, has the authority to force drug companies to disclose list prices in television advertisements. But he added that he would welcome legislation to "shore up" that authority because manufacturers will "certainly challenge" any new requirement in court.

Stephen Barlas, *Views Conflict on Trump's Drug-Pricing Blueprint: Most Actions Face Political, Legal, and Technical Roadblocks*, 43 PHARM. & THERAPEUTICS 10 (2018).

204 *See* Exec Order No. 13,957, 85 Fed. Reg. 67,631(Oct. 21, 2020) (allowing for a new "Schedule F" category that resurrects the patronage system, which would reclassify many civil servants as employees removable at will—including for purely political reasons); Erich Wagner, *'Stunning' Executive Order Would Politicize Civil Service*, GOV'T EXEC. (Oct. 22, 2020), https://www.govexec.com/management/2020/10/stunning-executive-order-would-politicize-civil-service/169479/ [https://perma.cc/3JZC-ZVCG] ("The argument here is that anyone involved in policymaking can be swept into this new classification, and once they [a]re in they [a]re subject to political review and dismissal for any reason.").

205 Exec. Order 14,003, 86 Fed. Reg. 7,231 (January 22, 2021).

206 Paul R. Verkuil, *Putting the Fizz Back into Bureaucratic Justice*, REGUL. REV. (Feb. 8, 2021) https://www.theregreview.org/2021/02/08/verkuil-putting-fizz-bureaucratic-justice/ [https://perma.cc/TV9K-ZTAB].

government."[207] Moreover, this policy is likely to undercut the Pendleton Act[208] and the Civil Service Reform Act.[209]

It is noteworthy that the D.C. Circuit has allowed the President to push an agency to alter its statutory enforcement in pursuit of a broader policy on at least one occasion. Specifically, the Federal Communication Commission ("FCC"), under the direction of President Obama, passed an order reclassifying the internet under Title II of the Telecommunications Act.[210] This pursuit of "net neutrality," which mandated equal access to the internet for all by subjecting internet providers to heavier regulation, was deemed a means toward "[i]nnovation, [c]ompetition, [f]ree [e]xpression, and [i]nfrastructure [d]eployment."[211]

Ultimately, the Obama Administration's efforts to pressure the FCC to regulate the internet were approved by the court as consistent with the agency's statutory authority to regulate.[212] And yet, while the D.C. Circuit denied rehearing of this case en banc because of the uncertainty regarding the future of the Title II Order under the Trump Administration,[213] the judges remained aware of a possible tension be-

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207 *Id.* (emphasis omitted) (discussing President Trump's "executive order on 'Creating Schedule F in the Excepted Service'"); *see also* Wagner, *supra* note 204 (noting that scientists, data collectors, attorneys, and other low-profile, expert bureaucrats could be removed from the government under the new executive order unless they "pledge their unwavering loyalty to" the President, as opposed to serving the nation); Lisa Rein, Josh Dawsey & Toluse Olorunnipa, *Trump's Historic Assault on the Civil Service Was Four Years in the Making*, WASH. POST (Oct. 23, 2020) (providing a history of the new Executive Order that illustrates that it is aimed at "allowing [the Trump A]dministration to weed out career federal employees viewed as disloyal in a second term"); Kelsey Brugger, *Trump Order Looks to Dismantle the 'Deep State'*, GREENWIRE (Oct. 22, 2020) (noting that "[c]ritics argued that the order is a blatant attempt to get rid of those [bureaucratic] experts, further blurring the line between the political leadership and the civil service," and sharing a comment by a former agency head that the order would diminish transparency in hiring and would prioritize people whose primary qualification was political loyalty).

208 Civil Service (Pendleton) Act, ch. 27, 22 Stat. 403 (1883) (codified as amended in scattered sections of 5 U.S.C.).

209 Civil Service Reform Act ("CSRA"), Pub. L. No. 95–454, 92 Stat. 1111 (1978). As one scholar has noted, Trump's executive order sought "to undo what the Pendleton Act and subsequent civil service laws tried to accomplish, which was to create a career civil service with expertise that is both accountable to elected officials but also a repository of expertise in government." Wagner, *supra* note 204 (quoting a professor at the University of Texas School of Public Affairs).

210 Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5618 (2015) (reclassifying the internet from an "information service" to a "telecommunications service").

211 *Id*. at 5625.

212 *See* U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 730 (D.C. Cir. 2016).

213 U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 382 (D.C. Cir. 2017) (Srinivasan, J., concurring) (per curiam) (noting that en banc review of a previous decision upholding the Obama

tween the President's policy interests and the requirements of the statute. More specifically, the dissent bristled that the net neutrality rule resulted from President Obama pressuring the FCC "into rejecting this decades-long, light-touch consensus in favor of regulating the Internet like a public utility," thus "[a]bandoning Congress's clear, deregulatory policy."[214]

Also under President Obama, a federal court invalidated a Bureau of Land Management rule promulgated on the basis of a "Climate Action Plan" and related directives from the President.[215] More specifically, "[t]he court held that the Bureau of Land Management exceeded its authority under the Mineral Leasing Act, which permits the agency to limit natural gas waste, but not to regulate air quality standards."[216] Notably, the court stated that "an administrative agency may not exercise its authority 'in a manner that is inconsistent with administrative structure that Congress enacted into law.'"[217] While the extent to which the Department of Interior (via the Bureau of Land Management) was behaving outside its mandate is up for debate,[218]

FCC's Open Internet Order is "particularly unwarranted" in light of the Trump FCC's notice of proposed rulemaking that would "replace the existing rule with a markedly different one").

214 *Id.* at 394 (Brown, J., dissenting) ("When the FCC followed the *Verizon* 'roadmap' to implement 'net neutrality' principles without heavy-handed regulation of Internet access, the Obama Administration intervened. Through covert and overt measures, FCC was pressured into rejecting this decades-long, light-touch consensus in favor of regulating the Internet like a public utility," thus "[a]bandoning Congress's clear, deregulatory policy. . . ."). *But see id.* at 382 (Srinivasan, J., concurring) (contending, in response to Judge Brown, that presidential pressure to increase statutory enforcement did not contravene the agency's statutory authority).

215 *See* Wyoming v. Dep't. of Interior, 493 F. Supp. 3d 1046, 1067 n.20, 1070 n.23, 1073 n.26 (D. Wyo. 2020).

216 Max Masuda-Farkas, Alana Sheppard & Megan Russo, *Week in Review*, REGUL. REV. (Oct. 16, 2020). In this way, the Bureau of Land Management was found to have infringed on the authority of the Environmental Protection Bureau as well, which is charged by the Clean Air Act with the regulation of air quality. *See* Wyoming v. Dep't. of Interior, No. 16-cv-00285, 2017 WL 161428, at *20–21 (D. Wyo. 2017).

217 Wyoming v. Dep't of Interior, 493 F. Supp. at 1064 (quoting Food & Drug Admin. v. & Williamson Tobacco Corp, 529 U.S. 120, 125 (2000)).

218 *See, e.g.*, Press Release, Peter Zalzal, Lead Attorney, Environmental Defense Fund, Wyoming Federal Court Overturns Common Sense Protections Against Wasting Natural Gas on Public and Tribal Lands (Oct. 8, 2020), https://www.edf.org/media/wyoming-federal-court-overturns-common-sense-protections-against-wasting-natural-gas-public [https://perma.cc/FK7W-6YWQ] ("The court recognized the Department of the Interior's clear authority to prevent harmful natural gas waste and that the measures the department adopted in 2016 would indeed cut waste. Nonetheless, it found the Waste Prevention Rule was unlawful based on its *additional* air quality benefits for tribal and Western communities.").

the court found that the agency, acting pursuant to President Obama's instructions, went beyond the bounds of its delegated authority.[219]

Conversely, in a separate case heard around the same time, the D.C. Circuit approved efforts by the executive branch to coordinate in the absence of delegated authority to do so. In a decision by then-Judge Kavanaugh, the court declared that the President has independent authority to coordinate her branch, regardless of whether she is so authorized by the legislature to execute the law in that manner,[220] notwithstanding that in this case, President Obama had little to do with the coordination plan at issue.[221]

Commentators argue that the President's power to coordinate her branch is beneficial to her branch, and therefore justified even without express legislative approval.[222] It is also possible to argue that the Constitution authorizes coordination[223] as "necessary to protect the operations of the federal government, even in cases in which no statute provides explicit authority to do so."[224]

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219 Wyoming v. Dep't. of Interior, 493 F. Supp. at 1052 (holding that the agency "exceeded its statutory authority . . . in promulgating the new regulations.").

220 Nat'l Min. Ass'n v. McCarthy, 758 F.3d 243, 249 (D.C. Cir. 2014) ("Under Article II of the Constitution, departments and agencies in the Executive Branch are subordinate to one President and may consult and coordinate to implement the laws passed by Congress . . . . In a 'single Executive Branch headed by one President,' we do not lightly impose a rule 'that would deter one executive agency from consulting another about matters of shared concern.'" (quoting Empresa Cubana Exportadora de Alimentos y Productos Varios v. Dep't of the Treasury, 638 F.3d 794, 803 (D.C. Cir. 2011))).

221 *See id*. at 246 (noting that two agencies adopted the coordination plan and failing to mention any presidential involvement at all).

222 *See, e.g.*, Bijal Shah, *Congress's Agency Coordination*, 103 MINN. L. REV. 1961, 1964 (2019) (noting that "the relevant literature has focused only on the ways in which interagency coordination has served as an *executive* tool for regulatory reform, to improve administrative adjudication, or to reconcile shared jurisdiction among agencies"); *McCarthy*, 758 F.3d at 249 (arguing that "our 'form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive.'") (citations omitted); Harold J. Krent, *Presidential Control of Adjudication Within the Executive Branch*, 65 CASE W. RES. L. REV. 1083, 1101–02 (2015) (discussing *McCarthy*) ("Congressional delegation to specific executive branch officials has not precluded Presidents from exercising managerial oversight in addition to the controls of appointment and removal. Without such oversight, there would be little coordination among agencies, resulting in duplication and waste.").

223 *See McCarthy*, 758 F.3d at 249 ("[W]e will not read into that statutory silence an implicit ban on inter-agency consultation and coordination . . . [because] restricting such consultation and coordination would raise significant constitutional concerns . . . . Indeed, one of the main goals of any President, and his or her White House staff, is to ensure that such consultation and coordination occurs in the many disparate and far-flung parts of the Executive behemoth.").

224 Goldsmith & Manning, *supra* note 33, at 1837–38, 1838 n.17 (noting that the Supreme Court recognized "the President's inherent authority to provide a bodyguard to protect a federal judge despite the lack of any explicit statutory authority" (citing Cunningham v. Neagle, 135 US 1, 67–68 (1890))).

Nonetheless, improvements to administrative communication and efficiency do not negate the possibility the Congress may have intended, in some cases, to privilege values that are at odds with coordination or to concentrate the bulk of statutory authority in a particular agency (for instance, one with the most relevant regulatory expertise). Furthermore, "[t]o the extent that coordination lowers the level of service legislators could provide to their constituents, these members are likely to use their oversight jurisdiction to impede coordination."[225] For instance, scholars have argued that the congressional reorganization of bureaucracy to create the new DHS was structured to allow different components of the agency to respond to different priorities.[226] In other words, Judge Kavanaugh's D.C. Circuit decision ignored the extent to which presidential or agency efforts to coordinate interfere with the execution of law as intended by the legislature.

In Justice Elena Kagan's best-known example of presidential administration,[227] *FDA v. Brown & Williamson Tobacco Corp*,[228] President Clinton directed the Food and Drug Administration ("FDA") to regulate beyond the scope of its authority.[229] In condemnation of President Clinton's efforts, the Supreme Court found that the agency overstepped its statutory authority when it promulgated rules meant to regulate the tobacco industry.[230] At the time, President Clinton had made clear his goal of increasing government oversight of the tobacco market and tobacco products.[231] In striking down the FDA's new policy, the majority focused on the legislature as the primary source of agency authority[232]—in contrast to the dissent's implication that the

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225 Dara Kay Cohen, Mariano-Florentino Cuéllar & Barry R. Weingast, *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673, 719–20 (2006).

226 More specifically, "[a]llowing the two separate legislative subcommittees with different goals to retain jurisdiction over the different pieces of the now reorganized bureau" may have purposefully "impede[d] coordination" in order to allow "different interests on the two subcommittees to continue to pull the two portions of the reorganized bureau in different directions." *Id*. at 706.

227 *See* Kagan, *supra* note 23.

228 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 158 (2000).

229 *See id.*

230 *Id.* at 125–26.

231 The President's News Conference, 2 PUB. PAPERS 1237 (Aug. 10, 1995), *available at* https://www.presidency.ucsb.edu/documents/the-presidents-news-conference-1076 [https://perma.cc/49EC-F3EQ].

232 *Brown & Williamson*, 529 U.S. at 132–33 (suggesting that a "coherent regulatory" framework of legislation, including and beyond the agency's enabling statute, defines and limits the breadth of valid agency action).

President may confer authority onto an agency[233]—and determined that "an FDA ban [on tobacco] would plainly contradict congressional intent."[234]

To justify its purposivist approach, the Court noted the FDA's longstanding practice of refraining from tobacco regulation, and Congress's acquiescence to this practice, as evidenced by its choice not to legislate a change to the practice.[235] The Court also identified a succession of statutes in which Congress relied on the agency's own characterization of its limited jurisdiction in repeated statements before Congress,[236] as well as other legislation regulating tobacco that indicated the legislature's expectation that the FDA did not have authority to regulate tobacco under its enabling statute, the Food, Drug, and Cosmetic Act ("FDCA").[237]

The Court also said that, on several occasions, Congress considered and rejected proposed amendments to the FDCA giving the agency authority to regulate tobacco products,[238] and that the structure of the Act precluded the agency from regulating tobacco products without banning them,[239] an outcome that would not be acceptable given the fact that Congress has shown clear intent that cigarettes and tobacco not be banned.[240] Given the economic importance of the tobacco industry, the Court concluded, Congress would not have subjected tobacco to regulation under the FDCA without saying so explicitly.[241] Ultimately, President Clinton's forceful assertion of agency jurisdiction was not enough to overcome this requirement.[242]

It is notable that the decision in this case was decided on a narrow 5-4 vote, and the dissent took a purposivist approach to statutory interpretation that ultimately supports the agency's position.[243] Indeed, both the majority and the dissent saw fit to engage in an analysis that

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233 *Id.* at 189–90 (Breyer, J., dissenting).

234 *Id.* at 122. Note that the FDA did not actually propose a wholesale ban on tobacco, but the Court found that, because the agency is required to ban drugs which "cannot be used safely for any therapeutic purpose," allowing their jurisdiction to include tobacco would compel a complete ban on tobacco products. *Id.* at 142.

235 *Id.* at 152.

236 *Id.* at 153.

237 21 U.S.C. §§ 301–399; *see Brown & Williamson*, 529 U.S. at 122.

238 *Brown & Williamson*, 529 U.S. at 147–48.

239 *Id.* at 142.

240 *Id.* at 121.

241 *Id.* at 147.

242 *Id.*

243 *See id.* at 161, 163 (Breyer, J., dissenting) ("I believe that the most important indicia of statutory meaning—language and purpose—along with the FDCA's legislative history . . . are sufficient to establish that the FDA has authority to regulate tobacco.").

emphasizes the legislature's policy aims, although the dissent separately argues that the President should be able to direct policy.[244] Notably, in the wake of *Brown & Williamson*, Congress gave the agency authority to regulate tobacco after all,[245] which suggests that the dissent's views of the intentions of the statutory scheme may have been accurate.[246]

Finally, the idiosyncratic example of the "Bush-Wilson Agreement" between President George H.W. Bush and former Archivist Don W. Wilson bears noting.[247] This agreement, signed on President Bush's last day in office, "purport[ed] to give . . . President Bush exclusive control over electronic records of the Executive Office of the President created during [his] term in office."[248] The D.C. district court found that this agreement violated the Presidential Records Act,[249] and issued an injunction prohibiting the Acting Archivist from implementing the agreement.[250]

Ultimately, this Part has illustrated that presidential administration goes beyond centralizing executive action in order to further the President's policy agenda or even directing agencies to formulate and implement controversial policies. Indeed, the Executive may pressure agencies to behave in ways that run counter to statutory requirements or expectations. More specifically, the President sometimes directs agencies to under- or overenforce the law. As to underenforcement, cases from the past three administrations offer examples. As to efforts to expand the scope of an agency's enforcement power, relevant cases span from the Biden Administration all the way back to the Clinton presidency. These cases all suggest that by influencing what agencies do for her own purposes, the President may push agencies to contravene statutory purpose or requirements.

So, what might we take away from all of this? Arguably, presidential administration is not only at odds with particular statutes, but also with the separation of powers. While both the executive and legis-

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244 *See id.* at 190–91 (Breyer, J., dissenting).

245 *See* Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111–31, 123 Stat. 1776 (2009).

246 *See* Christine Kexel Chabot, *Selling* Chevron, 67 ADMIN. L. REV. 481, 537 (2015) (noting that "the majority in *Brown & Williamson* was worried about erroneously affirming tobacco regulations to which Congress had not agreed" but may have failed "to recognize health protection Congress *did* delegate").

247 *See* Am. Hist. Ass'n v. Peterson, 876 F. Supp. 1300, 1303 (D.D.C. 1995).

248 *Id.*

249 44 U.S.C. §§ 2201–2209.

250 *Peterson*, 876 F. Supp. at 1303–04.

lative branches have constitutional claims to administrative control, the Executive has failed, to some extent, to acquiesce to legislative primacy in lawmaking. This is evidenced by Presidents' neglect of their duty to influence agencies in ways that benefit a searching administrative inquiry into legislative meaning. In other words, the prevailing, narrow focus of modern Presidents on their own policy interests alone—and the acquiescence of scholars to a self-centered version of Executive unilateralism—has rendered presidential administration deficient.

If one is a formalist, presidential administration in its current form may be unconstitutional in some cases. Presidentialism may lead to a failure by the executive branch to engage in faithful execution or to allow Congress to legislate. Furthermore, from a functionalist perspective, even if conventional presidential administration fosters political accountability, good governance or beneficial policies, it nonetheless encompasses an incomplete set of virtues. Instead, rather than being driven overwhelmingly by partisanship or politics, the executive branch has a responsibility to engage in bounded discretion exercised to fulfil statutory aims and to implement a balanced separation of powers that limits executive aggrandizement.

II. Expansive Presidential Administration Within Boundaries

The executive branch's authority to exercise discretion, however broad, is not a license to engage in single-minded pursuit of the President's own policy purposes. Part I illustrated not only that presidents in the modern era are directive- and agenda-focused, but also that presidential administration is sometimes at odds with statutory law. Part II touts a new conception of presidential administration, as opposed to simply denouncing it wholesale like others who seek to reinvigorate the bureaucracy.[251] In doing so, it advocates for a paradigm of presidential administration that prioritizes fidelity to legislative mandates and norms over the President's own policy and political interests and in addition to other goals, such as political accountability, high-quality coordination, uniformity in execution, and beneficial policy, that may otherwise be supported by presidentialism. Overall, this Part

251 *See*, *e.g.*, Blake Emerson & Jon D. Michaels, *Abandoning Presidential Administration: A Civic Governance Agenda to Promote Democratic Equality and Guard Against Creeping Authoritarianism*, 68 UCLA L. Rev. 418, 423 (2021) (stating that the authors are "down on presidential administration" and arguing in favor of "[t]ossing [o]ut the [p]residential [a]dministration [p]laybook").

argues that even if conventional presidential administration results in good governance and outcomes, presidentialism is nonetheless built on an incomplete set of values if it is not adequately statute-focused; it explains how even broad exercises of presidential and administrative discretion might be driven by a focus on statutory execution, as opposed to presidential aims; and it asserts that presidential administration that is focused on statutory aims may be consistent with a centralized or even unitary executive branch.

Scholars have advocated for presidentialism on the basis that it furthers good governance and preferable policy outcomes. This Part's argument for statute-focused presidential administration concedes that it is not necessarily consistent with an emphasis on public care, consultation with experts in all situations, or socially beneficial policymaking.

Some scholars level functionalist criticism against executive policymaking,[252] and critiques about the substance and partisanship of executive policymaking have been aimed at presidents from Roosevelt to Trump.[253] But others hold the view that a "strongly unitary executive can promote important values of accountability, coordination, and uniformity in the execution of the laws."[254] Truly, what many might consider to be "good" or beneficial policy can come from the presidential reshaping of statutory mandates, be it thirty years ago[255] or more recently.[256]

Furthermore, presidential administration on its own terms may seek to foster good governance[257] or coordination,[258] or even to insu-

252 *See, e.g.*, Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741, 1748–50 (2009) (noting criticisms of the idea that unitary executive theory furthers accountability); Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1031 (2013) (arguing that "presidential involvement in agency enforcement, though extensive, has been ad hoc, crisis-driven, and frequently opaque"); Mendelson, *supra* note 68 (advocating for greater transparency in OIRA oversight).

253 *See supra* note 25 (listing such critiques).

254 Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2 (1994); *see also* Michael A. Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PA. L. REV. 827, 829 (1996) (noting that arguments in favor of a centralized executive branch cite the reduction of collective action problems).

255 *See supra* notes 228–41 and accompanying text (discussing President Clinton's and the FDA's joint efforts in the 1990s to regulate the use of tobacco).

256 *See supra* notes 210–14 and accompanying text (discussing President Obama's and the FCC's joint efforts in 2017 to promote net neutrality).

257 *See, e.g.*, Exec. Order No. 10,355, 85 Fed. Reg. 79,379 (Dec. 7, 2020) (concerning the integration of agency "preparedness programs").

258 *See supra* note 222 (discussing how and why Presidents foster coordination).

late agency decisionmakers[259] in pursuit of better policy or decisional outcomes. Presidents have long engaged in cost/benefit analysis[260] (notwithstanding situations in which the Executive applies this analysis to fundamentally unjustifiable effect)[261], which can lead to transparency, accountability, or higher-quality policies,[262] notwithstanding the drawbacks of this approach.[263] Then again, cost-benefit analysis may not square with certain regulatory aims,[264] let alone with a statutory emphasis on maximizing benefits alone.

As to expertise in administration, Kathryn A. Watts notes that "not all forms of presidential control are equal."[265] Some forms of presidential control "taint agency science, prompt agencies to ignore

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259 *See* Kevin M. Stack, *Obama's Equivocal Defense of Agency Independence*, 26 CONST. COMMENT. 583 (2010). Note that in Executive Order 13,924, President Trump directed agency heads to "consider the principles of fairness in administrative enforcement and adjudication." 85 Fed. Reg. 31,353 (May 22, 2020). That having been said, President Trump's "focus on regulatory fairness, although presented in a neutral fashion, was directed at slowing down and even obstructing the enforcement process itself." Verkuil, *supra* note 206.

260 *See* Barilleaux & Kelley, *supra* note 33, at 7 (suggesting that President George W. Bush was interested in "ensuring that all regulations were vetted through a cost-benefit prism"); Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2295–96 (2006) (discussing "Reagan and Clinton [e]xecutive [o]rders [that] . . . impose[d] a cost-benefit analysis on all executive agencies when the organic statutes in question d[id] not preclude it"); Mashaw & Berke, *supra* note 25, at 555, 580, 590 (noting that Presidents Obama, Clinton, and Reagan all mandated cost-benefit analysis). *See*, *e.g.*, Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process, 40 C.F.R § 83 (2020).

261 *See, e.g.*, *A Debate Over President Trump's "One-In-Two-Out" Executive Order*, REGUL. REVIEW (June 26, 2017), https://www.theregreview.org/2017/06/26/debate-one-in-two-out-executive-order/ [https://perma.cc/N2DR-J2LY] (showcasing several scholars debating the constitutionality and lawfulness of Executive Order 13,771).

262 *See* Caroline Cecot, *Deregulatory Cost-Benefit Analysis and Regulatory Stability*, 68 DUKE L.J. 1593 (2019); Jonathan Masur, *Will Cost-Benefit Analysis Become the Law of the EPA?*, YALE J. ON REGUL.: NOTICE & COMMENT (July 11, 2018), https://www.yalejreg.com/nc/will-cost-benefit-analysis-become-the-law-of-the-epa-by-jonathan-masur/ [https://perma.cc/8LY2-TKFV] (arguing a Clear Air Act rule issued under the Trump Administration provided a good opportunity for the EPA "to instantiate [cost-benefit analysis] as the law of that agency").

263 *See* Matthew D. Adler & Eric Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165, 167 (1999) (noting that while the "popularity [of cost-benefit analysis] among agencies in the United States government has never been greater[, m]any law professors, economists, and philosophers believe that [cost-benefit analysis] does not produce morally relevant information and should not be used in project evaluation"); *A Debate Over the Use of Cost-Benefit Analysis*, REGUL. REV. (Sept. 26, 2016), https://www.theregreview.org/2016/09/26/debate-cost-benefit-analysis/ [https://perma.cc/RFZ3-RRLC] (noting that opponents of cost-benefit analysis argue that it "can mislead decision-makers [and] object to putting into dollar terms certain benefits—such as reductions in premature mortality or improvements in health—that they believe either cannot or should not be monetized").

264 *See* Susan Rose-Ackerman, *Putting Cost-Benefit Analysis in Its Place: Rethinking Regulatory Review*, 65 U. MIA. L. REV. 335 (2011).

265 Watts, *supra* note 75, at 706.

the law, and undermine transparency," she explains, while others "promote positive values like political accountability and regulatory coherence."[266] Moreover, the President may be better positioned to prioritize values that would not be executed well by technocrats, enforcement officials, or others at the front lines of the bureaucracy.

To put it succinctly, policies in forceful pursuit of the President's agenda are not suspicious on their face. However, even when the President acts to further social or optimal outcomes, good governance, or administrative norms, there is no clear evidence to suggest that Presidents generally pursue these values as a result of a careful evaluation of statutory aims. Even when presidentialism leads to virtuous policies, the President is usually motivated by her own goals, as opposed to a keen interest in dutiful statutory execution. Accordingly, this Part argues for the inclusion of an interest in functional interbranch balance in the set of incentives driving presidential administration, notwithstanding that a healthy separation of powers may also foster higher-quality presidentialism.

Notably, the focus of this Part is not on limiting the force or the scope of presidential control, but rather on shifting the President's *motivation* for wielding control. Accordingly, this Part imagines a model in which the President exercises control over agencies to support and amplify their capacity to implement legislation. In this alternate world, the President functionally acknowledges legislative supremacy in the creation of law, thus rendering an approach to administration that incorporates a more robust set of separation of powers values and limits to executive aggrandizement into the mix of incentives that currently drive presidentialism—incentives that include, predominantly, political accountability and self-interest, in addition to efficiency, good governance, and an interest in principled outcomes.

The remainder of this Part explores how various dimensions of execution discretion can be applied toward the legitimate execution of law and explains how even broad delegations of administrative power and a powerful President may be consistent with a renewed executive focus on law execution. In many situations, strong and expansive presidentialism dovetails with an invigorated administrative focus on statutory scheme. A vision of bounded presidentialism has room, even, for a unitary executive, but one in which the President assumes strict

266 *Id.*

control over agencies to ensure their accountability to norms and requirements espoused by Congress.

A. Legislative Authorization of or Acquiescence to Presidentialism

Statute-focused administration may be consistent with presidentialism.[267] Indeed, it may be that in some cases, Congress may have wished to have little or no say in the matter of law execution. At the very least, the legislating Congress may have supported the exercise of presidential discretion or at least expected the President to wield some control over the administration of statute.

First, perhaps Congress intended for policies to be formulated based on high-level or political considerations. Here, there may be a significant expanse of discretion delegated to the administrative state, and the agency may exercise it to follow the President to the ends of the earth. Complementarily, the President could legitimately act as a tiebreaker,[268] based on reasonable analysis suggesting that statutory values are vague, indeterminate, or conflicting; hold no clear objective; or are orthogonal to new regulatory challenges.[269]

There may also be situations in which old or broad delegations of statute necessitate presidential or political control as the intended or only recourse for statutory reconciliation, or to manage new challenges that implicate the legislative scheme at issue. After all,

> [a] key reason Congress makes broad delegations . . . is so an agency can respond, appropriately and commensurately, to new and big problems. Congress knows what it doesn't and can't know when it drafts a statute; and Congress therefore gives an expert agency the power to address issues—even significant ones—as and when they arise."[270]

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267 *See*, *e.g.*, Guedes v. ATF, No. 21-5045, 2022 WL 3205889, at *2–3 (D.C. Cir. Aug. 9, 2022) (stating that the ATF's interpretation of the National Firearms Act, "urged" by "then-President Trump and Congress," was "the best construction of the statute").

268 *See* Kent et al., *supra* note 32, at 2191 (suggesting that an textual reading of the Take Care Clause includes a "limited affirmative prescription [that] gives the President authority to fill in incomplete legislative schemes to promote the best interests of the people, . . . whose interests are usually mediated through their representatives"); Cornell W. Clayton, *Separate Branches—Separate Politics: Judicial Enforcement of Congressional Intent*, 109 POL. SCI. Q. 843, 872 (1994–95) ("[H]olding the executive branch responsible to the law does not rob the presidency of the energy that the Framers intended or that contemporary circumstances require.").

269 *See generally* Freeman & Spence, *supra* note 65 (discussing the problems of applying old statutes to new regulatory challenges).

270 West Virginia v. EPA, 142 S. Ct. 2587, 2628 (2022) (Kagan, J., dissenting) (discussing, in particular, Section 111 of the Clean Air Act).

This understanding applies in regulatory contexts as distinct as environmental protection[271] and national security.[272]

These types of situations differ, however, from those in which agencies exercise their discretion to pursue the President's goals in a vacuum. Take, for instance, the Trump Administration's contention,[273] and likewise, the argument furthered by the George W. Bush Administration,[274] that the EPA is not authorized under the Clean Air Act to regulate greenhouses gases—either those that emanate from certain sources, as was the EPA's argument under the Trump Administration,[275] or at all, as asserted by the Bush EPA.[276] In both of these cases, courts found against the agency after ascertaining the thrust of the statute at issue.

In *American Lung Ass'n*, the D.C. Circuit drew on purposivism to declare that the agency reached the "incorrect conclusion that the plain statutory text [of the Clean Air Act] clearly foreclosed the Clean Power Plan, so that complete repeal was 'the only permissible interpretation of the scope of the EPA's authority.'"[277] While this decision was reversed by the Supreme Court in *West Virginia v. EPA*, which found the Clean Power Plan to be unlawful, the Court's decision arguably allows a Trump-era policy deregulating environmental protection[278] to stand in contravention of both statutory text and intent.[279]

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271 *See*, *e.g.*, *id.* ("The majority's decision rests on one claim alone: that generation shifting is just too new and too big a deal for Congress to have authorized it in Section 111's general terms. But that is wrong. [I]n enacting Section 111 [Congress made a broad delegation.] The majority today overrides that legislative choice. In so doing, it deprives EPA of the power needed—and the power granted—to curb the emission of greenhouse gases.").

272 *See*, *e.g.*, Timothy Meyer & Ganesh Sitaraman, *The National Security Consequences of the Major Questions Doctrine*, 122 MICH. L. REV. *1-2 (forthcoming 2023) (arguing that an "expansive and free-form" major questions doctrine "raises serious problems for foreign affairs and national security" because it threatens the executive branch's ability to apply broadly-written statutes such as the Emergency Economic Powers Act, the Trade Expansion Act of 1962, the Trade Act of 1974, and the Defense Production Act to engage in "economic warfare" in order "to fight modern conflicts"), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4181908 [https://perma.cc/D69Q-KLJF].

273 *See* Am. Lung Ass'n v. EPA, 985 F.3d 914, 938 (D.C. Cir. 2021).

274 *See* Massachusetts v. EPA, 549 U.S. 497, 511–13 (2007).

275 *See supra* notes 97–107 and accompanying text.

276 *See supra* notes 112–15 and accompanying text.

277 *Am. Lung Ass'n*, 985 F.3d at 995.

278 *See* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, VA. L. REV. at *1 n.1 (forthcoming) (characterizing *West Virginia v. EPA* as "invoking major questions doctrine to invalidate EPA regulation designed to curb emissions from greenhouse gasses"), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4165724 [https://perma.cc/RJL4-FVZ8]; *id.* at *1–2 (arguing, among other things, that the major questions doctrine as deployed in *West Virginia v. EPA* "operates as a powerful deregulatory tool that limits or substantially

Thomas McGarity and Wendy Wagner assert that the "Court reached its result by applying the 'major questions' doctrine to avoid a deep analysis of the text and legislative history on Section 111" of the Clean Air Act.[280]

Accordingly, scholars have argued that the Court's affirmation of the Trump EPA's interpretation of the Clean Air Act was enabled by a controversial application of the major questions doctrine,[281] "which replaces normal text-in-context statutory interpretation."[282] Elena Kagan suggests that the major questions doctrine applies, for instance, when an agency tries to "decide significant issues on which they have no particular expertise"[283]—that is, "when there is a mismatch between the agency's usual portfolio and a given assertion of power."[284] "But that is not true here. The Clean Power Plan falls within EPA's wheelhouse, and it fits perfectly . . . with all the Clean Air Act's provisions."[285]

Likewise, in the Bush-era *Massachusetts v. EPA*, the Supreme Court drew on a textual analysis to assert that the Clean Air Act constitutes "capacious agency authorization" that "empower[s] the EPA Administrator to set emission standards for '*any* air pollutant.'"[286] In both cases, it seems, the statute—which was passed to wage a "war on

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nullifies congressional delegations to agencies in the circumstances where delegations are more likely to be used, and more likely to be effective").

279 *See* West Virginia v. EPA, 142 S. Ct. 2587, 2628 (2022) (Kagan, J., dissenting).

> [Congress] broadly authorized EPA in Section 111 to select the "best system of emission reduction" for power plants. The "best system" full stop—no ifs, ands, or buts of any kind relevant here. The parties do not dispute that generation shifting is indeed the "best system"—the most effective and efficient way to reduce power plants' carbon dioxide emissions. And no other provision in the Clean Air Act suggests that Congress meant to foreclose EPA from selecting that system; to the contrary, the Plan's regulatory approach fits hand-in-glove with the rest of the statute.

Id.

280 Thomas O. McGarity & Wendy E. Wagner, *Do Not Blame Us*, REGUL. REV. (July 25, 2022), https://www.theregreview.org/2022/07/25/mcgarity-wagner-do-not-blame-us/ [https://perma.cc/Z35P-ZRXD].

281 *See West Virginia v. EPA*, 132 S. Ct. at 2641 (Kagan, J., dissenting) (noting that the major questions doctrine could be described by a "get-out-of-text-free card").

282 *Id.* at 2634 (Kagan, J., dissenting) (suggesting that the majority's formulation of the major questions doctrine "replaces normal text-in-context statutory interpretation").

283 *Id.* at 2633 (Kagan, J., dissenting).

284 *Id.*

285 *Id.*

286 Loshin & Nielson, *supra* note 113 at 62-63 (emphasis added) (discussing *Massachusetts v. EPA*).

air pollution"[287] —authorized the agency to exercise broad discretion to determine how best to reduce air pollution. Regardless of the canon of statutory interpretation the EPA decides to use to enforce the Clean Air Act, both the D.C. Circuit and the Supreme Court have said that the EPA cannot, with sincerity, assert that the legislation allows the agency to underregulate in the face of new challenges to the environment, such as those posed by greenhouse gases.

Even if delegations of discretion are generous or abstract, this does not necessarily mean that they should be at the mercy of politicos. A broad delegation might instead be the result of collective action problems or a lack of expertise in the legislature. In such instances, Congress might have expected agencies to exercise discretion that is limited by or that ensures a particular allegiance to the legislation's aims. In other words, administrative actors may have discretion, but only within boundaries.[288] This may mean, as a concrete matter, that there are limits to an agency's freedom to bend to the President's preferences.

In such instances, statute-focused execution might require devolving power downwards from the President and political appointees towards civil servants—a move from presidential administration to "civic administration."[289] In such cases, the President might direct an agency to consider more closely the requirements of statutes, instead of compelling it to bend statutory requirements to her policy interests. In this regard, Kevin M. Stack argues that "agencies' institutional capacities—a familiar constellation of expertise, indirect political accountability, and ability to vet proposals before adopting them—make them ideally suited to carry out the task of purposive interpretation."[290] When broad delegation results from indeterminacy, its enforcement may require, primarily, administrative engagement in expert, technocratic, or other nuanced determinations.

One example of broad delegation that requires a technical analysis hails from forty years ago and led to the well-known *Benzene* case,[291] which concerned the Department of Labor's authority to "pro-

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287 INDUR M. GOKLANY, CLEARING THE AIR: THE REAL STORY OF THE WAR ON AIR POLLUTION (1999).

288 *See* Cary Coglianese & Christopher S. Yoo, *Introduction: The Bounds of Executive Discretion in the Regulatory State*, 164 U. PA. L. REV. 1587, 1591 (2016) (introducing a symposium that "cast into some doubt the seemingly absolute discretion the executive branch has until now been thought to possess").

289 Emerson & Michaels, *supra* note 251, at 422.

290 Stack, *supra* note 43, at 871.

291 Indus. Union Dep't v. Am. Petroleum Inst. (The Benzene Case), 448 U.S. 607 (1980).

vide safe and healthful employment."[292] In this case, the Supreme Court decided that the Secretary of Labor exceeded his statutory authority by failing to make a threshold finding that "a significant risk of material health impairment" existed to justify the standard he set in enforcing this law.[293] In other words, the broad delegation in this case did not require a high-level judgment call, but rather a technical and expert determination concerning the allowable amounts of exposure to a particular chemical.[294]

Today, President Biden seeks to "ensure that the review process promotes policies that reflect new developments in scientific and economic understanding, fully accounts for regulatory benefits that are difficult or impossible to quantify, and does not have harmful anti-regulatory or deregulatory effects,"[295] which suggests he may be open to allowing agency experts to assess how best to enforce a statute.[296] More generally, no delegation of discretionary authority—old, broad, abstract, or otherwise—should be exercised on the basis of political interests alone without contextual statutory analysis.

That having been said, the President may feasibly direct the scope of policy, even in the absence of a clear legislative imperative to do so, or even if there is no need for leadership to reconcile vague or inconsistent legislation. For instance, if a rule is interpretative, it could be directed by the President without undercutting the underlying statute.[297] However, presidentialism should occur within the constraints of statute and include a genuine effort to uphold the preferences of the Congress that passed the relevant legislation.

Moreover, there may be cases in which careful interpretation suggests that agencies can maintain fidelity to the aims of a statutory scheme by furthering the President's policy goals or interest in con-

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292 *Id.* at 607 (holding that a rule regulating benzene in small doses was not supported by substantial evidence).

293 *Id.* at 639.

294 *See id.*

295 Memorandum on Modernizing Regulatory Review, *supra* note 83.

296 *See id.*; *see also* Susan Dudley, *Regulatory Reset*, REGUL. REV. (Feb. 19, 2021), https://www.theregreview.org/2021/02/19/dudley-regulatory-reset/ [https://perma.cc/7HT8-3UKK] (arguing that Biden's Memorandum on Modernizing Regulatory Review, which drew on "long-standing, bipartisan principles [that] call for agencies to analyze the effects of alternative regulatory approaches before they issue rules," displayed "regulatory humility").

297 In *Alina Health Services*, the Court resolved a circuit court split in which more than one circuit suggested "that notice and comment wasn't needed in cases" involving the interpretation of Medicare provisions. Azar v. Allina Health Servs., 139 S. Ct. 1804, 1810 (2019) (citing Via Christi Reg'l Med. Ctr., Inc. v. Leavitt, 509 F.3d 1259, 1271, n.11 (10th Cir. 2007); Baptist Health v. Thompson, 458 F.3d 768, 776 n.8 (8th Cir. 2006) as examples of cases mentioning this principle).

tending with a new regulatory challenge. The CDC's recent issuance of both a mask mandate[298] and an eviction moratorium[299] pursuant to the Public Health Service Act offer case studies to exercise this approach. In both of these instances, the agency was arguably justified in pursuing the President's directive to manage the spread of COVID-19 because the statute fundamentally empowers the agency to confront public health crises through quarantine and other public health measures.[300] As these examples illustrate, the essential aspect of the legislation can be identified via textual and purposivist statutory interpretation.

In the case of the federal mask requirement, the legal analysis in the decision overturning the mandate has been widely criticized primarily for its idiosyncratic application of textualism.[301] One law professor observed that the court's "understanding of 'sanitation' [is] . . . not how the term is used in the public health field or understood by the [CDC], which issued the mandate."[302] As noted earlier, the judge's decision focused on the ordinary meaning of

> the word "sanitation" in the statute [based on her] consult[ation of] various contemporary dictionaries. [The judge] found a couple of definitions . . . [some of which the judge] acknowledge[s] "would appear to cover the Mask Mandate," [but f]or reasons that are hard to explain, she prefers [other] definitions. . . . None of this is entirely logical or even textually coherent . . . ."[303]

Some scholars of corpus linguistics have since asserted that "linguistic principles and data support the opposite conclusion about 'sanitation' and the statute's meaning" and that therefore, the "language

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298 *See supra* notes 162–72 and accompanying text.

299 *See supra* notes 175–88 and accompanying text.

300 *See History of Quarantine*, CDC, https://www.cdc.gov/quarantine/historyquarantine.html [https://perma.cc/KS88-N44L].

301 *See* John Kruzel, *Judge's 'Textualist' Ruling on Airline Mask Mandate Sparks Backlash*, THE HILL (Apr. 20, 2022, 5:16 AM), https://thehill.com/regulation/court-battles/3273602-judges-textualist-ruling-on-airline-mask-mandate-sparks-backlash/ [https://perma.cc/R3K9-E4JM] (noting that critics "derided" the ruling as "as overly formalistic and divorced from the health imperatives of a global pandemic").

302 Joe Hernandez & Selena Simmons-Duffin, *The Judge Who Tossed Mask Mandate Misunderstood Public Health Law, Legal Experts Say*, NPR (Apr. 19, 2022, 6:23 PM), https://www.npr.org/sections/health-shots/2022/04/19/1093641691/mask-mandate-judge-public-health-sanitation [https://perma.cc/NK2V-RBWJ] (quoting Erin Fuse Brown, professor at Georgia State University College of Law).

303 Amy Davidson Sorkin, *The Hazard-Filled Ruling on the Transportation Mask Mandate*, NEW YORKER (Apr. 22, 2022), https://www.newyorker.com/news/daily-comment/the-hazard-filled-ruling-on-the-transportation-mask-mandate [https://perma.cc/D8RD-DR8B].

of the Public Health Services Act authorizes the CDC's transit mask order."[304] In relevant part, they conclude that the judge "invented [two] senses of 'sanitation' which are divorced from the meanings described by the dictionaries" and which may also reflect a technical, not ordinary, meaning of the word.[305] In doing so, the judge artificially excluded from the meaning of the word measures related to preserving public health.[306] Furthermore, the court excluded mask mandates from the definition of "sanitation" of its choosing, despite the fact that even the definition it chose ("measures that clean something") could include such a mandate.[307]

More broadly, these scholars argue that "the district court's opinion is a representative example of modern textualism. This modern textualism," these authors continue, "has replaced faithful agency to Congress with populist appeals to 'democratic' interpretation of law's 'ordinary meaning . . . . '"[308] These commentators note as well the problems with textualism that "strip[s] single words from their context."[309] This analysis defends the view that textualism is more legitimate when anchored by the context provided by the legislation at issue.

Arguably, in this case, the judge's interpretation of statute both eschewed "faithful agency to Congress" and ran counter to an interpretation that is democratically accountable.[310] After all, the directive to implement the mask mandate came from the President, whose preferences are held out as representative of voters' interests. This understanding supports this Section's contention that presidentialism can be

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304 Stefan Th. Gries, Michael Kranzlein, Nathan Schneider, Brian Slocum & Kevin Tobia, *Unmasking Textualism: Linguistic Misunderstanding in the Transit Mask Order Case and Beyond*, 123 COLUM. L. REV. F. (manuscript at 1–4) (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4097679&dgcid=EJournal_htmlemail_law:society:legislation:ejournal_abstractlink [https://perma.cc/3B6D-Y9XT].

> From the Supreme Court to the Middle District of Florida, a slate of new textualist judges are poised to issue impactful holdings in the name of "ordinary" and "public" meaning. These opinions claim legitimacy from linguistics and empirical sciences. But the principles and data invoked are often invalid, unrobust, cherry-picked, or misleading. If textualists are to plausibly deny that their interpretations are motivated by normative commitments, their commitment to valid linguistic principles will have to be more convincing.

Id. (manuscript at 5).

305 *Id.* (manuscript at 15).

306 *See id.* (manuscript at 14).

307 *Id.* (manuscript at 13).

308 *Id.* (manuscript at 4–5).

309 *Id.* (manuscript at 5).

310 *Id.* (manuscript at 4).

deployed to direct agencies to enforce the law fruitfully with respect to its goals, for instance, in the face of a national health crisis.

In regard to the eviction moratorium, the controversy is not as easy to resolve as suggested by the recent Supreme Court order blocking the moratorium.[311] More specifically, neither the textualist nor purposivist aspects of the majority's reading of the relevant statutory authority render the only possible interpretation or, moreover, the interpretation that best furthers the aims of the statutory scheme at issue.

The majority in *Association of Realtors* read § 361(a) of the Public Health Service Act[312] to mean that the second sentence,[313] which lists specific tasks now assigned to the CDC such as "fumigation, disinfection, sanitation, pest extermination, [and] destruction of animals or articles found to be so infected or contaminated,"[314] limits the CDC's authority in the first sentence of the paragraph to "make and enforce such regulations as . . . are necessary to prevent the introduction, transmission, or spread of communicable diseases . . . ."[315] For better or for worse, after the Court blocked the moratorium, the Biden Administration and the CDC itself also adopted the position that there is no available authority to issue another moratorium.[316]

However, as Jack Goldsmith notes, the Supreme Court opinion is merely an order halting the moratorium, not a final determination on its merits.[317] Goldsmith remarks that "despite the diminished procedural context, and without any explanation from the Court, many in the administration and in the commentariat treated these signals as a conclusive prediction about how the Supreme Court viewed the legality

311 Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2488 (2021) (per curiam) ("The applicants not only have a substantial likelihood of success on the merits—it is difficult to imagine them losing.").

312 42 U.S.C. § 264(a).

313 *See supra* notes 164–66 and accompanying text.

314 42 U.S.C. § 264(a); *see also* 42 C.F.R. § 70.2 (2020) (delegating this authority to the CDC).

315 42 U.S.C. § 264(a).

316 Among other White House officials, the White House coordinator repeated the following "talking point": "'Unfortunately, the Supreme Court declared on June 29 that the [CDC] could not grant such an extension without clear and specific congressional authorization.' Sperling added that, as of that date, 'the CDC director and her team have been unable to find legal authority' to extend the moratorium." Goldsmith, *supra* note 182; *see also* sources cited *supra* note 182.

317 Goldsmith, *supra* note 182 ("There was widespread agreement [that] the Supreme Court's action in June did not amount to a definitive and binding precedent [and that] for the moment, it would not be illegal for the government to issue another ban—especially one more narrowly focused on hard-hit counties.").

of the eviction moratorium."[318] This suggests that while the Biden Administration was right to reexamine whether the CDC's moratorium is consistent with the statute, its willingness to accept the Court's speculation as a foregone conclusion is not necessarily the only, let alone the correct, approach to statute-focused presidentialism in this situation. Assuming that the controversy remains open, there may be other ways to interpret the language that satisfy the Biden Administration's COVID relief goals, allow the executive branch to confront new challenges in disease management, benefit social outcomes more generally and, most importantly, further the thrust of the Public Health Service Act.

Those on the Court dissenting from the order offer such an approach.[319] First, they suggest, "it is far from 'demonstrably' clear that the CDC lacks the power to issue its modified moratorium order."[320] In addition to engaging in a detailed balancing of the equities that weighs in favor of the moratorium,[321] unlike the more cursory calculus made by the majority,[322] the dissent also declares, "The statute's first sentence grants the CDC authority to design measures that, in the agency's judgment, are essential to contain disease outbreaks. The provision's plain meaning includes eviction moratoria necessary to stop the spread of diseases like COVID–19," while the second sentence "is naturally read to expand the agency's powers by providing congressional authorization to act on personal property when necessary."[323] Peter Shane notes that this was also the position generally held by defenders of the moratorium.[324] As for the argument that "the second sentence should instead be read to cabin the CDC's authority," the dissent goes on to suggest that "[n]ot only does that reading lack a clear statutory basis but the second sentence goes on to empower the CDC to take 'other measures, as in [its] judgment may be necessary.'"[325]

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318 *Id.*

319 Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2490 (2021) (Breyer, J., dissenting) (per curiam) (alteration in original).

320 *Id.*

321 *Id.* at 2492–94 (providing a detailed analysis of the harms of COVID-19 weighed against the limited—as opposed to nationwide—coverage of the most recent moratorium).

322 *See id.* at 2488 ("[T]he equities had shifted in the plaintiffs' favor: Vaccine and rental-assistance distribution had improved since the stay was entered, while the harm to landlords had continued to increase.").

323 *Id.* at 2491 (Breyer, J., dissenting).

324 *See* Shane, *supra* note 182.

325 *Ala. Ass'n of Realtors*, 141 S. Ct. at 2491 (Breyer, J., dissenting) (citing 42 U.S.C. § 264(a)).

"Furthermore," the dissent continues, "reading the provision's second sentence to narrow its first would undermine Congress' purpose," particularly as it pertains to eviction moratoria.[326] Indeed, "[w]hen Congress enacted § 361(a), public health agencies intervened in the housing market by regulation, including eviction moratoria, to contain infection by preventing the movement of people."[327] Accordingly, "[i]f Congress had meant to exclude these types of measures from its broad grant of authority, it likely would have said so."[328] In addition, a "key drafter" of the statutory text at issue "explained, '[t]he second sentence . . . was written not to limit the broad authority contained in the first sentence, but to 'expressly authorize . . . inspections and . . . other steps necessary in the enforcement of quarantine.'"[329]

Overall, this Section suggests that there may very well be situations in which a close administrative reading of statute leads the executive branch to conclude that the policy should be directed by the President, either because the statute is vague, inconsistent, or not up to confronting new challenges, or because Congress intended there to be a strong political role in the development of policy—for instance, in order to handle a pressing crisis.

B. The Legitimacy of Prosecutorial Discretion

The constitutional faithful execution requirement has a particular "historical purpose: to limit the discretion of public officials."[330] On the one hand, the requirement of faithful execution "was imposed because of a concern that officers might act ultra vires."[331] On the other hand, as Andrew Kent, Ethan Leib, and Jed Shugerman argue, "[f]aithful execution requires [more than] the absence of bad faith."[332] Rather, the President is beholden to "not only proscriptive dimensions of the duty of faithful execution but prescriptive ones as well."[333] As Bruce Ackerman says: "Before a [P]resident can even begin exe-

326 *Id.* at 2491–92.

327 *Id.* at 2491 (noting the use of similar moratoria in New York City in 1920 to prevent the eviction of tenants infected with influenza and pneumonia).

328 *Id.*

329 *Id.* at 2492 (citing *Hearings on H. R. 3379 Before the Subcomm. on Interstate & Foreign Com.*, 78th Cong., 139 (1944)).

330 Kent et al., *supra* note 32, at 2117.

331 *See id.* at 2118 ("[T]he duty of faithful execution helped the officeholder internalize the obligation to obey the law, instrument, instruction, charter, or authorization that created the officer's power.").

332 *Id.* at 2190.

333 *Id.*

cuting the law, he must first figure out what the law requires him to do. It is not enough for him to suppose that 'the law' means whatever he wants it to mean. . . . The present institutional setup fails this test."[334]

Complementarily, administrative agencies are fundamentally stewards of statutory law as well, pursuant not only to the legislative delegations of power enjoyed by department heads, but also to agencies' role as agents of the Executive.[335] As Richard Epstein notes, the duties of faithful execution extend "not only to the duties that fall upon [the President] personally in his official capacity, but also impose on him a duty of oversight to see that all lesser officials within the executive branch respect" the law.[336] In this vein, the requirements of statutory fidelity apply not only to the President, but also to others in the executive branch.[337] It is for these reasons that agency actions are evaluated by the courts per the mandates of law passed by Congress.

That having been said, the President's duty to enforce statutes is accompanied by various constitutional powers the President may exercise in service of this duty. As a result of this authority—in particular, to engage in prosecutorial discretion—a president may feasibly direct the selective application of legislation in a manner that nonetheless adheres to the statutory scheme at hand. Accordingly, strong

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334 ACKERMAN, *supra* note 25, at 148.

335 "[A]gencies' policymaking authority is executive in nature—that is, associated with their duty to enforce the law." Bijal Shah, *Judicial Administration*, 11 U.C. IRVINE L. REV. 1119, 1168 n.320 (2021) (citations omitted); Adrian Vermeule, *No*, 93 TEX. L. REV. 1547, 1557–60 (2013) (suggesting this is the most agreed-upon theory of the origins of agencies' policymaking power).

336 EPSTEIN, *supra* note 33, at 247–48; *see also* Melanie Marlowe, *The Unitary Executive and Review of Agency Rulemaking*, *in* THE UNITARY EXECUTIVE AND THE MODERN PRESIDENCY (Ryan J. Barilleaux & Christopher S. Kelley eds., 2010); Barilleaux & Kelley, *supra* note 260, at 97 ("Presidents must 'take Care that the Laws be faithfully executed,' but this requires the assistance of others—others in the executive branch who are responsible to the president."); Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. 1753, 1757 (2016) (noting that the Take Care clause "demands that the President ensure that his subordinates act in good faith in enforcing the law"); Herz, *supra* note 69, at 252–53 (arguing that the Take Care clause ensures that presidents will not only execute the law personally but also monitor the executive branch agencies to ensure that the laws, as understood by the president, are faithfully executed).

337 *See* WILSON, *supra* note 73, at 66 ("As legal executive, his constitutional aspect, the President cannot be thought of alone."); *see also* Kent et al., *supra* note 32 at 2118 ("Yet one of our most interesting findings here is that commands of faithful execution with duties that parallel Article II applied not only to senior government officials who might have been plausible models for the presidency in Article II, but also to a vast number of less significant officers."); Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1875–78 (2015) (noting that the passive voice of the Take Care Clause necessarily implies law administration by someone other than the President).

presidentialism and fidelity to statute may be consistent with one another when governed by the constitutional mandate that, "[w]here the President has discretion not to enforce . . . he can announce rules to be used in the exercise of that discretion."[338] As Goldsmith and Manning note regarding the execution of law, "[s]ome prosecutorial discretion is inevitable; if the executive cannot plausibly enforce the law against all who violate it, then enforcement agencies must set prosecution priorities."[339] This suggests that in service of their enforcement responsibility, Presidents may specify how to prioritize the enforcement of a statutory mandate, given the limited pool of resources available to them.[340] In addition, the Supreme Court has "determined that the administrative exercise of discretion as to whether to investigate or prosecute allegations of statutory violations is exempt from judicial review,"[341] which provides an avenue for presidential administration to influence administrative action that is purely executive in nature.

Consider President Obama's DACA policy.[342] On the one hand, as noted earlier, it was initiated after President Obama trumpeted an intention to work around legislation,[343] and recently decried by a federal court as an "illegally implemented program."[344] On the other hand, both the Obama- and Biden-era memoranda outlining and implementing immigration policies offer the need to prioritize enforcement resources as one of several justifications.[345] Accordingly, it has

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338 Saikrishna Bangalore Prakash, *The Statutory Nonenforcement Power*, 91 TEX. L. REV. 115, 116 (2013).

339 Goldsmith & Manning, *supra* note 33, at 1863–64 (identifying the DACA policy as an acceptable exercise of prosecutorial discretion under the Take Care clause).

340 *See* PRAKASH, *supra* note 26, at 240 (noting that the discretion "enjoyed" by presidents under the Constitution includes the power to "influence which laws will be enforced through the allocation of scarce funds"). "Put another way, by passing many laws and supplying insufficient funds to 'fully' enforce them against violators, actual and alleged, Congress implicitly delegates the setting of enforcement priorities to the executive." *Id.* at 240–41.

341 Bijal Shah, *Heckler v. Chaney in* LEADING CASES IN ADMINISTRATIVE LAW (ABA Section of Administrative Law and Regulatory Practice) (forthcoming) (discussing Heckler v. Chaney, 470 U.S. 821 (1985)).

342 *See generally* Prakash, *supra* note 338 (arguing that the Obama Administration's setting of immigration enforcement policies did not suspend or dispense of any law).

343 *See supra* notes 127–32 and accompanying text.

344 Texas v. United States., No. 18-CV-00068, 2021 WL 3022434, at *2 (S.D. Tex. July 16, 2021); *see supra* notes 135–43 and accompanying text.

345 Memorandum from Janet Napolitano to David V. Aguilar, *supra* note 127 (framing the policy as "measures" that are "necessary to ensure that our enforcement resources are not expended on these low priority cases but are instead appropriately focused on people who meet our enforcement priorities"), *available at* https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [https://perma.cc/5JAC-KCBE]; Memorandum: Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA),

been widely argued that, rather than subverting legislation, the DACA policy and similar immigration policies were "ground[ed] . . . in a constitutionally rooted prosecutorial power of the president."[346]

As the most recent DACA controversy continues through the appeals process, courts could use this case as a vehicle to consider whether presidentialism serves agencies' fulsome execution of the law, or whether it constitutes, in fact, an effort to pervert agencies' legal authority. The judiciary could be convinced that the DACA policy "advance[s] a series of purposes consistent with Congress's broad public policy objectives."[347] If the Biden Administration is able to cast DACA,[348] recently issued enforcement priorities,[349] or policies such as the recent 100-day moratorium on certain deportations[350] "not as in conflict with Congress, but as fulfilling the purposes of existing law in a manner consistent with the principal-agent model,"[351] it could succeed in showing the courts that these enforcement priorities are consistent with statute and evince a faithful execution of the law.

Ultimately, this Section suggests at least one tool of statutory implementation that involves intense presidential administration—prosecutorial discretion—is consistent with the President's constitutional duty to enforce the law. However, the decision to engage in such directive presidentialism should happen only after careful engagement with statute, and not only in order to fulfil the President's policy goals or to be responsive to voters' interests.

C. Consistency with a Unitary Executive

Finally, advocating for legislation-focused presidentialism does not require staking out a position in the debate regarding whether the

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supra note 133 ("DACA reflects a judgment that these immigrants should not be a priority for removal . . . .").

346 *Cf.* Peter M. Shane, *Administrative Law To The Rescue?*, JACK M. BALKIN: BALKINIZATION (Dec. 8, 2020), https://balkin.blogspot.com/2020/12/administrative-law-to-rescue.html [https://perma.cc/7EM8-ZMYK] (referring to the Obama-era Deferred Action for Parents of Americans ("DAPA") policy, which, as Shane notes, was the twin policy to DACA, and also an example of executive action pursuing the president's vision of immigration enforcement).

347 *Id.* (suggesting that the Obama-era DAPA policy was consistent with legislative policy objectives like "strengthening local law enforcement, supporting the national economy, and preserving family unity").

348 *See supra* notes 134–46 and accompanying text.

349 *See* Memorandum from Alejandro N. Mayorkas, Sec'y, DHS, to Tae D. Johnson, Dir., U.S. Immigr. & Customs Enf't (Sept. 30, 2021), https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf [https://perma.cc/QVL9-AYK5] (advocating for prosecutorial discretion and listing enforcement priorities).

350 *See supra* notes 116–25 and accompanying text.

351 Shane, *supra* note 346.

President has the power to direct[352] the exercise of authority granted to an agency by statute, or merely to oversee it.[353] Perhaps counterintuitively, the assertion that presidential administration must promote statutory interests does not undermine the position of unitary executive theorists that the President is rightfully a strong leader as a constitutional matter.[354]

Indeed, there is no guarantee that targeting executive centralization serves to constrain presidential administration in the first place.[355] Moreover, this Section asserts, a centralized or unitary executive branch could exist in harmony with and even encourage the execution of law that prioritizes statutory aims over those of the President. In any case, statute-focused execution should become a primary incentive driving presidents' efforts to control their agents, however loose or firm that control may be.

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352 Unitary executive theorists hold an expansive view of the President's constitutional power that asserts she has the constitutional power not only to direct agency actions, but also to "step directly into the shoes" of administrators and act in their place. *See* Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1205 (2013) (stating that unitary executive theorists hold an expansive view of the President's constitutional power—not only to direct agency actions, but also to "step directly into the shoes" of administrators and act in their place); Saikrishna Bangalore Prakash, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991, 992 (1993) (arguing that historical evidence favors the "Chief Administrator theory," which holds that the President has the power to substitute his judgment for that of an agency head); Kagan, *supra* note 23, at 2327 (arguing that "when Congress delegates to an executive official, it in some necessary and obvious sense also delegates to the President" because "that official is a subordinate of the President").

353 Those who take a moderate view of executive power argue that the President may oversee what agencies do, but that she may not, as a constitutional matter, seize the authority delegated to administrators by legislation and make decisions in their stead. *See, e.g.*, Peter L. Strauss, *Overseer, or "The Decider"?: The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 759-60 (2007) ("In the ordinary world of domestic administration, where Congress has delegated responsibilities to a particular governmental actor it has created, that delegation is a part of the law whose faithful execution the President is to assure. [However, o]versight, and not decision, is his responsibility."); Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 267 (2006) ("[A]s a matter of statutory construction the President has directive authority—that is, the power to act directly under the statute or to bind the discretion of lower level officials—only when the statute expressly grants power to the President in name."); Cary Coglianese & Kristin Firth, *Separation of Powers Legitimacy: An Empirical Inquiry into Norms About Executive Power*, 164 U. PA. L. REV. 1869 (2016) (offering an analysis of possible constitutional constraints on the President's ability to direct the actions those officials take and suggesting one possible constraint would permit Presidents to oversee agencies but not to make decisions for them).

354 According to this view, "under our constitutional system, the President must have the authority to control all government officials who implement the laws." Lessig & Sunstein, *supra* note 254, at 2.

355 Coglianese & Firth, *supra* note 353, at 1873 (arguing that the prevalent debate seeking to "distinguish[] between presidential *oversight* and *decisionmaking* . . . is unlikely to do much, if anything, to constrain Presidents from effectively controlling administrative agencies").

At the very least, focusing presidentialism on statutory aims does not require the President to play merely a ministerial role. After all, the longstanding practice of broad delegation effectively recognizes executive authority to adapt laws over time to evolving circumstances in a way that defies a simple principal-agent understanding of faithful execution. For this reason, presidential or attendant political influence is not mechanical, nor does it impact administrative efficacy alone. To the contrary, there are, in fact, deep value choices inherent in the implementation of law.[356]

And yet, even an exceptionally directive president may engage in legislation-focused presidentialism. There is great potential for a powerful presidential role in ensuring fealty to the goals embodied by statutory law. Indeed, a unitary executive branch need not be considered a co-principal of Congress[357] but instead could rest on a system of presidential control that ensures agencies engage in more exacting adherence to legislative goals and expectations. Complementarily, presidentialism that prioritizes statutory goals can encourage a strong executive hierarchy and reinforce the President's role as head of the executive branch.

In the end, this Section does not engage in the usual unitary executive debate regarding whether the President has only oversight authority, or whether she also has directive authority, or can even "step into the shoes" of agency heads. In other words, it advocates neither for limits to the scope or allocation of executive power nor against centralization in the executive branch. Rather, this Section highlights this Article's concern with the motivations or incentives that drive presidential administration. For this reason, while most substantive or functionalist arguments in favor of constraining presidential power do not gain traction with unitary executive theorists, this Article's should. In fact, this Article supports a vision of unitary executive theory that emphasizes strong, directive, and expansive presidential control over agencies wielded, in the final analysis, in order to pursue the execution

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356 *See* Tim Brennan, *To End Science Denial, Admit That Policymaking Is Not All Science*, REGUL. REV. (June 14, 2021), https://www.theregreview.org/2021/06/14/brennan-end-science-denial-admit-policymaking-is-not-all-science/ [https://perma.cc/94EV-R97X] ("Policy discussions belong in the realm of values.").

357 *See* ADAM B. COX & CRISTINA M. RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW (2020) (arguing for co-principal model of presidentialism in immigration context). *But see* Bijal Shah, *Investigating a Unitary Executive Model of Immigration*, JACK M. BALKIN: BALKINIZATION (Dec. 4, 2020) (criticizing unitary executive overtones of Cox & Rodríguez's book), https://balkin.blogspot.com/2020/12/investigating-unitary-executive-model.html [https://perma.cc/LFU7-LAMG].

of the law for the law's own aims—as opposed to the President's policy goals alone.

III. Obliging an Executive Emphasis on Legislation

In pursuit of their policy aims, Presidents have neglected their duty to lead, organize, and shape agencies in any number of ways that benefit a searching administrative inquiry into legislative purpose and careful implementation of the law on its own terms. Still, as Jack Goldsmith and John F. Manning note, there is "no principled metric" for identifying when a valid exercise of presidential discretion "shades into an impermissible exercise of dispensation or suspension power."[358] "Virtually all laws require some degree of discretion and intelligence in their execution, especially if they are to be faithfully executed."[359] So, how can the executive branch's exercise of vast discretion be squared with its duty to engage in a statute-focused execution of the law?

As is typical when the Executive has failed to fulfill her duties, the separation of powers dictates that other branches of government step in to offer encouragement or constraint. Often, the argument of those seeking constraints to presidential power centers on the unrealistic assertion that Congress should simply legislate more.[360] This Part offers a complementary solution: that both the federal and internal (executive) separation of powers[361] frameworks be harnessed to infuse the executive branch with its own interest in limiting self-aggrandizement.

This Part recruits the legislature, courts, and internal executive branch actors—namely, administrative bureaucrats themselves—to evolve presidential administration into a more effective tool of statutory enforcement. In doing so, it draws on the view of Jerry L. Mashaw and David Berke that the "separation of powers has retained functional importance" to the management of presidentialism,[362] and

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358 Goldsmith & Manning, *supra* note 33, at 1863–64.

359 Epstein, *supra* note 33, at 267.

360 *See, e.g.*, Morton H. Halperin, *Take Back: How Congress Can Reclaim Its Power*, Just Sec. (June 10, 2019), https://www.justsecurity.org/64451/take-back-how-congress-can-reclaim-its-power/ [https://perma.cc/3YQT-48FB].

361 *See* Bijal Shah, *Toward an Intra-Agency Separation of Powers*, 92 N.Y.U. L. Rev. Online 1, 2 (2017) (citing Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. Rev. 227, 235 (2016) and Neal Kumar Katyal, *Internal Separations of Powers: Checking Today's Most Dangerous Branch from Within*, 115 Yale L.J. 2314 (2006)).

362 Mashaw & Berke, *supra* note 25, at 549.

implements Eric Posner's suggestion that "scholars . . . address directly whether bureaucratic innovation is likely to improve policy outcomes."[363]

As of now, the management of presidential administration has consisted of judicial efforts to deal with conflicts between presidentialism and legislation long after they have arisen. Put another way, it is the results of presidential administration, alone, that have been recognized as illegitimate—and only in instances where those results contravene the law. This, however, is not enough. Something is lost when the only constraint on presidential administration is a judicial backstop. Judicial confrontation of only the most egregious examples of agency action resulting from presidential maladministration does not suffice to ensure that the execution of law adheres to legislative principles and aims from the get-go. Forcing courts alone to manage presidential administration ex post not only puts undue pressure on the judiciary to identify legislative aims and preserve the separation of powers, but also results in a loss of the potential outcomes that could result from presidentialism in full-throated pursuit of legislative aims.

Rather, the President must be persuaded to consider seriously the legislature's aims when intervening in agency action,[364] and to make those considerations plain,[365] before a controversy arises in the courts. This Part offers a blueprint for coaxing the Executive and her branch into deliberative policymaking that emphasizes legislative considerations. Before conflicts arise in the courts, Congress, the judiciary, and even agencies themselves should encourage and preserve presidential efforts to direct agencies to execute the law in accordance with statutory goals and, thereby, to maintain executive subordination to legislative primacy in lawmaking.

Notably, much of this Part advocates for judicial review, which may seem ill-advised given current trends in the Supreme Court and certain courts of appeal toward strengthening presidential power by animating appointments requirements for administrative adjudicators and reducing removal protections for independent agency heads. The Supreme Court and other courts, however, have also shown an inter-

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363 Eric A. Posner, *Balance-of-Powers Arguments, the Structural Constitution, and the Problem of Executive "Underenforcement*," 164 U. PA. L. REV. 1677, 1677 (2016).

364 *See* Watts, *supra* note 75, at 734 (noting that in "statutory interpretation, the key question [is] whether the substance of the presidential suggestion was tethered to or divorced from the relevant statutory inquiry").

365 *See* WILSON, *supra* note 73, at 54 ("[O]ur government . . . must be made to disclose to us its operative coordination as a whole: its places of leadership, its method of action, how it operates, what checks it, what gives it energy and effect.").

est in constraining agencies—in part, as a result of explicitly anti-administrativist values, and also particularly through the use of the APA's arbitrary and capricious standard, discussed further in Part III.D. These frameworks of judicial review provide an opportunity for judicial oversight of the administrative state that serves, indirectly, as a check on the President as well.

As Posner has noted, there is difficulty in "defining and measuring power, let alone determining whether the power of different branches 'balances'" when comparing the political branches.[366] Accordingly, this Part does not offer a blunt, cross-cutting benchmark, bright line, or clear standard—nothing so satisfying, for instance, as a *Youngstown*-esque[367] framework delineating permissible and impermissible acts of presidentialism—that allows courts to assess whether Presidents are impeding administrative compliance to the law across areas of regulation. Rather, it presents options for Congress and the judiciary to manage, on a case-by-case basis, both the exercise and the fallout of presidentialism in pursuit of the President's own policymaking goals alone.

More specifically, this Part encourages presidential and agency prioritization of, and engagement with, statutory aims at successive stages of statutory implementation. First, this Part advocates for Congress to make clear its goals regarding presidential administration. For instance, legislation could define the President's role in statutory execution. Or, it could be drafted to more precisely articulate how agencies should weigh the mandates of legislation against presidential influence. Second, this Part argues that agencies should spend more time divining how to balance presidential and statutory aims. To create an incentive for agencies to do this, the judiciary might intensify its restriction of agencies' attempts to redefine the scope of their statutory delegations at the behest of the President. Moreover, courts could evaluate more explicitly and consistently the extent to which Congress intends for Presidents' own policy priorities to shape statutory implementation. Third, this Part argues that courts might also apply *Chevron* and the major questions doctrine to more explicitly confront, analyze, and excise presidentialism that leads to conflict between an agency's statutory interpretation and the aims of legislation. Finally, this Part asserts that courts could determine whether presidential administration has improved or harmed the agency's capacity

366 Posner, *supra* note 363, at 1680.

367 *Compare supra* note 32, *with supra* note 54.

to make policy that reflects legislative preferences by engaging the accountability-forcing dimensions of arbitrary and capricious review.

A. Legislative Specification of the President's Role in Execution

In *Louisiana v. Biden*,[368] the federal court spoke to the President's authority to direct the agencies to "pause" certain statutory requirements, stating that he was not authorized to do so per the relevant statutes and that only Congress could have authorized such a pause.[369] The confusion regarding the scope of the President's power to exercise administrative discretion in this context could have been avoided if Congress had spoken directly to the issue.

To clarify the limits of presidentialism vis-à-vis legislation, this Section suggests, Congress should specify requirements for, and limits to, presidential action that would better ensure the execution of the aims of the law. As Kathryn A. Watts has noted, "there is a lack of clarity concerning both . . . when statutes delegating discretionary powers to agencies allow agencies to act pursuant to presidential directions" and "when statutes delegating discretionary powers to agencies allow agencies to take presidential suggestions into account."[370] Congress itself could make explicit the scope and intensity of presidential administration it is willing to allow, instead of leaving the question open to judicial or scholarly interpretation.[371] Notably, this complements other pathways by which the legislature might entrench its preferred statutory interpretations in the administrative state.[372]

Presidential role specification would allow Congress to harmonize presidential directives and the requirements of legislation. It could also be used to augment the President's power under statute or, in contrast, to decentralize the executive branch when necessary to bring a statutory scheme to life. First, Congress could better ensure that the President keeps her interests subordinate to those of the legislature in the execution of statutory law by assigning the President clear and fixed administrative roles. This suggestion complements the argument that Congress "take back power" from the President by is-

368 543 F. Supp. 3d 388 (W.D. La. 2021).

369 *See supra* notes 194–97 and accompanying text.

370 Watts, *supra* note 75, at 727 (emphasis omitted).

371 *See, e.g.*, Kagan, *supra* note 19, at 2247 (asserting that unless Congress made an agency independent, it expects that Presidents will exercise heavily directive authority).

372 *See* Jody Freeman & Matthew C. Stephenson, *The Untapped Potential of the Congressional Review Act*, 59 HARV. J. ON LEGIS. 279, 281 (2022) (remarking on the "unrealized potential" of the Congressional Review Act, which "authorizes special fast-track procedures for Congress to pass a joint resolution disapproving an agency rule").

suing narrower delegations to agencies.[373] Second, the legislature could specify options for the President to influence the execution of law, and in doing so, communicate explicitly whether the President is included in or excluded from administrative policymaking.

Note that this Section excludes discussion of legislative control through the appropriations process and of formal and informal legislative oversight. This is in part because these dynamics have received thorough treatment in the literature and because they have only a limited impact on the influence of presidentialism on policymaking.[374] In addition, political theorists have discussed how Congress organizes itself internally to fight bureaucratic drift,[375] and this Section will not rehash that material. Rather, this Section contributes a discussion of presidential role specification to the set of existing options for legislative control, assuming circumstances in which legislators are interested in guiding the executive branch in this way and able to overcome collective action problems to do so.

The suggestion that Congress specify the President's role in executing the law is buoyed by the fact that courts already look to legislation to determine the scope of the President's jurisdiction to direct the law or provide agencies cover from judicial review. For instance, the Supreme Court has justified an agency's decision not to engage in an environmental impact assessment under the National Environmental Policy Act ("NEPA")[376] "rule of reason" because, according to the Court, this provision shields the agency from accountability to NEPA when the President has directed the agency and the agency has no discretion to refuse the President's directive.[377]

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373 *See* McGinnis & Rappaport, *supra* note 25, draft at 23–24.

374 *See, e.g.*, Matthew B. Lawrence, *Disappropriation*, 120 COLUM. L. REV. 1 (2020); Brian D. Feinstein, *Congress in the Administrative State*, 95 WASH. U. L. REV. 1187 (2018).

375 *See* Macey, *supra* note 93, at 671–74 (describing this work). Well-known examples include the works of Mathew D. McCubbins, Roger Noll, and Barry Weingast, often referred to as "McNollgast." *See*, *e.g.*, Mathew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989); Mathew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987).

376 42 U.S.C. §§ 4321–4370.

377 *See* Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 767, 770 (2004); *see also* Adam J. White, *Executive Orders as Lawful Limits on Agency Policymaking Discretion*, 93 NOTRE DAME L. REV. 1569, 1593–94 (2018) (noting that in *Dep't of Transp. v. Pub. Citizen*, the Supreme Court held "that when an agency implements a policy decision made by the President, it is not required to analyze the environmental impacts of the President's decision, because it has no control over the President").

In addition, the D.C. Circuit[378] has "read the Procurement Act as giving the President direct and broad-ranging authority to achieve a sophisticated management system capable of pursuing the 'not narrow' goals of 'economy and efficiency.'"[379] In this case, the court looked to the President himself to determine the scope of his power under statute;[380] Perhaps the court would have looked to the statute, had the legislature itself specified this matter. In addition, federal courts of appeals have viewed agencies' actions in some instances as the manifestation of the presidential plenary power—particularly in matters of national security and foreign affairs—and therefore deemed those actions unreviewable.[381]

As an initial matter, Congress could pass statutes to solve the tensions between presidential and statutory aims identified earlier in this Article. This could include allotting a role for treaty-based law, executive order, or presidential task forces to shape how agencies enforce the law,[382] installing the President or a proxy as the clear leader of multi-agency efforts,[383] or specifying a role for the President in policymaking and in administrative statutory interpretation such that *Chevron* is no longer the primary mechanism by which an incoming president may assert her preferred interpretation of statute.[384]

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378 Am. Fed'n of Lab. & Cong. of Indus. Org. v. Kahn, 618 F.2d 784 (D.C. Cir. 1979).

379 J. Frederick Clarke, Jr., AFL-CIO v. Kahn *Exaggerates Presidential Power Under the Procurement Act*, 68 CALIF. L. REV. 1044, 1045–46 (1980) (quoting *Kahn*, 618 F.2d at 787–89); Federal Property and Administrative Services Act ("Procurement Act"), 40 U.S.C. §§ 471–514 (1976). .

380 *Id.* at 1046 ("The court found support for its broad reading of the President's procurement authority in the history of the *Executive's* interpretation of the Act.") (emphasis added).

381 50 U.S.C § 1701. *See, e.g.*, Epsilon Elecs., Inc. v. U.S. Dep't of the Treasury, 857 F.3d 913, 916 (D.C. Cir. 2017) (noting that the International Emergency Economic Powers Act authorizes the President to declare a national emergency when he "identifies an 'unusual and extraordinary threat' to the American economy, national security, or foreign policy that originates from abroad" and to "address the threat by regulating foreign commerce"); DKT Mem'l Fund Ltd. v. Agency for Int'l Dev., 887 F.2d 275, 281–82 (D.C. Cir. 1989) (declaring that President Reagan's abortion policy limitations were authorized by 22 U.S.C. § 2151b(b), which granted him discretion "to furnish [foreign] assistance, on such terms and conditions as he may determine, for voluntary population planning," and were therefore not subject to judicial review); Midwestern Gas Transmission Co. v. Fed. Energy Regul. Comm'n, 589 F.2d 603, 627 (D.C. Cir. 1978) (finding that the agency acted pursuant to the Alaska Natural Gas Transportation Act of 1976, which lays out a five-part procedural framework that requires unreviewable participation of the President).

382 *See supra* notes 57–59 and accompanying text (discussing how the law deems legislation supreme over these forms of presidential "law").

383 *See supra* notes 220–24 and accompanying text (discussing interagency coordination).

384 *See supra* Part II.C.

Also, Congress could employ presidential role specification to centralize the executive branch, either for ideological reasons or to improve the efficiency and efficacy of administration. While the soundness of doing so is up for debate, the amplification of executive power by an intentionally acquiescent Congress is perhaps more politically accountable than allowing the judiciary—the least politically accountable branch of government—to continue to be the primary force in amplifying executive power. This approach is perhaps also more defensible than the unitary executive theory, per which the President has absolute authority, which rests on an indeterminate understanding of Article II.[385]

Possibilities for role specification that creates a more unitary executive abound. As an initial matter, Congress has done this before. In passing legislation, Congress sometimes "quite explicitly delegates power to the president for making future decisions that are better made quickly in light of circumstances that cannot be known at the time of the initial delegation."[386] In addition, Congress has sought to regularize the policymaking function of the President, at least as it relates to rulemaking and ex parte communication, by passing overarching legislation dedicated to this matter.[387] In this context, statutory language was drafted, or at least construed, for the purpose of bolstering the President's ability to engage in administrative policymaking and shield agencies from judicial review. In at least one case, the agency's regulations, promulgated to implement an executive order, were deemed valid precisely because the President issued the executive order pursuant to powers granted by statute.[388] Moreover, Con-

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385 *See supra* notes 352–53 (discussing this assumption and counterarguments).

386 *See* EPSTEIN, *supra* note 33, at 267; Karpova v. Snow, 497 F.3d 262, 270 (2d Cir. 2007) (finding that executive orders were issued validly under the authority granted to the President by both the International Emergency Economic Powers Act and the United Nations Participation Act); Flynn v. Shultz, 748 F.2d 1186, 1193 (7th Cir. 1984) (noting that the Hostage Act authorizes the President to makes determination as to whether a person was "unjustly deprived" in order to compel the State Department to act).

387 *See* Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM L. REV. 943, 982 (1980) (referencing the following proposed legislation: ABA COMM. ON L. & ECON., FEDERAL REGULATION: ROADS TO REFORM, ch. 5 (1979); Accountability in Regulatory Rulemaking Act of 1979, S. 1545, 96th Cong., (1979); The Regulatory Flexibility and Administrative Reform Act of 1979, S. 2147, 96th Cong., (1979); and the Administrative Practice and Regulatory Control Act of 1979, S. 129, 196th Cong., (1979)).

388 *Karpova*, 497 F.3d at 270. In this case, "Treasury regulations [were] put into place to implement an executive order that imposed economic sanctions on Iraq; the executive orders were themselves authorized by the Iraqi Sanctions Act of 1990." Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1122 (2009) (analyzing *Karpov*a).

gress could also ensure that the President's role is unreviewable, just as it has in the past.[389]

Conversely, Congress could deploy presidential role specification to decentralize the executive branch, particularly if Congress disapproves of presidential administration that leads agencies to warp their adherence to affirmative mandates.[390] As Paul Verkuil notes, "a statutory grant of clear power to determine policy in the President and his staff [could] limit[] that power in a substantively restrictive and procedurally burdensome manner."[391]

In this way, Congress could use presidential role specification to reinforce structural separation. The legislature should proceed carefully, depending on the role it wishes the President and political leadership to take on. For instance, it could require a President to serve only a consultative—as opposed to a directive—role in administration, as a way to counteract the Supreme Court's measures chipping away at for-cause removal protections.[392] Congress might also temper presidential intervention in policymaking by requiring that it occur only in consultation with agency officials. Furthermore, the legislature could limit political interference in adjudication just as easily as it delegated to Presidents the authority to engage in ex parte influence in the past.[393]

B. Judicial and Agency Arbitration of Administrative Jurisdiction

This Section urges the judiciary not only to limit administrative efforts to alter or expand their jurisdiction, as it has done in the past,[394] but also evaluate closely the impact of political pressure on the scope of administrative authority. In doing so, the judiciary will be able to ameliorate the negative impact of presidentialism on the administrative execution of statutes. Agencies, too, must evaluate whether they have the requisite statutory authority to regulate, or

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389 *See supra* note 387 and accompanying text.

390 *See supra* Section I.A.

391 *See* Verkuil, *supra* note 387, at 984 (arguing further that Congress could "offer the President less power over executive agencies than he currently enjoys under article II").

392 *See* Bijal Shah, *The President's Fourth Branch?*, FORDHAM L. REV. (forthcoming); Bijal Shah, *Expanding Presidential Influence on Agency Adjudication*, REGUL. REV. (July 23, 2021), https://www.theregreview.org/2021/07/23/shah-agency-adjudication/ [https://perma.cc/4N45-H9VF] (discussing the Supreme Court's efforts to chip away at for-cause removal protections).

393 *See* Verkuil, *supra* note 387, at 982 (listing legislation that has increased the opportunity for Presidents to intervene in formal agency processes).

394 *See supra* Part I.

choose not to regulate, in accordance with presidential aims or directives.

As an initial matter, if courts are interested in walking back, calibrating, or simply rationalizing the President's reach, they might engage in comparisons of constitutional power. For instance, courts could choose, as a matter of practice, to acquiesce to presidential administration only after explicit consideration of how the President's constitutional power and responsibilities square with the legislature' constitutional authority.

Moreover, courts might also constrain administrative efforts to pursue the President's promises when there is a lack of existing statutory law adequate to justify the agency's actions. One example involves recent priorities set by the FTC under a new Chair.[395] If the Supreme Court perceives the FTC as regulating beyond the scope of its authority either substantively or procedurally, the Court might rein in this agency.[396] Other examples include the Biden and Trump Administrations' efforts to protect those with preexisting conditions and lower the price of prescription drugs.[397] Both may require either changes to the Affordable Care Act or to Medicare provisions, or new legislation altogether that authorizes agencies to implement relevant measures in a comprehensive and meaningful way.[398]

In a related example, the Trump Administration proposed a requirement that all Department of Health and Human Services ("HHS") regulations expire automatically unless agencies conduct a retrospective review of each regulation.[399] "The proposed rule—which

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395 *See supra* notes 198–200 and accompanying text.

396 *See* Richard J. Pierce, Jr., *Unsolicited Advice for FTC Chair Khan*, YALE J. ON REGUL.: NOTICE & COMMENT (July 15, 2021).

397 *See supra* notes 201–03 and accompanying text.

398 *See* Thomas Waldrop & Nicole Rapfogel, *Too Little, Too Late: Trump's Prescription Drug Executive Order Does Not Help Patients*, CTR. FOR AM. PROGRESS (Oct. 15, 2020), https://www.americanprogress.org/issues/healthcare/news/2020/10/15/491425/little-late-trumps-prescription-drug-executive-order-not-help-patients/ [https://perma.cc/Q6MU-UGF7] (suggesting that the recent executive order on lowering the costs of prescription drugs is a presidential effort to "circumvent Congress"); *see also* Amy Goldstein, Yasmeen Abutaleb & Josh Dawsey, *Trump Pledges to Send $200 Drug Discount Cards to Medicare Recipients Weeks Before Election; Funding Source Unclear*, WASH. POST (Sept. 24, 2020) (suggesting that there is no legal funding source for a recent Trump Administration promise to "$200 discount cards to 33 million older Americans to help them defray the cost of prescription drugs").

399 Securing Updated and Necessary Statutory Evaluations Timely ("SUNSET"), 86 Fed. Reg. 5694 (Jan. 19, 2021), https://www.govinfo.gov/content/pkg/FR-2021-01-19/pdf/2021-00597.pdf [https://perma.cc/3RPA-AGZ9]; *see also* Steve Usdin, *Trump Administration Considering 10-Year Sunset for All Rules*, BIOCENTURY (Oct. 23, 2020, 3:04 PM), https://www.biocentury.com/article/631364 [https://perma.cc/NV3J-NHP8] ("The Trump administration

would offer no explicit public health benefits—threatens the rescission of thousands of meaningful, science-based regulations, including those concerning food safety and transparency, consumer protections, pharmaceuticals, and health care programs."[400] Advocates of this policy argue that it is supported by the Regulatory Flexibility Act ("RFA")[401] because it forces the agencies to comply with the RFA's requirements for retrospective review.[402]

The RFA requires that an agency amend to repeal a rule only if the agency determines that a rule is not achieving its purpose or is unduly burdensome.[403] The RFA does not, however, authorize the automatic sunsetting mandated by the new rule.[404] Indeed, a complaint brought by a coalition of health groups argues, in part, that the rule sunsets regulations "without RFA review or considerations required under substantive statutes and the APA."[405]

As a result of this action, the Biden Administration is postponing implementation of this rule for one year; the Administration also appears to find merit in some of the plaintiffs' claims.[406] However, even though President Biden has pulled back from this policy, it might very well be resuscitated by a future President,[407] if not by the Biden White House itself. Accordingly, courts should take the opportunity now to evaluate whether there is adequate legislative authority for such a policy (in addition to considering whether the rule is in violation of the APA's arbitrary and capricious standard).[408]

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has drafted a proposal that would make many government regulations automatically expire after 10 years unless government agencies undertook a formal process to renew them.").

400 Mia Cabello, *The Midnight Regulation to End Regulations*, REGUL. REV. (Dec. 21, 2020), https://www.theregreview.org/2020/12/21/cabello-midnight-regulation-end-regulations/ [https://perma.cc/5C74-EMQG] ("It also risks diverting agency resources to the point that revising or creating new regulations to further public health would be extremely difficult.").

401 5 U.S.C. §§ 600–612.

402 Charles Yates & Adi Dynar, *The Biden Administration Should Not Sunset the Sunset Rule*, REGUL. REV. (Apr. 4, 2022), https://www.theregreview.org/2022/04/04/yates-dynar-biden-administration-should-not-sunset-the-sunset-rule/ [https://perma.cc/3GRQ-DA2J].

403 5 U.S.C. § 610.

404 *See id.*

405 Complaint at 24, Cnty. of Santa Clara v. HHS, No. 5:21-cv-01655 (N.D. Cal. Mar. 9, 2021).

406 *See* SUNSET, 86 Fed. Reg. 5694; SUNSET; Administrative Delay of Effective Date, 87 Fed. Reg. 12,399 (delaying the effective date) (Mar. 4, 2022).

407 *See* Martin Totaro & Connor Raso, *Agencies Should Plan Now for Future Efforts to Automatically Sunset Their Rules*, BROOKINGS INST. (Feb. 25, 2021), https://www.brookings.edu/research/agencies-should-plan-now-for-future-efforts-to-automatically-sunset-their-rules/ [https://perma.cc/J3VY-MUUT] (arguing that "a future administration might well try to adopt a similar action" as President Trump's sunset rule).

408 *See infra* notes 589–95 and accompanying text.

In one more example, President Trump issued an executive order that renders civil servants subject to at-will removal,[409] which he declared to be a "[f]aithful execution of the law."[410] This order, which remains a policy option for future presidents who seek to promote a more unitary executive,[411] undercuts the Pendleton Civil Service Reform Act.[412] Accordingly, the judiciary should also be careful not to approve of a new category of unprotected bureaucrat if the category is not in keeping with the Pendleton Act's limitation of the patronage system.[413] In other words, courts should recognize that an initiative like Schedule F falls outside the scope of administrative authority unless there is new legislation passed to authorize universal at-will removal of bureaucrats.

The Biden policy "pausing" new gas and oil leases[414] offers another, albeit more difficult, case study for reconciling presidentialism and statute. Here, the agency argued that the authority to pause oil and gas leases is "committed to agency discretion by law . . . under MLA or under OCSLA," as part of the agency's discretion in government contracts and everyday operations.[415] Eric Biber and Jordan Diamond suggest that this could mean the agency's discretionary authority logically and lawfully extends to managing—and even canceling—fossil fuel leases and contracts.[416] They also, however, "emphasize that this argument is not a slam-dunk—there are strong counterarguments in the legislative history, the caselaw, and the structure of the MLA."[417]

A more successful argument for a policy that allows such pauses for the express purpose of preventing fossil fuel development on public lands would be one that finds purchase in the aims of a legislative scheme; such an argument may require consulting different statutory

409 *See supra* note 204 and accompanying text.

410 Exec. Order No. 13,957, 85 Fed. Reg. 67,631 (Oct. 26, 2020) ("*Faithful execution of the law* requires that the President have appropriate management oversight regarding this select cadre of professionals.") (emphasis added).

411 *See supra* notes 206–07 and accompanying text.

412 *See supra* note 209 and accompanying text.

413 *See* Rebecca Beitsch, *Trump Sued Over 'Partisan' Order Stripping Some Civil Service Protections*, THE HILL (Oct. 27, 2020, 4:37 PM), https://thehill.com/homenews/administration/523023-trump-sued-over-partisan-order-stripping-some-civil-service [https://perma.cc/C4D6-XF9S] ("The suit asks courts to block the executive order, arguing that Trump is bypassing a congressional role.").

414 *See supra* notes 190–97 and accompanying text.

415 Louisiana v. Biden, 543 F. Supp. 3d 388, 407, 409 (W.D. La. 2021).

416 Eric Biber & Jordan Diamond, *Keeping It* All *in the Ground*?, 63 ARIZ. STATE L. REV. 279, 298 (2021).

417 *Id.* at 303.

frameworks than the one on which the agency initially relied. In this vein, the EPA could argue that it has discretion to engage in this policy under the Endangered Species Act,[418] which might compel the agency to go even further to prohibit environmental damage caused by fossil fuels,[419] or in the Federal Land Policy and Management Act,[420] which requires the agency to "prevent unnecessary or undue degradation" of public lands.[421] As to the latter statute, the agency could conclude that the greenhouse gas emissions from fossil fuels implicate this legislation "by contributing to climate change."[422] If so, the statute would "trigger a nondiscretionary duty to stop that degradation by canceling the leases" that produce greenhouse gas emissions.[423]

In addition, agencies have long mediated between the President's broad agenda and the requirements and intentions of the law they are tasked with executing, but these efforts to mediate are subjugated by political interests. In this vein, an agency *itself* might consider whether a presidential request or even directive is something the agency has the authority to implement pursuant to legislation.[424] And if not, the agency could decline to implement the President's initiative in order to remain in compliance with its governing statutory scheme. In doing so, the agency would offer an incentive to the President to identify existing legislation or initiate new legislation to support her preferred regulatory outcomes.

For example, under the Trump Administration, one agency may have resisted implementing an unlawful policy despite political pressure, although it ultimately succumbed to some degree. In pursuit of President Trump's "Blueprint to Lower Prescription Drug Prices,"[425] the HHS initiated a rulemaking docket titled "HHS Blueprint to Lower Drug Prices and Reduce Out-of-Pocket Costs."[426] The

418 16 U.S.C. §§ 1531–1544.

419 *See* Biber & Diamond, *supra* note 416, at 307.

420 43 U.S.C. §§ 1701–1787.

421 Biber & Diamond, *supra* note 416, at 302, 307-08 (quoting 43 U.S.C. § 1732(b)).

422 *Id.* at 308.

423 *Id.*

424 *Cf.* Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1762-63 (2013) (discussing how agencies self-insulate from presidential review to avoid various drawbacks, including the possibility of policy reversals); Bijal Shah, *Civil Servant Alarm*, 94 CHI.-KENT L. REV. 627, 649 (2019) (discussing bureaucratic resistance that allowed agencies to refrain from unlawful behavior, despite the presidential pressure).

425 *See supra* note 201.

426 83 Fed. Reg. 22,692 (May 16, 2018).

rulemaking docket requested information only,[427] and did not lead to any concrete policies despite the fact that over 3,000 comments were received on that notice.[428] On the one hand, the agency published a related document on its website[429] and another, narrow rule concerning prescription drug prices.[430] On the other hand, the agency initially declined to implement an expansive rule,[431] perhaps because it could not find a legal pathway to implement the President's promises without statutory changes.[432] The agency eventually regulated a modest reduction to certain Medicare premiums a few years later.[433]

In this case, it appears that the agency was not interested in resisting the President's initiative, even if it was outside the scope of what the agency could accomplish under current law.[434] But it is possible that an agency might resist presidential directives, subsequent to "'internal' . . . separation of powers" dynamics.[435] In the past, broad swaths of the immigration bureaucracy have resisted presidential initiatives, not only under the Trump administration,[436] but also in re-

427 *Id.* ("Through this request for information, HHS seeks comment from interested parties to help shape future policy development and agency action.").

428 Barlas, *supra* note 203, at 628.

429 DAN BEST, DEP'T OF HEALTH & HUM. SERVS., REPORT ON 100 DAYS OF ACTION ON THE AMERICAN PATIENT FIRST BLUEPRINT (2018), https://www.hhs.gov/sites/default/files/ReportOn100DaysofAction_AmericanPatientsFirstBlueprint.pdf [https://perma.cc/6NL3-FHFF].

430 *See* Medicare and Medicaid Programs; Regulation to Require Drug Pricing Transparency, 84 Fed. Reg. 20,732 (May 10, 2019) (requiring that the list price be mentioned on television advertisements for drugs).

431 *See* Waldrop & Rapfogel, *supra* note 398 ("[A]fter touting the [Blueprint] policy for months, [HHS] eventually declined to issue regulations implementing it."); *see also* Barlas, *supra* note 203, at 606 ("The fact that drug companies are sitting on the edge of their seats waiting for the administration to put a plan in place doesn't mean a plan will evolve quickly. It clearly won't.").

432 *See* Barlas, *supra* note 203, at 606 (discussing how HHS Secretary Alex Azur conceded that the agency's authority to pursue these measures would be better supported by additional legislation).

433 *See* Modernizing Part D and Medicare Advantage to Lower Drug Prices and Reduce Out-of-Pocket Expenses, 84 Fed. Reg 23,832 (May 23, 2019) (to be codified at 42 C.F.R. pts. 422, 423).

434 *See* Barlas, *supra* note 203 (noting that HHS Secretary Azur would "welcome legislation eliminating the 100% cap on drug rebates imposed under the Patient Protection and Affordable Care Act, 'which would create a significant disincentive for drug companies to raise list prices.'").

435 Shah, *supra* note 361, at 102–03, 102 n.4 (discussing the literature on an internal or administrative separation of powers, which suggests that "a balanced relationship among . . . intra-agency actors would improve administrative functionality").

436 *See* Shah, *supra* note 424, at 639–47 (illustrating that under President Trump, "civil servants from varied branches of the immigration bureaucracy, with divergent views on the proper balance between the humanitarian and exclusionary goals of the U.S. immigration law, have

sponse to policies from Presidents Obama,[437] George W. Bush,[438] and even Reagan,[439] and in some cases succeeded in changing the contours of presidential administration.[440] A healthy bureaucratic interest in maintaining the statutory or congressional mission of an agency could encourage administration that balances presidential aims and legislative directives. Agency head attempts to assert the requirements of lawful administrative action vis-à-vis political pressure could be ineffective, at least in the short term, given the President's power to fire agency heads who dare to resist unlawful directives.[441] In the long term, however, with the help of courageous civil servants, political appointees' resolve to pursue greater fidelity to the law could become customary.

Courts could reinforce agency heads' efforts to resist political pressure in order to more faithfully execute the legislation in contention. To do this, courts may reconsider whether the exercise of administrative discretion—particularly if it has a significant impact on the implementation of law—is reviewable. On the one hand, the Supreme Court has declared that when the President is directing an agency in her own capacity, her exercise of discretion is not reviewable under the agency's enabling statute.[442] On the other hand, the D.C. Circuit has noted that even if an agency is acting at the behest of the Presi-

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voiced substantively similar opposition to the President's immigration agenda," albeit to limited effect).

437 Shah, *supra* note 378, at 637–39 (showing that under President Obama, policies that outlined new immigration enforcement priorities led to defiance from Immigration and Customs Enforcement ("ICE") officers that was in keeping with their usual interest in maximizing deportation, and that ICE officers succeeded in changing the President's policies).

438 Shah, *supra* note 378, at 636–37 (discussing how under President G.W. Bush, two sets of dissimilar civil servants that nonetheless worked together—DHS prosecutors and Department of Justice immigration judges—were united in the view that a new detention policy would negatively affect noncitizens and noting "that the program was short-lived due in part to this resistance, which suggests that upper-level officials were responsive to bottom-up concerns") (citation omitted).

439 Shah, *supra* note 378, at 335–36 (discussing how, under President Reagan, civil servants whose focus was on management challenged new detention policies due to concerns about their impact on the immigration system).

440 *See supra* notes 437–38.

441 *See* Shah, *supra* note 424, at 646 (noting the incident in which Attorney General Sally Yates was fired by the Trump Administration for noting that an immigration directive might be unlawful).

442 *See*, *e.g.*, Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 112–13 (1948) (holding that President's discretion under the Civil Aeronautics Act to approve certain decisions of the Civil Aeronautics Board is not subject to judicial review under statute because the President's decision in this context "derives its vitality from the exercise of unreviewable Presidential discretion").

dent, it acts under its own auspices—or rather, the requirements of legislation—and therefore, is still subject to judicial oversight.[443] According to the D.C. Circuit, even if an agency head "were acting at the behest of the President, this 'does not leave the courts without power to review the legality [of the action], for courts have power to compel subordinate executive officials to disobey illegal Presidential commands.'"[444]

When changes in administration occur, agencies should also revisit policies directed by the previous President—in addition to closely considering policy changes directed by new Presidents[445]—to ensure they adequately fulfil statutory aims. A new administration and its political leaders might be able to identify instances in which the previous administration acted counter to the aims of legislation. Furthermore, the President herself might support or even lead administrative attempts to balance her demands against the requirements of statute. On the one hand, directing agencies to reevaluate regulation may be driven by the ultimate goal of pursuing certain policy outcomes that are equally misaligned with statute as the policies of the outgoing President. On the other hand, these sorts of directives may reconcile presidentialism and legislation by allowing the President to pursue her partisan policy interests while also encouraging agencies to investigate the quality and legitimacy of the regulatory fulfillment of statutory purposes.

The Biden Administration appears to have empowered agencies to engage in regulatory reevaluation.[446] For instance, a recent Biden

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443 Chamber of Com. v. Reich, 74 F.3d 1322, 1328 (D.C. Cir. 1996).

444 *Id.* (alteration in original) (quoting Soucie v. David, 448 F.2d 1067, 1072 n.12 (D.C. Cir. 1971)). In *Reich*, the D.C. Circuit condemned the President's directive on the ground that it was preempted by statutory authority—in this case, the National Labor Relations Act. *Id.* at 1399. There is disagreement as to whether such preemption is an improper restriction on presidential power or whether judicial review and the subsequent restriction of presidential power in this context is justified to ensure that the President does not push agencies to exceed their congressionally-delegated power. *Compare* Charles Thomas Kimmett, *Permanent Replacements, Presidential Power, and Politics: Judicial Overreaching in* Chamber of Commerce v. Reich, 106 YALE L.J. 811, 832 (1996), *with* Gordon M. Clay, *Executive (Ab)use of the Procurement Power:* Chamber of Commerce v. Reich, 84 GEO. L.J. 2573, 2574–75 (1996).

445 *See infra* Section III.D.

446 *See, e.g.*, Memorandum on Protecting Women's Health at Home and Abroad, 2021 DAILY COMP. PRES. DOC. 1–2 (Jan. 28, 2021) ("The Secretary of Health and Human Services shall review the Title X Rule and any other regulations governing the Title X program . . . and shall consider, as soon as practicable, whether to suspend, revise, or rescind . . . those regulations, *consistent with applicable law*, including the Administrative Procedure Act.") (emphasis added).

directive invites the HHS to revisit its policies[447] and rules to ensure that they adequately implement the Title X statute.[448] In another directive, the Secretary of Housing and Urban Development ("HUD") is directed to examine the effects of Trump-era regulations and HUD's policies more generally "on HUD's statutory duty to ensure compliance with the Fair Housing Act."[449] In one more directive, the President seeks to clarify the "requirements of the National Firearms Act."[450] Additionally, President Biden issued an executive order directing the Department of Education to ensure compliance with Title IX[451] as it relates to discrimination on the basis of sexual orientation and gender identity.[452] And another executive order seeks to ensure regulatory consistency with Medicaid[453] and the Affordable Care Act.[454]

The Title X initiative is motivated by an interest in ensuring that low-income patients are not denied support in instances where they might contemplate abortion or related health measures.[455] However, the initiative also encourages the agency to reconsider its policies to ensure that they fit more squarely with the statutory requirements and

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447 *Id.* (revoking Memorandum on the Mexico City Policy, 2017 DAILY COMP. PRES. DOC. 1 (Jan. 23, 2017))("The Mexico City Policy"). The Mexico City Policy, which limited the funding of nongovernmental organizations that provide abortion-related services or counsel, was initially announced by President Reagan in 1984, "rescinded by President Clinton in 1993, reinstated by President George W. Bush in 2001, and rescinded by President Obama in 2009" before President Trump reinstalled them in 2017. *Id.*

448 *Id.* (directing the Secretary of HHS to review the "Title X Rule" promulgated by the Trump administration and any other regulations that might interfere with the proper implementation of Title X of the Public Health Service Act, 42 U.S.C. §§ 300–00a-6, which "provides Federal funding for family planning services that primarily benefit low-income patients").

449 Memorandum on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies, 86 Fed. Reg. 7487 (Jan. 26, 2021) (referencing the Fair Housing Act, 42 U.S.C. §§ 3601–3631).

450 Press Release, The White House, Fact Sheet: Biden-Harris Administration Announces Initial Actions to Address the Gun Violence Public Health Epidemic (Apr. 7, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/07/fact-sheet-biden-harris-administration-announces-initial-actions-to-address-the-gun-violence-public-health-epidemic/ [https://perma.cc/MG5Z-B828] (referencing the National Firearms Act, I.R.C. §§ 5801–5872).

451 20 U.S.C. §§ 1681–1688.

452 Exec. Order No. 14,021, 86 Fed. Reg. 13,803 (Mar. 8, 2021); *see also* Tovia Smith, *Biden Begins Process to Undo Trump Administration's Title IX Rules*, NPR (Mar. 10, 2021, 5:27 PM), https://www.npr.org/2021/03/10/975645192/biden-begins-process-to-undo-trump-administrations-title-ix-rules [https://perma.cc/9JHS-CRF9].

453 42 U.S.C. §§ 1396–1396w-6.

454 Exec. Order No. 14,009, 86 Fed. Reg. 7793 (Jan. 28, 2021); I.R.C. § 5000A.

455 *See generally* Memorandum on Protecting Women's Health at Home and Abroad, *supra* note 446.

intent of Title X.[456] The Fair Housing directive makes clear that it seeks to ensure full administrative compliance with the intentions of the statute.[457] The gun control initiative, while motivated by an interest in limiting gun use and violence, could encourage the Bureau of Alcohol, Tobacco, Firearms and Explosives to better understand its obligations under the National Firearms Act.[458] The executive order concerning anti-LGBT discrimination directs the Department of Education to review a rule promulgated under the Trump Administration[459] "and any other agency actions taken pursuant to that rule, for consistency with governing law, including Title IX,"[460] in particular, as it relates to a recent Supreme Court decision.[461] In addition, the Biden executive order on Medicaid seeks "to review waivers issued under the prior administration that 'may reduce coverage under or otherwise undermine Medicaid'" and the Affordable Care Act.[462] For now, the Supreme Court has accepted the Biden Administration's efforts to make its policy more consistent with these two legislative schemes.[463]

Finally, courts should consider more explicitly whether Congress intended to allow the President to direct the agency to shift areas of regulation, as determined by the agency's enabling act. This endeavor will be more successful in situations where Congress chose to legislate

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456 *Id.*

457 *See* Memorandum on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies, *supra* note 449 ("Based on that examination, the Secretary shall take any necessary steps, as appropriate and consistent with applicable law, to implement the Fair Housing Act's requirements that HUD administer its programs in a manner that affirmatively furthers fair housing and HUD's overall duty to administer the Act (42 U.S.C. 3608(a)) including by preventing practices with an unjustified discriminatory effect.").

458 *See* Press Release, the White House, *supra* note 450.

459 Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026 (May 19, 2020) (to be codified at 34 C.F.R. 106).

460 Exec. Order No. 14,021, *supra* note 452, at 13,803–04.

461 *See* Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32,637 (June 22, 2021), ("Consistent with the Supreme Court's ruling and analysis in *Bostock*, the Department interprets Title IX's prohibition on discrimination 'on the basis of sex' to encompass discrimination on the basis of sexual orientation and gender identity." (citing Bostock v. Clayton County, 140 S. Ct. 1731 (2020))).

462 Jonathan Shin, *U.S. Supreme Court Removes Oral Arguments Over State Medicaid Work Requirements from Calendar*, JD SUPRA (Mar. 18, 2021), https://www.jdsupra.com/legalnews/u-s-supreme-court-removes-oral-9821606/ [https://perma.cc/95Q9-XDRE]; *see also* Exec. Order No. 14,009, *supra* note 454.

463 *See* Shin, *supra* note 462.

the issue with greater specificity.[464] In some cases, this approach might yield a standard for determining the legitimacy of presidentialism.

Previous cases come close, but not close enough, to the type of evaluation courts might undertake. For instance, in *Brown & Williamson*, both the majority and the dissent failed to consider whether Congress intended to allow the President to direct the FDA's regulatory jurisdiction.[465] And although the *Brown & Williamson* majority dove into the details of legislative intent, it did not emphasize evaluating the legitimacy of presidentialism within the statutory scheme at issue.[466]

Likewise, in *West Virginia v. EPA*, the majority did not assess the President's role in the agency's policymaking. In *American Lung Ass'n*, the decision below, the majority makes an oblique reference to presidentialism by declaring that "[t]he EPA here 'failed to rely on its own judgment and expertise, and instead based its decision on an erroneous view of the law.'"[467] However, both the Supreme Court and the D.C. Circuit's analyses would have benefitted from more explicit recognition of the President's aims and an effort to evaluate whether presidentialism is consistent with the requirements of legislation.

The closest this set of cases came to considering presidentialism in the implementing statute is in Judge Walker's concurrence in *American Lung Ass'n*. First, Judge Walker identifies the political accountability and majoritarianism inherent to the legislative process,[468] and

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464 *See infra* Part III.A (arguing that Congress should specify the President's role in statutory enforcement).

465 *See supra* notes 228–46 and accompanying text (discussing the purposivist approach of this decision).

466 *See id.*

467 *Am. Lung Ass'n*, 985 F.3d at 944 (citation omitted). After all, "President Trump's [own] administration concluded that 'Earth's climate is now changing faster than at any point in the history of modern civilization, primarily as a result of human activities.'" *Id.* at 935 (citing U.S. GLOB. CHANGE RSCH. PROGRAM, 2 FOURTH NATIONAL CLIMATE ASSESSMENT, 24 (David Reidmiller et al. eds., 2018).) Further cementing the need for climate change regulation, "[t]he administration added that 'the evidence of human-caused climate change is overwhelming and continues to strengthen,' . . . 'the impacts of climate change are intensifying across the country[, and c]limate-related changes in weather patterns and associated changes in air, water, food, and the environment are affecting the health and well-being of the American people, causing injuries, illnesses, and death.'" *Id.*

468 *Id.* at 996–97. (Walker, J., concurring in part and dissenting in part). ("To guard against factions, legislation requires something approaching a national consensus . . . . [It] must survive bicameralism and presentment. Only through that process can ideologically aligned states use federal power to impose their will on the unwilling. . . . In that process, each political institution probes legislative proposals from the perspective of different constituencies. . . . The point is: It's difficult to pass laws—on purpose.") (citations omitted).

advocates for legislative supremacy in policymaking.[469] He then applies this lens to the matter at issue: "In its clearest provisions, the Clean Air Act evinces a political consensus."[470] And like the majority, he gestures to the corrupting influence of presidentialism: "[b]ut if ever there was an era when an agency's good sense was alone enough to make its rules good law, that era is over."[471]

Judge Walker appears skeptical that agencies, under the corrupting influence of the President, have the capacity to engage in statutory interpretation that honors the hard-won results of the legislative process. A related implication of his statements is that Congress could not have intended for presidentialism to corrupt agencies' "good sense" application of statute.

Admittedly, it may be the case that courts determine the legitimacy of agency action resulting from presidential administration based on the composition of judges or their support for particular policy outcomes. For instance, Michael Herz argues in regard to *Brown & Williamson*[472] that "the result was driven by the individual Justices' sympathy, or lack thereof, toward the FDA's undertaking."[473] To the extent this is a problem[474] for any case discussed in Part I, mechanizing the judicial balancing of presidentialism against statutory aims could reduce ex post policymaking by courts.[475] Furthermore, if Congress becomes aware that courts are interested in this matter in any capacity, they might legislate more precisely, as suggested in Part III.A.

C. Judicial Parsing of Presidentialism via Chevron *and the Major Questions Doctrine*

Continuing in the vein of evaluation and balance, this Section suggests that courts apply *Chevron* and the major questions doctrine to determine whether administrative submission to the President's

469 *Id.* at 1003 ("Congress decides what major rules make good sense."). For a discussion of the implications of Judge Walker's statements for the major questions doctrine, see *infra* notes 504–06 and accompanying text.

470 *Am. Lung Ass'n*, 985 F.3d at 997 (Walker, J., concurring in part and dissenting in part).

471 *Id.* at 1003.

472 529 U.S. 120.

473 Michael Herz, *The Rehnquist Court and Administrative Law*, 99 Nw. U. L. REV. 297, 346 (2004).

474 *See* Thomas W. Merrill, *Legitimate Interpretation—or Legitimate Adjudication?*, 105 CORNELL L. REV. 1395, 1400 (2020) (arguing that "[t]he best way to preserve the legitimacy of courts and other adjudicators, this Article contends, is to assess the performance of these institutions in terms of norms of legitimate dispute resolution, not legitimate law declaration.").

475 *See* Shah, *supra* note 63, at 856–59; *see generally* Shah, *supra* note 335 (discussing ways in which courts engage in agency action).

policy goals is consistent with statutory preferences. In doing so, the judiciary could discourage agencies from furthering statutory interpretation that favors the President's policy interests in an outsized way.

Notably, *Chevron* calls for deference to presidential preferences:

> While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute . . . .[476]

Building on this further, Justice Kagan argued that if administrative statutory interpretation has been influenced by the President, it is more deserving of *Chevron* deference than if the President were not involved.[477] Then again, the Supreme Court has both affirmed[478]—and expressed skepticism of[479]—administrative statutory interpretation informed by the President. Conversely, the D.C. Circuit has, on at least

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476 Chevron, U.S.A., Inc. v. Nat.'l Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984).

477 *See* Kagan, *supra* note 23, at 2372 ("A sounder version of [*Chevron*] would take unapologetic account of the extent of presidential involvement in administrative decisions in determining the level of deference to which they are entitled.").

478 *See, e.g.*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981–82 (2005) (accepting George W. Bush Administration's changed interpretation of the Telecommunications Act of 1934); Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 747 (1996) (permitting the Clinton Administration's new interpretation of the National Banking Act); Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 418–20 (1993) (upholding the Secretary of HHS's interpretation, which reflected the interests of President George W. Bush, of Title XVIII of the Social Security Act); Rust v. Sullivan, 500 U.S. 173, 187–89 (1991) (finding that the changed interpretation of Title X by the Reagan and Bush Administrations withholding funding from providers who engage in abortion-related activities was "amply justified" with a "reasoned analysis").

479 *See, e.g.*, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013) (affirming the George W. Bush Administration's, and not the Obama Administration's, reading of the Alien Tort Statute; note that both—that is, opposing—arguments were presented to the Court by the same U.S. Solicitor General); Levin v. United States, 568 U.S. 503, 518 (2013) (disagreeing with Obama Administration's "freshly minted revision" of how to reconcile the Gonzalez Act with the Federal Tort Claims Act); Transcript of Oral Argument at 32, U.S. Airways, Inc. v. McCutchen, 569 U.S. 88 (2013) (No. 11–1285) (demonstrating Justice Roberts's disapproval of change in statutory interpretation based on a change in administration: "It would be more candid for your office to tell us when there is a change in position that it's not based on further reflection of the secretary. It's not that the secretary is now of the view—there has been a change [in administration]"); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 215 (1988) (refusing to abide by the Reagan Administration's recently switched position that the underlying statute permitted the promulgation of retroactive Medicare cost-limiting rules); Immigr. & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 447 n.30 (1987) (determining that conflicting interpretations of "well-founded fear" in asylum law from the Johnson to the Reagan Administrations were entitled to little deference).

one recent occasion, supported the results of presidential administration even after dispensing with *Chevron*.[480]

Critics of *Chevron* have charged that it leads judges away from determining how agencies can best follow statutory text and congressional intent, and some have also taken the view that statutory interpretation influenced by the President is less likely to reflect the legislature's preferences.[481] In 1981, the Supreme Court suggested that if an agency changes its statutory interpretation in response to presidential influence, the new interpretation "is entitled to considerably less deference."[482] Thirty years later, the Seventh Circuit decried shifting political influence on administrative statutory interpretation as

> mak[ing] a travesty of the principle of deference to interpretations of statutes by the agencies responsible for enforcing them, since that principle is based on a belief either that agencies have useful knowledge that can aid a court or that they are delegates of Congress charged with interpreting and applying their organic statutes consistently with legislative purpose.[483]

Both conservative and progressive scholars have argued that deference to administrative statutory interpretation influenced by the President is problematic. As to the former end of the spectrum, before his confirmation, now-Justice Kavanaugh argued that "*Chevron* encourages the Executive Branch . . . to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints."[484] As to commentary from a more progressive scholar, Peter M. Shane has likewise suggested that an interpretation of a statute that fluctuates based on the "preferences of a majority of the President's electoral supporters" cannot be squared with legislative intent.[485]

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480 Guedes v. ATF, No. 21-5045, 2022 WL 3205889, at *3 (D.C. Cir. Aug. 9, 2022) (affirming the bump-stock regulation despite its decision—at the request of both parties—to "dispense with the *Chevron* framework.").

481 *See, e.g.*, Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against* Chevron *Deference in Immigration Adjudication*, 70 DUKE L.J. 1197 (Feb. 2021) (arguing that *Chevron* should not be applied to the outcomes of immigration adjudications); Josh Blackman, *Presidential Maladministration*, 2018 U. ILL. L. REV. 397 (2018) (arguing against the idea that agencies deserve greater deference for statutory interpretation that has the President's fingerprints on it).

482 Watt v. Alaska, 451 U.S. 259, 273 (1981).

483 Sandifer v. U.S. Steel Corp., 678 F.3d 590, 599 (7th Cir. 2012) (citations omitted).

484 Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

485 Peter M. Shane, Chevron *Deference, the Rule of Law, and Presidential Influence in the Administrative State*, 83 FORDHAM L. REV. 679, 698–99 (2014).

Courts have split on the matter. On the one hand, the Ninth Circuit recently refused *E. Bay Sanctuary Covenant v. Trump* to give *Chevron* deference to an agency where President Trump directed its interpretation of the Immigration and Naturalization Act, because the interpretation was in conflict with the Act.[486] On the other hand, in *Little Sisters of the Poor v. Pennsylvania*,[487] the Supreme Court accepted an administrative interpretation of the Affordable Care Act directed by President Trump.[488] More specifically, the Court implied that the statute clearly allows for the agency's new policy allowing employers to opt out of providing no-cost contraceptive coverage under the Affordable Care Act.[489] This was despite the fact that the Third Circuit affirmed the granting of a preliminary injunction against the agency rule because it considered the interpretation to be at odds with the statute itself.[490]

To be clear, the Supreme Court did not engage in a deference analysis, although the concurrence argued that it should have.[491] Superficially, the Supreme Court simply disagreed with the Third Circuit's interpretation of statute. But the Court's decision also indicates its tolerance for presidential control over administrative statutory interpretation, given President Trump's well-known interest in a policy exempting employers from contraceptive coverage,[492] and his directive

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486 *See* E. Bay Sanctuary Covenant v. Trump, 950 F.3d 1242 (9th Cir. 2020). (declaring that a new regulation, issued pursuant to a presidential proclamation, was in direct conflict with the Immigration and Naturalization Act and therefore not entitled to deference under *Chevron*).

487 Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 591 U.S., slip op. (July 8, 2020).

488 *Id.* at 2.

489 *See id.* at 18. *But see id.* at 64 (Kagan, J., concurring) (arguing that both the majority and dissent incorrectly posited that the statute is clear).

490 *See* Pennsylvania v. President United States, 930 F.3d 543, 558 (3d Cir. 2019), *rev'd*, *Little Sisters of the Poor*, 591 U.S. slip op. at 26 (affirming the grant of preliminary injunction against agency rule allowing, at President Trump's direction, employers to opt out of providing no-cost contraceptive coverage under the Affordable Care Act). "Nowhere in the enabling statute did Congress grant the agency the authority to exempt entities from providing insurance coverage for such services . . . ." *Id.*

491 *Little Sisters of the Poor*, 591 U.S., slip op. at 2 (Kagan, J., concurring) ("Try as I might, I do not find . . . clarity in the statute. . . . But *Chevron* deference was built for cases like these. *Chevron* instructs that a court facing statutory ambiguity should accede to a reasonable interpretation by the implementing agency. The court should do so because the agency is the more politically accountable actor. And it should do so because the agency's expertise often enables a sounder assessment of which reading best fits the statutory scheme.") (citations omitted).

492 *See* Tanner J. Bean & Robin Fretwell Wilson, *The Administrative State as a New Front in the Culture War:* Little Sisters of the Poor v. Pennsylvania, 2019–2020 CATO SUP. CT REV. 229, 233 (2020) ("Just four months after taking office, President Donald Trump, speaking in the Rose Garden, congratulated the Little Sisters for having 'just won a lawsuit' and that their 'long ordeal w[ould] soon be over.'") (alterations in original).

to expand the exemption to include not only religious, but also "moral" objectors.[493]

The judiciary might consider resolving this ambivalence regarding deference to statutory interpretation influenced by political considerations. More specifically, courts could limit the extent to which *Chevron* encourages presidentialism, particularly when it interferes with the goals of the legal scheme at issue, just as the Third Circuit did in *Little Sisters*.[494]

Note that such an approach does not require a "best" reading of statute, a view that reflects the concession discussed in Part II.A. Rather, it requires merely a nuanced reading, as opposed to reading with an eye toward interpreting statute in a manner that furthers the President's preferences. With this in mind, courts might evaluate both the leveraging of presidential pressure and application of expertise to determine which of the two, or which combination of the two, should be prioritized in the policymaking scheme at issue. Even more simply, courts might view with skepticism administrative policies that cut against the goals of a statutory scheme, such as the limitation of access to reproductive care under a law that seeks to expand access to healthcare.

This combined approach could impact the application of *Chevron* Step One and Step Two. At Step One, the judiciary must determine whether legislation is ambiguous—and if it is not, "give effect to the unambiguously expressed intent of Congress."[495] If the relevant statutory provision is ambiguous, courts must defer to the agency's interpretation.[496] As to the former, if courts determine that legislation has an unequivocal set of substantive aims, or otherwise intends an agency to act on the basis of expertise, and instead the agency followed the President's directives without regard for the orientation of the statute, the administrative interpretation in question might fail the Step One requirement of statutory ambiguity. Likewise, in situations in which the legitimacy of a policy depends on technical analysis, if an agency acts with blind faith in the President, courts might choose to apply Step Two with more teeth than usual.[497]

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493 *Id.* ("In one of its first actions, [the Trump A]dministration issued interim final rules, later finalized, that kept the coverage mandate, but exempted not only all religious objectors but also moral objectors.").

494 *See supra* note 490 and accompanying text.

495 Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

496 *Id.* at 844.

497 *See* Shah, *supra* note 62, at 671 n.140 ("Step Two of the *Chevron* analysis, at which point

Finally, it is worth considering a reformulation of the major questions doctrine that would allow courts to confront the deficiencies of administrative statutory interpretation shaped by the President.[498] Per the "major questions" (or "major rules") doctrine, "an agency can issue a *major* rule—i.e., one of great economic and political significance—only if it has clear congressional authorization to do so."[499] In other words, by invoking the major questions doctrine, courts may choose not to apply the *Chevron* framework at all in the first instance (or to find that the agency's interpretation fails at Step One, leading to the same result), based on the determination that the legislature could not have intended the agency to be the arbiter, under any circumstances, of a significant constitutional or policy question.[500] As then-Judge Kavanaugh admitted in his *U.S. Telecom Ass'n v. FCC* dissent, "determining whether a rule constitutes a major rule sometimes has a bit of a 'know it when you see it' quality,"[501] which Blake Emerson argues constitutes "an open-ended judgment call that could doom agency action in the absence of a crystal-clear statutory mandate."[502] This suggests that all roads lead back to the suggestions in Part III.A of this Article, which argues for more legislative specificity to resolve the legitimacy of presidentialism.

In the absence of legislative specificity, on the one hand, major questions analysis could allow "courts to strike down regulations the Administration [does] not favor for policy-based reasons,"[503] instead of providing nonpartisan oversight of presidential administration. On

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the court decides whether an agency's interpretation of ambiguous statute is reasonable, tends to be permissive; generally, the agency's interpretation is upheld at that level.") (citations omitted).

498 *C.f.* McGinnis & Rappaport, *supra* note 25, Working Paper at 27 (suggesting that if the Supreme "Court applies the major questions doctrine vigorously, it will also help reduce polarization").

499 U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 383 (D.C. Cir. 2017); *see also* Shah, *supra* note 335, at 1176–77 (noting that FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000); Massachusetts v. EPA, 549 U.S. 497 (2007); and Gonzales v. Oregon, 546 U.S. 243 (2006) establish that "under certain extraordinary circumstances or in regard to 'major questions' often concerning matters of national import or the determination of agencies' jurisdictions, courts can declare that Congress did not intend for agencies to interpret a statute, even if the statute is ambiguous") (citations omitted).

500 *See* Shah, *supra* note 335, at 1176–78 (discussing the major questions doctrine and its implications regarding *Chevron*).

501 855 F.3d at 423 (Kavanaugh, J., dissenting).

502 Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2041 (2018).

503 Natasha Brunstein & Richard L. Revesz, *The Trump Administration's Weaponization of the "Major Questions" Doctrine*, REGUL. REV. (May 2021), https://www.theregreview.org/2021/05/10/brunstein-revesz-trump-administrations-weaponization-major-questions-doctrine/ [https://perma.cc/QRT7-PPWF].

the other hand, the major questions doctrine could be complementary to legislative specification, if courts apply the doctrine to maintain the primacy of statutory aims (as opposed to judicial policy preference), particularly in instances where the policy at issue has been heavily influenced by the President.

In his concurring and dissenting opinion in *American Lung Ass'n,* Judge Walker evinced an interest in expanding the major questions doctrine to further limit agencies' ability to engage in statutory interpretation.[504] While some of this interest rests on anti-administrativism,[505] Judge Walker also implied that there are limits to the benefits of presidential intervention in administrative statutory interpretation, particularly to the extent that such intervention cuts against the potential for agencies to apply "good sense" in policymaking.[506] This opinion highlights the potential—albeit unrealized, in this case—usefulness of this doctrine for staving off dogmatic agency adherence to the President's values. In some ways, this concurrence foreshadowed the Supreme Court's final dispensation of this issue.

In *West Virginia v. EPA*, which reversed *American Lung Ass'n*, the Supreme Court refused to engage the *Chevron* framework by applying the major questions doctrine instead.[507] Scholars have argued that the Court's application of the major questions doctrine in this case is concerning.[508] Moreover, Leah Litman and Daniel Deacon argue that the major questions rule can now "effectively narrow the scope of agencies' authority outside the normal legislative process"[509] While Deacon and Litman note this possibility with disapproval, it could serve to constrain presidential administration that is inconsistent with statute.

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504 *See* Am. Lung Ass'n v. EPA, 985 F.3d 914, 1003 (D.C. Cir. 2021) (Walker, J., concurring in part and dissenting in part) ("Over time, the Supreme Court will further illuminate the nature of major questions and the limits of delegation.").

505 *Id.* ("Congress decides what major rules make good sense. The Constitution's First Article begins, 'All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.' . . . Thus, whatever multi-billion-dollar regulatory power the federal government might enjoy, it's found on the open floor of an accountable Congress, not in the impenetrable halls of an administrative agency—even if that agency is an overflowing font of good sense.").

506 *See id.*

507 West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (stating that the major questions doctrine is applied "in certain extraordinary cases [in which] both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there") (citation omitted).

508 *See supra* notes 281–85 and accompanying text.

509 Deacon & Litman, *supra* note 278, at *6 ("This dynamic undermines the purported purpose of the [major questions] doctrine, which is to channel policy disputes into legislatures.").

Justice Gorsuch's concurrence, while deeply anti-administrativist,[510] hints at this potential. For instance, he suggests that the major questions doctrine upholds separation of powers principles,[511] without which "[l]egislation would risk becoming nothing more than the will of the current President."[512] Without the court policing potential executive branch overreach via major questions (and certain constitutional doctrines),[513] "[s]tability would be lost, with vast numbers of laws changing with every new presidential administration. Rather than embody a wide social consensus and input from minority voices, laws would more often bear the support only of the party currently in power."[514] Gorsuch also cites *American Lung Ass'n* and *U.S. Telecom Ass'n v. FCC* to imply that the major questions doctrine could foil a president who attempts his "own regulatory solution" despite what Gorsuch perceives to be a lack of adequate statutory authority.[515]

However, if the major questions doctrine is more likely to rear its head in situations where political parties or movements have rendered certain policies controversial[516]—policies that presumably draw the ire of the Supreme Court as a result of controversy, leading the Court to set the *Chevron* framework aside—it is possible that a political actor like the President could take advantage of the major questions doctrine to dispense with the policy of her predecessor. Arguably, the Trump Administration ultimately accomplished as much vis-à-vis the Clean Power Plan in *West Virginia v. EPA*.[517]

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510 *See*, *e.g.*, *West Virginia v. EPA*, 142 S. Ct. at 2618 (Gorsuch, J., concurring) (disparaging "the will of unelected officials barely responsive to" the President); *id.* (evincing concern about a world in which "agencies could churn out new laws more or less at whim [and suggesting that administrative] [i]ntrusions on liberty would not be difficult and rare, but easy and profuse"); *id.* (worrying about "[p]owerful special interests, which are sometimes 'uniquely' able to influence the agendas of administrative agencies . . . flourish[ing] while others would be left to ever-shifting winds").

511 *Id.* at 2617 (Gorsuch, J., concurring) ("The major questions doctrine works . . . to protect the Constitution's separation of powers.").

512 *Id.* at 2618 (Gorsuch, J., concurring).

513 *Id.* at 2617 (Gorsuch, J., concurring) (discussing sovereign immunity and prohibitions against statutory retroactivity).

514 *Id.* at 2618 (Gorsuch, J., concurring).

515 *Id.* at 2622 (Gorsuch, J., concurring) (citing Am. Lung Ass'n, 985 F.3d 914, 998 n.20 (D.C. Cir. 2021) ("President stating that 'if Congress won't act soon . . . I will'"), and U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 423–424 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc) ("noting a 'President's intervention [may] underscor[e] the enormous significance' of a regulation")).

516 *See* Deacon & Litman, *supra* note 278, at *33.

517 *See supra* notes 148–59 and accompanying text.

Nonetheless, explicit judicial consideration of statutory goals could serve as a proxy for balancing presidentialism against legislation. A thread of major questions cases including *U.S. Telecom Ass'n v. FCC*,[518] *Massachusetts v. EPA*[519] and *FDA v. Brown & Williamson*[520] suggests that even—or perhaps especially—when the President or political figures have had a major role in shaping administrative statutory interpretation, the Supreme Court will look to legislative frameworks first to determine the legitimacy of the agency's interpretation of the law at issue.[521] By making a nuanced determination about whether the agency's policy comports with what legislation authorizes, courts can sidestep the need to evaluate the legitimacy of presidentialism in that context.

Indeed, in both *Massachusetts v. EPA* and *Brown & Williamson*, cases in which the President was heavily involved in the policymaking at issue, the Supreme Court rebuked the agency for acting outside the scope of its delegated jurisdiction. In *Massachusetts v. EPA*, the Court said explicitly that "the EPA impermissibly based its decision not to regulate greenhouse gases on political preferences rather than reasons grounded in the agency's evaluation of the relevant science."[522] In *Brown & Williamson*, the Court took pains to highlight the importance of the legislature's preference for the agency, deemphasizing the role of the President in directing the agency (in contrast to the dissent).[523] In this way, the Court limited the impact of presidentialism, even though it did not express an intention to do so.

In *U.S. Telecom Ass'n*, the D.C. Circuit debated whether the agency's action was explicitly authorized by statute.[524] The dissent, penned by then-Judge Kavanaugh, argues that "[t]he FCC's net neutrality rule is a major rule, but Congress has not clearly authorized the FCC to issue the rule. For that reason alone, the rule is unlawful."[525] In response, Judge Srinivasan asserted in a concurrence:

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518 855 F.3d 381 (D.C. Cir. 2017); *see also supra* notes 210–14 and accompanying text.

519 549 U.S. 497 (2007).

520 529 U.S. 120, 158 (2000).

521 *See* Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1812, 1812 n.310 (2021) (noting in regard to *U.S. Telecom Ass'n* and *Brown & Williamson* that "[c]ases involving 'major' questions are, almost by definition, the cases in which political accountability is a meaningful possibility").

522 Shannon Roesler, *Agency Reasons at the Intersection of Expertise and Presidential Preferences*, 71 ADMIN. L. REV. 491, 511 (2019) (citing Massachusetts v, EPA, 549 U.S. at 533–34).

523 *See supra* text accompanying notes 228–47.

524 *See* 855 F.3d at 382.

525 *Id.* at 418 (Kavanaugh, J., dissenting).

> [O]ur colleague [Judge Kavanaugh] submits that Supreme Court decisions require clear congressional authorization for rules like the net neutrality rule, and the requisite clear statutory authority, he argues, is absent here. . . . Assuming the existence of the [major questions doctrine], and assuming further that the rule in this case qualifies as a major one so as to bring the doctrine into play, the question posed by the doctrine is whether the FCC has clear congressional authorization to issue the rule. The answer is yes. Indeed, we know Congress vested the agency with authority to impose obligations like the ones instituted by the [FCC] Order ["Protecting and Promoting the Open Internet"] because the Supreme Court has specifically told us so.[526]

Reasonable minds may disagree as to whether the concurrence's determination was correct. The point here is that the major question fight in this case focused on the right inquiry: the scope and intention of legislative authorization on its own terms, not as negotiable for presidential purposes.

D. Hard Look Review to Encourage Statute-Focused Execution

Presidentialism and expertise are in conflict with one another in the administrative state.[527] Indeed, courts have "long wrestled with whether presidential and political influence on agency expertise is justifiable."[528] To do so, they have applied the APA's arbitrary and capricious standard, which is generally deferential,[529] to engage in "'hard look' review, which considers the quality of administrative decisionmaking" and often involves "judicial involvement in the minutiae of administrative expertise."[530]

One area where this standard has been applied involves cases in which agencies change their policies in response to a new President. Scholars have suggested that such policy changes may be legitimate in some situations,[531] and even more, that a "sounder version" of hard

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526 *Id.* at 382–83 (Srinivasan, J., concurring) (leading into a discussion of Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005)).

527 *See* Jerry L. Mashaw, *Is Administrative Law at War with Itself?*, 29 N.Y.U. ENV'T J. 421, 421 (2021) (arguing that "a consistent general theory of administrative legitimacy still eludes us" because of the tension between "presidentialism" and "presidential administration").

528 Shah, *supra* note 335, at 1156.

529 *Id.* at 1137.

530 *Id.* at 1123, 1136.

531 *See, e.g.*, Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 593 (2003); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 470–71 (1987) ("The disagree-

look "review would take unapologetic account of the extent of presidential involvement in administrative decisions in determining the level of deference to which they are entitled."[532] Still, from the Reagan presidency through today, courts have evaluated policy changes instigated by a new President under either the arbitrary and capricious standard or via hard look review—accepting the changes in some cases,[533] but rejecting them in others.[534]

And yet, if agencies have truly acquiesced to legislative aims, administrative policies should remain consistent across administrations. Accordingly, one substantive contribution of the well-known *State Farm* case—which introduced the rule that a policy change resulting from the transition to a new presidency is not per se arbitrary and capricious—is the idea that "agencies should explain their decisions in technocratic, statutory, or scientifically driven terms, not political terms."[535] Then again, as Thomas McGarity has observed, "When the President or his staff can secretly intervene into any stage of the regulatory process, accountability suffers. An agency can usually manipu-

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ment . . . stemmed from contrasting views about the proper role of politics in the regulatory process.") (analyzing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto.Ins. Co., 463 U.S. 29 (1983)).

532 Kagan, *supra* note 23, at 2372 (arguing that the presence of presidential involvement in agency action should be viewed as beneficial to meeting the arbitrary and capricious standard).

533 *See, e.g.*, *State Farm*, 463 U.S. at 29–31 (validating a policy change initiated by the Reagan Administration); FCC v. Fox Television Stations, Inc., 556 U.S. 502, 516 (2009) (deciding that a changed policy on expletives in response to a presidential directive was not arbitrary and capricious, so long as there was an articulated reason); Wyoming v. U.S. Dep't of Agric., 661 F.3d 1209, 1265 (10th Cir. 2011) (declaring that an agency's decision to reverse course under a longstanding, but interim, rule at the request of President Clinton was acceptable, because the agency "indeed took a 'hard look' at the environmental consequences of the . . . [r]ule and therefore did not act arbitrarily and capriciously . . . ."); Int'l Union v. Chao, 361 F.3d 249, 251–52 (3rd Cir. 2004) (declaring that the agency decision, in response to directives from the George W. Bush Administration, not to promulgate a rule prioritized by the Clinton Administration was not arbitrary or capricious); *see also* Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 20 (2009) (discussing *Chao*).

534 *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497 (2007) (explaining in depth why an agency's decision denying a petition to regulate greenhouse gas emissions from motor vehicles was arbitrary and capricious); Epsilon Elecs., Inc. v. U.S. Dep't of the Treasury, 857 F.3d 913 (D.C. Cir. 2017) (finding that the agency, acting under direction from the President, nonetheless failed to adequately explain why it discounted certain evidence in its decision); Organized Vill. of Kake v. U.S. Dep't of Agric., 795 F.3d 956 (9th Cir. 2015) (deciding that the agency did not provide a reasoned explanation for a change in policy under a new administration); Nat. Res. Def. Council, Inc. v. U. S. Nuclear Regul. Comm'n, 685 F.2d 459, 460 (D.C. Cir. 1982) (per curiam) (finding that the agency's rule was arbitrary and capricious because it "fail[ed] to allow for proper consideration of the uncertainties . . . [and] fail[ed] to allow for proper consideration of the health, socioeconomic and cumulative effects"); *id.* at 509 (Edwards, J., concurring in part and dissenting in part) (noting President Reagan's role in the decision to pursue the policy).

535 Watts, *supra* note 534, at 5 (emphasis omitted).

late its analysis and explanations of the existing data to fit a presidentially required outcome."[536]

This Section argues that the executive branch must evaluate what a statute requires,[537] instead of administering legislation based on a plan to pursue the President's policy interests and an assessment of the President's authorities developed in isolation from statutory law. Indeed, as presidential control over administration continues to increase, the executive branch must be required to strike a balance between the President's and the legislature's goals, and to identify and articulate its reasons in doing so. To encourage this shift, courts should probe administrative justifications, even those seemingly based in rationality, rather than taking at face value that agencies are not motivated primarily or solely by political aims.

Arbitrary and capricious review may assist in these tasks. As Kevin M. Stack notes, "one of the most fundamental elements of arbitrary and capricious review under [section] 706 of the APA is that the agency must make some demonstration of the connection between its decision and the statute's aims."[538] Notably, the formative *State Farm* decision states that "[n]ormally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider . . . ."[539] Furthermore, "[t]he agency's duty to 'cogently explain why it has exercised its discretion in a given manner' thus includes a duty of connecting the agency's chosen course of action to the ends established by the act."[540] To be clear, "hard look" review need not require the creation of a standard of review for the President's actions, as scholars have recently suggested.[541] Rather, courts would deploy the existing "hard look" framework while review-

536 Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 456–57 (1987).

537 *See* Bellia, *supra* note 336, at 1757 (arguing that the Take Care "[C]lause calls for the President not merely to ensure that the laws be executed, but that they be '*faithfully*' executed").

538 Stack, *supra* note 43, at 899 (noting that "[t]he canonical application of arbitrary and capricious review in the *State Farm* decision illustrates this demand").

539 463 U.S. at 43.

540 Stack, *supra* note 43, at 900 (citing Gillian E. Metzger, Foreword, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1312 (2012)).

541 *See* Manheim & Watts, *supra* note 30 (advocating for a coherent legal framework to guide judicial review of presidential orders); Shalev Roisman, *Presidential Factfinding*, 72 VAND. L. REV. 825, 896–99 (2019) (suggesting process-based and hard look review of presidential, as opposed to administrative, fact-finding); Daniel E. Walters, *The Judicial Role in Constraining Presidential Nonenforcement Discretion: The Virtues of an APA Approach*, 164 U. PA. L. REV. 1911, 1938 (2016) (arguing that the "best arrow" to curtail presidential inaction in statutory enforcement is judicial review, "which oscillates between extreme deference and 'hard look' review depending on the circumstances").

ing *agency* action to suss out both the existence of presidential intervention and the extent to which this intervention disrupted the agencies' wholehearted execution of legislation.

This suggestion is not meant to imply that the doctrine should be applied such that a whiff of—or even significant—political involvement would result in overturning a policy as a result of the generally deferential standard of review under APA section 706(2)(a), or even as a result of hard look review. For instance, in *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*[542] the D.C. Circuit refused to find a bump-stock rule impermissible even though it was the product of "naked political desire," promulgated at the direction of President Trump.[543] Rather, the court decided that the agency had a satisfactory explanation for the rule regardless of presidential involvement—namely, that the Gun Control Act[544] anticipated that the Attorney General would regulate to ban dangerous firearms such as those with a bump-stock device, which were used to perpetrate the "Las Vegas massacre" in 2017.[545]

Courts should consider the extent of the President's influence, whether it fits within legislative expectations and—importantly—whether this influence led the agency to neglect considerations important to the goals of the legislative scheme. In doing so, courts might be persuaded that the legislature intended policymaking to be shaped by strong political leadership, as in *Guedes*.[546] But courts might also find that agencies, having acquiesced to the President's preferences, have ignored the law's expectations that they act mainly on the basis of expertise or other nonpolitical considerations.[547]

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542 920 F.3d 1 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 789 (2020); *see also* Guedes v. ATF, No. 21-5045, 2022 WL 3205889, at *2–3 (D.C. Cir. Aug. 9, 2022) (affirming *Guedes I* and *Guedes II* by finding the ATF's interpretation of the National Firearms Act, "urged" by "then-President Trump and Congress," was correct).

543 *Id.* at 34.

544 18 U.S.C. §§ 921–934.

545 *See Guedes*, 920 F.3d at 7–8. Notably, the court comes to an outcome affirming the regulation despite its decision—at the request of both parties—to "dispense with the *Chevron* framework." *Guedes*, 2022 WL 3205889, at *3.

546 *See id.* at 34 (noting that "[p]residential administrations are elected to make policy, . . . [a]nd '[a]s long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration'") (alteration in original) (citations omitted).

547 *See, e.g.*, Christopher S. Kelley, *The Unitary Executive and the Clinton* Administration, *in* THE UNITARY EXECUTIVE AND THE MODERN PRESIDENCY 116-17 (Ryan J. Barilleaux & Christopher S. Kelley eds., 2010) (suggesting that President Clinton's "[f]aithfully executing the [National Defense Authorization Act] would require appointing someone with an extensive background 'in national organizational management in appropriate technical fields, and . . . well

For example, in *Grace v. Barr*,[548] the D.C. Circuit held that a proposed Department of Justice policy raising the bar for "credible fear" determinations pertaining to nongovernmental actors (like gangs and abusive domestic partners) was arbitrary and capricious because the agency failed to provide a reasoned explanation for the change.[549] The new policy issued from a politically-charged adjudication by Attorney General Jeff Sessions,[550] resulting from his power to refer and review immigration cases himself.[551] Despite the importance of this policy to President Trump's immigration agenda, Judge Tatel noted for the majority that the policy failed arbitrary and capricious review because it raised the bar far above what Congress intended for credible fear determinations.[552]

In another immigration case, *Gomez v. Biden*,[553] a federal court found a DHS decision to mass rescind a parole program, per a clear presidential directive, to be arbitrary and capricious.[554] The district court for the District of Columbia also entertained a case where the plaintiffs asserted that the Department of State's limitations on diversity visas are invalid because they apply a set of presidential proclamations that are arbitrary and capricious, which results in agency behavior that is also, in part, arbitrary and capricious.[555] While the district court's final decision ordered the State Department to process

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qualified to manage the nuclear weapons non-proliferation and materials disposition programs of the newly-created [National Nuclear Security Administration]' ").

548 965 F.3d 883 (D.C. Cir. 2020).

549 *Id.* at 900.

550 A-B-, 27 I&N Dec. 316 (A.G. 2018), *vacated*, 28 I&N Dec. 307 (A.G. 2021) ("An applicant seeking to establish persecution based on violent conduct of a private actor must show more than the government's difficulty controlling private behavior. The applicant must show that the government condoned the private actions or demonstrated an inability to protect the victims.").

551 *See generally* Bijal Shah, *The Attorney General's Disruptive Immigration Power*, 102 Iowa L. Rev. 129 (2017) (arguing that the Attorney General's referral and review mechanism has been used to contravene the law).

552 *See id.* at 148.

553 No. 20-cv-01419, 2021 U.S. Dist. LEXIS 53808 (D.D.C. Feb. 19, 2021), *appeal docketed*, No. 21-5288 (D.C. Cir. Dec. 16, 2021).

554 *Id.*; Gomez v. Trump, 490 F. Supp. 3d 276 (D.D.C. Sept. 30, 2020). Note that plaintiffs ask the court "to reject the government's argument that their case is moot since President Joe Biden rescinded orders restricting their entry, arguing that their 'injuries linger' because they haven't been allowed to immigrate." Dorothy Atkins, *Visa Winners Say 'Injuries Linger' Despite Biden Orders*, Law 360 (Mar. 30, 2021), https://www.law360.com/articles/1370298 [https://perma.cc/2USH-D5BP].

555 S.A. v. Trump, 363 F. Supp. 3d 1048, 1055 (N.D. Cal. 2018) (finding arbitrary and capricious the recission of the Central American Minors program conditional parole approval determinations, which followed an executive order directing the agency to reform the program in this manner); *see also* Exec. Order No. 13,767, 83 Fed. Reg. 8793 (Jan. 30, 2017).

the visas reserved for members of the class of plaintiffs,[556] this decision was subsequently stayed until after the D.C. Circuit court issues its opinion on the Biden Administration's appeal of this case.[557]

Notably, the Supreme Court granted certiorari in another case to determine whether a Trump-era regulation substantially expanding the "public charge" exception to noncitizen admissibility was permissible, but subsequently dismissed the case at the request of the Biden Administration.[558] In addition, a few decisions have suggested that the arbitrary and capricious standard could reign in agencies' neglect of NEPA's environmental impact statement requirement at the behest of Presidents.[559]

A number of considerations flow from the proposal that courts apply the arbitrary and capricious standard to ensure that an agency in the pursuit of presidential interests demonstrates a connection between its decisions and statutory aims,[560] does not "rel[y] on factors which Congress has not intended it to consider,"[561] and connects its "chosen course of action to the ends established by the" relevant statute.[562] One issue that arises is how courts might adequately draw on an administrative record to evaluate presidential influence. As the D.C. Circuit has illustrated, it is difficult to identify and evaluate the President's influence on agency action.[563] The President is not generally

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556 *See* Gomez v. Biden, 1:20-cv-01419-APM (D.D.C. Aug. 17, 2021).

557 *See* Kin Shaun Goh v. Dep't of State, No. 21-cv-00999 (D.D.C. Sept. 30, 2021).

558 U.S. Citizenship and Immigr. Servs., v. San Francisco, 981 F.3d 742 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1292 (2021) (challenging a regulation reinterpreting the Immigration and Nationality Act, 8 U.S.C. 1182(a)(4)(A)); Amy Howe, *Cases Testing Trump's "Public Charge" Immigration Rule Are Dismissed*, SCOTUSBLOG (Mar. 9, 2021, 2:56 PM), https://www.scotusblog.com/2021/03/cases-testing-trumps-public-charge-immigration-rule-are-dismissed/ [https://perma.cc/NZH9-5AAK] (noting also that the Supreme Court "canceled oral arguments in two other immigration cases after policy changes by the Biden [A]dministration. One case involved funding for the wall along the U.S.-Mexico border; the other involved a Trump administration policy that required some asylum seekers to wait in Mexico before an asylum hearing.").

559 *See, e.g.*, Backcountry Against Dumps v. U.S. Dep't of Energy, 2017 U.S. Dist. LEXIS 114496 (S.D. Cal. Jan. 30, 2017) (finding agency issuance of a presidential permit to be arbitrary and capricious because the agency failed to issue an environmental impact statement); Border Power Plant Working Grp. v. Dep't of Energy, 260 F. Supp. 2d 997, 1018, 1033 (S.D. Cal. 2003) (involving a similar issue as *Backcountry Against Dumps*). The court later dismissed the action against the agency after the agency revised its analysis. Border Power Plant Working Grp. v. Dep't of Energy, 467 F. Supp. 2d 1040 (S.D. Cal. 2006).

560 *See supra* note 538 and accompanying text.

561 *See supra* note 539 and accompanying text.

562 *See supra* note 540 and accompanying text.

563 *See* Sierra Club v. Costle, 657 F.2d 298, 406–07 (D.C. Cir. 1981) (allowing for "conversations between the President or his staff and other Executive Branch officers" in proceedings that are not adjudicatory or quasi-adjudicatory).

held accountable for an agency's decision, "nor is his reasoning process made available to the regulatees and the beneficiaries of regulation."[564]

On the one hand, the Supreme Court appears to limit the impact of presidentialism on its own decisions. For instance, a speech by President Obama notably did not influence the Court's decision as to whether an agency had been delegated the authority to treat a penalty as a tax under the Affordable Care Act.[565] And almost twenty years after the famous case involving President Clinton's statements urging the FDA to regulate tobacco,[566] the Court again implied that public-facing presidential leadership cannot overcome the Court's own understanding of the statutory requirements that govern policymaking, when it rejected efforts by the Department of Commerce to add a question about citizenship to the census at President Trump's behest.[567]

On the other hand, Part I of this Article showcases how the President can influence an *agency's* action. Given this, perhaps all such statements should be part of the legal domain, rather than only those that the President wishes to be on record. It is possible that making relatively transparent, public presidential statements reviewable could lead to an increase in opaque, internal forms of political pressure that remain out of judicial reach. Then again, there is value in ensuring that at least some forms of presidential administration are subject to review, particularly when they have the capacity to render administrative action insufficient under the law.

Moreover, the agency's reasoning is more readily available than the President's, which means that agencies may be held accountable when acting under the influence of the President—regardless of whether the President's influence is captured on the record. "Insisting that agencies give reasons for their decisions [influenced by the President] and requiring them to expose the data underlying their decisions . . . may not result in the most efficient decisionmaking process, but it does hold them to public account."[568] Furthermore, the Supreme

564 McGarity, *supra* note 536, at 457.

565 *See* Shaw, *supra* note 130, at 101–03 (discussing Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012)). ("It was striking, then, that despite the debates at oral argument about its significance and the extensive media coverage, no genuine reliance on the President's statement appeared" in the relevant cases on the topic of whether the penalty attached to the Affordable Care Act was a tax.); Watts, *supra* note 75, at 700–04 (discussing the same example).

566 *See supra* notes 227–41 and accompanying text.

567 *See* Dep't of Com. v. New York, 139 S. Ct. 2551, 2575–76 (2019).

568 McGarity, *supra* note 536, at 456.

Court may have an appetite for this approach, given that it recently drew on the arbitrary and capricious standard to rebuke pretextual justifications for policies that further the President's goals.[569]

Another important question is, how should a judge evaluate the agency's justification for responsiveness to the President's interests? In some cases, the court may be able to determine that the agency meets the minimal arbitrary and capricious standard, despite problematic presidential directives.[570] In other situations, if the only justification offered consists of the President's statements, courts might be reluctant to uphold a policy under arbitrary and capricious review.

In *DHS v. Regents* and *Department of Commerce v. NY*, the Supreme Court evolved the arbitrary and capricious standard into an accountability-forcing mechanism for censuring pretextual, or otherwise unethical, agency justifications for policies that further the President's interests. In *DHS v. Regents*, the Court invalidated the Trump-directed rescission of the DACA policy.[571] According to the Court, the agency acted in an arbitrary and capricious manner because it did not adequately justify its action.[572] Although the agency eventually supplemented its reasoning, the Court concluded that this supplement was made after the action was taken and therefore could not be relied upon to justify the prior action.[573] Benjamin Eidelson suggests that the Court's refusal to accept a post hoc rationalization is a turn to "the 'accountability-forcing' form of arbitrariness review."[574] The argument that the DACA policy has led to reliance that in turn requires the

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569 *See* DHS v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020) (rejecting an agency's rescission of an Obama-era policy at the request of President Trump under the arbitrary and capricious standard because the agency did not articulate a substantial reason at the time of the rescission).

570 *See supra* notes 342–51 (explaining the legitimate basis for the DACA policy despite President Obama's statements suggesting that he sought to act in lieu of formal legal change).

571 Memorandum from Elaine C. Duke, Acting Sec'y, DHS, to James W. McCament, Acting Dir., Citizenship & Immigr. Servs., et al. (Sept. 5, 2017), https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca [https://perma.cc/6645-PEVU]; Memorandum from Janet Napolitano to David V. Aguilar, *supra* note 127.

572 *DHS v. Regents*, 140 S. Ct. at 1909–15 (noting that the Secretary of the Department of Homeland Security "failed to consider . . . important aspects of the problem," per the requirements of *State Farm*) (alteration in original).

573 *Id.* at 1907–08.

574 Eidelson, *supra* note 521, at 1748. *But see* Stephen Lee, *DACA and the Limits of Good Governance*, REGUL. REV. (July 29, 2020), https://www.theregreview.org/2020/07/29/lee-daca-good-governance/ [https://perma.cc/QN26-JMPE] (arguing that the *DHS v. Regents* decision is "narrow" and "illustrates the limits of the good governance rationale in the context of ongoing struggles . . . to expand immigrant rights").

continuation of this policy,[575] an argument that the judiciary has entertained,[576] offers another manner by which courts could evaluate the legitimacy of presidential administration.

Similarly,[577] in *Department of Commerce v. New York*, the Court reinvigorated arbitrary and capricious review as a means for sniffing out pretextual justifications for policies developed at the President's request.[578] In this case, the Court rebuked an agency that implemented the President's public promises on the basis of a pretextual justification.[579] "Consistent with hard look doctrine, the Court sought to consider 'what role political judgments can and should play' in the administration of the Census."[580] Ultimately, the Court upheld a lower court case setting aside the Commerce Secretary's decision to add a citizenship question to the 2020 Census because the Secretary's expressed justification was pretextual,[581] and thus unavailable for "meaningful judicial review."[582] While much of Chief Justice Roberts's majority opinion treated the Commerce Secretary's decision "as a per-

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575 *See* Bijal Shah, *Reliance Interests & the DACA Rescission*, AM. CONST. SOC'Y (Apr. 27, 2018), https://www.acslaw.org/expertforum/reliance-interests-the-daca-rescission/ [https://perma.cc/T2RV-UURL].

576 *See* NAACP v. Trump, 298 F. Supp. 3d 209, 240 (D.D.C. 2018) (deciding that the Trump DHS's "failure to give an adequate explanation of its legal judgment," which rendered the DACA rescission arbitrary and capricious, "was particularly egregious here in light of the reliance interests involved"); *see also* Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 221–22 (2016) (instructing that "[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change" that addresses the "facts and circumstances that underlay or were engendered by the prior policy," including any "serious reliance interests") (citations omitted).

577 *See* Lee, *supra* note 574 ("In allowing for subterfuge and pretext, *Regents* resembles the census case from last term, *Department of Commerce v. New York*, which concerned the Secretary of Commerce's attempt to include a question about citizenship on the 2020 census survey.").

578 Shah, *supra* note 335 (discussing how "arbitrary-and-capricious review 'serves to identify pretextual decisionmaking'—for instance, in the seminal *State Farm* decision") (citation omitted).

579 Dep't of Com. v. New York, 139 S. Ct. 2551, 2575–76 (2019) ("We are presented, in other words, with an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process. It is rare to review a record as extensive as the one before us when evaluating informal agency action—and it should be. But having done so for the sufficient reasons we have explained, we cannot ignore the disconnect between the decision made and the explanation given. Our review is deferential, but we are 'not required to exhibit a naiveté from which ordinary citizens are free.'") (citation omitted).

580 *See* Shah, *supra* note 335, at 1123.

581 *Dep't of Com. v. New York*, 139 S. Ct. at 2574–75 (concluding that "the decision to reinstate a citizenship question cannot be adequately explained in terms of [the agency's] request for improved citizenship data to better enforce the [Voting Right Act]").

582 *Id.* at 2573.

fectly reasonable and historically grounded policy choice,"[583] the decision ultimately found that the Secretary "had lied."[584] As the Chief Justice explained: "If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case."[585]

It bears noting, however, that *Regents* and *Department of Commerce v. New York* both turned on Justice Roberts's vote. If new Justices favor a unitary executive at all costs, the Court may become less amenable to arbitrary and capricious review as a means to force accountability, or even simply to root out pretextual justifications, when agencies pursue the President's aims. Note, too, that enforcement constitutes an additional stumbling block; after all, despite the outcome of *Regents*, President Trump refused[586] to follow court orders to restore the DACA program.[587]

Likewise, courts took agencies to task for implementing a new interpretation of the Temporary Protected Status ("TPS") legislation—specifically, one that bars Haitians from TPS status, at the behest of President Trump—without adequate explanation, by deploying the arbitrary and capricious standard to censure a policy motivated by the President's discriminatory impulses or racial animus.[588] Courts

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583 Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 26 (2020).

584 *Id.* at 27. This meant he put forth "'contrived reasons [that] defeat the purpose' of courts requiring agencies to provide reasoned explanations for their actions." *Id.*; *see also* Eidelson, *supra* note 521, at 1788 (noting that when the Secretary "lied about his reasons for adding the citizenship question, [there was] damage to *political* accountability" as well).

585 *Dep't of Com. v. New York*, 139 S. Ct. at 2576.

586 *Department of Homeland Security Will Reject Initial Requests for DACA as It Weighs Future of the Program*, DHS (July 28, 2020), https://www.dhs.gov/news/2020/07/28/department-homeland-security-will-reject-initial-requests-daca-it-weighs-future [https://perma.cc/Z5Q7-44FN].

587 *See, e.g.*, CASA de Md. v. DHS, No. 17-cv-02942-PWG (D. Md. July 17, 2020) (order compelling DHS to comply with *Dep't of Com. v. New York*).

588 For instance, courts in the Second, Ninth, First, and Fourth Circuits have come to this decision. *See, e.g.*, Ramos v. Wolf, 975 F.3d 872 (9th Cir. 2020) (finding that the plaintiffs' claims failed largely due to the lack of evidence tying the President's alleged discriminatory intent to the specific TPS terminations at issue); Saget v. Trump, 375 F. Supp. 3d 280, 324 (E.D.N.Y. 2019) (indicating that the agency's decision was arbitrary and capricious because it departed from past agency decisions without an explanation and was improperly influenced by the White House); Ramos v. Nielsen, 321 F. Supp. 3d 1083, 1099 (N.D. Cal. 2018) (noting that plaintiffs' allegations and a facial review of TPS termination notices supported a plausible inference that the agency adopted a new policy or practice without an explicit explanation for the change); Centro Presente v. DHS, 332 F. Supp. 3d 393 (D. Mass. 2018) (denying motion to dismiss because it was plausible that policy is arbitrary and capricious due to the potential for discriminatory reasons motivating the decision.); CASA de Md., Inc. v. Trump, 355 F. Supp. 3d 307 (D. Md. 2018)

should continue this practice to ensure that agencies do not bend the enforcement of statute to a President's base instincts.

Finally, consider the Trump Administration's proposal that the HHS implement an automatic sunset for all regulations.[589] Until recently, neither Congress nor the Biden Administration had addressed its potential consequences, which includes the imminent invalidation of tens of thousands of agency regulations.[590] As a result, health organizations who are concerned about the fallout of the rule[591] have sued to invalidate the rule, in part, under the arbitrary and capricious standard[592] (in addition to arguing that the rule is unlawful).[593]

As noted earlier, the Biden Administration has postponed implementing this rule, but only temporarily.[594] For this reason, it would be prudent for the judiciary to apply the arbitrary and capricious standard in this case to determine whether a presidential directive to an agency to sunset its regulations is likely to be in violation of the APA. Beyond the fact that the statutory authority for this effort is unspecified,[595] any policy that automatically expires all regulations is most likely arbitrary and capricious. Moreover, the judiciary might consider whether the HHS, under the direction of the Trump Administration, in fact proposed this policy after a careful or nuanced analysis of the legislation that governs all regulatory frameworks. If not, this case could go the way of *Regents* and *Department of Commerce v. NY*, in which the Supreme Court applied the accountability-forcing component of arbitrary and capricious review to find that the agency had violated the APA.

(denying motion to dismiss because there was enough evidence to support plaintiff's contention that the decision was arbitrary and capricious and the decision racially motivated).

589 *See supra* note 399 and accompanying text; *see also* SUNSET, 86 Fed. Reg. 5964.

590 *See* Jasmine Wang, *Health Regulation's Ticking Time Bomb*, REGUL. REV. (Apr. 27, 2021), https://www.theregreview.org/2021/04/27/wang-health-regulations-ticking-time-bomb/ [https://perma.cc/Z67Y-8R2Q] (noting that the SUNSET rule "could cause more than 18,000 regulations from [HHS] to disappear").

591 *See supra* notes 400–02 and accompanying text.

592 Complaint, *supra* note 405, at 27 (arguing that the rule is "arbitrary and capricious because, among other reasons, it purports to 'incentivize' the Department to review regulations at an infeasible pace HHS has never achieved by eliminating regulations relied upon by the general public").

593 *See supra* notes 403–05 and accompanying text.

594 *See supra* notes 406–07 and accompanying text; *see also* SUNSET, 86 Fed. Reg. at 5964; Administrative Delay of Effective Date, 87 Fed. Reg. 12,399 (Mar. 4, 2022).

595 *See supra* text accompanying notes 399–400.

CONCLUSION

According to the Constitution, Woodrow Wilson remarks, the President is "only the legal executive, the presiding and guiding authority in the application of law and the execution of policy."[596] Agencies, too, are charged with the enforcement of legislation in their capacity as part of the executive branch. Therefore, when the President directs administration, her priority should be ensuring that agencies are fully accountable to the aims of law. And yet, as Wilson presciently noted, the President "has become very much more. He has become the leader of his party and the guide of the nation in political purpose, and therefore in legal action."[597]

This Article argues that modern Presidents have brought their responsibility to execute the law into tension with their own policy interests—a tension that has manifested in the administrative state. To support this claim, it offers a nuanced evaluation of administrative outcomes that result from presidential intervention. Its contribution in this regard lies in demonstrating that Presidents have disrupted execution by directing agencies to contravene statutory aims. This state of affairs suggests that presidential administration conflicts with the obligations that animate and govern agencies, even if presidentialism furthers values of political accountability, good governance, or even subjective understandings of what makes for beneficial or optimal policy.

In response to this quandary, this Article advocates for a new presidential administration—one that may involve expansive executive discretion and a directive president, but that is nonetheless directed at implementing the goals of the law itself, as opposed to the President's own policymaking aims alone. Furthermore, it provides a blueprint for what is required of the other branches to bring this vision into being. This multifaceted approach should include not only reprobation of the most egregious contraventions of law resulting from presidentialism, but also a restructuring of presidential administration itself from all sides, including from within.

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596 WILSON, *supra* note 73, at 59.

597 *Id.* at 60.

Essay

Supervising Guantanamo Tribunals: Appointments Clause Challenges After *Arthrex*

*Laura Stanley**

Abstract

Recent Supreme Court jurisprudence suggests courts may begin to play a greater role in scrutinizing congressional statutes that shield agency adjudicators from presidential control. In the context of patent adjudication, the Supreme Court held in Arthrex *that administrative patent judges' decisions must be subject to agency-head review because even though the judges issued final decisions on behalf of the executive branch, those judges were not properly appointed under the Appointments Clause as principal officers. There are few remaining administrative adjudicators who issue final decisions that lack final agency-head review. The Convening Authority—the person who convenes military tribunals known as "military commissions" to try unlawful enemy combatants for violations of the law of war—is an outlier. Although the Convening Authority reports to and is removable by the Secretary of Defense, only some of the officer's decisions are reviewable by an executive tribunal.*

This Essay examines this exceptional system of executive oversight in the aftermath of Arthrex*. It argues that until there is certainty regarding the Convening Authority's officer status, defendants will continue to raise Appointments Clause challenges, causing additional setbacks for the military commissions that have already largely failed to secure convictions. Ultimately,*

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this Essay recommends incorporating senatorial consent into the appointment of the Convening Authority or providing for agency-head review in the Military Commissions Act in order to prevent future Appointments Clause challenges.

Table of Contents

Introduction

Shortly after the September 11 attacks, Majid Shoukat Khan traveled from Baltimore, Maryland—the city where he resided—to his native country of Pakistan.[1] In Pakistan, he agreed to be a suicide bomber in an al-Qaeda attempt to assassinate former Pakistani President Pervez Musharraf.[2] After that plan failed, Khan returned to the United States and continued to provide support to al-Qaeda.[3] Kahn

1 *See Majid Shoukat Khan*, Off. Mil. Comm'ns, https://www.mc.mil/Cases.aspx?caseType=omc&status=1&id=45 [https://perma.cc/E6JU-ASWV].

2 *See id.*

3 *See id.*

delivered $50,000 worth of al-Qaeda money to finance the 2003 bombing of the Indonesian Marriott Hotel that killed eleven people.[4] Khan was taken into Pakistani custody in March 2003, and he entered Central Intelligence Agency ("CIA") custody in May 2003.[5] He has been detained at Guantanamo Bay since 2006.[6] In February 2012, he pled guilty to conspiracy, providing material support for terrorism, murder in violation of the law of war, and attempted murder in violation of the law of war.[7]

In April 2021, Khan's lawyers reached a plea deal with the government.[8] Khan will face a reduced prison sentence, and in return, he will not invoke a landmark decision in his sentencing proceedings.[9] The landmark decision, issued by Military Commission Judge Colonel ("Col.") Douglas Watkins, would have allowed Khan to call witnesses to testify about his alleged torture in the CIA prison system, and the military judges trying the case could reduce his prison sentence as a remedy for that torture.[10] But under the plea deal, Khan agreed to give up the factfinding hearing where he could call CIA witnesses, and in return he could be released as early as 2022.[11] This plea deal was negotiated and approved by Col. Jeffrey Wood, the Convening Authority for military commissions.[12] By statute, Col. Wood's decision to grant Khan a reduced prison sentence cannot be reviewed by any other officer in the executive branch.[13]

Under Section 948h of the Military Commissions Act of 2006 ("MCA"), the Convening Authority is the official who selects the members of the military commissions to try unlawful enemy combat-

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4 *See id.*

5 *See* S. REP. NO. 113-288, at 89 n.497 (2014); *Majid Khan*, RENDITION PROJECT, https://www.therenditionproject.org.uk/prisoners/majid-khan.html [https://perma.cc/P9SS-47AP].

6 *See* RENDITION PROJECT, *supra* note 5.

7 OFF. MIL. COMM'NS, *supra* note 1.

8 *See* Ruling on Defense Motion to Withdraw AE 033, Motion for Pretrial Punishment Credit, and to Vacate AE 033K, Ruling, United States v. Khan, No. AE 033R (Mil. Comm'ns Trial Judiciary Aug. 16, 2021), https://www.mc.mil/Portals/0/pdfs/Khan/Khan%20(AE033R(RULING)).pdf [https://perma.cc/8Q3F-5DYY].

9 *See id.* at 2; *see also* Carol Rosenberg & Julian E. Barnes, *Guantánamo Detainee Agrees to Drop Call for C.I.A. Testimony*, N.Y. TIMES (June 3, 2021), https://www.nytimes.com/2021/05/14/us/politics/guantanamo-detainee-cia-testimony.html [https://perma.cc/5FKA-FWRU].

10 *See* Ruling on Defense Motion for Pretrial Punishment Credit and Other Related Relief, United States v. Khan, No. AE 033K (Mil. Comm'ns Trial Judiciary June 4, 2020), https://www.mc.mil/Portals/0/pdfs/Khan/Khan%20(AE033K).pdf [https://perma.cc/HDK9-L27A].

11 Rosenberg & Barnes, *supra* note 9.

12 *Id.*

13 *See infra* Part III.

ants held at Guantanamo Bay.[14] Among other significant duties, the official's primary responsibility is convening the military commissions.[15] The Convening Authority also approves the charges that will be brought and can dismiss charges altogether.[16] Before the case is tried, the Convening Authority can negotiate and approve plea agreements.[17] After the proceedings, the Convening Authority can reduce the length of a prison sentence or overturn a guilty verdict altogether.[18]

Although the Secretary of Defense can act as the Convening Authority, under the MCA the Secretary can also appoint a civilian to act as the Convening Authority.[19] As a matter of practice, the Secretary has frequently opted to appoint a civilian to the role of Convening Authority.[20] It is possible this method of appointment is unconstitutional because it does not provide for senatorial consent. The Appointments Clause stipulates:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[21]

The Clause provides for two distinct methods of appointment based on whether the officer is principal or inferior.[22] Principal officers must be nominated by the President and confirmed by the Senate, but inferior officers can be appointed unilaterally by the President

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14 *See* 10 U.S.C. § 948h.

15 *See* 10 U.S.C. §§ 948h–948m.

16 10 U.S.C. § 950b.

17 10 U.S.C. § 949i.

18 10 U.S.C. § 950b.

19 10 U.S.C. § 948h.

20 *See* Petition for a Writ of Certiorari app. C at 87a–89a, Al Bahlul v. United States, 142 S. Ct. 621 (2021) (No. 21-339) (listing all persons appointed as the Convening Authority). The majority of the eleven individuals appointed to the post of Convening Authority were civilians prior to their appointment. *See, e.g.*, Al Bahlul v. United States, 967 F.3d 858, 864 (D.C. Cir. 2020); *Military Commission Personnel Announcement*, U.S. DEP'T OF DEF. (Mar. 18, 2015), https://www.defense.gov/News/Releases/Release/Article/605420/ [https://perma.cc/FS77-RF9F].

21 U.S. CONST. art. II, § 2, cl. 2.

22 According to the text of the Clause, there are two types of officers: "inferior Officers" and "Officers of the United States." *Id.* Because the appointment method stipulated for the "Officers of the United States" is more arduous, the Supreme Court refers to them as "principal officers." *See, e.g.*, Edmond v. United States, 520 U.S. 651, 659 (1997).

or agency heads. The text of the Clause, however, does not elaborate on how to delineate between the two types of officers.[23] It has been left to the Supreme Court to develop the doctrine on how to draw that line.[24] The distinction is not trivial in the context of agency adjudication, as a decision issued by an improperly appointed adjudicator could later be invalidated by an Article III court.[25]

Accordingly, whether the Convening Authority is a principal or inferior officer is an important question. Congress implicitly characterized the Convening Authority as an inferior officer by authorizing the Secretary of Defense to unilaterally appoint someone to the office in the MCA.[26] But the Convening Authority has the authority to issue a limited number of significant final decisions that bind the executive branch, which suggests a possible incompatibility with the inferior officer status.[27]

Previously, the U.S. Court of Appeals for the D.C. Circuit held that the Convening Authority is an inferior officer,[28] but the court's decision predated the Supreme Court's recent decision in *United States v. Arthrex*.[29] In *Arthrex*, the Court held that administrative patent judges ("APJs") appointed as inferior officers were acting as principal officers by issuing final decisions on behalf of the executive branch.[30] Although the Court considered three factors from the balancing test set forth in *Edmond v. United States*,[31] the Court clarified that the most important factor in *Edmond* was the officer's final decision-making authority.[32] The Court remedied the issue by making the APJs' decisions subject to agency-head review.[33] Some scholars view *Arthrex* as a "blockbuster" administrative law decision that shows the Court is increasingly willing to scrutinize congressional statutes that shield agency adjudicators from sufficient presidential control.[34] After

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23 *See* U.S. CONST. art. II, § 2, cl. 2.

24 *See, e.g.*, United States v. Arthrex, Inc., 141 S. Ct. 1970, 1978–86 (2021); *Edmond*, 520 U.S. at 658–66; Morrison v. Olson, 487 U.S. 654, 670–77 (1988).

25 *See, e.g.*, Arthrex, Inc. v. Smith & Nephew, Inc., 941 F.3d 1320, 1338–39 (Fed. Cir. 2019).

26 10 U.S.C. § 948h.

27 *See infra* Section III.A.

28 *See* Al Bahlul v. United States, 967 F.3d 858, 870 (D.C. Cir. 2020).

29 *Arthrex*, 141 S. Ct. at 1970.

30 *Id.* at 1978–86.

31 520 U.S. 651 (1997). In *Edmond*, the Court applied three factors to delineate between principal and inferior officers: (1) the reviewability of the officer's decisions, (2) the oversight of the officer by a superior, and (3) the ability for a superior to remove the officer. *See id.* at 664–65; *see also infra* Section II.A.

32 *Arthrex*, 141 S. Ct. at 1988.

33 *Id.* at 1987.

34 *See* Christopher J. Walker, *What* Arthrex *Means for the Future of Administrative Adju-*

Arthrex, whether the Convening Authority is a principal or inferior officer remains an open question.

This Essay examines the exceptional system of executive oversight of the Convening Authority created by the MCA. Part I provides a brief overview of the Appointments Clause. Part II discusses the relevant Supreme Court doctrine that delineates between principal and inferior officers. Part III then examines the Convening Authority's officer status. It provides a brief history of the Convening Authority, and it considers whether oversight by the Secretary of Defense and the Court of Military Commission Review ("CMCR") is sufficient to render the Convening Authority an inferior officer. It also considers whether the accused have standing to raise Appointments Clause challenges. Part IV argues that regardless of the officer status of the Convening Authority, the accused will continue to raise Appointments Clause challenges, creating setbacks for the military commissions. It recommends actions that the President or Congress can take to prevent future Appointments Clause challenges.

I. Brief Overview of the Appointments Clause

The Appointments Clause was born out of concern that executive branch officials would be unaccountable to elected officials.[35] The Founders were skeptical of "oppressive officers" who needed to be "ashamed or intimidated[] into more honourable and just modes of conducting affairs" by the free press.[36] To ensure officers remained "accountable to political force and the will of the people," the Founders adopted an Appointments Clause, which provided for appointment by the President with the advice and consent of the Senate.[37] The Clause was intended to "provide[] a direct line of accountability for any poorly performing officers back to the actor who selected them."[38]

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dication: Reaffirming the Centrality of Agency-Head Review, Yale J. on Reg.: Notice & Comment (June 21, 2021), https://www.yalejreg.com/nc/what-arthrex-means-for-the-future-of-administrative-adjudication-reaffirming-the-centrality-of-agency-head-review/ [https://perma.cc/4V7N-YRSQ].

35 *See* Freytag v. Comm'r, 501 U.S. 868, 884 (1991).

36 Thornhill v. Alabama, 310 U.S. 88, 102 (1940).

37 *Freytag*, 501 U.S. at 884; Note, *Congressional Restrictions on the President's Appointment Power and the Role of Longstanding Practice in Constitutional Interpretation*, 120 Harv. L. Rev. 1914, 1917 (2007).

38 Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 Stan. L. Rev. 443, 447 (2018).

The debates at the Constitutional Convention mostly centered around whether the Appointments Clause would vest the full appointment power in the President or if there would be senatorial appointment to provide a check on concentrated power.[39] The final language of the Appointments Clause reflects the Founders' ultimate rejection of giving the Senate pure appointment power because the Senate was "too numerous, and too little personally responsible, to ensure a good choice."[40]

The inferior officer provision, sometimes referred to as the "Excepting Clause," represents the Founders' countervailing concern about efficiency in the appointment process.[41] There was minimal discussion at the Constitutional Convention about the Excepting Clause, which was added to the Constitution on the final day of the Convention.[42] James Madison argued that it did not provide enough methods to appoint officers without Senate consent.[43] The Supreme Court's early impression was that "[the Excepting Clause's] obvious purpose is administrative convenience" because requiring a nomination by the President and confirmation by the Senate for numerous offices would be too cumbersome.[44]

Like the early debates at the Constitutional Convention, modern administrative law debates on the Appointments Clause focus on the advantages and disadvantages of political control over executive officers, such as adjudicators.[45] On the one hand, agency adjudicators need to be appointed and easily removable by the President to ensure they are accountable to an elected official.[46] On the other hand, political influence in the adjudicatory process raises concerns that lobbyists and interest groups will influence or "capture" the adjudicators.[47] Ad-

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39 *Congressional Restrictions on the President's Appointment Power and the Role of Longstanding Practice in Constitutional Interpretation*, *supra* note 37.

40 JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 274–75 (Gaillard Hunt & James Brown Scott eds., 1920).

41 *See* Edmond v. United States, 520 U.S. 651, 660 (1997).

42 *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 627–28 (Max Farrand ed., 1911).

43 *See id.*

44 *Edmond*, 520 U.S. at 660 (citing United States v. Germaine, 99 U.S. 508, 510 (1879)).

45 *See, e.g.*, Christopher J. Walker, *Constitutional Tensions in Agency Adjudication*, 104 IOWA L. REV. 2679 (2019) [hereinafter Walker, *Constitutional Tensions*].

46 *Id.* at 2680.

47 *See* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1375, 1381 (2018) (Gorsuch, J., dissenting) (arguing that "[p]owerful interests are capable of amassing armies of lobbyists and lawyers to influence (and even capture) politically accountable bureaucracies"); Walker, *Constitutional Tensions*, *supra* note 45, at 2680.

ministrative adjudicators often make decisions that implicate due process concerns, such as those concerning property interests. Insulating individuals from decisions made by biased adjudicators is a core principle of the modern due process doctrine.[48] Thus, insulating adjudicators from political influence becomes a potential response to these due process concerns, but that is directly in tension with the objective of ensuring officers are politically accountable under the Appointments Clause.[49]

A practical weakness of the Appointments Clause is the cumbersome process it creates for the appointment of principal officers.[50] The process is prolonged when the Senate does not acquiesce to nominations. The Senate has slowed in confirming nominations over time, with the average length of the confirmation process jumping from fifty-six days in the Reagan administration to 117 days in the Trump administration.[51] The number of Senate-confirmed positions exploded—increasing from roughly 800 to 1,200 between 1960 and 2020—with the growth in administrative agencies, which further exacerbated the issue.[52] Another issue in implementing the Appointments Clause is delineating between principal and inferior officers to determine which appointment process is required for each respective officer. That is the key issue that this Essay addresses.

II. Delineating Between Officers in Administrative Adjudication

The text of the Appointments Clause is minimal, so it has been left to the Supreme Court to determine how to delineate between

48 *See, e.g.*, Schweiker v. McClure, 456 U.S. 188 (1982); Withrow v. Larkin, 421 U.S. 35 (1975); Gibson v. Berryhill, 411 U.S. 564 (1973).

49 *See* Walker, *Constitutional Tensions*, *supra* note 45, at 2680.

50 After a nomination is referred to the appropriate Senate committee, the Senate committee may or may not act on the nomination. Lorraine H. Tong, Cong. Rsch. Serv., RS20986, Senate Confirmation Process: A Brief Overview 1–2 (2009). The Senate committee often holds a hearing if they do choose to act on the nomination, and if it is approved, the full Senate may or may not take up the nomination on the full floor. *Id.* The full Senate must provide an affirmative majority vote for the officer to be confirmed. *Id.*

51 P'ship for Pub. Serv., Unconfirmed: Why Reducing the Number of Senate-Confirmed Positions Can Make Government More Effective 4 (2021), https://presidentialtransition.org/wp-content/uploads/sites/6/2021/08/Unconfirmed-report.pdf [https://perma.cc/46N5-V7WG].

52 *Id.* For the latest precise count, see the quadrennial report on positions referred to as the "Plum Book." *See* H. Comm. on Oversight & Reform, 116th Cong., Policy and Supporting Positions 209–12 (Comm. Print 2020).

principal and inferior officers.[53] In the context of administrative adjudication, *Edmond* and *Arthrex* together provide the precedent for delineating between principal and inferior officers.[54]

A. Edmond v. United States

The issue in *Edmond* was whether Congress could "authorize[] the Secretary of Transportation to appoint civilian [judges to] the Coast Guard Court of Criminal Appeals [("CGCCA")]" under the Uniform Code of Military Justice ("UCMJ").[55] The CGCCA is an intermediate appellate court within the military justice system, and it had two civilian members at the time of the petitioners' court-martial.[56] The petitioners, whose court-martial convictions were affirmed by the CGCCA and the Court of Appeals for the Armed Forces, argued that the CGCCA judges were principal officers that must be appointed by the President and confirmed by the Senate.[57] Accordingly, the petitioners requested a new hearing before a properly appointed panel.[58]

Writing on behalf of seven members of the Court, Justice Scalia concluded that the civilian officers were inferior officers under the Appointments Clause.[59] Justice Scalia distinguished inferior officers as those "whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."[60] Applying this test to the CGCAA, Justice Scalia found that the dual system of oversight by the Judge Advocate General and the Court of Appeals for the Armed Forces provided enough supervision to render the judges inferior officers.[61]

The opinion also emphasized three other considerations to support their inferior officer status. First, the Judge Advocate General could remove a CGCCA judge without cause, which the Court recognized "is a powerful tool for control."[62] Second, the Judge Advocate General exercised other means of control over the CGCCA judges by

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53 *See, e.g.*, United States v. Arthrex, Inc., 141 S. Ct. 1970, 1978–86 (2021); Edmond v. United States, 520 U.S. 651, 656 (1997); Morrison v. Olson, 487 U.S. 654, 670–77 (1988).

54 *See Arthrex*, 141 S. Ct. at 1978–86; *Edmond*, 520 U.S. at 659.

55 *Edmond*, 520 U.S. at 653.

56 *See id.*

57 *See id.* at 655.

58 *See id.*

59 *See id.* at 666.

60 *Id.* at 663.

61 *See id.* at 664–65.

62 *Id.* at 664.

prescribing uniform procedures the court had to follow.[63] Third, the "significant" factor is that the CGCCA judges could not issue a final decision on behalf of the executive branch;[64] the judges' decisions were reviewable by the Court of Appeals for the Armed Forces.[65]

Justice Scalia discussed other considerations that did not ultimately persuade the Court. For example, the CGCCA and other intermediate courts in the military justice system are not required to defer to the trial court's fact finding and may "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact."[66] Additionally, the Judge Advocate General does not have the ability to review or reverse the CGCCA decisions, and "[h]e may not attempt to influence (by threat of removal or otherwise) the outcome of the individual proceedings."[67] But neither limitation made the judges principal officers.[68]

To understand the similarities and differences between the military justice system and the military commission system, there is additional relevant context that was not discussed in *Edmond*. By its inherent nature, an intermediate appellate court in the military justice system, like the CGCCA, only renders a decision when there is an appeal of a decision made by *other* executive branch officials.[69] As Justice Scalia mentioned, the intermediate appellate court decisions are then reviewable by an executive tribunal.[70] What was not at issue in *Edmond*, however, was the convening authority for the military justice system. Under Article 22 of the UCMJ, a military justice convening authority exercises very similar authority to that of the Convening Authority for military commissions.[71] For example, the military justice convening authority selects members of courts-martial and can overturn or reduce sentences.[72] Importantly, though, under the UCMJ, the convening authority is generally a commissioned officer or one of six civilian officers, all of which are considered principal officers for the purposes of the Appointments Clause.[73]

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63 *Id.*

64 *Id.* at 665.

65 *Id.*

66 *Id.* at 662.

67 *Id.* at 664.

68 *Id.* at 665.

69 *See Appellate Review of Courts-Martial*, U.S. CT. APPEALS FOR ARMED FORCES https://www.armfor.uscourts.gov/newcaaf/appell_review.htm [https://perma.cc/ZH3A-CCHW].

70 *See Edmond*, 520 U.S. at 664–65.

71 *See* 10 U.S.C. § 822.

72 *See id.*

73 *Id.* Summary and special court-martial convening authorities may be junior officers who

B. United States v. Arthrex, Inc.

In *Arthrex*, the issue presented was whether, under the Appointments Clause, Congress could authorize the Secretary of Commerce to appoint APJs to the Patent Trial and Appeals Board ("PTAB") at the U.S. Patent and Trademark Office ("PTO").[74] The APJs reviewed decisions that were made by patent examiners and decided whether an invention satisfied the standards for patentability.[75] The APJs could also review patents previously issued by the PTO.[76] For example, they could reconsider whether a patent satisfies novelty and nonobviousness requirements.[77]

Arthrex, Inc., a medical device developer, claimed that another company infringed on its patent, but three APJs concluded that Arthrex's patent was invalid.[78] In an appeal to the Federal Circuit, Arthrex argued that the APJs were principal officers under the Appointments Clause and their appointment by the Secretary of Commerce alone was unconstitutional.[79]

The Federal Circuit held that the APJs were improperly appointed principal officers for two main reasons.[80] First, the Secretary of Commerce and the Director of the PTO did not have the power to review the judges' decisions.[81] The PTAB issued final decisions on behalf of the executive branch that were not reviewable by a principal officer.[82] Second, the Secretary of Commerce and the Director of the PTO did not have the power to remove the judges at will.[83] Although the agency head provided supervision and oversight by issuing procedural rules, the Secretary could remove the APJs "only for such cause as will promote the efficiency of the service."[84] The Federal Circuit remedied the Appointments Clause violation by invalidating tenure protections for the APJs and making them removable at will.[85] This did not satisfy any party, and some scholars argued that the remedy

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are not Senate confirmed, but they can have cases removed from them by the senior convening authorities. 10 U.S.C. §§ 823(b), 824(b).

74 United States v. Arthrex, Inc., 141 S. Ct. 1970, 1976 (2021).

75 *Id.* at 1977.

76 *Id.*

77 *Id.*

78 *Id.* at 1978.

79 *Id.*

80 *See* Arthrex, Inc. v. Smith & Nephew, Inc., 941 F.3d 1320 (Fed. Cir. 2019).

81 *See id.* at 1329.

82 *See id.*

83 *Id.* at 1332.

84 *Id.* at 1331, 1333.

85 *Id.* at 1338.

did not even fix the constitutional flaw because an officer who can be removed at will is not automatically an inferior officer.[86] All parties filed a petition for a writ for certiorari.[87]

In a 5–4 decision, Chief Justice Roberts wrote that the final decision-making authority of the APJs made their roles "incompatible with their appointment by the Secretary to an inferior office."[88] However, the Court did not affirm the Federal Circuit's remedy and instead came up with a creative remedy to fix the Appointments Clause violation. Rather than vacate the PTAB's decision and issue a remand for a new hearing before properly appointed officers, the Court altered the review structure and gave the Director of the PTO the ability to review final PTAB decisions.[89] The Court held that "[o]nly an officer properly appointed to a principal office may issue a final decision binding the Executive Branch in the proceeding before us."[90]

Chief Justice Roberts was careful to point out that the criteria considered in *Arthrex* are not the only criteria that courts can use to distinguish between principal and inferior officers. But he implied that the criteria considered in *Arthrex* may need to be applied to distinguish between types of administrative adjudicators (as opposed to other administrative decision-makers, like those issuing or enforcing legislative rules):

> In reaching this conclusion, we do not attempt to "set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes." Many decisions by inferior officers do not bind the Executive Branch to exercise executive power in a particular manner, and *we do not address supervision outside the context of adjudication*. Here, however, Congress has assigned APJs "significant authority" in adjudicating the public rights of private parties, while also insulating their decisions from review and their offices from removal.[91]

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86 *See* United States v. Arthrex, Inc., 141 S. Ct. 1970, 1979 (2021); *see also* Alan Morrison, *The Principal Officer Puzzle*, YALE J. ON REG.: NOTICE & COMMENT (Nov. 15, 2019), https://www.yalejreg.com/nc/the-principal-officer-puzzle-by-alan-b-morrison [https://perma.cc/TVC7-HVLS].

87 *Arthrex*, 141 S. Ct. at 1978.

88 *Id.* at 1985.

89 *Id.* at 1986.

90 *Id.* at 1985.

91 *Id.* at 1985–86 (emphasis added) (citations omitted) (quoting Edmond v. United States, 520 U.S. 651, 661 (1997)).

This language could be interpreted to mean that the criterion considered in *Arthrex* must be applied when evaluating supervision *inside* the context of administrative adjudication.

This decision leaves questions unanswered. For example, did *Arthrex* modify the *Edmond* three-part balancing test by strengthening the role of principal-officer review or simply end patent exceptionalism? Justice Thomas's dissent points to the significance of the holding, noting that this was the first time the Supreme Court invalidated a portion of a statute for vesting appointment power with an agency head under the Appointments Clause.[92]

It is too soon to observe how lower courts will react to *Arthrex*, and early scholarly reactions have been mixed.[93] Professor Christopher Walker argued that "[m]any viewed *Arthrex* as a potential blockbuster for administrative law . . . [that] had the potential to further advance political control of the administrative state."[94] However, he noted that there are few remaining adjudicative systems where the agency head lacks final decision-making authority, meaning that *Arthrex* may have minimal implications for administrative adjudication.[95]

The U.S. Court of Appeals for the D.C. Circuit recently held that the Convening Authority is an inferior officer, but the panel's decision predated the Supreme Court's *Arthrex* decision.[96] In a recent petition for certiorari, Ali Hamza Ahmad Suliman Al Bahlul asked the Supreme Court to vacate the D.C. Circuit decision affirming his conviction and remand it for reconsideration after *Arthrex*, which the Supreme Court denied.[97] The petition argued that in *Arthrex*, the Court "eschewed [the *Edmond*] balancing test" and held that officers must be Senate-confirmed whenever they are permitted to issue final, unreviewable decisions on behalf of the executive branch.[98] The government argued that the Court in *Arthrex* did not abandon the *Ed-*

92 *Id.* at 1997–98 (Thomas, J., dissenting).

93 A review of the Westlaw citing reference cases as of June 17, 2022, shows only thirty-seven citing cases, many of which are patent disputes.

94 Walker, *supra* note 34; *see also* Oliver Dunford & Damien Schiff, *Distinguishing Between Inferior and Non-Inferior Officers Under the Appointments Clause: A Question of "Significance"* (Pac. Legal Found., Research Paper No. 2021-2, 2021), https://ssrn.com/abstract=3917655 [https://perma.cc/X7ZE-RQ2V] (arguing that the Court effectively eschewed the *Edmond* multifactor test in *Arthrex* and pointing out that the Court seems more interested in whether an officer wields significant authority).

95 *See* Walker, *supra* note 34.

96 *See* Al Bahlul v. United States, 967 F.3d 858 (D.C. Cir. 2020).

97 *See* Petition for a Writ of Certiorari, *supra* note 20, at 19; *see also Al Bahlul*, 967 F.3d at 877.

98 Petition for a Writ of Certiorari, *supra* note 20, at 19.

mond three-part test, and the D.C. Circuit appropriately applied *Edmond*'s three factors when it found the Convening Authority to be an inferior officer.[99]

III. Supervising the Convening Authority

A. *History of the Military Commissions Act and the Convening Authority*

This Section describes the history of the MCA and the Convening Authority in order to analyze whether the Convening Authority is a principal or inferior officer. The MCA, signed into law by President George W. Bush in 2006, authorized the trial of "alien unlawful enemy combatants" by military commissions housed in the Department of Defense ("DoD").[100] It was drafted after the Supreme Court invalidated the previous military commission system that tried persons detained as "enemy combatants" in *Hamdan v. Rumsfeld*.[101] Shortly after the terrorist attacks on September 11, 2001, President Bush issued a Military Order that authorized noncitizens suspected of terrorist acts to be tried by military commissions.[102] Historically, military commissions were set up in the field to try "enemy belligerents" accused of violations of the law of war.[103] They were distinguished from the military courts-martial that were set up to try members of the armed forces—and sometimes civilians accompanying them—for violations of the UCMJ.[104] In *Hamdan*, the Court held that the military commission system had to follow procedural rules as similar as possible to the rules under the UCMJ.[105] In response, Congress enacted the MCA to establish procedures and rules that are modeled after, but distinct from, the UCMJ.[106]

The military commissions authorized by the MCA "may be convened by the Secretary of Defense or by any officer or official of the

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99 *See* Brief for the United States in Opposition at 16, Al Bahlul v. United States, 142 S. Ct. 621 (2021) (No. 21-339).

100 Jennifer K. Elsea, Cong. Rsch. Serv., RL33688, The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparison with Previous DOD Rules and the Uniform Code of Military Justice 6 (2007).

101 *See* 548 U.S. 557 (2006).

102 Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,834 (Nov. 16, 2001).

103 Jennifer K. Elsea, Cong. Rsch. Serv., RL31191, Terrorism and the Law of War: Trying Terrorists as War Criminals Before Military Commissions 3 (2001).

104 *Id.* at 16. Members of the armed forces could be tried by a court-martial or an Article III court for war crimes. *Id.*

105 *Hamdan*, 548 U.S. at 220–22.

106 Elsea, *supra* note 100, at 1.

United States designated by the Secretary for that purpose."[107] In other words, the Secretary can unilaterally delegate authority to the Convening Authority to convene the military commissions by statute.

The Convening Authority has many roles. The Convening Authority appoints the Chief Judge of the Military Commissions Trial Judiciary, who selects the military judges for trials, as well as the "members" of the military commissions who serve as jurors.[108] The Convening Authority negotiates and approves plea agreements[109] and can grant immunity from prosecution.[110] Prior to trial, the Convening Authority selects which charges, if any, to refer to a military commission.[111] During trial, the Convening Authority can dismiss charges before the findings are announced.[112] After trial, the Convening Authority has "sole discretion and prerogative" to set aside a guilty finding and reduce or commute a sentence.[113] In sum, the Convening Authority directs and oversees the entire military commissions process with its strong decision-making authority.[114] This long and nonexhaustive list of significant authorities indicates that the Convening Authority is an "officer" within the meaning of the Appointments Clause and not a mere "employee."[115] It is more challenging to discern if the Convening Authority is a principal or inferior officer.

Commissioned officers generally do not need a second appointment under the Appointments Clause because commissioned officers will have already received Senate appointments.[116] The current Convening Authority, Col. Jeffrey Wood, was appointed to the office as a civilian, which makes any convictions and sentences approved by him vulnerable to Appointments Clause challenges.[117] If he was appointed

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107 10 U.S.C. § 948h.

108 10 U.S.C. § 948i.

109 *See* U.S. DEP'T OF DEF., MANUAL FOR MILITARY COMMISSIONS pt. II, r. 705, at 59 (2019) [hereinafter MMC].

110 *Id.* pt. II, r. 704, at 57.

111 *Id.* pt. II, r. 407, at 20–21.

112 *Id.* pt. II, r. 604, at 39.

113 10 U.S.C. § 950b(c).

114 10 U.S.C. § 949b(a)(2)(B).

115 The Supreme Court explained that the difference between "inferior officers" and mere "employees" has to do with the "important functions" of the role and whether the person exercised an "important function." *See* Freytag v. Comm'r, 501 U.S. 868, 880–82 (1991) (holding that special trial judges of the Tax Court were inferior officers and not mere employees because they served important functions like taking testimony and ruling on the admissibility of evidence).

116 *E.g.*, Weiss v. United States, 510 U.S. 163 (1994).

117 The press release announcing Jeffrey Wood's appointment included the title of "Colonel." *See SECDEF Appoints New Convening Authority for Military Commissions*, U.S. DEP'T OF DEF. (Apr. 21, 2020), https://www.defense.gov/News/Releases/Release/Article/2158184/secdef-

as a commissioned officer, this may have insulated him from Appointments Clause challenges.

The following Sections focus on the system of supervision over the Convening Authority for the purpose of evaluating its status under the Appointments Clause. They describe the dual system of oversight provided by the Secretary of Defense and the CMCR and conclude that after *Arthrex*, the Convening Authority's officer status is uncertain.

B. Oversight by the Secretary

Congress gave the Secretary of Defense two mechanisms to oversee the Convening Authority: removal and regulation. First, the Secretary can remove the Convening Authority from office.[118] If an officer is subject to easy removal by a higher officer, this favors the officer's status as an inferior officer rather than a principal officer. However, the extent of the Secretary's removal ability is contested.

Strictly speaking, the MCA allows the Secretary of Defense to remove the Convening Authority at will. The MCA has no explicit tenure or removal provisions, and "[t]he long-standing rule relating to the removal power is that, in the face of congressional silence, the power of removal is incident to the power of appointment."[119] However, the MCA limits the Secretary from influencing the outcome of individual proceedings. It provides that "[n]o person may attempt to coerce or, by any unauthorized means, influence . . . the action of any convening, approving, or reviewing authority with respect to their judicial acts."[120] The impact of this provision on the Secretary's removal power is unresolved.

The accused argue that this forbids the Secretary of Defense from threatening to remove the Convening Authority for the handling of a case.[121] For example, in early 2018, Secretary Jim Mattis fired Conven-

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appoints-new-convening-authority-for-military-commissions [https://perma.cc/4LWU-JKFE]. However, correspondence produced in discovery in *Al Bahlul* clarifies that Wood was appointed to the position in "his capacity as a GS-13 federal technician for the Arkansas National Guard, which is a federal civilian employee position." *See* Letter from Michel Paradis, Couns. for Petitioner, Mil. Comm'n Def. Org., to Hon. Scott S. Harris, Clerk, Sup. Ct. of the U.S., (Nov. 19, 2021), https://www.supremecourt.gov/DocketPDF/21/21-339/200786/20211119192819398_2021-11-19%20Letter.pdf [https://perma.cc/8X5E-33VX].

118 Al Bahlul v. United States, 967 F.3d 858, 872 (D.C. Cir. 2020).

119 *Id.* (alteration in original) (quoting Kalaris v. Donovan, 697 F.2d 376, 401 (D.C. Cir. 1983)).

120 10 U.S.C. § 949b(2)(B).

121 Petition for a Writ of Certiorari, *supra* note 20, at 10.

ing Authority Harvey Rishikof.[122] Rishikof was purportedly exploring potential plea bargains with five suspects in the September 11 terrorist attacks.[123] One of the detainees, Ammar al Baluchi, argued that the firing was improper retaliation.[124] A military commission judge accepted DoD's alternative explanations for the firing of Rishikof.[125] Defendant Al Bahlul raised similar concerns, arguing that DoD's alternative explanations were "widely seen as pretextual."[126]

A DoD memorandum released in litigation reveals that the agency views potential allegations of "unlawful influence" as a risk in Convening Authority firings.[127] The memorandum assessed the legal risk of firing Rishikof and concluded that the main risk was the possibility for allegations of "unlawful influence" because of "indications [that the Convening Authority] may entertain a [plea agreement] if offered by an accused."[128] If DoD's own interpretation is that subsequent allegations of undue influence create a legal risk, it is reasonable to assume the agency views this as a potential limit on the Secretary's ability to remove the Convening Authority at will.

Second, Congress gave the Secretary the power to prescribe the procedures and rules governing the military commissions and the Convening Authority.[129] The Secretary exercised that authority by issuing the corollary Rules for Military Commissions ("Rules") in a 238-page guidance document.[130] The Rules elaborate on the MCA requirements. For example, the Rules parrot the text of the MCA prohibition on undue influence, and then they clarify that there are

122 Charlie Savage, *Fired Pentagon Official Was Exploring Plea Deals for 9/11 Suspects at Guantánamo*, N.Y. TIMES (Feb. 10, 2018), https://www.nytimes.com/2018/02/10/us/politics/guantanamo-sept-11-rishikof.html [https://perma.cc/XF4F-EZRB].

123 *Id.*

124 Mr. al Baluchi's Motion to Dismiss for Unlawful Influence over Convening Authority and Legal Advisor, United States v. Mohammad, No. AE 555 (AAA) (Mil. Comm'ns Trial Judiciary Feb. 9, 2018), https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE555(AAA)).pdf [https://perma.cc/UQ8G-GDGA].

125 *See* Ruling on Mr. al Baluchi's Motion to Dismiss for Unlawful Influence over Convening Authority and Legal Advisor at 30–32, United States v. Mohammad, No. AE 555EEE (Mil. Comm'ns Trial Judiciary Jan. 10, 2019), https://www.justsecurity.org/wp-content/uploads/2019/01/AE-555EEE-RULING-dtd-10-Jan-19.pdf [https://perma.cc/4BMC-7QVY].

126 Petition for a Writ of Certiorari, *supra* note 20, at 23.

127 Ruling on Mr. al Baluchi's Motion to Dismiss for Unlawful Influence over Convening Authority and Legal Advisor, *supra* note 125, at 18.

128 *Id.*

129 10 U.S.C. § 949a(a).

130 *See* MMC, *supra* note 109, pt. II. DoD also issued "regulations" for the military commission trials in a separate guidance document, but this Essay draws from the Rules. *See* DEP'T OF DEF., REGULATION FOR TRIAL BY MILITARY COMMISSION (2011).

exceptions to this rule that are not written in the statute.[131] The D.C. Circuit explained that "[w]hile the Secretary's power to define rules of evidence and other procedures does not by itself make the Convening Authority an inferior officer, it provides further evidence that the Convening Authority's work is directed by the Secretary and subject to his supervision."[132]

C. The Convening Authority's Power to Render Final Decisions

Although the Convening Authority is empowered to take significant actions, many do not constitute final decisions that bind the executive branch. For example, the Convening Authority convenes the military commissions, but this does not constitute a final decision.[133] There are only three specific actions the Convening Authority can take that constitute a final, binding decision that is not reviewable by another executive branch official. The Convening Authority can (1) approve a plea agreement, (2) overturn a verdict, and (3) commute a sentence. Notably, the Convening Authority can only make final decisions that are adverse to the government and beneficial to the accused.

First, the Convening Authority has the authority to enter into pretrial agreements. The MCA provides that a "plea of guilty made by the accused . . . may form the basis for an agreement reducing the maximum sentence approved by the convening authority, including the reduction of a sentence of death to a lesser punishment . . . ."[134]

Although the Rules include a list of what the plea agreements may include, the Rules explain that the list is non-exhaustive and grant the Convening Authority significant latitude to design the agreements.[135] For example, the Convening Authority can add in additional conditions that the accused requests.[136]

Not every approval of a plea agreement constitutes a final decision. For instance, a plea agreement could simply include a promise that trial counsel will not present certain evidence at trial. But some approvals of a plea bargain inherently constitute a final decision, such

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131 *See* MMC, *supra* note 109, pt. II, r. 104, at 9–11. The exceptions are straightforward. For example, the prohibition on undue influence does not extend to court instructions provided in opening proceedings. *Id.*

132 Al Bahlul v. United States, 967 F.3d 858, 872 (D.C. Cir. 2020).

133 *See* MMC, *supra* note 109, pt. II, r. 504(a)–(b), at 31.

134 10 U.S.C. § 949i(c).

135 MMC, *supra* note 109, pt. II, r. 705(b), at 59–60.

136 *Id*.

as an agreement to reduce a sentence pronounced by a military commission.

Second, the Convening Authority can overturn a verdict of guilty issued by a military commission. The MCA provides that "[t]he authority . . . to modify the findings and sentence of a military commission under this chapter is a matter of the sole discretion and prerogative of the convening authority."[137] If the Convening Authority does overturn a verdict of guilty, he can then drop or modify the charges against the accused.[138]

Third, the Convening Authority can commute a sentence. "The convening authority acting on the case . . . may suspend the execution of any sentence or part thereof in the case, except a sentence of death."[139] However, the MCA prohibits the Convening Authority from increasing the sentence unless the sentence prescribed for the offense is mandatory.[140]

The Rules place a few limits on the Convening Authority's ability to overturn a finding or commute a sentence. For example, the Convening Authority must act on a verdict or sentence within a certain time period.[141] The Convening Authority must also consider certain factors, like the outcome of the trial, the legal advisor's recommendations, and any matters the accused brings up.[142]

As with plea agreements, overturning a verdict will not always constitute a final decision on behalf of the executive branch. When there is an error or omission in the legal record, or there is improper military commission action that can be rectified without prejudice to the accused, then charges may be brought again.[143] However, it does constitute a final decision if the charges are subsequently dropped. A decision to commute a sentence more plainly constitutes a final decision.

The Convening Authority certainly makes other significant decisions. For example, the Convening Authority can approve a finding of guilty.[144] But, importantly for the purposes of assessing the Convening Authority's status under the Appointments Clause, these decisions are not final. Outside of the three types of final decisions identified in this

137 10 U.S.C. § 950b(c)(1).
138 10 U.S.C. § 950b(c)(3)(A).
139 10 U.S.C. § 950i(d).
140 10 U.S.C. § 950b(d)(2)(B).
141 *See* MMC, *supra* note 109, pt. II, r. 1107(b)(2), at 156.
142 *Id.* pt. II, r. 1107(b)(3), at 156–57.
143 10 U.S.C. § 950b(d)(2).
144 10 U.S.C. § 950b(c)(3).

Section, the Convening Authority's decisions are all reviewable by the CMCR.

The CMCR is an executive tribunal comprised of appellate military judges who are appointed by the Secretary of the Defense or the President and confirmed by the Senate.[145] Under the MCA, the accused may appeal a finding of guilty approved by the Convening Authority to the CMCR.[146] The CMCR's review is limited to issues of law, and not factual findings, but this was also true in *Edmond*.[147] In *Edmond*, the Court of Appeals for the Armed Forces' review of factual findings was limited, but the Supreme Court still held that the CGCCA did not have the "power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers."[148] Thus, the Convening Authority decisions reviewed by the CMCR are not final.

D. Is the Convening Authority Unconstitutionally Appointed?

The constitutional doctrine and the dual system of oversight prescribed by the MCA begs the question: Does the Convening Authority's final decision-making authority make the officer a principal officer?

The conclusion that the Convening Authority is a principal officer is supported by a broad interpretation of the majority's reasoning in *Arthrex*.[149] Chief Justice Roberts wrote that only principal officers can issue final decisions, but he included a critical qualifier.[150] Only a principal officer can issue a final decision "in the proceeding before [the Court]."[151] If the deciding factor in distinguishing between officers in all modes of administrative adjudication after *Arthrex* is the ability to issue final decisions, then the Convening Authority's ability to issue final, unreviewable decisions creates a constitutional problem. But if inferior officers can issue final decisions in adjudications outside of patent adjudications, then the Convening Authority may be immune to Appointments Clause challenges.

Considering the differences between the Convening Authority and the CGCCA judges in *Edmond* also supports the conclusion that

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145 10 U.S.C. § 950f(b).

146 10 U.S.C. §§ 950f(d), 950g(a).

147 Al Bahlul v. United States, 967 F.3d 858, 871 (D.C. Cir. 2020); Edmond v. United States, 520 U.S. 651, 662 (1997).

148 *Edmond*, 520 U.S. at 652.

149 *See supra* Section II.B.

150 United States v. Arthrex, Inc., 141 S. Ct. 1970, 1985 (2021).

151 *Id.*

the Convening Authority is an improperly appointed principal officer.[152] In *Edmond*, the Court assessed an intermediate appellate court in the military justice system.[153] By its nature, an intermediate appellate court in the military justice system does not issue final decisions. The Court of Appeals for the Armed Forces may review all of its decisions.[154] What was not at issue in *Edmond* was the convening authority in the military justice system, which is analogous to the Convening Authority for military commissions.[155] A convening authority in the military justice system may be able to issue final decisions on behalf of the executive branch, but unlike the Convening Authority for military commissions, such military convening authorities are Senate confirmed.[156]

On the other hand, the conclusion that the Convening Authority is an inferior officer is supported by a narrow reading of *Arthrex*.[157] If *Arthrex* did not elevate final decision-making authority above the other two factors, then the Convening Authority may be compliant with the Appointments Clause because of the Secretary's removal power. In *Arthrex*, the agency head could not remove the APJs without cause, but under the MCA, the Secretary can remove the Convening Authority at will.[158]

The MCA does limit the Secretary from influencing the outcome of a proceeding, but so far military commissions have been unwilling to view threats of removal as undue influence.[159] Additionally, the MCA's prohibition on undue influence extends only to influence exercised by "unauthorized means."[160] Because the text of the statute is ambiguous, it is reasonable for DoD to argue that the Secretary's removal authority is an authorized means of influence.

The MCA created an anomaly from the typical modes of administrative adjudication. The system of supervision over the Convening Authority falls squarely in the middle of the systems of supervision at

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152 The D.C. Circuit argued that CMCR review of the Convening Authority's decisions was analogous to the Court of Appeals for the Armed Forces' review of CGCCA, but it did not highlight the differences between a Convening Authority and an intermediate appellate court. *See Al Bahlul*, 967 F.3d at 871.

153 *Edmond*, 520 U.S. at 653.

154 *Id.* at 664–65.

155 10 U.S.C. § 822.

156 *See id.*; *supra* note 73 and accompanying text.

157 *See supra* Section II.B.

158 *See supra* Section III.D.

159 *See supra* Section III.B.

160 10 U.S.C. § 949(b)(2).

issue in *Edmond* and *Arthrex*.[161] The Convening Authority is below the CMCR and the Secretary of Defense in the hierarchy of the executive branch, but some of its significant decisions evade their review.

E. Standing to Raise Appointments Clause Challenges

Although it is possible that the method of appointing the Convening Authority is unconstitutional, courts may not need to proceed further than justiciability.[162] It is likely that detainees held at Guantanamo Bay cannot show an injury sufficient to confer standing to raise Appointments Clause challenges.

Article III of the Constitution limits the federal courts to resolving only "cases" and "controversies."[163] The doctrine of standing is the corollary of this limit on judicial power, and it requires plaintiffs to show they have an injury in fact and that the injury is redressable by the court.[164] The injury must also be "fairly traceable to the defendant's allegedly unlawful conduct."[165] It is unlikely that the accused can trace injuries to the Convening Authority's potentially unlawful exercise of power.

A similar issue was presented recently in *California v. Texas*.[166] There, the question was whether the plaintiffs had standing to challenge the constitutionality of the individual mandate under the Patient Protection and Affordable Care Act.[167] The case presented a standing question for the Court because, in 2017, Congress zeroed out the financial penalty used to enforce the individual mandate.[168] The Supreme Court held that the individual and state plaintiffs were unable to trace their injuries—i.e., paying to carry the coverage and paying

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161 Edmond v. United States 520 U.S. 651 (1997); United States v. Arthrex, Inc., 141 S. Ct. 1970 (2021).

162 Supreme Court precedent also leaves unresolved whether noncitizen detainees at Guantanamo Bay can bring structural constitutional challenges to statutes. In fact, Supreme Court precedent has not resolved which individual rights apply to noncitizens. In *Boumediene v. Bush*, 553 U.S. 723 (2008), the Supreme Court held that the noncitizens detained at Guantanamo Bay can challenge the lawfulness of their detention in federal court by filing writs of habeas corpus. *Id.* at 732. Although the Supreme Court has repeatedly refused to recognize constitutional protections for noncitizens who are not present on U.S. soil, this caselaw is largely limited to due process protections and other individual rights. *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259, 273–75 (2001); Kwong Hai Chew v. Colding, 344 U.S. 590, 597 (1953); Johnson v. Eisentrager, 339 U.S. 763, 784–85 (1950).

163 U.S. CONST. art. III, § 2.

164 Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–71 (1992).

165 Allen v. Wright, 468 U.S. 737, 751 (1984).

166 141 S. Ct. 2104 (2021).

167 *Id.* at 2112.

168 *Id.*

the costs for additional citizens who opt into state-operated insurance programs—to any potentially unlawful government action.[169] Since the government no longer enforced the mandate, the decision to purchase coverage was not related to any government action.[170]

As discussed in Section III.C, the three actions that the Convening Authority can take to create the Appointments Clause liability are all beneficial to the accused and adverse to the government.[171] Because the Convening Authority's potentially unlawful exercise of power is always beneficial to the accused, it is unlikely that the accused can trace an injury to that conduct.

Consider again the case of Al Bahlul, who asked the Supreme Court to vacate the D.C. Circuit decision affirming his conviction and remand it for reconsideration after *Arthrex*.[172] After Al Bahlul's conviction by military commission, the Convening Authority "approved the findings and sentence without exception."[173] The accused then appealed the decision to the CMCR, which affirmed the findings and sentence.[174] His injury is traceable only to final decisions that have been issued by properly appointed principal officers.

The accused could potentially establish standing through two avenues. First, the accused could argue that an injury is traceable to the Convening Authority's unlawful exercise of power. If the Convening Authority had appropriate supervision, the defendant may have been offered a better plea bargain or a reduced sentence. However, this is speculative, and the Supreme Court regularly rejects requests for standing when alleged injuries are too speculative.[175]

Second, the accused could push for "standing-through-inseverability."[176] In his dissent in *California v. Texas*, Justice Alito argued that plaintiffs should be able to obtain standing by claiming an injury

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169 *Id.* at 2113.

170 *Id.* at 2114.

171 *See supra* Section III.C.

172 *See* Petition for a Writ of Certiorari, *supra* note 20.

173 Brief for Petitioner at 6, Al Bahlul v. United States, 967 F.3d 858 (D.C. Cir. 2020) (No. 19-1076).

174 *Id.*

175 *See, e.g.*, Clapper v. Amnesty Int'l USA, 568 U.S. 398, 411 (2013) (holding that the plaintiffs did not have standing to challenge the FISA Amendments Act because the claim that they would be targets of surveillance was too speculative). In contrast, in *Collins v. Yellen*, 141 S. Ct. 1761 (2021), the plaintiffs challenged a "for cause" removal restriction on the Director of the Federal Housing Finance Agency, and the Court held that the harm was directly traceable to an allegedly unlawful exercise of power. *Id.* at 1770. But in that case, the Director was unlawfully exercising power in each decision he made because of the removal restriction. *See id.*

176 *See* California v. Texas, 141 S. Ct. 2104, 2122 (2021) (Thomas, J., concurring).

is traceable to unlawful conduct, even if that conduct is causing them injury only because it is inseverable from another statutory provision that is causing them injury.[177] The accused could argue that the Convening Authority's potentially unlawful decision-making authority is inseverable from the rest of the MCA.[178] As an example, the accused could argue that other provisions of the MCA are intertwined with the Convening Authority's ability to approve plea agreements. Defendants may be unwilling to negotiate a plea agreement with a party who does not have the final say, and the military commissions process as a whole depends on an efficient plea agreement system that encourages swift adjudication. However, six other Justices in *California v. Texas* signaled a lack of support for such relaxed tracing requirements.[179]

IV. Putting Appointments Clause Questions to Rest

Until there is finality regarding the Convening Authority's status under the Appointments Clause, the accused are likely to raise Appointments Clause challenges, causing additional setbacks for the military commissions that have already largely failed to secure convictions.[180] In addition to Al Bahlul, another detainee already raised an Appointments Clause challenge to the MCA, suggesting there is an appetite to raise such challenges.[181] The Supreme Court denied Al Bahlul's petition for a writ of certiorari,[182] leaving in place the D.C. Circuit's decision that the Convening Authority is an inferior officer. The D.C. Circuit has exclusive jurisdiction over appeals from

177 *Id.* at 2130 (Alito, J., dissenting).

178 Jonathan Adler predicts that a "standing-through-inseverability" doctrine would undercut standing limits because it would be exceedingly easy to make arguments like this one. In other words, plaintiffs could easily find a constitutionally vulnerable claim within a regulatory statute and argue that it is inseverable from the provision that causes injury. *See* Jonathan H. Adler, *What the Supreme Court Got Right (and Justice Alito Got Wrong) in the Texas ACA Decision*, The Volokh Conspiracy (June 17, 2021, 11:23 PM), https://reason.com/volokh/2021/06/17/what-the-supreme-court-got-right-and-justice-alito-got-wrong-in-the-texas-aca-decision/ [https://perma.cc/S2WV-PHZB].

179 *California v. Texas*, 141 S. Ct. at 2113–19. Justice Thomas agreed that inseverability "might well support standing in some circumstances," but he thought it should not be addressed in *California v. Texas*, in part because the Court has never analyzed it in any detail. *Id.* at 2122 (Thomas, J., concurring).

180 *See* Steve Vladeck, *It's Time to Admit that the Military Commissions Have Failed*, Lawfare (Apr. 16, 2019, 10:40 PM), https://www.lawfareblog.com/its-time-admit-military-commissions-have-failed [https://perma.cc/G3FQ-37UA].

181 *See In re* Al-Nashiri, 791 F.3d 71, 74–75 (D.C. Cir. 2015) (declining to decide if CMCR appointments violated the Appointments Clause in response to a petition for writ of mandamus because the constitutional challenges could be raised on appeal following a final judgment).

182 Al Bahlul v. United States, 967 F.3d 858 (D.C. Cir. 2020).

the CMCR, meaning no circuit split can develop.[183] However, later panels can overturn the decisions of an earlier panel when there are developments in the law.[184] The later decision in *Arthrex* creates the possibility that a later panel will overturn the earlier decision, incentivizing the accused to continue raising the issue on appeal.[185] This Part recommends actions that the President or Congress can take to prevent any future Appointments Clause challenges.

A. Appoint the Convening Authority with Senate Consent

The President and Senate should avoid Appointments Clause challenges by nominating and confirming all Convening Authorities moving forward. In fact, when a detainee asked the D.C. Circuit, via mandamus, to resolve an Appointments Clause challenge to the CMCR, the D.C. Circuit denied the request and suggested the President and Senate could avoid the issue on appeal from final judgment by nominating and confirming CMCR judges.[186] They "chose to take that tack."[187] Col. Wood was appointed to the office as a civilian, but some of the previous officers designated to be Convening Authorities were nominated and confirmed prior to their designation, making them less vulnerable to Appointments Clause challenges.[188]

B. Amend the Military Commissions Act to Provide Agency-Head Review

As an alternative, Congress should amend the MCA to explicitly give the Secretary of Defense final decision-making authority over Convening Authority decisions that are not reviewable by the CMCR. This is in line with traditional Administrative Procedure Act adjudication where the agency head maintains freedom to review the decision of an administrative law judge.[189] Professors Christopher Walker and Melissa Wasserman identified several reasons why vesting decision-making authority with the agency head is beneficial in patent adjudication, which may also apply to military commissions.[190] First, it en-

183 10 U.S.C. § 950g.

184 Joseph Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 797 (2012).

185 *See* United States v. Arthrex, Inc., 141 S. Ct. 1970, 1978–86 (2021).

186 *See Al-Nashiri*, 791 F.3d at 82.

187 *In re* Al-Nashiri, 835 F.3d 110, 116 (D.C. Cir. 2016).

188 *See supra* note 20.

189 *See* FCC v. Allentown Broad. Corp., 349 U.S. 358, 364 (1955).

190 *See* Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 175 (2019).

sures the agency head is in control, and the agency head usually has "a comparative advantage in policy expertise relative to agency adjudicators."[191] Second, it helps promote consistency in outcomes.[192] Third, it makes the agency head aware of the details of the adjudicatory system, which helps the agency head advocate for any necessary changes to the system.[193] Although this would increase political influence in the adjudications, it would reduce the risk of Appointments Clause challenges.

Conclusion

The Convening Authority—the person who convenes military commissions to try unlawful enemy combatants for violations of the law of war—is one of the few remaining administrative adjudicators who issue final decisions that lack agency-head review. By statute, the Secretary of Defense can unilaterally appoint the Convening Authority, and recent Supreme Court jurisprudence raises questions about the constitutionality of this method of appointment. To put to rest any future Appointments Clause issues after *Arthrex*, the President and Senate should nominate and confirm all Convening Authorities moving forward, or Congress should amend the statute to give the Secretary of Defense final decision-making authority over Convening Authority decisions that currently evade review.

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191 *Id.*

192 *See id.* at 176.

193 *See id.* at 177.

Essay

(Con)textual Interpretation: Applying Civil Rights to Healthcare in Section 1557 of the Affordable Care Act

*Heather Skrabak**

Abstract

When Congress passed the Affordable Care Act in 2010, Section 1557 of the legislation promised powerful nondiscrimination protections in healthcare on the bases of race, color, national origin, sex, age, and disability. This was a thrilling new development, as Congress had already extended civil rights protections against discrimination to other areas, such as education, housing, workplaces, voting, and government services. However, in the years since the legislation's passage, regulations have struggled to clarify how such extensive protections should apply in the specific context of healthcare. Regulations from multiple administrations have faced litigation, particularly regarding their application to the healthcare of transgender individuals.

Previous judicial statutory interpretations have failed to fully capture the proper healthcare context of the statute. This Essay argues that nuances of healthcare should be used to clarify statutory interpretation in three areas: (1) the scope of Section 1557, (2) Section 1557's definition of "sex discrimination," and (3) provision of additional religious freedom exemptions. A properly contextualized interpretation of Section 1557 considers healthcare's universality, personal nature, and emergency potential. This Essay will

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demonstrate that, in light of the Supreme Court's decision in Bostock v. Clayton County*, the Obama administration's 2016 application of the statutory text to the healthcare context was correct.*

TABLE OF CONTENTS

INTRODUCTION

Since the 1960s, Congress has extended protections against discrimination based on specific characteristics to many areas, including education, housing, workplaces, voting, and government services.[1] When Congress passed the Patient Protection and Affordable Care Act ("ACA") in 2010, it extended civil rights protections on the bases of race, color, national origin, sex, age, and disability to health programs receiving federal dollars.[2] These health programs include Medicare and Medicaid, which together cover around thirty-five percent of Americans.[3] The ACA antidiscrimination provisions—known as Section 1557—require that "any health program or activity" conform to four major civil rights laws.[4] Specifically, Section 1557 extends the protections afforded by Title VI of the Civil Rights Act of 1964, Title IX

1 *See* Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (prohibiting discrimination on the basis of disability in federal government-funded programs); Fair Housing Act of 1968, Pub. L. No. 90-284, §§ 804–806, 82 Stat. 73, 83–84 (prohibiting housing discrimination on the basis of race, color, religion, or national origin); Voting Rights Act of 1965, Pub. L. No. 89-110, §§ 2, 4, 79 Stat. 437, 437–38 (prohibiting voting restrictions based on race); Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 201, 401, 407, 703, 83 Stat. 241, 243, 246, 248, 255 (prohibiting discrimination based on race, color, religion, or national origin in public education, workplaces, and public accommodations).

2 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1557, 124 Stat. 119, 260 (2010).

3 Katherine Keisler-Starkey & Lisa N. Bunch, U.S. Census Bureau, *Health Insurance Coverage in the United States: 2019*, at 4 (Sept. 2020), https://www.census.gov/content/dam/Census/library/publications/2020/demo/p60-271.pdf [https://perma.cc/T9XL-X725].

4 42 U.S.C. § 18116.

of the Education Amendments of 1972, the Age Discrimination Act, and Section 504 of the Rehabilitation Act to healthcare.[5] However, these Acts address public accommodation and government-funded services broadly, including education.[6] Section 1557 does not specify how their prohibitions on discrimination should apply in the context of healthcare.

Current interpretation of Section 1557 is far from clear. The political nature of civil rights enforcement virtually ensures that new administrations in the White House or congressional leadership changes will result in regulatory modifications.[7] Furthermore, regulations regarding Section 1557 have been subject to numerous lawsuits, which resulted in conflicting holdings that complicate interpretation further.[8] Specifically, disagreement rests on three major areas of Section 1557: (1) the statute's scope, (2) definition of "sex discrimination," and (3) provisions of additional religious freedom exemptions. These disagreements have harmed transgender patients seeking gender-affirming care because Section 1557's scope impacts insurance coverage for gender-affirming surgery. For transgender Medicaid patients, such procedures are often cost-prohibitive outside of federal coverage.[9] Af-

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5 *Id.* § 18116(a) (prohibiting discrimination on the grounds covered by those Acts).

6 *See* Age Discrimination Act of 1975, 42 U.S.C. § 6102 (prohibiting discrimination on the basis of age in programs or activities receiving federal financial assistance); Rehabilitation Act of 1973, 29 U.S.C. § 794 (prohibiting discrimination on the basis of disability in programs or activities receiving federal financial assistance); Education Amendments of 1972, 20 U.S.C. § 1681 (prohibiting discrimination on the basis of sex in "education program[s] or activit[ies] receiving Federal financial assistance"); Civil Rights Act of 1964, 42 U.S.C. § 2000a (prohibiting discrimination or segregation based on "race, color, religion, or national origin" in places of public accommodation).

7 *See* Mark Febrizio, *Biden is Using Multiple Mechanisms to Reverse Trump's Regulatory Agenda*, GEO. WASH. U. REG. STUD. CTR. (Apr. 21, 2021), https://regulatorystudies.columbian.gwu.edu/biden-using-multiple-mechanisms-reverse-trumps-regulatory-agenda [https://perma.cc/G9JW-ALA2].

8 *See* Religious Sisters of Mercy v. Azar, 513 F. Supp. 3d 1113, 1135 (D.N.D. 2021) (finding that reinstating the 2016 rule violated RFRA as it "provoke[d] a credible threat of enforcement for refusal to provide or insure gender-transition procedures"); Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs., 485 F. Supp. 3d 1, 61–64 (D.D.C. 2020) (preliminarily enjoining the 2020 rule's elimination of protections against discrimination on the basis of "sex stereotyping" and expansive religious exemptions); Walker v. Azar, 480 F. Supp. 3d 417, 426–30 (E.D.N.Y. 2020) (partially enjoining the 2020 rule for reevaluation in the context of *Bostock*); Complaint at 6, New York v. U.S. Dep't of Health & Hum. Servs., No. 1:20-cv-05583 (S.D.N.Y. July 20, 2020); Complaint at 4, Bos. All. of Gay, Lesbian, Bisexual, & Transgender Youth v. U.S. Dep't of Health & Hum. Servs., No. 1:20-cv-11297 (D. Mass. July 9, 2020); Franciscan All., Inc. v. Burwell, 227 F. Supp. 3d 660, 694–95 (N.D. Tex. 2016) (preliminarily enjoining the 2016 rule's prohibition of discrimination on the basis of "gender identity" and "termination of pregnancy").

9 *See* Ronni Sandroff, *Paying for Transgender Surgeries*, INVESTOPEDIA (Feb. 23, 2022),

ter *Bostock v. Clayton County*,[10] Section 1557's "sex discrimination" definition arguably covers transgender discrimination; however, the application to the healthcare context remains contentious. In addition, the degree to which statutory religious freedom exemptions in Title IX are imported impacts a religious hospital's requirement to provide nondiscriminatory care.

Courts and political administrations have differed greatly in applying Section 1557 to healthcare. Some courts have weighed the overall ACA goals heavily.[11] Some have insisted on a strict textual definition.[12] Likewise, in many respects, the 2016 Obama administration took the healthcare context into account when promulgating regulations,[13] but the Trump administration in 2020 largely did so inconsistently.[14]

An appropriate statutory interpretation of Section 1557 should consider a nuanced understanding of the healthcare context in three ways. First, healthcare's universal nature, as described below, should guide statutory interpretation of Section 1557's scope to construe Section 1557 coherently with other provisions of the ACA, avoid absurd results, and take similar legislation regarding all four civil rights Acts into account. Second, the intensely personal nature of healthcare should guide statutory interpretation of the definition of "sex discrimination," aligning interpretation of Section 1557 with recent Title VII and Title IX court decisions and considering the overall barrier-busting intent of the ACA. Third, the potential for emergency needs in healthcare should guide statutory interpretation of religious exemption requirements, harmonizing the contextual differences among Ti-

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https://www.investopedia.com/paying-for-transgender-surgeries-5184794 [https://perma.cc/RY6L-RG85] (gender-affirming surgeries cost about $25,000 for bottom surgeries and up to $10,000 for top surgeries). Medicaid eligibility differs by state; thirty-eight states and the District of Columbia have adopted the ACA's Medicaid expansion to cover adults with incomes up to 138% of the federal poverty level, or $17,774 in 2021. *Status of State Medicaid Expansion Decision: Interactive Map*, KAISER FAM. FOUND. (Feb. 24, 2022), https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map/ [https://perma.cc/D9JX-WGWE].

10 140 S. Ct. 1731 (2020).

11 *See, e.g.*, Fain v. Crouch, 545 F. Supp. 3d 338, 342–43 (S.D. W.Va. 2021); Flack v. Wis. Dep't of Health Servs., 328 F. Supp. 3d 931, 947 (W.D. Wis. 2018).

12 *See Walker*, 480 F. Supp. 3d at 421.

13 *See* Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376, 31,376, 31,380, 31,389 (May 18, 2016) [hereinafter 2016 Rule].

14 *See* Nondiscrimination in Health and Health Education Programs or Activities, 85 Fed. Reg. 37,160, 37,177–81 (June 19, 2020) [hereinafter 2020 Rule] (emphasizing the need for medical treatment to take into account the "biological binary of male and female" while declining to consider LGBTQ "gender identity" needs in the medical context).

tle IX, the Religious Freedom Restoration Act ("RFRA"), and Section 1557 in healthcare. Under this analysis, the three primary disagreements involving Section 1557 should properly be resolved to incorporate an expansive scope, an expansive definition of "sex discrimination" reflective of Title VII, and not carry over the blanket religious exemptions in Title IX.

Part I of this Essay will present a brief regulatory history of Section 1557. Part II will show how healthcare's universality, personal nature, and emergency potential should guide statutory interpretation of Section 1557's scope, definition of "sex discrimination," and religious freedom exemptions. Clarifying the application of major civil rights laws to healthcare in Section 1557 regulations would lessen interpretive fluctuations, producing stability and clarity for impacted patients.

I. SECTION 1557 BACKGROUND

On March 23, 2010, the ACA was signed into law by then-President Barack Obama.[15] The final bill, over 900 pages long, was the result of extensive negotiations.[16] Buried within the lengthy text laid a little-discussed provision on nondiscrimination: Section 1557. In its general provision, Section 1557 reads:

> Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 . . . , title IX of the Education Amendments of 1972 . . . , the Age Discrimination Act of 1975 . . . , or [Section 504 of the Rehabilitation Act], be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section [504], or such Age Discrimination Act shall apply for purposes of violations of this subsection.[17]

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15 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

16 *Id.*; Glenn Kessler, *History Lesson: How the Democrats Pushed Obamacare through the Senate*, WASH. POST (June 22, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/06/22/history-lesson-how-the-democrats-pushed-obamacare-through-the-senate [https://perma.cc/EU63-HVU9] (describing the negotiations that took place over the twenty-five days of debate that preceded the ACA's passage).

17 42 U.S.C. § 18116 (footnotes omitted).

Unlike many ACA provisions that required extensive implementing regulations, Section 1557 went into effect when the law was signed.[18] Prior to the issuance of regulations, the United States Department of Health and Human Services ("HHS") Office for Civil Rights ("OCR") received and investigated complaints alleging violations of the law.[19]

In these early case-by-case efforts to enforce the nondiscrimination provision, the Obama administration tailored application of Section 1557 to the healthcare context. The HHS OCR reported various efforts, from investigations to voluntary resolution agreements, addressing instances in which transgender individuals alleged discrimination on the basis of sex.[20] Most of the complaints made between the year of ACA's passage and the year of the first Section 1557 regulations were denials of care or insurance based on the patient's gender identity, including against transgender individuals.[21]

In May 2016, the Obama administration issued regulations to clarify and codify implementation of Section 1557,[22] ("the 2016 rule"). These regulations aptly considered the application of civil rights to the healthcare context to (1) assert an expansive definition of the entities to which the regulations apply, (2) define sex discrimination to include, among other things, discrimination based on "gender identity," "sex stereotyping," and "termination of pregnancy," and (3) decline to apply Title IX's blanket religious freedom exemption.[23] Additionally, the rule appropriately interpreted Section 1557 in the healthcare context by providing examples of prohibited practices, including denying insurance coverage for gender transitions and abortion-related services.[24]

In defining "gender identity" and "sex stereotyping," the Obama administration's rule explicitly protected transgender and gender nonconforming persons from healthcare discrimination. "Gender iden-

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18 *Id.*

19 *See* Sharita Gruberg & Frank J. Bewkes, *The ACA's LGBTQ Nondiscrimination Regulations Prove Crucial*, CTR. FOR AM. PROGRESS (Mar. 7, 2018), https://www.americanprogress.org/article/acas-lgbtq-nondiscrimination-regulations-prove-crucial [https://perma.cc/GX3M-4E35]; OFF. FOR C.R., U.S. DEP'T HEALTH & HUM. SERVS., THE BROOKLYN HOSPITAL CENTER IMPLEMENTS NON-DISCRIMINATORY PRACTICES TO ENSURE EQUAL CARE FOR TRANSGENDER PATIENTS (2015), https://www.hhs.gov/sites/default/files/ocr/civilrights/activities/agreements/TBHC/statement.pdf [https://perma.cc/KTM8-SLUZ].

20 Gruberg & Bewkes, *supra* note 19.

21 *Id.*

22 2016 Rule, *supra* note 13, at 31,376.

23 *Id.* at 31,376, 31,386–87.

24 *See id.* at 31,380, 31,456.

tity" was defined as "an individual's internal sense of gender . . . which may be different from an individual's sex assigned at birth."[25] "Sex stereotyping" was defined as "stereotypical notions of masculinity or femininity, including expectations of how individuals represent or communicate their gender to others . . . [and] the expectation that individuals will consistently identify with only one gender and that they will act in conformity with the gender-related expressions stereotypically associated with that gender."[26] The rule did not separately define "termination of pregnancy" but rather elected to mirror Title IX regulations prohibiting discrimination in educational facilities based on a student's termination of pregnancy.[27]

In August 2016, in *Franciscan Alliance v. Burwell*,[28] a group of religiously affiliated healthcare providers challenged the 2016 rule, asserting that requiring them to perform and provide insurance coverage for gender transitions and abortion-related services violated RFRA.[29] The providers also claimed that the rule exceeded HHS's statutory authority by extending Title IX's prohibition of sex discrimination without including Title IX's religious and abortion exemptions.[30] On December 31, 2016, the Northern District of Texas granted a nationwide preliminary injunction on the prohibition of discrimination on the basis of "gender identity" and "termination of pregnancy."[31] The Northern District of Texas later vacated these portions of the regulation,[32] and the *Franciscan Alliance* plaintiffs appealed to the Fifth Circuit.[33]

Three years later in 2019, the Trump administration indicated that it was reconsidering the Section 1557 implementation regulations and issued a notice of proposed rulemaking.[34] After extensive commentary, the final rule was printed on June 19, 2020[35] ("the 2020 rule").

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25 *See id.* at 31,467.

26 *See id.* at 31,468.

27 *See id.* at 31,387 (citing 45 C.F.R. § 86.40(b) (2005)).

28 Franciscan All., Inc. v. Burwell, 227 F. Supp. 3d 660 (N.D. Tex. 2016), *vacated sub nom.* Franciscan All., Inc. v. Azar, 414 F. Supp. 3d 928 (N.D. Tex. 2019).

29 *Id.* at 671–72; Complaint at 1, Franciscan All., Inc. v. Burwell, 227 F. Supp. 3d 660 (N.D. Tex. 2016) (No. 7:16-cv-00108-O).

30 *Franciscan All.*, 227 F. Supp. 3d at 685.

31 *Id.* at 695.

32 Franciscan All., Inc. v. Azar, 414 F. Supp. 3d 928 (N.D. Tex. 2019), *vacating* Franciscan All., Inc. v. Burwell, 227 F. Supp. 3d 660 (N.D. Tex. 2016).

33 Private Plaintiffs' Notice of Appeal, Franciscan All., Inc. v. Azar, 414 F. Supp. 3d 928 (N.D. Tex. 2019).

34 Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27,846, 27,846 (proposed June 14, 2019).

35 2020 Rule, *supra* note 14, at 37,160.

This final rule failed to consider the specific context of healthcare, and: (1) narrowed the entities to which the regulations applied, (2) eliminated the 2016 definition of "sex discrimination," and (3) applied extensive religious freedom and abortion-specific exemptions.[36] The final rule was a sharp contrast to the Supreme Court's June 15, 2020 decision just four days earlier in *Bostock v. Clayton County*, which held that discrimination on the basis of "sex" in Title VII included instances of gender identity and sex stereotyping.[37] Numerous lawsuits, including one brought by twenty-three state attorneys general, challenged the 2020 rule as inconsistent with federal law, in excess of statutory authority, and arbitrary and capricious in its execution.[38] On August 17, 2020, the Eastern District of New York enjoined part of the 2020 rule from going into effect.[39]

Following the injunction, a group of religiously affiliated providers was concerned that the 2016 rule might come back into effect. They sued for declaratory relief to prevent HHS from interpreting Section 1557 to require them "to perform and provide insurance coverage for gender-transition procedures."[40] The District of North Dakota granted this declaratory relief on January 19, 2021, one day prior to President Biden's inauguration.[41]

On May 10, 2021, the Biden administration announced that it would enforce Section 1557 consistent with *Bostock* and include discrimination based on sexual orientation and gender identity.[42] Although this notice indicated that those interpreting Section 1557 should abide by both *Bostock* and RFRA, patients and healthcare providers still lack contextual clarity. The notice stated vaguely that "interpretation will guide OCR in processing complaints and conducting investigations, but does not itself determine the outcome in any particular case or set of facts."[43]

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36 *See id.* at 37,171, 37,162, 37,177.

37 Bostock v. Clayton County, 140 S. Ct. 1731, 1754 (2020).

38 *See* Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs., 485 F. Supp. 3d 1, 16 (D.D.C. 2020); Walker v. Azar, 480 F. Supp. 3d 417, 426–30 (E.D.N.Y. 2020); Complaint at 6, New York v. U.S. Dep't of Health & Hum. Servs., No. 1:20-cv-05583 (S.D.N.Y. July 20, 2020); Complaint at 4, Bos. All. of Gay, Lesbian, Bisexual, & Transgender Youth v. U.S. Dep't of Health & Hum. Servs., No. 1:20-cv-11297 (D. Mass. July 9, 2020).

39 *Walker*, 480 F. Supp. 3d at 430.

40 Religious Sisters of Mercy v. Azar, 513 F. Supp. 3d 1113, 1134, 1141 (D.N.D. 2021).

41 *Id*. at 1153–54.

42 Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972, 86 Fed. Reg. 27,984, 27,984 (May 25, 2021).

43 *Id*. at 27,985.

Because "the legal landscape ha[d] shifted significantly" following this announcement, the Fifth Circuit remanded the pending appeal to the Northern District of Texas to re-hear *Franciscan Alliance*.[44] On August 9, 2021, the court held that RFRA entitled the *Franciscan Alliance* plaintiffs to relief from Section 1557's requirements to cover gender transition procedures.[45] In doing so, the court declined to consider the specific healthcare context of Section 1557, instead applying Title IX and RFRA requirements wholesale.[46]

This Essay revisits the statutory interpretation of Section 1557 post-*Bostock*, incorporating discussion of the 2016 and 2020 rules. In applying extensive civil rights protections to healthcare, particular aspects of healthcare are instructive. This Essay identifies nuances of healthcare that should inform interpretation of Section 1557 in contentious areas.

II. In the Context of Healthcare

Healthcare is distinct from the other contexts in which antidiscrimination provisions have long applied. In applying Section 1557 to healthcare, three qualities must be given proper attention: (1) the universal need for healthcare, (2) the personal nature of healthcare, and (3) the emergency nature of healthcare. This section argues that given the ongoing conflict over statutory interpretation for Section 1557, courts should use these qualities to guide their determination of what canons and principles to prioritize.

A. The Universality of Healthcare: The Scope of "Health Programs and Activities"

In November 2020, Christopher Fain, a forty-four-year-old transgender man, and Zachary Martell, a thirty-three-year-old transgender man, filed suit under Section 1557 against the West Virginia Department of Health and Human Resources for discriminatory denial of gender-confirming healthcare.[47] Mr. Fain is a Medicaid recipient and Mr. Martell is a dependent under the state employee health plan.[48] The state filed a motion to dismiss, claiming that under the 2020 rule, Section 1557 did not extend to Medicaid or employment-based health

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44 Franciscan All., Inc. v. Becerra, 843 F. App'x 662, 662 (5th Cir. 2021).

45 Franciscan All., Inc. v. Becerra, 553 F. Supp. 3d 361, 375–78. (N.D. Tex. 2021).

46 *See id.* at 377.

47 Complaint ¶¶ 6–10, Fain v. Crouch, 545 F. Supp. 3d 338 (S.D. W. Va. 2021). Additional plaintiffs included Mr. Martell's husband, Mr. McNemarv; the plaintiffs also filed as a class action. *Id.*

48 *Id*. ¶¶ 8–9.

insurance.[49] The statutory interpretation question here turned on whether Medicaid and employment-based health insurance providers were included or omitted from Section 1557's scope.[50] Resolution of the question of the scope of Section 1557 should specifically consider the universal nature of healthcare needs, as seen in the drafters' intent and references to other Acts of Congress.

Discrimination in healthcare is distinct from discrimination in other contexts, such as higher education, employment, or government services. First and foremost is the universal nature of healthcare needs, meaning that nearly everyone is guaranteed to need healthcare at some point or will be otherwise required to interact with the healthcare system.[51] Upholding the ACA's individual mandate in 2012, the Supreme Court noted that: "Everyone will eventually need health care at a time and to an extent they cannot predict."[52] This universal nature should drive statutory interpretation of Section 1557's scope, with a particular focus on such principles as the intent of the drafters, avoidance of an absurd result, and comparison to similar laws indicated in the text. As discussed below, under this interpretive scheme, interpretations follow the expansive 2016 rule. The narrow interpretation of the 2020 rule conflicts with the intention of the drafters, runs into an absurd result, and creates dissonance with similar laws indicated in the text. A correct definition would also address residual confusion between the section's application to insurance companies, Medicaid, Medicare, and other HHS-funded programs.

Section 1557 applies to "any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established

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49 *Fain*, 545 F. Supp. 3d at 340.

50 *See id.* ("The crux of the parties' dispute is about the scope of Section 1557, and in particular, the meaning of 'any health program or activity.'").

51 By contrast, Title IX, Title VI, Section 504, and the Age Discrimination Act protect against discrimination in less universally applicable areas, particularly public education (Title IX), use of public accommodations (Title VI), and government-funded programs (Section 504 of the Rehabilitation Act and the Age Discrimination Act). *See* Education Amendments of 1972, 20 U.S.C. § 1681; Civil Rights Act of 1964, 42 U.S.C. § 2000a; Rehabilitation Act of 1973, 29 U.S.C. § 794; Age Discrimination Act of 1975, 42 U.S.C. § 6102.

52 NFIB v. Sebelius, 567 U.S. 519, 547 (2012). In defending the ACA before the Court, General Verilli noted that "[e]veryone . . . is in or will be in the health care market." Transcript of Oral Argument at 111, U.S. Dep't of Health & Hum. Servs. v. Florida (2012). Justice Sotomayor agreed that "absent some intervention from above . . . virtually everyone will use health care." *Id.* at 69.

under [Title I]."[53] The 2016 rule interpreted this language to mean "if *any part* of a health care entity receives Federal financial assistance, then *all of its programs and activities* are subject to the discrimination provision."[54] Under this interpretation, the rule would "likely cover almost all licensed physicians because they accept Federal financial assistance."[55] Conversely, the 2020 rule interpreted Section 1557 to apply only to two categories of covered entities. The first was entities "principally engaged in the business of providing healthcare," encompassing hospitals, nursing facilities, and other providers—but not insurance companies.[56] The second category was ACA exchanges established under Title I of the ACA, which does not encompass employer-based group health plans, Medicaid, and other HHS-funded programs.[57]

The narrow scope of the 2020 rule, if found valid, could have a major impact on a large swath of Americans. Medicaid enrollees and employees enrolled in employer-based group health plans would be effectively regulated out of Sections 1557's protections by the 2020 change. Individual employer-based insurance plans constitute the largest source of health coverage for the non-elderly, accounting for over 183 million individuals in 2019.[58] Medicaid covers low-income families and certain other qualified individuals.[59] Medicaid is the largest provider of health coverage from a single source in the United States,[60] with over 82 million individuals enrolled as of April 2021.[61] Together, they account for around seventy percent of health insurance coverage of the U.S. population.[62]

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53 42 U.S.C. § 18116(a).

54 2016 Rule, *supra* note 13, at 31,386 (emphasis added).

55 *Id.* at 31,445.

56 2020 Rule, *supra* note 14, at 37,171.

57 *Id.* at 37,173.

58 Katherine Keisler-Starkey & Lisa N. Bunch, U.S. Census Bureau, *Health Insurance Coverage in the United States: 2019*, at 5 (Sept. 2020), https://www.census.gov/content/dam/Census/library/publications/2020/demo/p60-271.pdf [https://perma.cc/UAZ3-57DY]; *see also* Matthew Rae, et al., *Long-Term Trends in Employer-Based Coverage*, PETERSON-KFF (April 1, 2020), https://www.healthsystemtracker.org/brief/long-term-trends-in-employer-based-coverage [https://perma.cc/W6CR-JMFG].

59 *See Eligibility*, CTRS FOR MEDICARE & MEDICAID SERVS., https://www.medicaid.gov/medicaid/eligibility/index.html [https://perma.cc/48QM-QNC7].

60 *Id.*

61 CTRS. FOR MEDICARE & MEDICAID SERVS., MAY 2021 MEDICAID AND CHIP ENROLLMENT TRENDS SNAPSHOT (2021), https://www.medicaid.gov/medicaid/national-medicaid-chip-program-information/downloads/may-2021-medicaid-chip-enrollment-trend-snapshot.pdf [https://perma.cc/EXH5-B2JP].

62 *Health Insurance Coverage of the Total Population*, KAISER FAM. FOUND., https://www.kff.org/other/state-indicator/total-population/?dataView=0&currentTimeframe=0&se-

To best interpret the drafter's intent, courts must consider the whole act rule. The whole act rule of statutory interpretation provides that "[a] statute should be construed in light of the other provisions in the statute so as to achieve a coherent whole."[63] The universal nature of healthcare was specifically considered by the ACA drafters, leading to extensive debates around healthcare coverage for communities often left out of coverage like undocumented populations.[64] Congressional acknowledgment of healthcare's universality was so strong that a core contention in ACA negotiations was how coverage could meet the needs of undocumented persons, which led to the collapse of the Gang of Eight negotiations and Representative Joe Wilson screaming "you lie" during President Obama's address of the Joint Session of Congress.[65] Such political carve-outs exempted some communities from eligibility, so the ACA drafters noted that the insurance coverage mandate "requirement achieves *near*-universal coverage."[66] A central purpose of the ACA was to increase health access by addressing lax coverage by employers and in Medicaid programs.[67] Specifically, ACA Title I, referenced in Section 1557, is titled "Quality, Affordable Healthcare For All Americans,"[68] stating a clear intent to address universal, not limited, healthcare needs. While headings are not positive law, courts may rely upon them to clarify the drafters' intent.[69]

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lectedDistributions=employer--medicaid&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D [https://perma.cc/QM8F-TQWN].

63 RICHARD E. LEVY & ROBERT L. GLICKSMAN, STATUTORY ANALYSIS IN THE REGULATORY STATE 129 (2014).

64 *See* Maggie Severns, '*Exceedingly Deep Convictions': Inside Xavier Becerra's Quest for Health Care for Immigrants*, POLITICO (Feb. 22, 2021, 4:30 AM), https://www.politico.com/news/2021/02/22/xavier-becerra-immigrant-health-care-470423 [https://perma.cc/DQ8E-Q3BP]; STEVEN P. WALLACE ET AL., UCLA CTR. FOR HEALTH POL'Y RSCH., UNDOCUMENTED IMMIGRANTS AND HEALTH CARE REFORM 2 (2012) ("Health insurance coverage is lower for undocumented immigrant than US-born citizens and other US immigrant groups.").

65 *See* Severns, *supra* note 64; *see also* BARACK OBAMA, THE PRESIDENT'S ADDRESS BEFORE A JOINT SESSION OF CONGRESS, H.R. Doc. No. 111-62, at 5 (2009) ("There are also those who claim that our reform effort will insure illegal immigrants. This, too, is false—the reforms I'm proposing would not apply to those who are here illegally.").

66 42 U.S.C. § 18091(2)(D) (emphasis added).

67 *See, e.g.*, 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) (expanding Medicaid coverage); 42 U.S.C. § 18031(b)(1) (creating insurance exchanges for individuals without employer coverage); 26 U.S.C. § 4980H (mandating employers to provide qualifying healthcare or pay a tax).

68 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1001, 124 Stat. 119, 130 (2010).

69 *See* Carter v. Liquid Carbonic Pac. Corp., 97 F.2d 1, 4 (9th Cir. 1938) (finding the table of contents and headings instructive in reviewing tax legislation).

In the case of unclear text, courts may consider if either interpretation leads to an absurd result.[70] The absurdity canon assumes that the legislature would not intend an absurd result.[71] Under the 2020 rule, the exclusion of Medicaid and employer-based plans from Section 1557 nondiscrimination requirements holds insurers to different nondiscrimination standards for different categories of enrollees.[72] Many health insurers offer both employer-sponsored plans and ACA Title I exchange plans. Under an expansive interpretation, every plan offered by such an insurer would be subject to Section 1557; while under a narrow interpretation, only the ACA exchange plans would be covered by Section 1557. Thus, under the 2020 rule, many insurers would be prevented from certain coverage and certain denials for only part of their enrollees.[73] Given the huge potential for harm to these groups that could result from the narrow construction and considering the efforts by the ACA to expand coverage, particularly Medicaid and employer-based coverage, limiting nondiscrimination protection to Exchange plans seems a patently absurd result inconsistent with the original purpose and intent of ACA.

The scope of Section 1557 should also be interpreted consistently with similar statutes.[74] The *in pari materia* canon provides that statutes dealing with the same subject matter should be interpreted consistently.[75] This consistency may be especially persuasive when Congress uses echoing language in the subsequent statute.[76] Section 1557 mir-

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70 *See* Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892) ("It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.").

71 LEVY & GLICKSMAN, *supra* note 63, at 108.

72 *Compare* 2020 Rule, *supra* note 14, at 37,173 ("To the extent that employer-sponsored group health plans do not receive Federal financial assistance and are not principally engaged in the business of providing healthcare . . . , they would not be covered entities."), *with id.* at 37,174 ("A [Qualified Health Plan] would be covered by the rule because it is a program or activity administered by an entity established under Title I (*i.e.*, an Exchange), pursuant to § 92.3(a)(3).").

73 *Id.* at 37,174 ("Regarding ACA-compliant plans sold off-Exchange, because a health insurance issuer is not principally engaged in the business of providing healthcare, its operations would be subject to this rule only for the portion that receives Federal financial assistance. The issuer's components (*e.g.*, off-Exchange plans) that do not directly receive Federal financial assistance would not be subject to this rule.").

74 *See* Smith v. United States, 508 U.S. 223, 234–35 (1993) (interpreting "use" by reference to similar statutes).

75 LEVY & GLICKSMAN, *supra* note 63, at 136.

76 *See* Lorillard v. Pons, 434 U.S. 575, 581 (1978) (holding that when "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute").

rors the Civil Rights Restoration Act of 1987 ("CRRA")[77] in requiring that the underlying nondiscrimination statutes (Title IX, Title VI, Section 504, and the Age Discrimination Act) apply to "any health program or activity, *any part of which* is receiving Federal financial assistance."[78] The CRRA modifies the same statutes that Section 1557 incorporates and similarly applies to all of the operations of covered entities, "*any part of which* is extended Federal financial assistance."[79]

Given the interrelatedness of the CRRA and Section 1557, the expansive interpretation which has long applied to the CRRA should be similarly extended to Section 1557. The CRRA was expressly passed to restore broad coverage of civil rights provisions after the Court had narrowly interpreted the scope of underlying statutes in *Grove City College v. Bell*[80] and *Consolidated Rail Corp. v. Darrone*.[81] In *Grove City College*, the Court found that the statutory language of Title IX only subjected an institution receiving funds to Title IX nondiscrimination requirements for the precise program receiving funds, not the entire institution.[82] The Court held similarly for the Rehabilitation Act in *Darrone* in addressing disability claims.[83] Congress moved to correct the statutory language and passed the CRRA to move from a "program-specific approach and reinstate[] an institution-wide application" to rights under the underlying statutes.[84] Current interpretations of Title IX are therefore quite broad in holding that if any part of an educational institution receives federal financial assistance, any education program within the entire institution is subject to Title IX requirements.[85] Section 1557's direct link to the CRRA indicates that the drafters intended to assert a similar scope. The 2016 rule correctly indicates that the CRRA "establishes that *the entire program or activity* is required to comply with the prohibitions on discrimination if any part of the program or activity receives Federal financial assistance."[86]

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77 Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28 (1988).

78 42 U.S.C. § 18116(a) (emphasis added).

79 20 U.S.C. § 1687 (emphasis added).

80 465 U.S. 555 (1984).

81 465 U.S. 624 (1984); *see* Doe v. Salvation Army in U.S., 685 F.3d 564, 571–72 (6th Cir. 2012) ("Congress passed the Civil Rights Restoration Act of 1987 to restore the previously broad scope of coverage of the four statutes that used the word 'program or activity[.]'").

82 Grove City Coll. v. Bell, 465 U.S. 555, 573–74 (1984).

83 *See* Consol. Rail Corp. v. Darrone, 465 U.S. 624, 636 (1984).

84 Cohen v. Brown Univ., 991 F.2d 888, 894 (1st Cir. 1993).

85 *See, e.g.*, Mansourian v. Bd. of Regents of Univ. of Cal. at Davis, 816 F. Supp. 2d 869, 917 (E.D. Cal. 2011).

86 2016 Rule, *supra* note 13, at 31,386 (emphasis added).

Returning to *Fain v. Crouch*, the Southern District of West Virginia declined attempts by The Health Plan to dismiss charges brought under Section 1557 as inapplicable to them.[87] The court found that the underlying statutory language of Section 1557 indicated it applied to The Health Plan, effectively discrediting the 2020 rule's interpretation.[88] The court credited the intent of the ACA as a whole, such as its aims to "increase the number of Americans covered by health insurance."[89] The court found the ACA's extensive focus on health insurance reform supported an interpretation of "health program or activity" that includes health insurers.[90]

B. The Personal Nature of Healthcare: The Definition of "Sex Discrimination"

In April 2018, Cody Flack and Sara Ann Makenzie, transgender individuals and Wisconsin Medicaid recipients, filed suit against the Wisconsin Department of Health Services.[91] They had each been denied gender-affirming, medically necessary treatment for their gender dysphoria and challenged those denials under Section 1557.[92] The question before the court in *Flack v. Wisconsin Department of Health Services* was whether such denials were within the definition of "sex discrimination."[93] The recent Supreme Court decision in *Bostock* and the cases following suggest sex discrimination under Section 1557 must include discrimination on the basis of gender identity and sex stereotyping.[94] When considering the implications of *Bostock* in the context of healthcare, courts should consider the deeply personal nature of physician-patient interactions, as seen in the drafters' intent and in references to other Acts of Congress. The necessary judicial result of such a statutory and contextualized interpretation is required coverage of gender-confirming services.

Healthcare decisions and needs are highly personal, individualized, and private. This principle undergirds privacy protections, such as the Health Insurance Portability and Accountability Act, which

87 Fain v. Crouch, 545 F. Supp. 3d 338, 342–43 (S.D. W. Va. 2021).

88 *See id.* at 340–41.

89 *Id.* at 342 (citing NFIB v. Sebelius, 567 U.S. 519, 538 (2012)).

90 *Id.*

91 Complaint ¶¶ 1–2, Flack v. Wis. Dep't of Health Servs., 328 F. Supp. 3d 931 (W.D. Wis. 2018) (No. 3:18-cv-00309).

92 *Id.* ¶¶ 2, 4, 12.

93 *Flack*, 328 F. Supp. 3d at 947 ("[T]he parties dispute whether plaintiffs' transgender status falls under 'sex.'").

94 *See* Bostock v. Clayton County, 140 S. Ct. 1731, 1754 (2020).

place the protection of healthcare information above and beyond that of other information.[95] Yet realistically, healthcare needs cannot be hidden from one's physicians or insurance provider. Because highly individualized and deeply personal characteristics must be shared with healthcare providers for effective care, an expanded definition of "sex discrimination" should cover related discrimination in healthcare.

Such deeply personal discussions often arise in the context of care for transgender and nonconforming individuals. Physicians often must ask detailed, personal questions addressing the patient's lifestyle and habits, whether for a sprained ankle or gender-confirming services.[96] In this setting, LGBTQ patients are particularly vulnerable to negative comments and refusals of care, as occurred regularly prior to the ACA's passage.[97] In the case of blanket denials of coverage for transgender-related surgery, hospitals and insurance carriers have effectively denied coverage based on the status of the patient.[98] But this gap in healthcare need not persist—an understanding of the deeply personal nature of healthcare, supported through statutory principles such as consideration of related statutes, textualism, and drafters' intent, should guide courts in determining the proper extent of coverage under "sex discrimination."

Interpretation of "sex discrimination" should be aligned with similar statutes under the *in pari materia* canon.[99] Section 1557 incorporates Title IX and courts look to Title VII for guidance in interpreting

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95 *See generally* Health Insurance Portability and Accountability Act (HIPAA) of 1996, Pub. L. 104-191, 110 Stat. 1936.

96 *See* Fallon E. Chipidza, Rachel S. Wallwork & Theodore A. Stern, *Impact of the Doctor-Patient Relationship*, PRIMARY CARE COMPANION FOR CNS DISORDERS (Oct. 22, 2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4732308/ [https://perma.cc/9U5U-PP7L] ("The doctor-patient relationship involves vulnerability and trust. . . . Patients sometimes reveal secrets, worries, and fears to physicians that they have not yet disclosed to friends or family members. Placing trust in a doctor helps them maintain or regain their health and well-being.").

97 *See* Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People From Accessing Health Care*, CTR. FOR AM. PROGRESS (Jan. 18, 2018), https://www.americanprogress.org/article/discrimination-prevents-lgbtq-people-accessing-health-care/ [https://perma.cc/GJ6C-KQKH]; INSTITUTE OF MEDICINE, THE HEALTH OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE 62 (2011), [https://perma.cc/V8U4-HRMG].

98 *See* Brief of Plaintiffs-Appellants at 3, Franciscan All., Inc. v. Becerra, 843 F. App'x 662 (5th Cir. 2021) (No. 7:16-cv-00108) (asserting that provision of gender-confirming care by objecting doctors is "forbidden by their faith and harmful to their patients"); Matthew Bakko & Shanna K. Kattari, *Transgender-Related Insurance Denials as Barriers to Transgender Healthcare: Differences in Experience by Insurance Type*, 35 J. GEN. INTERNAL MED. 1693, 1694 (2020) (showing that while gender-affirming care is universally understood to be medically necessary, twenty-five percent of individuals surveyed experienced a coverage denial or other barrier related to their transgender status in the past year).

99 LEVY & GLICKSMAN, *supra* note 63, at 136.

Title IX.[100] Title VII addresses workplace discrimination, which the Supreme Court held bars discrimination based on sex-stereotyping in the 1989 case *Price Waterhouse v. Hopkins*.[101] That opinion stated, "[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their [sex] group."[102] Following *Price Waterhouse*, a number of courts held that Title VII and Title IX protected transgender individuals from discrimination in workplaces and education.[103] Similarly, a case of first impression applied *Price Waterhouse* to Section 1557 to extend discrimination protections to transgender individuals in healthcare.[104] The 2016 rule applied an expanded definition, defining "sex" to include "gender identity," "sex stereotyping," and "termination of pregnancy."[105] The rule also detailed specific discriminatory actions prohibited under Section 1557, including categorical coverage exclusions for gender transition services and coverage or claim denial for services specific to transgender individuals.[106]

The statutory definition of "sex" was subsequently clarified by the Supreme Court's decision in *Bostock*, which definitively held that Title VII protections extend to discrimination on the basis of sexual orientation and gender identity.[107] Based on this decision, the Eastern

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100 *See, e.g.*, Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 75 (1992) (interpreting Title IX discrimination on the basis of sex to include harassment of a subordinate because of the subordinate's sex, based on *Meritor Savings Bank, FSB v. Vinson*, a Title VII case); Jennings v. Univ. of N.C., 482 F.3d 686, 695 (4th Cir. 2007).

101 490 U.S. 228 (1989).

102 *Id.* at 251.

103 *See, e.g.*, Prescott v. Rady Child.'s Hosp.–San Diego, 265 F. Supp. 3d 1090, 1099 (S.D. Cal. 2017) (interpreting *Price Waterhouse* to mean that "[b]ecause Title VII, and by extension Title IX, recognize that discrimination on the basis of transgender identity is discrimination on the basis of sex, the Court interprets the ACA to afford the same protections"); Grimm v. Gloucester Cnty. Sch. Bd., 822 F.3d 709, 715 (4th Cir. 2016) (reversing dismissal of Title IX sex discrimination claim by transgender student); Schroer v. Billington, 577 F. Supp. 2d 293, 306–08 (D.D.C. 2008) (holding that the withdrawal and revocation of job offer due to applicant's transgender status violated Title VII); Barnes v. City of Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005) (holding that a transgender individual produced sufficient evidence to "establish[] that he was a member of a protected class by alleging discrimination against the City for his failure to conform to sex stereotypes"). *But see* Johnston v. Univ. of Pittsburgh, 97 F. Supp. 3d 657, 671 (W.D. Pa. 2015) (holding that a student failed to establish a Title IX discrimination claim based on his transgender status).

104 *Prescott*, 265 F. Supp. 3d at 1105.

105 2016 Rule, *supra* note 13, at 31,388 (noting that "[a]s the Supreme Court made clear in *Price Waterhouse v. Hopkins*, in prohibiting sex discrimination, Congress intended to strike at the entire spectrum of discrimination against men and women resulting from sex stereotypes"); *id.* at 31,389 (applying the *Price Waterhouse* sex stereotyping theory to healthcare).

106 *See id.* at 31,472.

107 Bostock v. Clayton County, 140 S. Ct. 1731, 1754 (2020).

District of New York blocked parts of the 2020 rule from going into effect in *Walker v. Azar*.[108] Moreover, the court found that even if the 2020 rule did not adopt a new definition of "on the basis of sex," the rule's preamble showed it understood the rule to focus on biological sex, which needed to be reevaluated in the context of *Bostock*.[109] Since then, the Fourth Circuit and other courts have applied *Bostock* to extend Title IX to transgender students.[110] Attempts to interpret Title IX to cover only "sex discrimination on the basis of the biological differences between males and females" as in *Franciscan Alliance*[111] and the 2020 rule[112] will fail.[113] Courts will find that *Bostock* means Section 1557 provides expansive coverage of claims of alleged sex discrimination. The Department of Justice and HHS of the Biden Administration have indicated their intention to follow a similar interpretation.[114]

Consideration of the personal and private nature of healthcare should allow protections from Title IX and Title VII, in the education and workplace context, to extend to the healthcare context. The *Price Waterhouse* Court was concerned that workplace criticisms of a transgender individual were coded, sex-specific language attesting to al-

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108 *See* Walker v. Azar, 480 F. Supp. 3d 417, 430 (E.D.N.Y. 2020).

109 *See id.* at 429–30.

110 *See* Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 619–20 (4th Cir. 2020); *see also* Clark Cnty. Sch. Dist. v. Bryan, 478 P.3d 344, 354 (Nev. 2020) (holding that *Bostock* extends to Title IX's prohibition of discrimination "on the basis of sex"); N.H. v. Anoka-Hennepin Sch. Dist. No. 11, 950 N.W.2d 553, 563, 570 (Minn. Ct. App. 2020) (holding that *Bostock* extends to Title IX, such that "preventing a transgender student from using a school restroom or locker room consistent with the student's gender identity violates Title IX").

111 Franciscan All., Inc. v. Burwell, 227 F. Supp. 3d 660, 687 (N.D. Tex. 2016) ("It is . . . clear from Title IX's text, structure, and purpose that Congress intended to prohibit sex discrimination on the basis of the biological differences between males and females.").

112 Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. at 37,161 (narrowing the plain meaning of "sex" in Title IX by rescinding the 2016 Rule's definition of "on the basis of sex" without providing a replacement regulatory definition). Without giving a new definition, the preamble extensively discussed and asserted that the "original and ordinary public meaning" of "sex" refers only to "the biological binary of male and female," and cited dictionary definitions, common usage, and current Title IX interpretation. *Id.* at 37,178–79. The 2016 Rule's protections against denial of claims or restricting benefits based on transgender status were also rescinded, as "[i]n [HHS]'s current view, the 2016 Rule did not give sufficient evidence to justify, as a matter of policy, its prohibition on blanket exclusions of coverage for sex-reassignment procedures." *Id.* at 37,198.

113 *See Walker*, 480 F. Supp. 3d at 430.

114 *See* Memorandum from Principal Deputy Assistant Att'y Gen. Pamela S. Karlan, Civ. Rts. Div., U.S. Dep't of Just., to Fed. Agency Civ. Rts. Dirs. & Gen. Couns. (Mar. 26, 2021) (interpreting *Bostock* to apply to Title IX); Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972, 86 Fed. Reg. 27,984 (May 25, 2021) (announcing interpretation and enforcement Section 1557 consistent with *Bostock* and Title VII).

leged "personality problems," at least some of which were "reactions to her as a *woman* manager."[115] *Bostock* held that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[116] Similarly, denials of care, such as gender-affirming procedures, if that care would have been granted for persons whose genders matched those assigned at birth, are categorically denials based on the transgender status of the patient.

Additionally, the whole act rule should be applied to find that the intent of the ACA was to increase access for persons historically denied care. Section 1557 should help address the problem that the ACA meant to address: gaps in health insurance coverage.[117] The ACA categorically identified and addressed barriers to health insurance availability, like requiring coverage for pre-existing conditions and preventing coverage determinations based on an individual's age, disability, and expected length of life.[118] Section 1557 mirrors the ACA's overall efforts to require plans to consider the healthcare needs of diverse segments of the population, including "women, children, [people] with disabilities, and other groups."[119]

Returning to *Flack v. Wisconsin Department of Health Services*, in August 2019, the court interpreted the Section 1557 statutory language to cover gender-affirming services, granting declaratory and permanent injunctive relief.[120] The court found the gender-confirming surgery exclusion in Wisconsin's Medicaid program violated Section

115 Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989).

116 Bostock v. Clayton County, 140 S. Ct. 1731, 1741 (2020).

117 *See* BARACK OBAMA, THE PRESIDENT'S ADDRESS BEFORE A JOINT SESSION OF CONGRESS, H.R. Doc. No. 111-62, at 1, 3 (2009) ("Everyone understands the extraordinary hardships that are placed on the uninsured, who live every day just one accident or illness away from bankruptcy. . . . These are middle-class Americans. Some can't get insurance on the job. Others are self-employed, and can't afford it, since buying insurance on your own costs you three times as much as the coverage you get from your employer. Many other Americans who are willing and able to pay are still denied insurance due to previous illnesses or conditions that insurance companies decide are too risky or expensive to cover. . . . The plan I'm announcing tonight would meet three basic goals: It will provide more security and stability to those who have health insurance. It will provide insurance to those who don't.").

118 *See* 42 U.S.C. § 300gg-3 (prohibiting discrimination based on health status including preexisting conditions); 42 U.S.C. § 18022(b)(4)(B) (prohibiting "discriminat[ion] against individuals because of their age, disability, or expected length of life" in coverage decisions, reimbursement rates, incentive programs, or benefit design).

119 42 U.S.C. § 18022(b)(4)(C) (requiring plans to "take into account the health care needs of diverse segments of the population, including women, children, persons with disabilities, and other groups").

120 Flack v. Wis. Dep't of Health Servs., 328 F. Supp. 3d 931, 955 (W.D. Wis. 2018).

1557 by discriminating on the basis of sex.[121] Vaginoplasty and phalloplasty were covered in cases such as reconstructions after a car accident.[122] However, vaginoplasty and phalloplasty as gender-affirming surgery for transgender persons were not covered by the Medicaid program.[123] Thus, the court found the coverage restraint violated the statutory text of Section 1557.[124]

C. The Emergency Potential of Healthcare: Religious Exemptions from Section 1557

In September 2016, Katharine Prescott filed suit against Rady Children's Hospital of San Diego ("RCHSD"), on her own behalf and that of her deceased son, Kyler Prescott, under Section 1557.[125] Kyler Prescott was fourteen years old, transgender, and suffering from suicidal ideation when he was admitted to RCHSD in 2015.[126] Kyler and his mother informed staff that he was a boy and repeatedly insisted that he be addressed and treated as such during his stay.[127] This did not occur.[128] After staff repeatedly misgendered Kyler and denied or ignored his correct gender identity, Kyler's providers decided to end his seventy-two-hour suicide hold early due to his distress at his treatment.[129] Six weeks later, Kyler died by suicide.[130] This case illustrates the specific difference between healthcare and other contexts: healthcare's emergency potential. The potential for emergency situations in healthcare should guide interpretation of the provision of religious exemptions to discrimination rules because discriminatory services in the context of immediate medical need can present dangerous delays or gaps in care.

The discriminatory care that Kyler experienced is common.[131] Fifteen percent of LGBTQ Americans and thirty percent of transgender

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121 *Id.* at 948.

122 *See id.*

123 *Id.*

124 *Id.*

125 Complaint at 1, Prescott v. Rady Child.'s Hosp.–San Diego, 265 F. Supp. 3d 1090 (S.D. Cal. 2017) (No. 16-cv-02408-BTM-JMA).

126 *Prescott*, 265 F. Supp. 3d at 1096.

127 *Id.* at 1096–97.

128 *Id.*

129 *Id.*

130 *Id.*

131 *See, e.g.*, Rumble v. Fairview Health Servs., No. 14-cv-2037, 2015 WL 1197415, at *15–16 (D. Minn. Mar. 16, 2015) (finding the plaintiff plausibly asserted actionable discriminatory care based on transgender status, based on a physician's "hostility," "aggression," "disparaging comments about [Plaintiff]'s use of hormones," and an "assaultive exam"); Sharita Gruberg, Lindsay Mahowald & John Halpin, *The State of the LGBTQ Community in 2020*, CTR. FOR AM. PRO-

individuals report "postponing or avoiding medical treatment due to discrimination."[132] Many Catholic hospitals in particular follow guidance dictated by the United State Conference of Catholic Bishops,[133] which could result in refusal to provide gender-affirming care and discriminatory refusals to treat transgender patients.[134] Courts facing claims resulting from such refusals must weigh patient nondiscrimination against provider religious freedom protections borrowed from RFRA and Title IX.[135] Apparent conflicts between Title IX, RFRA, and Section 1557 should be settled by the harmonization of statutes canon, allowing RFRA's case-by-case determination of religious exemptions but not Title IX's wholesale exemptions, due to the healthcare context of Section 1557.

A clear contextual difference between healthcare and other contexts in which antidiscrimination provisions apply is the potential for individuals to need healthcare on an emergency basis. When a person chooses a school, a workplace, or other government services, delays may be frustrating. However, in healthcare, delays in care or refusals to treat a patient can result in life-and-death situations.[136] This is the basis for healthcare statutes like the Emergency Medical Treatment and Labor Act ("EMTALA"), requiring emergency departments to stabilize all persons coming through their doors.[137] This is not a small issue: across the country, one in six acute care hospital beds is in a

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GRESS (Oct. 6, 2020), https://www.americanprogress.org/article/state-lgbtq-community-2020/ [https://perma.cc/HSF2-6QJQ].

132 Gruberg, Mahowald & Halpin, *supra* note 131.

133 *See Created Male and Female: An Open Letter from Religious Leaders*, U.S. CONF. OF CATH. BISHOPS (Dec. 15, 2017), https://www.usccb.org/topics/promotion-defense-marriage/created-male-and-female [https://perma.cc/D9A8-QJGF] (rejecting the "false idea [] that a man can be or become a woman or vice versa" and calling for a rejection of "[g]ender ideology"); U.S. CONF. OF CATH. BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES (Nov. 17, 2009), https://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf [https://perma.cc/SYX6-82TL].

134 *See, e.g.*, Minton v. Dignity Health, 252 Cal. Rptr. 3d 616, 620 (Cal. Ct. App. 2019) (noting that a Catholic hospital that refused to provide a hysterectomy to treat gender dysphoria was "bound to follow . . . 'Ethical and Religious Directives for Catholic Health Care Services'").

135 *Id.* at 624–25 (weighing Minton's personal civil rights against Dignity Health's religious principles to find that "upholding Minton's claim does not compel Dignity Health to violate its religious principles if it can provide all persons with full and equal medical care at comparable facilities not subject to the same religious restrictions").

136 *See* Cara Murez, *Long Emergency Room Waits May Raise Risk of Death*, UPI (Jan. 19, 2022, 4:30 PM), https://www.upi.com/Health_News/2022/01/19/emergency-room-delays-death-risk/9731642622635 [https://perma.cc/A2B3-TDU7] ("[T]he death rate within 30 days for patients who are eventually admitted starts to rise five hours after arrival [at an ER].").

137 *See, e.g.*, 42 U.S.C. § 1395dd (2018).

Catholic-owned or affiliated hospital, with forty-six Catholic-restricted hospitals serving as sole community providers for short-term acute care.[138] The hospital's Catholic affiliation may not be apparent, as less than three percent of the nation's 652 Catholic hospital websites are immediately identifiable as Catholic.[139] The emergency potential of healthcare suggests the proper statutory interpretation should disallow a blanket religious exemption for treatment of transgender patients.

Application of Title IX to Section 1557 should consider both the borrowing canon and the harmonization canon. Under the borrowing canon, settled interpretations of a borrowed statute also apply under the new statute.[140] Thus, incorporation of Title IX would seem to adopt all of Title IX's exemptions. The most troubling result of this borrowing is Title IX's exemption of educational institutions controlled by religious organizations from the prohibition of sex discrimination, if the application would be inconsistent with the organization's religious tenets.[141] *Franciscan Alliance* utilized this canon to support their interpretation that Section 1557 should include blanket religious exemptions from Title IX.[142] The 2020 rule similarly removed specific protections and reiterated strong protections for RFRA and Title IX religious exemption.[143] Concerningly, these interpretations seem to withdraw discrimination protections at the hospital's whim, contrary to the ACA and Section 1557's antidiscrimination purpose.[144]

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138 Lois Uttley & Christine Khaikin, MergerWatch, Growth of Catholic Hospitals and Health Systems: 2016 Update of the Miscarriage of Medicine Report 1 (2016). In five states—Alaska, Iowa, Washington, Wisconsin, and South Dakota—"more than 40 percent of acute care beds are in hospitals operating under Catholic health restrictions." *Id.*

139 Katie Hafner, *As Catholic Hospitals Expand, So Do Limits on Some Procedures*, N.Y. Times (Aug. 10, 2018), https://www.nytimes.com/2018/08/10/health/catholic-hospitals-procedures.html [https://perma.cc/NUJ8-EQXC].

140 Levy & Glicksman, *supra* note 63, at 136; Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 65–66 (1987) (finding that ERISA language incorporated into the LMRA indicated incorporation of judicial understanding of that ERISA provision).

141 *See* 2016 Rule, *supra* note 13, at 31,379.

142 Franciscan All., Inc. v. Burwell, 227 F. Supp. 3d 660, 689–92 (N.D. Tex. 2016) (finding that the text of Section 1557 implied that all of Title IX's provisions should be extended to the healthcare context, including religious exemptions). *Franciscan Alliance* also considered the canon disfavoring surplusage to interpret "on the ground prohibited under" to show Title IX was meant to be incorporated in its entirety. *Id.*

143 *See* 2020 Rule, *supra* note 14, at 37,192 (eliminating a regulatory definition of sex-based discrimination and declining to give specific examples of covered services). Ignoring concerns by commentors about leaving undefined the areas covered by sex-based discrimination, the final rule asserted that a case-by-case determination would be sufficient, prohibiting clear guidance and leaving determination to OCR. *See id.*

144 *See supra* Section II.B.

Under the harmonization of statutes canon, courts may consider how to balance the two laws. The harmonization canon encourages courts to interpret statutes in a way that harmonizes conflicting provisions.[145] In harmonization, courts should find that differences between educational facilities under Title IX and healthcare facilities under Section 1557 warrant different approaches, namely that persons selecting religious educational institutions have the benefit of choice, while religious hospitals are the main or only source of care for many individuals, particularly in rural settings or emergency circumstances.[146] A blanket religious exemption could lead to denial or delay of care in the healthcare context or discourage persons from seeking care, both of which could have serious or life-threatening consequences. The 2016 rule reflected this conclusion, declining requests by religiously affiliated organizations to extend Title IX's exemption to the healthcare context.[147]

Courts interpreting Section 1557 must consider it through the lens of RFRA, as RFRA contains a provision explicitly modifying all other federal statutes.[148] The *Franciscan Alliance* court, in determining that the 2016 rule likely violated RFRA,[149] failed to properly apply RFRA's "least restrictive means" test in considering implementation of Section 1557. The court found that the 2016 rule likely violated RFRA based on the RFRA requirement that the "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person . . . is the least restrictive means of furthering [a] compelling governmental interest."[150] The court determined the government did not employ the least restrictive means to achieve its goals—arguing that if it wanted to expand access to transition procedures, the government could fund the procedures themselves.[151]

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145 LEVY & GLICKSMAN, *supra* note 63, at 140; *see* Massachusetts v. EPA, 549 U.S. 497, 531–32 (2007) (harmonizing conflicting EPA and DOT regulations of carbon dioxide emissions as allowing validly different standards, even if their purview seems to overlap).

146 *See* UTTLEY & KHAIKIN, *supra* note 138, at 1 ("There are 46 Catholic-restricted hospitals that are the sole community providers of short-term acute hospital care for people living in their geographic regions.").

147 *See* 2016 Rule, *supra* note 13, at 31,379–80.

148 42 U.S.C. § 2000bb-3.

149 Franciscan All., Inc. v. Burwell, 227 F. Supp. 3d 660, 693 (N.D. Tex. 2016).

150 42 U.S.C. § 2000bb-1(b).

151 *Franciscan All.*, 227 F. Supp. 3d at 693. The court also found that requiring case-by-case determinations effectively made the practice of religious belief more expensive than non-religion. *See id.* at 692; *see also* Religious Sisters of Mercy v. Azar, 513 F. Supp. 3d 1113, 1135 (D.N.D.

The *Franciscan Alliance* court failed to consider the goals of the ACA: to ensure that all patients can properly access care. Cases of discrimination against transgender individuals often result in their unwillingness or hesitancy to utilize healthcare facilities where they are unsure about receiving appropriate care.[152] EMTALA, which specifically addresses basic, limited hospital emergency room obligations in emergency circumstances, does not provide an exemption for religious objections.[153] While a case-by-case determination may be appropriate in other contexts, Congress has properly prioritized all patient urgent healthcare needs through statutes like EMTALA and extended that to other healthcare settings through blanket nondiscrimination coverage in the ACA.

The *Franciscan Alliance* court's improper RFRA evaluation extends to the purported "least restrictive means." Unfortunately, this potential solution misses the context of emergency situations in healthcare, wherein a religiously-affiliated provider's denial of care could have tragic consequences. Realistically, a person might not know their condition was related to their gender identity or that they needed a therapeutic abortion until well into an emergency room visit, thus rendering separate funding for government provision of those benefits unrealistic. Because there are no other less restrictive means to allow discrimination in the context of healthcare emergencies, *Franciscan Alliance* improperly evaluated Section 1557 under RFRA by issuing a blanket ban.

2021) (finding reinstatement of the 2016 rule "provoke[d] a credible threat of enforcement for refusal to provide or insure gender-transition procedures" and thus violated RFRA).

152 *See, e.g.*, Rumble v. Fairview Health Servs., 14-cv-2037, 2015 WL 1197415, at *7 (D. Minn. Mar. 16, 2015) (addressing claims that, as a result of discriminatory treatment, the transgender plaintiff "will never go to Fairview Southdale Hospital again, 'even in an emergency' although it is the nearest hospital to his home"); Prescott v. Rady Child.'s Hosp.–San Diego, 265 F. Supp. 3d 1090, 1103–04 (S.D. Cal. 2017) (finding valid claims for misrepresentation of "being capable of working with transgender patients and patients with dysphoria" as Kyler's parent "would not have sought medical care for Kyler at RCHSD had she known that [such] claims were false").

153 *See* 42 C.F.R. § 489.24 (2016); *see also* CTRS. FOR MEDICARE AND MEDICAID SERVS., *Appendix V—Interpretive Guidelines—Responsibilities of Medicare Participating Hospitals in Emergency Cases*, *in* STATE OPERATIONS MANUAL (2009) ("Hospitals are responsible for treating and stabilizing, within their capacity and capability, any individual who presents him/herself to a hospital with an [emergency medical condition]. The hospital must provide care until the condition ceases to be an emergency or until the individual is properly transferred to another facility. An inappropriate transfer or discharge of an individual with an [emergency medical condition] would be a violation of EMTALA.").

Conclusion

The application of civil rights to healthcare is necessarily contextual. The specific concerns, issues, and unique nature of healthcare should guide interpretation of Section 1557 of the Affordable Care Act. The Biden administration will likely issue regulations to clarify interpretation of Section 1557 after *Bostock*, which may trigger litigation over contentious issues like abortion and gender-affirming care. The context of healthcare should guide judicial application of interpretive tools and canons such as plain meaning, avoidance of an absurd result, furthering the intention of the drafters, and considering similar statutes. Specifically, healthcare's universality, personal nature, and emergency potential support an expansive interpretation of Section 1557's scope, an expansive definition of sex discrimination, and limited deference for religious refusals.

American civil rights laws have focused on protecting communities vulnerable to mistreatment by service providers, educational institutions, and employers. In extending civil rights to healthcare in Section 1557, Congress protected communities most at risk of mistreatment by medical providers. Subsequent litigation has shown that the transgender community faces a disproportionate burden of such mistreatment. Interpretations of Section 1557 should specifically consider the unique aspects of healthcare and hold that such high stakes necessitate extensive civil rights protections.

Essay

A New CFIUS: Refining the Committee's Multimember Structure with For-Cause Protections

*Vania Wang**

Abstract

Foreign investment in the United States has always been an important element of the nation's economy, but it can leave the United States and its citizens vulnerable to foreign control. In recent years, many have grown concerned that sovereign governments have been investing in the United States with motives beyond mere business and financial strategy. Since 1975, the President and the Committee on Foreign Investment in the United States ("CFIUS" or the "Committee") have overseen foreign investment transactions and reviewed them for any implications on national security. As their scope of review has expanded over the years and inbound investment has increased in the country, CFIUS and the President have become far more active in finding that transactions should be reversed due to national security concerns. China's presence in this space is especially notable, with its companies forming the highest percentage of transactions reviewed and reversed.

Through the case study of TikTok's forced divestment from ByteDance, this Essay explains the broad scope of the Committee's and President's power

* J.D., 2022, The George Washington University Law School; B.A., Chemistry, 2015, Reed College. I would like to thank my professor, the Honorable F. Scott Kieff, for his support. For their hard work on this piece, I am indebted to the editors and staff of *The George Washington Law Review*. For their love and insight, I am grateful to my friends and my partner, Tola Ogunrinde. Finally, thank you to my parents for making the brave choice to immigrate to the United States so that I could grow up as a Chinese person in America. Any remaining errors are my own.

regarding Chinese transactions, and the weaknesses in the Committee's multi-member structure that make it vulnerable to presidential interference with protectionist motivations. The Essay concludes by making recommendations on how the joint goals of national security and open investment can be achieved. Proposals include restructuring the Committee to include members that are not removable at will by the President, with the ultimate recommendation to reform it completely as an independent agency.

TABLE OF CONTENTS

INTRODUCTION

In 2020, TikTok was the world's most downloaded mobile app, with approximately 66.5 million users in the United States.[1] At the time, it was the only app out of the top five most downloaded apps that was not owned by Facebook, who had dominated the charts in recent years.[2] TikTok was created and is owned by a Chinese company, ByteDance Ltd.[3]

TikTok achieved this status despite then-President Donald Trump's best efforts to topple its presence in the United States. In August of 2020, President Trump issued two orders banning all transactions with ByteDance and forcing TikTok to divest from ByteDance in ninety days.[4] He even went as far as banning all new downloads of the app through the Commerce Department in September.[5]

President Trump attributed his Administration's actions to data privacy concerns stemming from TikTok's Chinese ownership by ByteDance.[6] The core concerns were that the Chinese government would be able to access extensive user data through TikTok for espionage purposes, and that it could spread misinformation by censoring political speech and promoting the Chinese Communist Party's agenda.[7] Outside of the Cabinet, however, experts asserted that

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1 *TikTok Named as the Most Downloaded App of 2020*, BBC NEWS (Aug. 10, 2021), https://www.bbc.com/news/business-58155103 [https://perma.cc/4VD3-C3CV]. TikTok is projected to have 89.7 million users in the United States in 2023. L. Ceci, *Number of TikTok Users in the United States from 2020 to 2023*, STATISTA (Jan. 28, 2022), https://www.statista.com/statistics/1100836/number-of-us-tiktok-users/ [https://perma.cc/66RC-5VZ7].

2 *See TikTok Named as the Most Downloaded App of 2020*, *supra* note 1 (listing the other four most downloaded apps: Facebook, WhatsApp, Instagram, and Facebook Messenger).

3 *See id.*

4 Exec. Order No. 13,942, 85 Fed. Reg. 48,637 (Aug. 6, 2020); Order of Aug. 14, 85 Fed. Reg. 51,297 (Aug. 14, 2020).

5 *See* Bobby Allyn & Bill Chappell, *U.S. to Bar Downloads of TikTok, WeChat*, NPR (Sept. 18, 2020, 9:48 AM), https://www.npr.org/2020/09/18/914322620/u-s-to-bar-downloads-of-tiktok-wechat [https://perma.cc/J53Z-MY3B].

6 *See* Zak Doffman, *Is This Trump's Real TikTok 'Spyware' Risk?*, FORBES (Aug. 8, 2020, 7:10 AM), https://www.forbes.com/sites/zakdoffman/2020/08/08/trump-tiktok-spyware-ban-china-microsoft-security-update/?sh=497a7ef697e0 [https://perma.cc/4457-3AWD]. Former Secretary of State Mike Pompeo alleged that TikTok "feed[s] data directly to the Chinese Communist Party." *Id.*

7 *See* Petition for Review at 44, TikTok Inc. v. Comm. on Foreign Inv. in the U.S., (D.C. Cir. Nov. 10, 2020) No. 20-1444; Geoffrey Gertz, *Why is the Trump Administration Banning TikTok and WeChat?*, BROOKINGS (Aug. 7, 2020), https://www.brookings.edu/blog/up-front/

TikTok's Chinese ownership was simply not a threat to the United States's national security.[8] It was likely that any threats posed by TikTok were not so different from those posed by other social media companies.[9] Any potential threats could also be mitigated because the data collected by TikTok is stored on servers outside of China and is of limited value to the Chinese government.[10]

There were a number of other theories that potentially explained President Trump's orders. Some reporters theorized that the true impetus for President Trump's decision to force divestment was a TikTok prank that had hijacked his rally in Tulsa earlier that summer, leaving him fuming at the event's failure.[11]

Meanwhile, the Brookings Institute claimed there were likely broader motivations concerning ongoing trade tensions between the United States and China,[12] but not actually related to ByteDance's

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2020/08/07/why-is-the-trump-administration-banning-tiktok-and-wechat/ [https://perma.cc/3VYS-H99U].

8 *See* James Andrew Lewis, *How Scary is TikTok?*, CTR. FOR STRATEGIC & INT'L STUD. (July 14, 2020), https://www.csis.org/analysis/how-scary-tiktok [https://perma.cc/6KN6-NLYW].

9 Jefferson Graham, *TikTok and Privacy: What's the Problem? Perhaps the Video-sharing App Gathers Too Much Data*, USA TODAY (Aug. 7, 2020, 11:55 AM), https://www.usatoday.com/story/tech/2020/08/06/tiktok-any-worse-privacy-and-data-mining-than-facebook/3311726001/ [https://perma.cc/YQG7-YAA8].

10 *See id.*; Lewis, *supra* note 8. As more evidence has come to light in the last year, experts and lawmakers have grown concerned about whether China can still access the flow of TikTok data regardless of where the data is stored. Emily Baker-White, *Senate Intelligence Committee Calls on FTC to Investigate TikTok for 'Deception*,' FORBES (July 5, 2022, 5:47 PM), https://www.forbes.com/sites/emilybaker-white/2022/07/05/senate-intelligence-committee-calls-on-ftc-to-investigate-tiktok-for-deception/?sh=4a72929c6bd5 [https://perma.cc/3FDB-GAW2]; Emily Baker-White, *Leaked Audio from 80 Internal TikTok Meetings Shows That US User Data Has Been Repeatedly Accessed from China*, BUZZFEED NEWS (June 17, 2022, 12:31 PM), https://www.buzzfeednews.com/article/emilybakerwhite/tiktok-tapes-us-user-data-china-bytedance-access [https://perma.cc/R8YF-5G3H]. In 2020 when President Trump imposed divestment, however, such evidence did not exist to warrant skipping attempts to mitigate. Further, as discussed in Section I.A, ordering divestment before CFIUS review and investigation are completed is always considered premature.

11 TikTok teens had reserved tickets for President Trump's Tulsa rally with no intention of attending, overinflating the number of potential attendees. On the day of, President Trump spoke to a nearly empty crowd. *See* Abram Brown, *Is This the Real Reason Why Trump Wants to Ban TikTok?*, FORBES (Aug. 1, 2020, 2:03 PM), https://www.forbes.com/sites/abrambrown/2020/08/01/is-this-the-real-reason-why-trump-wants-to-ban-tiktok/ [https://perma.cc/RCM7-AVQJ]; Rebecca Leber, *Could Trump Have Another Reason for Banning TikTok?*, MOTHER JONES (Aug. 1, 2020), https://www.motherjones.com/politics/2020/08/could-trump-have-another-reason-for-banning-tiktok/ [https://perma.cc/27HU-P3B3]; Kalhan Rosenblatt, *Trump's Threatened TikTok Ban Could Motivate Young Users to Vote, Some Say*, NBC NEWS (Aug. 1, 2020, 3:39 PM), https://www.nbcnews.com/news/us-news/trump-s-threatened-tiktok-ban-could-motivate-young-users-vote-n1235587 [https://perma.cc/9ZSM-8KT6].

12 *See* Gertz, *supra* note 7.

ownership. The Central Intelligence Agency ("CIA") and Senator Mark Warner (D-VA)—the ranking member of the Senate Intelligence Committee at the time—both noted that the cybersecurity threat TikTok poses as a social media company is minuscule compared to more pressing China-based threats, such as Huawei's emerging dominance in next-generation 5G networks.[13] Surprisingly, the CIA emphasized that Chinese intelligence authorities have *never* actually intercepted data using TikTok.[14] The American Enterprise Institute called the situation "botched," noting that the blatant politicization of the investigation was alarming and not legally permissible.[15] Overall, few seemed to believe the reason for President Trump's decision was the national security reason that he had cited, suggesting that his order forcing TikTok's divestment was unwarranted and that he had merely cited the threat for the purposes of securing divestment.

This Essay uses TikTok's forced divestment as a case study to illustrate and discuss how the U.S. foreign investment review mechanism is critically vulnerable to the whims of the President, especially when the President has a predisposition against Chinese transactions. Part I sets the scene by describing the abnormal administrative hold President Trump had on CFIUS while it was reviewing the TikTok transaction, the repercussions of frequently reversing Chinese transactions on inbound investment, and the Biden Administration's interest in continuing the same level of scrutiny toward Chinese foreign investments. Part II of this Essay will explain CFIUS's history, the accountability motivations for its membership structure, and its broad scope of power in addressing national security concerns with foreign investment transactions. This Part will bring to view the drastic effects on Chinese investments when a President usurps the expansive powers set aside for the Committee. Part III will then describe how CFIUS's intra-Committee, legislative, and judicial accountability mechanisms fail in the midst of a presidential administration that is predisposed to finding national security concerns where there are not necessarily any. Parts II and III together depict the limitless powers that CFIUS has, how President Trump asserted those powers for himself through TikTok's forced divestment, and how he disrupted the system of

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13 *See* David E. Sanger & Julian E. Barnes, *Is TikTok More of a Parenting Problem Than a Security Threat?*, N.Y. TIMES (Aug. 7, 2020), https://www.nytimes.com/2020/08/07/us/politics/tiktok-security-threat.html [https://perma.cc/UUD2-P4G6].

14 *Id.*

15 *See* Emily Birnbaum, *'This Has Been Botched': This Is What Makes Trump's TikTok Tirade So Unusual*, PROTOCOL (Aug. 6, 2020), https://www.protocol.com/cfius-tiktok-not-how-this-works [https://perma.cc/B2ZW-Q2CT].

checks and balances in place. Part IV proposes a path forward after President Trump's unprecedented misappropriation of CFIUS's powers. In order to prevent further presidential encroachment, Part IV describes three ways of restructuring CFIUS with for-cause protections in order to remain true to the original intent behind its creation: protecting the United States from national security implications as a result of foreign direct investment ("FDI").

I. Case Study: TikTok's Forced Divestment Representing Continued Presidential Skepticism of Chinese Investments And Its Resulting Effects

Using TikTok's forced divestment as an example, this Part traces how President Trump jeopardized the neutrality and objectivity of CFIUS review by upsetting the established balance of power between the President and the Committee, its resulting effects on Chinese investments in the United States, and how it has set the tone for future administrations.

A. President Trump's Amplified Impact on Forcing TikTok's Divestment

National security issues regarding FDI in the United States are in the jurisdiction of the President and CFIUS.[16] The President and CFIUS are equipped with certain powers to defend the United States against transactions where a foreign person exercises foreign control over U.S. businesses to the detriment of national security, and transactions related to critical technology, critical infrastructure, sensitive personal data, and certain real estate.[17] Specifically, CFIUS has the power to review and investigate national security concerns, and decide whether to recommend the suspension or prohibition of a transaction to the President.[18] Meanwhile, only the President has the ultimate power to block a transaction due to such concerns—a drastic remedy.[19] The foreign investment review process proceeds in that exact order: CFIUS review, investigation, and referral, with a presidential

16 *See* James K. Jackson, Cong. Rsch. Serv., RL33388, The Committee on Foreign Investment in the United States (CFIUS) 1 (2018), [hereinafter 2018 CFIUS Report], https://www.everycrsreport.com/files/20180619_RL33388_034bbdb9b07b40ceae88b98fc36e010dad4ba066.pdf [https://perma.cc/L87D-4R47].

17 50 U.S.C. §§ 4565(a)(4)(B)(i)–(ii).

18 *Id.* §§ 4565(b)(1), (b)(2)(A), (l)(2); *see* 2018 CFIUS Report, *supra* note 16, at 13; *CFIUS Overview*, Cooley LLP, https://www.cooley.com/services/practice/export-controls-economic-sanctions/cfius-overview [https://perma.cc/6GMQ-CF44].

19 50 U.S.C. § 4565(d)(1)(4); *see CFIUS Overview*, *supra* note 18.

determination as needed.[20] The order allows CFIUS, as the first line of defense, to properly identify and thoroughly work out any potential national security issues throughout the process before it reaches the President.[21] It also guarantees, in line with the original intent for its creation, that foreign investment review authority does not rest in the hands of a single decision-maker.[22]

The Committee's independent decision to refer a transaction to the President is therefore crucial. It acknowledges that there are no legal alternatives available to mitigate a looming national security threat, and that the President must intervene.[23] Its referral affects the menu of options the President has in suspending or prohibiting a transaction, ensuring the President's ultimate remedy is deployed only when necessary. Accordingly, presidents have only wielded that power seven times since the Committee's inception in 1975 to respond to national security concerns.[24] President Trump, remarkably, was responsible for blocking four of the seven transactions, including

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20 *See* 2018 CFIUS REPORT, *supra* note 16, at 11.

21 *See id.*

22 *See infra* Section II.A (describing when President Reagan first delegated the majority of his FDI review powers to CFIUS).

23 50 U.S.C. § 4565(d)(2); *see* JAMES K. JACKSON, CONG. RSCH. SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS) 7 (2020) [hereinafter 2020 CFIUS REPORT], https://sgp.fas.org/crs/natsec/RL33388.pdf [https://perma.cc/9966-TMAB].

24 *See* Exec. Order No. 11,858, 40 Fed. Reg. 20,263 (May 7, 1975); 2018 CFIUS REPORT, *supra* note 16, at 7. The first transaction was in 1990, where President Bush ordered the China Aero-Technology Import and Export Corporation ("CATIC") to divest from MAMCO Manufacturing. The second was in 2012, when President Obama ordered Ralls Corporation (owned by two Chinese nationals) to divest from an Oregon wind farm. 2016 marked the third transaction, with President Obama blocking Chinese firm Fujian Grand Chip Investment Fund from acquiring Aixtron, a Europe-based semiconductor firm with U.S. assets. The fourth transaction was in 2017, when President Trump blocked Canyon Bridge Capital Partners, a Chinese investment firm, from the acquisition of Lattice Semiconductor Corp. in Portland. During the fifth transaction in 2018, President Trump blocked Singapore-based Broadcom's $117 billion hostile takeover bid on semiconductor chip maker Qualcomm due to national security concerns that China would overtake the United States in 5G if the transaction were to commence and Qualcomm's R&D funding would be reduced by Broadcom's notoriously bottom-line oriented CEO Hock Tan. In 2019, President Trump ordered Beijing Shiji Information Technology to divest from StayNTouch as the sixth transaction. The seventh and most recent transaction was in 2020, when President Trump attempted to force Chinese company ByteDance to divest from TikTok. *See* 2018 CFIUS REPORT, *supra* note 16, at 7; *President Trump Orders Divestiture of StayNTouch, Inc. by Shiji Group of China*, COVINGTON & BURLING LLP (Mar. 9, 2020), https://www.cov.com/en/news-and-insights/insights/2020/03/President-trump-orders-divestiture-of-stayntouch-inc-by-shiji-group-of-china [https://perma.cc/36AJ-BBRH]; William Alan Reinsch, Patrick Saumell, Isabella Frymoyer & Jack Caporal, *TikTok is Running out of Time: Understanding the CFIUS Decision and its Implications*, CTR. FOR STRATEGIC & INT'L STUD. (Sept. 2, 2020), https://www.csis.org/analysis/tiktok-running-out-time-understanding-cfius-decision-and-its-implications [https://perma.cc/FL56-DACB].

ByteDance's ownership of TikTok.[25] Even more remarkably, all seven blocked transactions involved Chinese investors or were prohibited due to concerns with China.[26] During his term, President Trump reviewed Chinese transactions more unfavorably than ever before and was aided by CFIUS, who played a role by referring the transactions for his prohibition.

TikTok's forced divestment demonstrates President Trump's control over CFIUS and the Committee's subsequent inability to properly review and investigate the transaction before its hasty referral to the President.[27] The proof is in President Trump's and his Administration's public communications about the transaction. The Trump Administration jeopardized the neutrality and confidentiality of the process by publicly announcing its intentions to force ByteDance's divestment before the CFIUS review and investigation had concluded and the transaction had been referred.[28] President Trump, whose role need only come into play at the end of FDI review, was active in disparaging TikTok and its Chinese ownership throughout the entire process. The Trump Administration's impropriety was only magnified, as it is usually extremely uncommon for the President and the Committee to speak about a transaction due to their operations in a classified national security environment.[29] Confidentiality requirements typically prevent even the acknowledgment of a review's existence.[30]

On July 6th, 2020, weeks before the review, investigation, or referral had concluded, former Secretary of State Mike Pompeo announced that the United States was intending to ban TikTok and other Chinese social media apps for national security reasons.[31] A day after, President Trump affirmed Secretary Pompeo's comments that

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25 2018 CFIUS REPORT, *supra* note 16, at 7; Reinsch, et al., *supra* note 24; *President Trump Orders Divestiture of StayNTouch, Inc. by Shiji Group of China*, *supra* note 24.

26 *See* 2018 CFIUS REPORT, *supra* note 16, at 7.

27 *See* Petition for Review, *supra* note 7, at 14–16 (describing TikTok's suit against the Trump Administration in the United States Court of Appeals for the D.C. Circuit for immediately referring the matter to the President without addressing any attempts at mitigation, a departure from its prescribed regulatory scheme).

28 *See* Lauren Feiner & Amanda Macias, *Mnuchin Confirms TikTok is Under CFIUS Review Following National Security Concerns*, CNBC (July 29, 2020, 11:30 AM), https://www.cnbc.com/2020/07/29/mnuchin-confirms-tiktok-is-under-cfius-review.html [https://perma.cc/8HJ9-2X4K].

29 *What is CFIUS?*, TALKS ON LAW, https://www.talksonlaw.com/briefs/what-is-cfius [https://perma.cc/N2ZS-H9YT].

30 *See* Birnbaum, *supra* note 15; *What is CFIUS?*, *supra* note 29.

31 Arjun Kharpal, *U.S. is 'Looking at' Banning TikTok and Chinese Social Media Apps, Pompeo Says*, CNBC (July 7, 2020, 11:48 AM), https://www.cnbc.com/2020/07/07/us-looking-at-banning-tiktok-and-chinese-social-media-apps-pompeo.html [https://perma.cc/4E2H-UJQ9].

his Administration was looking into the ban as retribution against China for coronavirus.[32] A day before CFIUS concluded its review period on July 29th, Treasury Secretary Steven Mnuchin told reporters that there would be a recommendation to the President even though CFIUS had yet to conduct its investigation.[33] That same day, President Trump announced "[w]e are looking at TikTok, . . . [w]e are thinking about making a decision," even though the transaction had still not yet been referred to him.[34] Finally, President Trump announced on August 1 that he would ban TikTok before even issuing official orders on the ban and the divestment on August 6 and 14, respectively.[35] CFIUS had only just referred the transaction to him on July 30, merely a few hours after concluding its review and starting its investigation.[36] In the end, it was not shocking when President Trump ordered TikTok's divestment from ByteDance. It was inevitable.[37]

President Trump left no opportunity for the Committee to conduct its own painstaking review and investigation before recommending the transaction to him. By inserting himself into the already inappropriately public conversation, his influence hung over CFIUS like a specter during its review and investigation period. The eagerness of the communications to the public revealed the Administration's premature disposition for a certain outcome. The public antics of President Trump and CFIUS member officials called into question whether their decision to force TikTok's divestment was based purely on national security reasons, thus jeopardizing the objectivity and neutrality of U.S. foreign investment review.

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32 Shelly Banjo, Jordan Fabian & Nick Wadhams, *Trump Says He's Considering a Ban on TikTok in the U.S.*, BLOOMBERG (July 8, 2020, 11:40 AM), https://www.bloomberg.com/news/articles/2020-07-07/tiktok-touts-u-s-ties-after-pompeo-threatens-to-ban-social-app [https://perma.cc/HM63-K2HJ].

33 Feiner & Macias, *supra* note 28.

34 *Id.*

35 *See* Exec. Order No. 13,942, 85 Fed. Reg. 48,637 (Aug. 6, 2020); Order of Aug. 14, 85 Fed. Reg. 51,297 (Aug. 14, 2020).

36 Petition for Review, *supra* note 7, at 15.

37 *See generally* Miles Kruppa, James Fontanella-Khan & Demetri Sevastopulo, *Trump's TikTok Dance: The Politicisation of American Business*, FIN. TIMES (Sept. 18, 2020), https://www.ft.com/content/cdf696fb-5d40-4ecd-a1d2-81007e59a23e [https://perma.cc/5BHG-2ER7] (describing President Trump's hawkish stance toward TikTok and the political lead up to his orders banning the app).

B. *The Repercussions of The Trump Administration's Actions on Chinese Investments*

President Trump's attempted divestment of TikTok is representative of the level of scrutiny the Trump Administration employed toward Chinese investments at large.[38] Because of the extreme focus on Chinese FDI during the Trump Administration, the United States has potentially lost $114 billion in foreign investments from the country in the past few years.[39] Chinese investor filings notifying CFIUS of a transaction also drastically declined from fifty-five in 2018 to seventeen in 2020.[40]

The economic health and long-term security of the United States depends on maintaining an open environment for foreign investment.[41] Simply put, American savings are insufficient to finance domestic investment, and foreign investors create jobs in the United States.[42] Further, in observing American policies to maintain tight control of its economy, other countries might follow suit and tighten their rules.[43] Ultimately, erring on the side of apprehension over open-

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38 *See supra* note 24; Blair Wang, *CFIUS Ramps Up Oversight of China Deals in the US*, DIPLOMAT (Sept. 14, 2021), https://thediplomat.com/2021/09/cfius-ramps-up-oversight-of-china-deals-in-the-us/ [https://perma.cc/JW79-GLZ7].

39 The United States potentially lost out on $38 billion a year after Chinese FDI peaked at $45 billion in 2016 only to drop to an average $7 billion a year from 2018 to 2020 during Trump's presidency. *See* Adam Chan, *CFIUS, Team Telecom and China*, LAWFARE (Sept. 28, 2021, 10:35 AM), https://www.lawfareblog.com/cfius-team-telecom-and-china [https://perma.cc/WG2S-9EWB] . Chinese investments in 2019 were the lowest since the global financial crisis in 2009. *See* Thilo Hanemann, Daniel H. Rosen, Cassie Gao & Adam Lysenko, *Two-Way Street—US-China Investment Trends—2020 Update*, RHODIUM GRP. (May 11, 2020), https://rhg.com/research/two-way-street-us-china-investment-trends-2020-update/ [https://perma.cc/G2FJ-J2TA]. 2020 showed some improvement with $7.2 billion in Chinese investments in the United States, compared to $6.3 billion in 2019.

40 COMM. ON FOREIGN INV. IN THE UNITED STATES, ANNUAL REPORT TO CONGRESS 35 (2020), https://home.treasury.gov/system/files/206/CFIUS-Public-Annual-Report-CY-2020.pdf [https://perma.cc/2H5N-P2JC]. Chinese investors filed forty-four notices in 2021, however, showing a willingness to test the Biden Administration's position on Chinese FDI. COMM. ON FOREIGN INV. IN THE UNITED STATES, ANNUAL REPORT TO CONGRESS 32 (2021), https://home.treasury.gov/system/files/206/CFIUS-Public-AnnualReporttoCongressCY2021.pdf [https://perma.cc/T6MC-WL5U].

41 ALAN P. LARSON & DAVID M. MARCHICK, CONG. RSCH. SERV., CSR NO. 18, FOREIGN INVESTMENT AND NATIONAL SECURITY: GETTING THE BALANCE RIGHT 6 (2006), https://cdn.cfr.org/sites/default/files/pdf/2006/07/CFIUSreport.pdf [https://perma.cc/KMF7-N8FB].

42 *Id.* at 7. In 2016 when FDI in the United States was at its highest, FDI was estimated to support 12 million jobs through direct employment, indirect or induced employment, or productivity spillovers. Will Moreland, *FDI Like You're FDR: CFIUS Review Under the Biden Administration's Rooseveltian Conception of National Security*, 12 J. NAT'L SEC. L. & POL'Y 627, 655 (2022).

43 *Id.* at 24.

ness has significant impacts beyond the intended effect of withholding sensitive information from foreign governments, the importance of which is debatable in TikTok's case.[44]

Though some national security concerns regarding China have proven to be accurate,[45] the increasing tenor of blocked transactions with Chinese companies and the plummeting values of inbound investment provoke concern as to whether the U.S. foreign investment review mechanism is operating as intended. The review mechanism should be amended so that it can rigorously identify transactions that truly threaten national security without obstructing the transactions that do not, of which TikTok is a prime example.[46] The President's role in particular—not only in blocking transactions but also in influencing CFIUS's processes—carries enormous weight and should be modified. Specifically, it should be modified to ensure U.S. foreign investment review is not subject to the decision-making of a single individual when the process was meant to include the Committee as well.[47]

C. The Biden Administration's Continuation of The Trump Administration's Legacy

The courts and the Biden Administration stymied most of the Trump Administration's overtures against TikTok in the last few years. Several months after Trump's orders in 2020, the District Court for the Eastern District of Pennsylvania and the District Court for the District of Columbia granted preliminary injunctions prohibiting the Commerce Department from banning new app downloads and transactions.[48] In 2021, President Biden ultimately revoked former Presi-

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44 *See supra* notes 11–15.

45 *See generally* Michael D. Swaine, *China Doesn't Pose an Existential Threat for America*, FOREIGN POLICY (Apr. 21, 2021, 5:54 PM), https://foreignpolicy.com/2021/04/21/china-existential-threat-america/ [https://perma.cc/AD47-G9ZU]; *Survey of Chinese Espionage in the United States Since 2000*, CTR. FOR STRATEGIC AND INT'L STUD. (July 2021), https://www.csis.org/programs/strategic-technologies-program/archives/survey-chinese-espionage-united-states-2000 [https://perma.cc/S9E6-4Q3Y]. However, the specific concern with Chinese foreign investments is that many companies from China are government owned or government controlled, and as a result, a foreign company's decisions have the potential to become an extension of the government's policy choices. *See* LARSON & MARCHICK, *supra* note 41.

46 *See supra* notes 11–15.

47 *See supra* note 18; 50 U.S.C. app. §§ 2170(b), (k).

48 *See, e.g.*, Jay Peters, *Second Judge Says Trump Can't Ban TikTok*, THE VERGE (Dec. 7, 2020, 8:25 PM), https://www.theverge.com/2020/12/7/22160239/tiktok-ban-judge-trump-administration-us-commerce-department [https://perma.cc/57JL-3AES]. Courts explained that President Trump likely exceeded his powers under the International Emergency Economic Powers Act in issuing his executive order on August 6th blocking all transactions with TikTok. *See id.*

dent Trump's executive order banning transactions with TikTok.[49] The Biden Administration, however, allowed one Trump-era presidential action to stand—Trump's presidential order forcing TikTok's divestment.[50] The issue remains under active discussion,[51] with the Biden Administration currently re-investigating whether there is a genuine national security threat to the United States stemming from ByteDance's ownership of TikTok.[52]

Nevertheless, now that President Trump exposed the structural flaws inherent in CFIUS's design, the danger remains that future presidents could prey on the vulnerability of the U.S. national security regime and monopolize it for their own political agendas. The Biden Administration has already taken steps to build on President Trump's empowerment of CFIUS to target China. The Biden Administration has added more staff to identify sensitive transactions and inquire into China-related transactions in which the United States has only a limited nexus.[53] Experts have projected that transactions that present China-related concerns will only receive deeper political and regulatory scrutiny.[54] The Commerce Department, relatedly, is keeping TikTok in mind while finalizing rules to strengthen the government's

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49 Exec. Order No. 14,034, 86 Fed. Reg. 31,423 (June 9, 2021).

50 Makena Kelly, *Biden Revokes and Replaces Trump Orders Banning TikTok and WeChat*, VERGE (June 9, 2021, 10:00 AM), https://www.theverge.com/2021/6/9/22525953/biden-tiktok-wechat-trump-bans-revoked-alipay [https://perma.cc/EUM9-CX5F].

51 *Id.*; *see also* Letter from Marco Rubio, U.S. Sen., to Janet Yellen, U.S. Sec'y of the Treasury (June 27, 2022), https://www.rubio.senate.gov/public/_cache/files/238dd5bf-46e6-493e-ad36-d6f72b95a70a/F2FE132A26782A5313972AB34A47CD88.tiktok-letter.pdf [https://perma.cc/7MKA-BVU2] (calling for the Biden Administration to conclude its ongoing discussion and proceed to enforce the August 14th presidential order).

52 Cat Zakrzewski & Drew Harwell, *Biden Administration Weighing New Rules to Limit TikTok, Foreign Apps*, WASH. POST (Feb. 2, 2022, 2:05 PM), https://www.washingtonpost.com/technology/2022/02/02/tiktok-biden-administration-rules/ [https://perma.cc/FAL2-52WY].; *see* David Shepardson & Steve Holland, *U.S. Asks Courts to Put TikTok Appeals on Hold Pending Biden Team Review*, REUTERS (Feb. 10, 2021, 8:24 AM), https://www.reuters.com/article/usa-tiktok-bytedance-biden-idINKBN2AA1MN [https://perma.cc/VP9V-CDRM].

53 *See generally Magnachip and Wise Road Capital Announce Withdrawal of CFIUS Filing and Mutual Termination of Merger Agreement*, YAHOO FIN. (Dec. 13, 2021), https://finance.yahoo.com/news/magnachip-wise-road-capital-announce-222400096.html [https://perma.cc/8XMX-3FRM]; Alex Leary & Katy Stech Ferek, *Biden Builds on Trump's Use of Investment Review Panel to Take on China*, WALL ST. J. (July 7, 2021, 1:25 PM), https://www.wsj.com/articles/investment-review-panel-gets-wider-role-under-biden-in-rivalry-with-china-11625650200 [https://perma.cc/RXF9-2PRP].

54 *CFIUS in the Biden Administration*, COVINGTON & BURLING LLP (Jan. 29, 2021), https://www.cov.com/en/news-and-insights/insights/2021/01/cfius-in-the-biden-administration [https://perma.cc/P3SG-NFQT]. CFIUS in general is employing a greater level of scrutiny, reviewing 164 declarations and 272 notices in 2021—a record number of covered transactions. *Top 10 Takeaways from Treasury's CY 2021 CFIUS Annual Report*, SIDLEY AUSTIN LLP (Aug. 4, 2022),

ability to ban apps that present data privacy issues that impact national security.[55] CFIUS must be reformed while the United States continues on a trajectory that will potentially single out China beyond the true risk it poses.

II. The History and Framework of CFIUS: Balancing Unlimited Power with an Interdisciplinary Structure

In order to better understand how CFIUS's decision-making was compromised during the TikTok transaction and why CFIUS is vulnerable to the President regarding Chinese transactions, this Part explains the history and intent of the Committee, the motivations for its interdisciplinary membership structure, and the broad powers that it has over Chinese transactions in particular, which can be dangerous when usurped by a single decision-maker. The following Section begins by describing the Committee's history, intent for its creation, and its unique membership structure.

A. CFIUS's History and Source of Authority

CFIUS is an interagency committee created by Section 721 of the Defense Production Act of 1950 and was established by executive order of President Ford in 1975 to review and investigate national security implications of foreign investment transactions in the United States.[56] The Committee is chaired by the Secretary of the Treasury; the other voting members are the heads of the Departments of Justice ("DOJ"), Homeland Security ("DHS"), Commerce ("Commerce"), Defense ("DOD"), State ("State"), Energy ("DOE"), and the Offices of the U.S. Trade Representative ("USTR"), and Science & Technology Policy ("OSTP").[57] The Director of National Intelligence and the Secretary of Labor function as non-voting, ex officio members of the Committee, and additional White House offices and nonmember agencies are included as necessary.[58]

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https://www.sidley.com/en/insights/publications/2022/08/top-10-takeaways-from-treasurys-cy-2021-cfius-annual-report [https://perma.cc/H858-YPN3].

55 *See* Zakrzewski & Harwell, *supra* note 52.

56 *See* Defense Production Act of 1950 § 721(k), 50 U.S.C. § 4565(k) (2012); Exec. Order No. 11,858, 40 Fed. Reg. 20,263 (May 9, 1975).

57 *CFIUS Overview*, U.S. Dep't of Treasury, https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-overview [https://perma.cc/X37J-2V5B].

58 *Id.*

CFIUS was originally only intended to monitor foreign investment in the United States.[59] However, in 1988 amid concerns over aggressive Japanese investment, Congress passed the Exon-Florio provision.[60] This provision is the source of the President's authority to block foreign transactions of persons engaged in interstate commerce if they threaten to impair national security.[61] The President is statutorily permitted to invoke this authority only when there is credible evidence that a foreign transaction will impair national security, and when no other laws are adequate and appropriate to address the threat.[62]

President Reagan delegated most of his authority to administer the Exon-Florio provision to CFIUS so that FDI review would not rest in the hands of a single department or decision-maker.[63] The only power President Reagan retained was the ultimate one to suspend or prohibit a transaction.[64] This delegation, later codified in the Foreign Investment and National Security Act of 2007 ("FINSA"),[65] transformed the interagency committee into a body with a broad mandate and significant authority to review, investigate, and advise the President on national security issues concerning foreign investment.[66] CFIUS still performs the same three functions today[67]: (1) review, during which the Committee prepares a threat assessment to identify any national security concerns; (2) investigate, which is essentially an extended review, where CFIUS may identify and impose measures on the parties mitigating its concerns before allowing the transaction to proceed;[68] and (3) recommend that the President block the transaction if at the end of the investigation period CFIUS has determined that

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59 *See* 2020 CFIUS REPORT, *supra* note 23, at 5.

60 *See* JAMES K. JACKSON, CONG. RSCH. SERV., RL33312, THE EXON-FLORIO NATIONAL SECURITY TEST FOR FOREIGN INVESTMENT (2013), https://sgp.fas.org/crs/natsec/RL33312.pdf [https://perma.cc/8ZH8-YSEQ].

61 *Id.*

62 50 U.S.C. § 4565(d)(2); 2020 CFIUS REPORT, *supra* note 23, at 7.

63 *See* Jon D. Michaels, *The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond*, 97 VA. L. REV. 801, 867–69 (2011) ("Insulation [from a single decision-maker] increases the likelihood that reasoned policy rather than raw politics shapes the Committee's investigation, mitigation strategy, and even ultimate recommendation. . . . To the extent that accountability is blurred by the secretive nature of foreign-investment review, . . . concerns about presidential predilections supplanting reasoned decisionmaking correspondingly rise.").

64 Exec. Order No. 12,661, 54 Fed. Reg. 779 (Dec. 27, 1988).

65 *Compare id.*, *with* 50 U.S.C. app. §§ 2170(b), (k).

66 JACKSON, *supra* note 60, at 4.

67 *See* Michaels, *supra* note 63, at 824.

68 *See CFIUS Overview*, *supra* note 18.

parties did not adequately resolve national security concerns or that no possible mitigation would resolve such concerns.[69]

Despite all members of the Committee being subject to at-will removal and serving at the pleasure of the President's national security agenda, the combination of the members' numerous institutional affiliations and commitments were anticipated to produce a balanced approach to foreign investment and insulation from the President.[70] The multitude of perspectives guarantees, through friction, outcomes based on reasoned deliberation and consistency.[71] It also makes presidential interference much more difficult, which is desirable so that the President can promote their foreign policy goals without having to address allegations of disparate treatment through CFIUS.[72]

The Committee's multimember structure was thought to be better suited than an independent agency structure for addressing unbounded executive action in the national security realm because officers can only be removed by the President for "inefficiency, neglect of duty, or malfeasance."[73] In the national security realm, the executive branch carries out FDI review in secret and without scrutiny[74] because heightened procedural transparency and accountability mechanisms imposed from other branches could potentially endanger national security.[75] Experts that support the multimember Committee structure have commented that for-cause presidential removal in independent agencies only provides insulation from the President and does not introduce any real checks on the agency.[76] For that reason, it is not an adequate substitute for legal constraints in an area where the executive branch is essentially boundless and the agency has a prominent role in decision-making.[77] However, because foreign investment review in the United States is conducted by a multimember Commit-

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69 *See The Invisible Risks of CFIUS: Timing and Uncertainty*, CONTROL RISKS (Sept. 3, 2020), https://www.controlrisks.com/our-thinking/insights/the-invisible-risks-of-cfius-timing-and-uncertainty [https://perma.cc/T2UC-K5AW].

70 *See* Michaels, *supra* note 63, at 865.

71 *See id.* at 863. This is also a version of the "bureaucracy" theory proposed by Professor Katyal that promoted internal executive checks and encouraged a robust flow of advice from agencies to the President. *See* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2318 (2006).

72 *See* Michaels, *supra* note 63, at 863–64.

73 Humphrey's Ex'r v. United States, 295 U.S. 602, 620 (1935).

74 *See* William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2475 (2006).

75 Michaels, *supra* note 63, at 831.

76 *See id.* at 866–68.

77 *See id.*

tee and not a single agency,[78] the overlapping Committee structure potentially cultivates executive accountability where it ordinarily would not exist.

To achieve its desired interdisciplinary approach in practice, CFIUS operates based on consensus among the member agencies.[79] Each member agency must confirm to Treasury that it has no unresolved national security concerns before the Committee as a whole clears a transaction to proceed.[80] The Committee membership is balanced between agencies that are oriented toward "economy" and those that are oriented toward "security."[81] The economic agencies, who are expected to move a transaction along in favor of economic incentives, typically include Treasury, Commerce, State, and USTR.[82] The security agencies, who are expected to be hesitant and avoid national security risks stemming from foreign investment, typically include DOD, DHS, and DOJ.[83] Leadership of the Committee by Treasury, an economic agency, is crucial[84] because its presence as the Chair prevents the process from stagnating over a security issue.[85] Overall, the member agencies in 2018 expressed satisfaction with the Committee's structure with Treasury as the lead agency and the current agencies as voting members.[86]

CFIUS's strong interdisciplinary check must exist to confine its vigorous review and investigatory powers, and to enable it to advise the President with reasoned deliberation and consistency. Sections II.B and II.C go on to portray CFIUS's wide scope of powers. Section II.B describes the broad definition of "national security," and how and why Chinese investments in particular are prime targets under that scope. Section II.C explains how CFIUS's own unique powers can exert enough pressure that companies will abandon transactions of

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78 *See id.*

79 *See* EDWARD M. GRAHAM & DAVID M. MARCHICK, U.S. NATIONAL SECURITY & FOREIGN DIRECT INVESTMENT 35–36, 40 (2006).

80 *Id. But see* 2018 CFIUS REPORT, *supra* note 16, at 14–15 ("[A]ny agency that has a different assessment of the national security risks posed by a transaction has the ability to push that assessment to a higher level within CFIUS and, ultimately, to the President.").

81 *See* GRAHAM & MARCHICK, *supra* note 79, at 35–36, 40.

82 *Id.*

83 *Id.*

84 *Id.*

85 *See id.*

86 *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-249, COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES: TREASURY SHOULD COORDINATE ASSESSMENTS OF RESOURCES NEEDED TO ADDRESS INCREASED WORKLOAD 22–23 tbl.3 (2018), https://www.gao.gov/assets/gao-18-249.pdf [https://perma.cc/9STZ-V5ZY].

their own accord without presidential intervention. Therefore, when a President influences members of CFIUS in furtherance of their own agenda, they assert crucial powers that were not intended for them and deprive themselves of the reasoned deliberation and consistency of a decision made by the multimember Committee.

B. "National Security" Implications of Chinese Foreign Investment

This Section explains why the United States sees Chinese foreign investments as a threat, and the unlimited discretion the Committee has in addressing Chinese transactions in the name of "national security." The Section concludes by using TikTok as an example to show that even transactions with mild national security implications can still be scrutinized by the Committee if China is a part of the deal.

It is no secret that CFIUS is meant to target China.[87] Senator John Cornyn (R-TX), the sponsor of the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA"), noted that the legislation was crafted to empower CFIUS against China's threat to our global technological advantage.[88] Under China's 2015 "Made in China 2025" plan, China seeks technological dominance in semiconductors, artificial intelligence, robotics, and information technology.[89] Senator Cornyn described that as a result of the plan, China had weaponized investment-driven transfer of advanced technologies,[90] increasing FDI in the United States 18,000 percent in a decade to $45.2 billion in 2016.[91] In response, the new legislation expanded the scope of investments the Committee had oversight of and included specific reports to Congress on Chinese investments,[92] plugging the "gaps" in coverage that had allowed some transactions to go unreviewed until too late.[93]

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87 *See* Chan, *supra* note 39.

88 *See Foreign Investments and National Security: A Conversation With Senator John Cornyn*, COUNCIL ON FOREIGN RELS. (June 22, 2017), https://www.cfr.org/event/foreign-investments-and-national-security-conversation-senator-john-cornyn [https://perma.cc/UQC4-9QL8]. Some Chinese officials have framed the plan as merely aspirational. James McBride & Andrew Chatzky, *Is 'Made in China 2025' a Threat to Global Trade?*, COUNCIL ON FOREIGN RELS. (May 13, 2019, 8:00 AM), https://www.cfr.org/backgrounder/made-china-2025-threat-global-trade [https://perma.cc/JW7F-82WR].

89 *Id.*

90 *Id.*

91 Chan, *supra* note 39 (describing how FDI has dropped to $7 billion a year from 2018 to 2020 during Trump's presidency).

92 *Id.*

93 *See Foreign Investments and National Security: A Conversation With Senator John Cornyn*, *supra* note 88. For example, major concerns among legislators centered around Huawei's pre-FIRRMA acquisition of 3Leaf, a U.S. server technology company. Chan, *supra* note 39. Huawei declined to notify CFIUS under its voluntary reporting mechanism because the

FIRRMA sharpened CFIUS's aim against China regarding *what* it can review and left no doubt that the modern CFIUS is meant to eliminate China's threat to the United States. CFIUS, however, has always had largely unfettered discretion in *how* it reviews—i.e., how it determines what constitutes a national security threat and what should be mitigated and recommended to the President. The Committee is not bound by a formal definition of "national security."[94] Congress and past and present administrations have routinely declined to define the meaning,[95] preferring to keep the term flexible as national security threats continue to evolve.[96] Due to the sensitive nature of the review, CFIUS's discretion is protected as it does not disclose its deliberations or reasons for its decisions.[97]

FINSA and FIRRMA do provide some illumination into the definition of "national security" by listing eighteen non-exhaustive factors CFIUS and the President may consider in reviewing or blocking a transaction.[98] Some of the factors include whether a transaction affects the following areas: domestic defense and energy production; critical technologies and infrastructure; U.S. technological leadership; exposure of biometric information; or exacerbation or creation of U.S. cybersecurity vulnerabilities.[99] Other factors are directed at the identities of the foreign parties—i.e., whether a transaction involves a country of special concern that has a demonstrated goal of acquiring a type of critical technology or infrastructure that would affect U.S. national security leadership and whether a foreign person engaging in a transaction has a history of complying with U.S. laws and regulations.[100]

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transaction was only for $2 million and involved only the purchase of patents. *Id.* Huawei had already gained access to 3Leaf's sensitive technology before CFIUS reviewed the transaction and ordered divestment. *Id.* Some other gaps include venture capital investments in early state technologies. *See Foreign Investments and National Security: A Conversation With Senator John Cornyn*, *supra* note 88.

94 *See* 2018 CFIUS REPORT, *supra* note 16, at 18.

95 *See id.*

96 *See* E. Maddy Berg, *A Tale of Two Statutes: Using IEEPA's Accountability Safeguards to Inspire CFIUS Reform*, 118 COLUM. L. REV. 1763, 1794 (2018); Paul J. Pena, *Evolving Threats Demand an Evolving National Security Strategy*, FORBES (Feb. 19, 2015, 5:14 PM), https://www.forbes.com/sites/realspin/2015/02/19/evolving-threats-demand-an-evolving-national-security-strategy/?sh=8a1359131249 [https://perma.cc/YM78-76MP] (describing the twenty-first century threats of cyber, biological, and nuclear attack).

97 *See* David Zaring, *CFIUS as a Congressional Notification Service*, 83 S. CAL. L. REV. 81, 83 (2009).

98 *See* 2020 CFIUS REPORT, *supra* note 23, at 29–31.

99 *Id.*

100 *Id.* at 31.

Finally, the list admits *any* factor the President or Committee may deem appropriate, which leaves the scope of power quite broad.[101]

These factors make it easier for CFIUS to target China without having to discern the actual implications of the transaction at hand.[102] Because Chinese companies have been encouraged through Made in China 2025[103] to strategically invest in foreign companies to gain access to advanced technology, all investments involving China—not just those involving critical technology or infrastructure—have the potential to be scrutinized. Since the United States has accused China of intellectual property theft and defying its laws and regulations,[104] all Chinese investments—not just those involving advanced technical knowledge—can be scrutinized. These factors emphasize the unlimited discretion that CFIUS has in targeting *all* investments with Chinese origins or involvement even if the content of the transactions themselves might not raise national security concerns.

As a result of this discretion, transactions that have mild, mitigable national security implications run the risk of majorly upsetting the Committee. In the case of TikTok, the Trump Administration cited that the reason for the forced divestment was data privacy considerations.[105] TikTok does not, however, collect types of personal data beyond what other similar social media companies collect,[106] and reportedly less than Facebook and Google.[107] Further, TikTok's source code and user data are maintained separately from its Chinese parent company. But because the Committee has unlimited discretion in determining what constitutes a national security threat, the Committee can determine every transaction involving China or affecting its technological race against China as a threat to the national security of the United States—just like it did with TikTok.

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101 *Id.* at 30.

102 *See generally* Uday Khanapurkar, *CFIUS 2.0: An Instrument of American Economic Statecraft Targeting China*, 48 J. CURRENT CHINESE AFFS. 226, 228–29 (2020), https://journals.sagepub.com/doi/10.1177/1868102620906973 [https://perma.cc/7XQK-UNP4].

103 McBride & Chatzky, *supra* note 88; *see also* 2020 CFIUS REPORT, *supra* note 23.

104 *See* Yukon Huang & Jeremy Smith, *China's Record on Intellectual Property Rights Is Getting Better and Better*, FOREIGN POL'Y (Oct. 16, 2019, 9:52 PM), https://foreignpolicy.com/2019/10/16/china-intellectual-property-theft-progress/ [https://perma.cc/86L6-3SXW]; *see also* 2020 CFIUS REPORT, *supra* note 23, at 29–31.

105 *See supra* note 6.

106 Graham, *supra* note 9.

107 Robert McMillan, Liza Lin & Shan Li, *TikTok User Data: What Does the App Collect and Why Are U.S. Authorities Concerned?*, WALL ST. J. (July 7, 2020, 8:16 PM), https://www.wsj.com/articles/tiktok-user-data-what-does-the-app-collect-and-why-are-u-s-authorities-concerned-11594157084 [https://perma.cc/YL67-RRPH].

The next Section explains the strength of CFIUS's independent impact and how presidential intervention into CFIUS's processes would give the President an overwhelming amount of power in reviewing foreign investments.

C. CFIUS's Independent Role from the President

CFIUS's powers to review and investigate foreign investments and to negotiate with transacting parties are extraordinarily strong.[108] Through these powers, the Committee is able to condition its endorsement of a deal based on whether parties meet the parameters that it sets to mitigate national security concerns.[109] Thus, parties will preemptively divest once it becomes clear that the Committee will not greenlight a deal even when the President has not taken action to suspend or prohibit a transaction.[110]

Though the President has blocked seven transactions in the entire lifetime of the Committee, the Committee itself has unraveled eighty-six transactions since 2008. In those instances, parties abandoned their transactions after (1) CFIUS informed the parties it was unable to identify mitigation measures that would resolve its national security concerns, or (2) CFIUS proposed mitigation terms that the parties chose not to accept.[111] During Trump's presidency from 2017 to 2020, the Committee unraveled an unprecedented fifty-seven transactions.[112] In contrast, there were only twenty-nine transactions aban-

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108 *See* Michaels, *supra* note 63, at 825–27.

109 *See id.*

110 *See* U.S. DEP'T OF TREASURY, COVERED TRANSACTIONS, WITHDRAWALS, AND PRESIDENTIAL DECISIONS 2008–2020, https://home.treasury.gov/system/files/206/CFIUS-Summary-Data-2008-2020.pdf [https://perma.cc/S7WY-AQAR].

111 *See id.*

112 *Id.* For example, in 2018, MoneyGram and Ant Financial, a Chinese financial services company agreed to terminate its $1.2 billion merger agreement in 2018 after it became clear CFIUS would not approve the transaction. Jon Russell, *The US Government Blocks MoneyGram's $1.2B Sale to Alibaba's Ant Financial*, TECHCRUNCH (Jan. 3, 2018, 2:06 AM), https://techcrunch.com/2018/01/02/moneygram-ant-financial-alibaba-deal-collapses/ [https://perma.cc/9YBR-RAQ2]; *MoneyGram and Ant Financial Announce Termination of Amended Merger Agreement*, MONEYGRAM (Jan. 2, 2018), https://ir.moneygram.com/news-releases/news-release-details/moneygram-and-ant-financial-announce-termination-amended-merger?ReleaseID=1053096 [https://perma.cc/H25S-WWH8]. Ant Financial paid a $30 million termination fee in order to terminate the agreement. *Id.* In 2019, China-based iCarbonX agreed to divest from PatientsLikeMe, and Beijing Kunlun Tech Co. Ltd. agreed to sell its rights to Grindr, all due to personal data concerns. *See President Trump Orders Chinese Company to Divest Acquisition of US Hotel Software Company*, O'MELVENY & MYERS LLP (Mar. 9, 2020), https://www.omm.com/resources/alerts-and-publications/alerts/President-trump-orders-chinese-company-to-divest-acquisition-of-us-hotel-software-company/ [https://perma.cc/6G4J-6WC8]. Under the Biden Administration, CFIUS has threatened to recommend that the $1.4 billion

doned during President Obama's two terms from 2008 to 2016.[113] Thus, the Committee became more proactive under a President who was adverse toward foreign direct investment.

CFIUS's unique authority to negotiate with parties through mitigation and secure their attrition when necessary is an important power, and distinct from the President's power to suspend or prohibit a transaction. When CFIUS negotiates with parties during its review and investigation periods, there is inherently a collaborative element[114] that does not exist once the President gets involved in a transaction. This allows the Committee to acquire the information needed to reach its decision in a measured and deliberate way. Transactions are escalated to the President only when negotiations have failed and national security concerns *cannot* be resolved.[115] When the President steps in to influence CFIUS's review and investigation process, they usurp the Committee's important role in negotiating with transacting parties to mitigate national security concerns.

When CFIUS told TikTok that there was no way to resolve national security concerns and refused to respond to its suggestions for mitigation only one day into the statutorily required investigation period,[116] the loss of sincere negotiations jeopardized CFIUS's process of reasoned deliberation and consistency. Genuine mitigation measures regarding sensitive personal data have included ensuring that only authorized persons have access to certain technology and services and ensuring that certain activities and products are located only in the

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acquisition of South Korea-based semiconductor company Magnachip by Chinese private equity firm Wise Road Capital posed risks to U.S. national security despite the company having minimal activities in U.S. interstate commerce. Chase D. Kaniecki, William S. Dawley & Pete Young, *CFIUS Threatens to Block Magnachip Deal; Shows Willingness to Interpret its Jurisdiction Broadly*, CLEARY GOTTLIEB STEEN & HAMILTON LLP (Dec. 15, 2021), https://www.clearytradewatch.com/2021/09/cfius-threatens-to-block-magnachip-deal-shows-willingness-to-interpret-its-jurisdiction-broadly/ [https://perma.cc/EX57-6HMW]. In December 2021, the companies terminated their merger agreement. *Magnachip and Wise Road Capital Announce Withdrawal of CFIUS Filing and Mutual Termination of Merger Agreement*, *supra* note 53.

113 U.S. DEP'T OF TREASURY, *supra* note 110.

114 *See* Giovanna M. Cinelli, *Navigating CFIUS Review: National Security Restrictions on Foreign Ownership of US Real Estate*, MORGAN LEWIS & BOCKIUS LLP (June 18, 2018), https://www.morganlewis.com/pubs/2018/06/navigating-cfius-review-national-security-restrictions-on-foreign-ownership-of-us-real-estate [https://perma.cc/E2C9-PJB4] (explaining how the review and investigation periods may involve Committee meetings with parties and requests for additional information to inform Committee deliberations).

115 *See* JACKSON, *supra* note 60, at 3 (describing the President's intervention as a last resort).

116 Petition for Review, *supra* note 7, at 14–16.

United States.[117] These measures were offered to other companies,[118] but not to TikTok while President Trump's presence over the transaction loomed large.

Certainly, there are emergency situations in which a President must intervene to protect the United States' national security. For example, President Trump has taken action to block Broadcom's hostile takeover of Qualcomm after a six-day investigation period by CFIUS.[119] This occurred after Broadcom began to take action to redomicile to the United States within a month, therefore stepping out of CFIUS's jurisdiction of foreign investments.[120] Qualcomm's stature as the crown jewel of the U.S. semiconductor industry, coupled with Broadcom's known tactics to underfund research and development, would have made the hostile takeover fatal to the American high-tech industry's ability to keep up with China.[121] Further, in taking action, Broadcom had refused to heed CFIUS's interim order requiring notice before taking actions to relocate.[122] When President Trump intervened in this case, it was because CFIUS could not restrain Broadcom alone. CFIUS and its powers to negotiate were no longer capable at that stage.

In contrast, when TikTok made concerted efforts to comply with CFIUS, offering suggestions for mitigation, it was denied any opportunity to negotiate with no explanation.[123] Even though Treasury and State officials expressed their intent to conclude that CFIUS had concerns in the media, the Committee itself never officially informed ByteDance of any concerns prior to announcing that it was not able to identify any adequate mitigation measures.[124] Ultimately, it referred the issue to President Trump without giving TikTok any opportunity to respond.[125] Absent CFIUS's efforts to conduct a thorough review

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117 COMM. ON FOREIGN INV. IN THE UNITED STATES, *supra* note 40, at 40–42.

118 *See* Michaels, *supra* note 63, at 826 (describing CFIUS mitigation requests of Lucent and Lenovo asking the companies to wall off classified information from certain personnel).

119 *See* Michael Leiter, Ivan Schlager & Donald Vieira, *Broadcom's Blocked Acquisition of Qualcomm*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 3, 2018), https://corpgov.law.harvard.edu/2018/04/03/broadcoms-blocked-acquisition-of-qualcomm/ [https://perma.cc/WMD4-LJUS].

120 *See id.*

121 *See* Kevin Granville, *CFIUS, Powerful and Unseen, Is a Gatekeeper on Major Deals*, N.Y. TIMES (Mar. 5, 2018), https://www.nytimes.com/2018/03/05/business/what-is-cfius.html [https://perma.cc/CGK2-A7CQ].

122 *See* Leiter et al., *supra* note 119.

123 Petition for Review, *supra* note 7, at 3; *see* 2018 CFIUS REPORT, *supra* note 16, at 11.

124 *See* Petition for Review, *supra* note 7, at 29, ex. 1.

125 *Id.* at 39.

and make a sincere effort to collaborate on mitigation, the transaction skipped the negotiations stage to go straight to the chopping block.

Finally, unlike Broadcom's attempted hostile takeover of Qualcomm, there was no actual urgency regarding the general public's use of TikTok. The CIA said Chinese intelligence authorities had *never* actually intercepted data using TikTok[126] since its initial acquisition by ByteDance in 2017.[127] Even now, the Biden Administration has taken a prolonged period of time to re-investigate the matter,[128] and has not banned or forced the app to immediately divest.[129] There was no reason for the Trump Administration to ban TikTok as hastily as it did, but because of CFIUS's inability to conduct a proper review and investigation under pressure from the President, it was not able to curtail President Trump's final prohibition. The Biden Administration is still cleaning up the Trump Administration's mistake,[130] but the damage has already been done. Experts have detected politicization and bias in the Committee's processes, tarnishing its neutral reputation and destroying trust in its reasoned decision-making.[131] Further, the route has now been illuminated for future administrations to make, without limits, the same hasty decisions influenced by a President inclined against Chinese transactions.

CFIUS's broad independent powers, which are especially strong when zeroed in on China, are different from a President's own powers regarding foreign investment in the United States. When CFIUS's powers are usurped by a President with protectionist motivations, there is nothing left to protect a company from having its transactions

126 *See* Sanger & Barnes, *supra* note 13.

127 *See* Georgina Smith, *The History of TikTok: From Musical.ly to the Number 1 App in the World*, DEXERTO (May 8, 2021, 3:48 PM), https://www.dexerto.com/entertainment/the-history-of-tiktok-1569106/ [https://perma.cc/TA9E-RS5W].

128 *See* Letter from Marco Rubio, U.S. Sen., to Janet Yellen, U.S. Sec'y of the Treasury, *supra* note 51 (calling for enforcement of the divestment order amidst the ongoing re-investigation); Tali Arbel & Matt O'Brien, *Biden Backs Off on TikTok Ban in Review of Trump China Moves*, AP NEWS (Feb. 10, 2021), https://apnews.com/article/donald-trump-jen-psaki-ca5e68d8b23cb26a0e964b3ea5fe826d [https://perma.cc/8WYG-BAV9] .

129 *See* Dan Primack, *TikTok's National Security Saga Nears Its End*, AXIOS (Mar. 11, 2022), https://www.axios.com/tiktok-national-security-saga-nears-end-oracle-2123b942-6ad6-4d0f-badf-51e272c2c4aa.html [https://perma.cc/DH67-XWQG] (describing how TikTok, two years later from the original order, may be close to a deal with Oracle to store all of its U.S. user data with the company); John D. McKinnon & Alex Leary, *TikTok Sale to Oracle, Walmart is Shelved as Biden Reviews Security*, WALL ST. J. (Feb. 10, 2021, 5:40 PM), https://www.wsj.com/articles/tiktok-sale-to-oracle-walmart-is-shelved-as-biden-reviews-security-11612958401 [https://perma.cc/Y3MA-V3XD].

130 *See* Shepardson & Holland, *supra* note 52.

131 *See* Birnbaum, *supra* note 15.

reversed. The Trump Administration was responsible for the greatest number of abandoned transactions ever in the Committee's history. The next Part discusses the sparse accountability mechanisms that exist to check U.S. foreign investment review, and how they have failed to stop an aggressive CFIUS and the President's ability to wield CFIUS's powers as their own.

III. The Insufficiency of CFIUS's Accountability Mechanisms in Preventing Presidential Protectionism

The President's power to oversee foreign direct investments and their threat to U.S. national security was diffused across CFIUS's interagency structure in furtherance of political accountability and measured decision-making[132] by President Reagan[133] and later by Congress.[134] This Part explores how CFIUS's interdisciplinary design failed in the midst of a President who did not shy from imposing their political agenda on CFIUS member agencies, and how there is no legislative or judicial recourse available to check such an incursion. This Part also describes how the Committee will continue to be vulnerable to presidential politicization in future administrations.

A. Intra-Committee Check

This Section explains how CFIUS's broad powers and interdisciplinary structure are inclined toward protectionism, making the Committee vulnerable to presidents who prematurely bar transactions with mitigable issues in the name of protecting the United States from national security threats.

CFIUS was designed to be cautious of national security threats in FDI, so its consensus-based processes involve each member agency confirming that it has no unresolved national security concerns before it clears a transaction to proceed.[135] However, as a result, *any* member agency that perceives national security risks posed by a transaction has the ability to escalate that assessment to a higher level within the Committee, and ultimately, to the President.[136] CFIUS was therefore

132 *See* Michaels, *supra* note 63, at 807–08.

133 *See* Exec. Order No. 12,661, *supra* note 64.

134 *See* 50 U.S.C. app. §§ 2170(b), (k).

135 *See* 50 U.S.C. § 4565(b)(3)(C)(ii); 2018 CFIUS Report, *supra* note 16, at 15.

136 2018 CFIUS Report, *supra* note 16, at 12.

extremely vigilant under President Trump,[137] with the Committee taking advantage of the ease with which a transaction can be denied.

Experts noted during Trump's presidency that the intentional balance between the Committee's economic and security agencies was disrupted,[138] specifically because the economic agencies were uncharacteristically aggressive on national security issues.[139] Experts explained that the historically tolerant economic agencies assumed positions and adopted biases that reflected those of the hawkish senior political officials in those agencies.[140] Decision-making was reported to have turned on the President's whims, with a notable absence of process, making it difficult for essential sub-cabinet level officials and staff to work through complicated issues[141] that could have been mitigated instead of escalated to President Trump. This occurred publicly in TikTok's case, when President Trump and CFIUS member officials Secretary Mnuchin and Secretary Pompeo outwardly expressed their intent to find national security threats even before the Committee concluded its review and investigation of the transaction, and President Trump ordered divestment almost immediately after the referral.[142] Trump's presidency made clear that a President can easily spur CFIUS's processes toward protectionism if it can influence a single member agency head.

Though CFIUS's decision-making under the Biden Administration is projected to be driven by formalized interagency processes rather than informal discussions among senior political officials,[143] the

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137 *See* Feiner & Macias, *supra* note 28; Kharpal, *supra* note 31 (describing former Secretary of State Pompeo and former Treasury Secretary Mnuchin national security concerns with TikTok and their intent to ban the application before the Committee's review and investigation period was completed).

138 *See* LARSON & MARCHICK, *supra* note 41.

139 *See* Feiner & Macias, *supra* note 28; Kharpal, *supra* note 31 (describing former Secretary of State Pompeo and former Treasury Secretary Mnuchin antagonistic against TikTok).

140 *CFIUS Annual Report Offers Picture of Committee's Evolution and Enhanced Capabilities*, COVINGTON & BURLING LLP (Aug. 9, 2021), https://www.cov.com/en/news-and-insights/insights/2021/08/cfius-annual-report-offers-picture-of-committees-evolution-and-enhanced-capabilities [https://perma.cc/XPV6-67Q9]. This was demonstrated in a brief moment when the head of a historically economic CFIUS member agency, Secretary of State Mike Pompeo, quoted former Attorney General William Barr, the head of a security agency, in a speech: "The ultimate ambition of China's rulers isn't to trade with the United States. It is to raid the United States." Michael R. Pompeo, Sec'y of State, U.S. Dep't of State, Speech at the Richard Nixon Presidential Library and Museum (July 23, 2020), https://sv.usembassy.gov/secretary-michael-r-pompeo-remarks-at-the-richard-nixon-Presidential-library-and-museum-communist-china-and-the-free-worlds-future/ [https://perma.cc/JBA9-WNDB].

141 *See CFIUS in the Biden Administration*, *supra* note 54.

142 *See supra* Section I.A.

143 *See* 2018 CFIUS REPORT, *supra* note 16, at 13.

balance between the economic and security agencies remains vulnerable. Due to tensions between the United States and China, the use of CFIUS will likely only increase in coming years, leaving room for undue influence from a President with a heavy hand toward preserving our nation's advantage against China.[144]

The Biden Administration is taking steps to build on the previous administration's' empowerment of the Committee by wielding its wide and rigorous scrutiny gained under FIRRMA.[145] For example, in December 2021, Chinese private equity firm Wise Road Capital caved under CFIUS's pressure to divest from Magnachip,[146] a semiconductor company founded and headquartered in South Korea but publicly traded in the United States and incorporated in Delaware.[147] Though almost none of its operations are in the United States, CFIUS decided that the transaction posed a national security threat because it would affect the U.S. technological leadership in the semiconductor industry by allowing China to acquire additional knowledge in the industry.[148]

CFIUS's willingness under President Biden to assert its extraterritorial reach here is notable.[149] It indicates that this Committee still views China's technological capabilities as a threat to our national security, and that it has no qualms raising such concerns even when another country is implicated. Further, though some have said that President Biden's CFIUS is more inclined to resolve matters consistent with its delineated process,[150] thus legally justifying its boldness, the process itself is still predisposed against Chinese involvement in foreign investments.[151] In order to preserve the Committee's objectivity and neutrality, it is best in this negative climate against China to remove any potentiality that a single decision-maker can completely sway the Committee. In wielding its broad authority, the Committee

144 The use of CFIUS is also increasing as the definition of national security expands to include economic security. *See generally* Moreland, *supra* note 42. However, this Essay is specifically focused on deterring misuse of FDI review regarding Chinese transactions with mitigable national security concerns and does not address the broadened use for preserving the United States' economic security.

145 *See* Leary & Ferek, *supra* note 53.

146 *Magnachip and Wise Road Capital Announce Withdrawal of CFIUS Filing and Mutual Termination of Merger Agreement*, *supra* note 53.

147 *CFIUS Prepares to Block Semiconductor Chinese Entity*, MORRISON & FOERSTER (Sept. 3, 2021), https://www.mofo.com/resources/insights/210903-cfius-semiconductor-chinese-entity.html [https://perma.cc/6FUX-Q6FH].

148 *See* Chan, *supra* note 39.

149 *See id.*

150 *CFIUS in the Biden Administration*, *supra* note 54.

151 *See supra* Section II.B.

should be aligned with its original intent to have separate FDI review powers from the President.[152]

The following Sections discuss the inability of the legislative and judicial branches to restrain the executive on national security issues. Ultimately, these Sections show that because CFIUS and the executive branch cannot be checked externally, the Committee must be reformed from the inside out.

B. Legislative Check

Congress has only a limited check on CFIUS, and therefore it can only guarantee so much accountability from the Committee. CFIUS is meant to operate free from burdensome congressional interference, so that its national security processes cannot be politicized and co-opted by a member whose district may be impacted by a transaction.[153] When Congress has chosen to exercise its oversight, which has not been often,[154] it has done so in two ways: (1) threatening to block CFIUS by statute[155] and (2) increasing agency reporting commitments.[156]

As for the first solution, Congress has threatened in the past to block CFIUS because it had approved a transaction that Congress deemed to pose national security concerns.[157] However, because it seems that what Congress fears most is executive inaction against China,[158] also seen in the case of TikTok,[159] it is unlikely that Congress

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152 *See supra* Sections II.A, II.C.

153 Matthew R. Byrne, *Protecting National Security and Promoting Foreign Investment: Maintaining the Exon-Florio Balance*, 67 OHIO ST. L.J. 849, 891–92 (2006).

154 Congress usually only exercises its oversight to affirm that the Committee has exercised enough scrutiny over transactions, not whether its scrutiny has been too much. One key example is the catalytic Dubai Ports World ("DP World") incident. During the DP World incident, Congress was upset at CFIUS's approval of a transaction transferring port operations at six U.S. ports to DP World, a United Arab Emirates state-owned company. *See* David E. Sanger, *Under Pressure, Dubai Company Drops Port Deal*, N.Y. TIMES (Mar. 10, 2006), https://www.nytimes.com/2006/03/10/politics/under-pressure-dubai-company-drops-port-deal.html [https://perma.cc/QL2D-MP26]. Congress believed that the transaction would allow U.S. ports to be vulnerable to terrorists; President George W. Bush and CFIUS believed such suspicions were racist. *See id.* Either way, DP World bowed out of the deal in the face of increasing pressure from Congress, and Congress drastically empowered CFIUS and increased its oversight of the Committee shortly after by passing FINSA. *See* 2020 CFIUS REPORT, *supra* note 23, at 5.

155 Congress threatened to block CFIUS by statute during the DP World incident. Sanger, *supra* note 154.

156 Congress increased agency reporting commitments in its legislative proposals after the DP World incident. 2020 CFIUS REPORT, *supra* note 23, at 12.

157 *See* Sanger, *supra* note 154.

158 *See id.* (describing Congress's willingness to jump in during the DP World incident when it deemed that CFIUS had not done enough to protect the country's national security by block-

would try to block CFIUS or the President if they deny a transaction approval instead. Further, Congress's block of an executive branch's action regarding national security raises serious separation of powers issues.[160] In this climate, it seems unlikely and also illegal for Congress to discharge its override powers to rein in the Committee and the President with regard to foreign investment.

As for the second solution, CFIUS's reporting responsibilities have been insufficient for keeping the Committee in check when it comes to over-scrutinizing investments. Reports contain the outcome of each review or investigation, as well as any mitigation agreements, the nature of the business activities or products, and plans to enforce compliance.[161] Reports do not contain any information about ongoing reviews or investigations.[162] As a result, reports are likely unhelpful because it is difficult for Congress to weigh in on discretionary issues until a determination has come to light. CFIUS has also been accused of lackluster reporting in the past,[163] making it even more difficult for Congress to exercise its oversight.

Tensions do exist between Congress and the FDI review process it has created for CFIUS and the President to implement, especially when CFIUS is not as proactive as Congress would prefer. But, because Congress has mainly been focused on strengthening CFIUS and the President's powers through its legislative mandates, and the accountability it is able to establish through reporting is minimal, Congress is largely powerless and disinclined to stop a Committee or presidential determination of a national security threat.

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ing the transaction); Chan, *supra* note 39 (explaining how FIRRMA sponsor Senator Cornyn (R-TX) majorly expanded through the legislation CFIUS's authority to empower it against the threat of Chinese investment).

159 Congress displayed this fear in the TikTok case when Senator Marco Rubio (R-FL) requested CFIUS review of TikTok, and Senators Chuck Schumer (D-NY) and Tom Cotton (R-AR) requested the Acting Director of National Intelligence to assess the potential cybersecurity threats posed by TikTok and other Chinese apps in October 2019. *See* Press Release, Senator Marco Rubio, Rubio Requests CFIUS Review of TikTok After Reports of Chinese Censorship (Oct. 9, 2019), https://www.rubio.senate.gov/public/index.cfm/2019/10/rubio-requests-cfius-review-of-tiktok-following-reports-of-chinese-censorship [https://perma.cc/7NGN-R6MY]; Whitney Kimball, *Senators Warn That TikTok May Pose National Security Threat*, GIZMODO (Oct. 24, 2019, 4:45 PM), https://gizmodo.com/senators-warn-that-tiktok-may-pose-national-security-th-1839333101 [https://perma.cc/42F9-Z9D7].

160 *See* LARSON & MARCHICK, *supra* note 41, at 28.

161 2020 CFIUS REPORT, *supra* note 23, at 33–34.

162 *Cf. id.*

163 *See* JACKSON, *supra* note 60, at 3.

C. Judicial Review

The judicial branch has a limited check on issues of national security as a constitutional matter,[164] deferring often to the executive branch on such issues.[165] Congress has cemented this concept through FINSA, mandating that presidential determinations after CFIUS review are not judicially reviewable.[166] As a result, attempts at judicial review of CFIUS and presidential determinations regarding FDI have largely been nonexistent.

Federal courts have only ruled on issues regarding CFIUS in a single case: *Ralls Corp. v. Committee on Foreign Investment in the U.S.* ("*Ralls*").[167] The court in *Ralls* ruled that President Obama's order prohibiting the transaction for national security reasons was unconstitutional,[168] as a foreign investor should be given due process protection to be notified of the official action, the unclassified evidence, and an opportunity to rebut the evidence.[169] The decision, however, did not impact the non-reviewability of CFIUS and presidential determinations of national security risk beyond permitting constitutional challenges.[170]

More recently, in the midst of the TikTok scandal, TikTok and ByteDance sued CFIUS, former Secretary of the Treasury and Chairperson of CFIUS Steven Mnuchin, former President Donald Trump, and former U.S. Attorney General William Barr.[171] In the suit, TikTok and ByteDance called for the Court of Appeals for the D.C. Circuit to reverse the CFIUS action and the President's presidential order forcing divestment due to constitutional and Administrative Procedure Act ("APA") violations.[172] It is uncertain, however, whether these claims are necessarily viable, as TikTok agreed to dis-

164 *See generally* Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1363, 1371 (2009).

165 *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 531 (2004); Kaufman v. Mukasey, 524 F.3d 1334, 1340 (D.C. Cir. 2008) (stating that "[agency] determinations regarding national security are matters that federal courts acknowledge are generally beyond their ken").

166 50 U.S.C. § 4565(e)(1).

167 Ralls Corp. v. Comm. on Foreign Inv. in the U.S. (*Ralls III*), 758 F.3d 296, 302 (D.C. Cir. 2014); *see also* Jonathan Wakely & Lindsay Windsor, *Ralls on Remand: U.S. Investment Policy and the Scope of CFIUS' Authority*, 48 INT'L L. 105, 106 (2014).

168 *Ralls III*, 758 F.3d at 325.

169 *Id.* at 319.

170 *Id.* at 311. The D.C. Circuit states that it thinks courts are barred from reviewing final actions by the President to suspend or prohibit any covered transaction under 50 U.S.C. app. § 2170(e), but that review of constitutional claims challenging the process by which determinations were made were permitted. *Id.*

171 *See* Petition for Review, *supra* note 7, at 1.

172 *Id.* at 34.

miss the claim[173] while the Biden Administration reviews the previous administration's actions against TikTok.[174]

The hurdle to changing judicial reviewability of CFIUS action is impossibly high. Some reforms have called for the creation of Article III courts capable of handling national security issues to review CFIUS actions or presidential orders[175] regarding FDI.[176] But because of the classified information that CFIUS handles, the statutory language preventing judicial review, and the danger of undermining the executive branch's constitutional authority, the judicial branch still currently defers to the executive branch on national security issues regarding FDI.[177]

CFIUS, like other agencies in the national security realm, is not subject to stringent legislative or judicial oversight. Therefore, when presidents step in to sway the Committee to block a transaction, there are essentially no ways to check CFIUS or for the Committee to retract a decision if needed. TikTok's forced divestment was only stalled because of the change in administrations. What would have happened to TikTok if President Trump had been re-elected?

The next Section proposes solutions for the Committee to maintain its objectivity and neutrality and extricate itself from the political agenda of a President who is suspicious of Chinese investments in the United States and interested only in a referral from the Committee to ban the transaction. Because the legislative and judicial accountability mechanisms are insufficient or unconstitutional to constrain national security decisions, the only option that remains is to re-evaluate CFIUS's structural design.

IV. RESTRUCTURING CFIUS

President Trump pushed executive boundaries like no President had ever done before, as demonstrated by the forced divestment of TikTok from ByteDance. In reviewing the transaction, he obliterated the modest intra-Committee checks set in place by forcing loyalist member agency heads to support and carry out his determinations on

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173 Will Knight, *TikTok a Year After Trump's Ban: No Change, But New Threats*, WIRED (July 26, 2021, 7:00 AM), https://www.wired.com/story/tiktok-year-trump-ban-no-change-new-threats/ [https://perma.cc/95XT-YZR6].

174 *See* Arbel & O'Brien, *supra* note 128.

175 *See* Isaac Lederman, *The Right Rights for the Right People? The Need for Judicial Protection of Foreign Investors*, 61 B.C. L. REV. 703, 744–45 (2020).

176 *See* Will Gent, *Tilting at Windmills: National Security, Foreign Investment, and Executive Authority in Light of* Ralls Corp. v. CFIUS, 94 OR. L. REV. 455, 459 (2016).

177 *See id.* at 482–83.

FDI before it even came time for him to act to suspend or prohibit a transaction. There was no divided government, and he went unchecked by public accountability, the legislative and judicial branches, and the intra-Committee check. TikTok's forced divestment and the Trump Administration's behavior during its term revealed the structural flaws of the Committee in constraining presidential overstepping and is a warning of what may occur again toward Chinese investments in the United States.

At this time, modest intra-Committee checks[178] alone are not enough to ensure a proper bureaucracy is functioning. Modern agencies are what Professor Katyal has described as a "stew of presidential loyalists and relatively powerless career officials"[179]—a statement that still resonates today. Further, executive prominence in the national security realm makes it difficult for executive accountability theories to apply, such as relying on the President to diffuse their power through Committee directives[180] or relying on the President and CFIUS to prioritize legislative expectations of separate powers between them.[181] Because of the state of devoted senior political officials in modern agencies and the President's indomitability in the national security realm, it is time to revisit the traditional way of insulating agencies from the President by installing for-cause protections for CFIUS.

This Essay proposes three alternative ways to restructure CFIUS and install for-cause protections for the Committee while preserving its interdisciplinary approach: (1) adding a new head of the Committee removable only for cause; (2) replacing the Committee members with officials from the original member agencies who are not the agency heads and are removable only for cause; and (3) re-creating CFIUS as an independent agency. Though for-cause protections were initially cited as subordinate to multimember structures as a means of

178 Professor Katyal advanced the idea that modest intra-Committee checks are insufficient through his theory on creating better bureaucracy through more bureaucratic overlap. *See* Katyal, *supra* note 71, at 2324–27.

179 *See id.* at 2322.

180 *See* Bijal Shah, *Deploying the Internal Separation of Powers Against Racial Tyranny*, 116 Nw. U. L. Rev. Online 244 (2021), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1318&context=NUlr_online [https://perma.cc/92TP-8WDV] (emphasizing empowerment of agency ability to check the President order to stave off their impulses toward racial tyranny).

181 *See* Bijal Shah, *Statute-Focused Presidential Administration*, 90 Geo. Wash. L. Rev. (2022) (forthcoming in this issue) (describing how agencies, which have recently been extremely responsive to the presidential policy agenda, must not neglect legislative directives).

creating agency accountability in CFIUS's design,[182] what CFIUS currently needs most is not legal constraint within the agency, but insulation from individual presidents that take advantage of the Committee's overwhelming powers. The next Section briefly discusses independent agency theories and their benefits before introducing the solutions, which involve a mixture of independent agency and multimember agency theories.

A. The Theory and Benefits of Independent Agencies

Independence in agencies has been crucial in our nation's legal history as a method to insulate agency decision-making from politics.[183] When a President cannot remove agency personnel for policy disagreements at will, they lack a key method to impose their political agenda.[184] Especially because the rate of turnover was so high at the senior political level during the Trump Administration,[185] for-cause protections limiting the President's reasons for removal would have been an effective way to ensure that the Committee could stand its ground against the President.

An important aspect of independent agencies is their ability to promote long-term interests of expert decision-making over the short-term interests of the presidential administration.[186] This is because their insulation allows them to easily diverge from presidential priorities.[187] Though the multimember approach was also an attempt at agency divergence from presidential priorities through its strength in numbers,[188] the issue remains that CFIUS's consensus-based approach was created with caution in mind. Due to the inclination towards caution, it only takes a single-member agency refusing to relent on its perception of a national security threat to impede the FDI process because it takes all of the agencies together to clear a transaction. Therefore, the President need only find one weak link to successfully assert a protectionist agenda and corrupt the Committee's processes.

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182 *See* Michaels, *supra* note 63, at 890.

183 *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 625 (1935) (recognizing independent agencies require insulation from politics because its operations "should not be open to the suspicion of partisan" bias).

184 Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 611 (2010).

185 Kathryn Dunn Tenpas, *Tracking Turnover in the Trump Administration*, BROOKINGS INST. (Jan. 2021), https://www.brookings.edu/research/tracking-turnover-in-the-trump-administration/ [https://perma.cc/PN72-NT5B].

186 *See* Bressman & Thompson, *supra* note 184, at 613.

187 *See id.*

188 *See* Michaels, *supra* note 63, at 866–67.

In order to guard against such behavior, the following Sections detail how for-cause protections in CFIUS could work to fortify its current multimember structure against presidential interference.

B. Replacing Treasury Secretary as the Chairperson with a Specially Designated Member Removable Only for Cause

The first of these configurations involves a recommendation to install a specially designated member as the Chairperson of CFIUS instead of the Secretary of Treasury. This new Chairperson would be someone nominated by the President, confirmed by Senate, and removable only for cause. Then, there would be someone on the Committee whose removal is insulated from the President and whose appointment is based on the dedicated purpose of leading the Committee. Under independent agency theory, such a choice would ensure that the President lacks a crucial way to impose their political agenda.[189] Future presidents looking to politicize the CFIUS process without going through the reasoned decision-making in the Committee would have to face off against the Committee Chairperson, who would have the freedom to make sound decisions independent of the President. The Committee would ideally still operate by full consensus of the member agencies but be led by an individual who is not installed at the member agencies and does not have a vote. Under the multimember theory, such a design would keep what can be retained of the system of checks and balances already established between the "economic" and "security" agencies.[190]

This solution would wrest the chairperson position from Treasury. Based on a 2018 Government Accountability Office report, the member agencies are satisfied with Treasury and the heavy role it plays in CFIUS.[191] However, the new Chairperson would not fully supplant Treasury because it would not have a vote in the Committee's consensus and would only serve in a coordinator role.

Further, as originally described by the multimember theory,[192] one could argue that the concentration of the Chairperson role in a single individual could make that person more vulnerable to direct pressure from the President. However, the original Committee struc-

189 *See* Bressman & Thompson, *supra* note 184.

190 *See* GRAHAM & MARCHICK, *supra* note 79, at 170.

191 *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-249, COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES: TREASURY SHOULD COORDINATE ASSESSMENTS OF RESOURCES NEEDED TO ADDRESS INCREASED WORKLOAD 22–23 tbl.3 (2018), https://www.gao.gov/assets/gao-18-249.pdf [https://perma.cc/9STZ-V5ZY].

192 *See* Michaels, *supra* note 63, at 866.

ture with Treasury as the chair of nine voting member agencies was arguably even more susceptible to presidential pressure due to their service at will.[193]

Finally, the addition of a chairperson removable only for cause could encourage jockeying of the position in its presidential nomination and congressional confirmation, and further politicization of CFIUS as a result. However, the long-term benefits of a chairperson who is insulated during the lifetime of that role far outweigh the initial pandering involved in securing the position.

The notable issue with this solution is the potential for the President to undermine the chairperson who is removable only for cause by influencing one of the at-will agency heads in their decision-making. The next two solutions address that issue by making everyone removable for cause, not just the chairperson.

C. Replacing the Committee Members with CFIUS-Designated Officials from Each Member Agency Instead of the Agency Heads

The second reconfiguration of CFIUS involves replacing the nine voting agency heads as Committee members with CFIUS-designated officials from the same agency. The CFIUS-designated officials that compose the Committee would be individuals nominated by the President, confirmed by Senate, and removable only for cause. This structure is distinguishable from the first proposal because there would not be an additional member to the Committee, and the Treasury representative would remain the Chairperson. Further, this structure would insulate every Committee member from the President, not just the Chairperson. Under independent agency theory, the Committee would be impenetrable by the President's political agenda.[194] This insulation revitalizes the internal checking process[195] of the multimember theory by ensuring each Committee member's decision is autonomous. It still retains the benefits of multimember theory by having each official stationed in their member agencies, obligating them to represent their institutional commitments.[196]

The drawback to this solution is the bureaucratic hassle of nominating and confirming nine different individuals stationed in each

193 *See supra* Section I.A (describing former Secretaries of State Pompeo and Treasury Mnuchin's intentions to force TikTok's divestment, affirmed by President Trump).

194 *See* Bressman & Thompson, *supra* note 184, at 611.

195 *See* Michaels, *supra* note 63, at 863.

196 *See id.*

member agency to be CFIUS point-people. Though it could be inefficient, the end result of an individuated Committee that successfully performs intra-Committee checks so it can make accurate assessments of national security threats is too important to discount.

The other hesitation is a common concern with independent agencies—whether an agency constitutionally can and should be detached from presidential plenary power, especially in the national security realm.[197] An insulated CFIUS should have no negative effect on the presidential obligation to "take Care that the Laws be faithfully executed."[198] President Reagan already delegated away the President's review and investigation powers to CFIUS, while keeping only the power to block transactions.[199] This was later codified by FINSA.[200] The insulation only makes the demarcations between the roles clear after the Trump Administration muddied the boundaries.

In fact, it would be difficult for the President to "take care" if the Committee is not sufficiently insulated. One of CFIUS's core functions is to present to the President the legal reasoning and evidence necessary to inform the presidential action of suspending or prohibiting transactions.[201] Without insulation from the President, as seen in the case of TikTok,[202] it could be impossible for CFIUS to refer transactions with reasoned deliberation and consistency if a President is inclined toward finding national security concerns with Chinese investments.

D. Restructuring the Committee as an Independent Federal Agency

This final proposal involves completely reforming CFIUS as an independent federal agency to conduct reviews, investigations, and recommendations of FDI transactions. This solution would consolidate the nine Committee members and the additional agency personnel assigned to CFIUS activities under one agency. The respective teams would still represent their area of agency expertise under the lead of individual Commissioners reflecting the original nine Committee members—each representing an Office of Treasury, Office of State, and so on. Each Commissioner would have a consensus vote. In

197 *See generally* Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1567 (2007).

198 U.S. CONST. art. II, § 3; Morrison v. Olson, 487 U.S. 654, 686 (1988).

199 *See* Exec. Order No. 12,661, *supra* note 64.

200 *See* 50 U.S.C. app. §§ 2170(b), (k).

201 *See* Johnsen, *supra* note 197 (describing how core functions of agencies that enable legal advice to the President are constitutional because it allows them to take care).

202 *See supra* Section I.A.

this way, the interdisciplinary nature of the multimember theory would still be preserved,[203] even though every member would be under only one agency. Further, the independent agency structure would solve the problem of presidential influence on the Committee because the structure would insulate every member, so no members would disrupt the interagency process because of presidential influence.[204]

Concerns that may arise from this new configuration include (1) whether the multimember structure would be rendered useless when funneled into a single agency that does not have various institutional commitments and (2) whether accountability for approving transactions would be affected as a result.[205] However, the intra-Committee checks that presently exist for when CFIUS approves a transaction would still exist within this proposed independent agency structure. First, the internal checking structure would be preserved through the nine Offices. Second, consensus voting among nine voting Commissioners would work both to slow down any undue eagerness to push a transaction toward approval and to keep Commissioners accountable to one another. Lastly, one can expect that the climate toward foreign investment within the independent agency would not be conducive to blind approval of transactions. Congress in particular would be more than enthusiastic to check CFIUS when it inappropriately approves a transaction, rather than when it denies a transaction and refers it to the President.[206] President Trump exposed the current lack of accountability mechanisms present when CFIUS denies a transaction—a status quo that seems to exist in no small part because of the broad powers and multimember structure of the Committee.[207] Conversely, checks for when CFIUS approves a transaction, as described in Section III.B,[208] would still be present if CFIUS were to be restructured as an independent agency.

Finally, national security review of investments is growing in the United States. The Committee has been strained in its resources across member agencies, delayed in its review and investigation time-

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203 *See* Michaels, *supra* note 63, at 873.

204 *See* Bressman & Thompson, *supra* note 184, at 611.

205 *See* Michaels, *supra* note 63, at 865.

206 *See supra* notes 154 (describing the DP World incident where congressional furor against CFIUS approval pressured transacting parties to divest), 159 (describing the suspicions against TikTok).

207 *See supra* Section III.A.

208 *See supra* Section III.B.

lines,[209] and limited in its budgets, with recently introduced filing fees up to $300,000 and a budget request for $39.6 million for 2022.[210] An outbound investment regime has also been proposed by Congress this year.[211] Functioning as an independent agency could finally give CFIUS the proper congressional recognition for the increased budget it would need to alleviate some of these problems. This reason alone supports this third configuration of CFIUS over the other two. There could not be a sooner time for a new CFIUS, reformed as an independent agency.

CONCLUSION

The Trump Administration's forced divestment of TikTok from ByteDance illuminated the flaws in CFIUS's structure that enable its processes to be easily usurped by the President. As CFIUS's scope of power becomes stronger and it is used more frequently than ever due to our political circumstances with China, CFIUS should maintain its broad jurisdiction over sensitive transactions but retain its separate powers from the President—as these powers were originally delegated by President Reagan and as statutorily determined in FINSA. Retaining the ultimate power to suspend or prohibit a transaction, the President plays an important function in extreme cases where a national security concern cannot be mitigated and negotiations with CFIUS have failed. However, CFIUS's functions should not be overly supplanted by the President's decision-making during those extreme circumstances—in order to best advise the President, the Committee's process should continue to include a detailed review, genuine mitigation requests, and a recommendation to the President to suspend or prohibit a transaction only if necessary. If anything, CFIUS's recommendations are an especially important check on the President because they can alter the menu of options the President can choose from when deciding to block a transaction.

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209 *See* Llewellyn Hinkes-Jones, *Foreign M&A Delayed More Often By U.S. Review*, BLOOMBERG L. (Jan. 29, 2018, 3:33 PM), https://news.bloomberglaw.com/securities-law/foreign-m-a-delayed-more-often-by-u-s-review-1 [https://perma.cc/4Y4K-7W2S] . All while reviewing a record number of covered transactions. *See Top 10 Takeaways from Treasury's CY 2021 CFIUS Annual Report*, *supra* note 54.

210 DEP'T OF THE TREASURY COMM. ON FOREIGN INV. IN THE U.S. ACTIVITIES, CONGRESSIONAL BUDGET JUSTIFICATION AND ANNUAL PERFORMANCE REPORT AND PLAN (FY 2022) 4–5, https://home.treasury.gov/system/files/266/07.-CFIUS-FY-2022-CJ.pdf [https://perma.cc/B94V-6VJU]; *CFIUS Filing Fees*, U.S. DEP'T OF TREASURY, https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-filing-fees [https://perma.cc/7K2L-6H93].

211 America COMPETES Act of 2022, H.R. 4521, 117th Cong. § 104001 (2022).

Now is the time to change CFIUS so that it can be an individual decision-making body. Though experts remain confident in the formalized nature of the Biden Administration's decision-making, the Committee is vulnerable as long as tensions with China remain high and while the President continues to have unfettered removal power over CFIUS member agency heads. The Committee's original multi-member design should incorporate for-cause removal protections in order to best achieve the intended goal of preserving our country's national security while promoting open investment.

Essay

Carrot & Stick: Reorganizing and Empowering the Election Assistance Commission

*Jessie Ojeda**

Abstract

The U.S. Election Assistance Commission ("EAC" or "Commission") is failing in its duties to shepherd and assist in the betterment of our federal elections. In the wake of the highly controversial 2016 and 2020 presidential elections and related claims of election interference, the EAC has received increased public scrutiny and demands for action. Prior and ongoing attempts to reform the EAC have gone nowhere, leaving the Commission mired in partisan gridlock at a time when its leadership is perhaps more needed than ever.

Originally formed in 2002 as a result of the 2000 presidential election scandals, the EAC was tasked with serving as a national clearinghouse and resource for federal election administration improvements. Since then, however, the EAC has consistently been underfunded, suffered from political gridlock, and lacked authority to enforce or make any substantive rules or policies. These problems are largely the result of a flawed administrative structure and restrictive statutory language, which have prevented the Commission from being able to effectuate necessary change.

This Essay proposes several revisions to the EAC's administrative and regulatory structure that could finally empower the EAC to act with necessary

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authority. Part I proposes three fundamental alterations to the EAC's enabling statute: (1) restructuring the EAC as modeled after the Consumer Product Safety Commission to add a Chair, amongst other administrative revisions, (2) providing for permanent authorizations for the EAC, and (3) endowing the EAC with enforcement and rulemaking authority, largely modeled on the Federal Election Commission. Part II then details a brief overview of critical areas of election and voting reform that could be addressed by a newly empowered EAC, including automatic voter registration, absentee and vote by mail ballots, early voting, and poll worker training and recruitment. Ultimately, it is the purpose of this Essay to envision a new framework for the EAC that would balance the often-conflicting goals of ballot access and election integrity while ensuring the Commission has the necessary power to overcome partisan gridlock and serve its intended purpose.

TABLE OF CONTENTS

INTRODUCTION

American faith in the election process is in crisis. Less than sixty percent of Americans polled in the immediate wake of the controversial 2020 presidential election said they trusted their election system.[1] This statistic becomes even more problematic when broken down along partisan lines. When polled in January 2021, less than a third of

[1] Nick Laughlin & Peyton Shelburne, *How Voters' Trust in Elections Shifted in Response to Biden's Victory*, MORNING CONSULT (Jan. 27, 2021), https://morningconsult.com/form/tracking-voter-trust-in-elections/ [https://perma.cc/A3ZX-ZWLW] (summarizing results of a poll conducted between January 22–25, 2021).

Republicans expressed trust in the system as opposed to eighty percent of Democrats.[2]

This is not the first time that Americans have experienced a crisis of faith in their elections—one could argue that it has even become a semi-regular occurrence.[3] Despite this, the federal government is often slow to act on election reform, with many viewing the issue as one better subject to state regulation.[4] One notable exception to this usual intransigence ensued from the controversial 2000 presidential election. Then candidates George W. Bush and Al Gore became embroiled in one of the closest election races in U.S. history, with the result ultimately coming down to a few hundred votes in Florida.[5] Issues with Florida's recount procedures led to the infamous case of *Bush v. Gore*,[6] which decided the election in Bush's favor.[7] The public outrage that followed was severe enough to warrant bipartisan Congressional action on election administration reform.[8] The result was the Help America Vote Act ("HAVA").[9]

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2 *Id.* (Forty-four percent of Independent voters indicated trust in the system).

3 *See* RJ Reinhart, *Faith in Elections in Relatively Short Supply in U.S.*, GALLUP (Feb. 13, 2020), https://news.gallup.com/poll/285608/faith-elections-relatively-short-supply.aspx [https://perma.cc/K7AF-NQWG]; *see also Public Trust in Government: 1958–2022*, PEW RSCH. CTR. (June 6, 2022), https://www.pewresearch.org/politics/2022/06/06/public-trust-in-government-1958-2022/ [https://perma.cc/X2M4-UF48].

4 Although the Constitution grants the states the power to determine the "Times, Places, and Manner" of elections, it importantly still reserves to Congress to "make or alter such Regulations." U.S. CONST. art. I, § 4. Although Congress has rarely invoked this power, it has done so in the National Voter Registration Act of 1993 and the Help America Vote Act of 2002. *See* Campbell Streator & Harold Ekeh, *As Federal Pro-Voter Reform Stalls, Advocates Should Prepare for State-Level Action*, ROLL CALL (June 18, 2021, 10:00 AM), https://www.rollcall.com/2021/06/18/as-federal-pro-voter-reform-stalls-advocates-should-prepare-for-state-level-action/ [https://perma.cc/GPK7-AAF4]; *see also* Suman Malempati, *The Elections Clause Obligates Congress to Enact a Federal Plan to Secure U.S. Elections Against Foreign Cyberattacks*, 70 EMORY L. J. 417 (2020) (challenging notion that Congress must defer to states to regulate federal elections and instead suggesting that Congress has a responsibility to exercise its power under the Elections Clause to take stronger federal action when it comes to ensuring election security).

5 *See On This Day, Bush v. Gore Settles 2000 Presidential Race*, NAT'L CONST. CTR. (Dec. 12, 2019), https://constitutioncenter.org/blog/on-this-day-bush-v-gore-anniversary [https://perma.cc/MJR4-R9WU].

6 531 U.S. 98 (2000).

7 *See On This Day, Bush v. Gore Settles 2000 Presidential Race*, *supra* note 5.

8 *See* Robert Pear, *The 2002 Campaign: Ballot Overhaul; Congress Passes Bill to Clean Up Election System*, N.Y. TIMES (Oct. 17, 2002), https://www.nytimes.com/2002/10/17/us/2002-campaign-ballot-overhaul-congress-passes-bill-clean-up-election-system.html?searchResultPosition=7 [https://perma.cc/PN82-C6ST].

9 Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (2002) (codified in scattered sections of 52 U.S.C.).

HAVA's purpose was to address problems in voting systems and technologies identified following the 2000 election and to establish minimum election administration standards for states and localities.[10] Election administration can be difficult to precisely define, but for purposes of this Essay, the Oxford Handbook definition is informative in explaining both the technical meaning and deeper significance of election administration:

> "[Election administration] is a complex, multistage process involving registration, structuring the voting process (which may include both in-person and remote voting), and then tabulating and auditing the results. Failures during this process can result in maladministration or claims of electoral mismanagement and fraud. Although such problems are typically associated with authoritarian states, experiences in established democracies illustrate that election administration failures can result in claims of voting fraud. Understanding the failure points in election administration is critical, given the role that elections play in the democratic process and the loss of public confidence in elections that can occur when elections are not implemented successfully. . . . Through effective election management, administrators can maintain public confidence in democracy."[11]

To carry out this task of election administration reform, HAVA established the Election Assistance Commission ("EAC" or "Commission"), an independent, bipartisan federal agency to serve as a national clearing house and funding source for state reforms and technology updates.[12] Specific duties of the EAC included creating voluntary voting system guidelines, operating a voting system certification program, and distributing federal grants for technology updates.[13]

Per HAVA, the EAC is meant to have four commissioners, subject to a political parity requirement, who are nominated by the President and confirmed by the Senate.[14] This has almost never been the case, though. A 2018 analysis by the Bipartisan Policy Center found

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10 *Id.*

11 Thad E. Hall, *Election Administration*, Oxford Handbooks Online (Aug. 2017), https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780190258658.001.0001/oxfordhb-9780190258658-e-9 [https://perma.cc/XJ8Y-9VEP].

12 *See Help America Vote Act*, U.S. Election Assistance Comm'n, https://www.eac.gov/about_the_eac/help_america_vote_act.aspx [https://perma.cc/PE69-R638].

13 *See id.*

14 Political parity refers to the requirement that no more than two members of the Commission may be affiliated with the same political party. *See* 52 U.S.C. § 20923(2).

that since the first four commissioners were confirmed on December 9, 2003, the EAC had enough commissioners for quorum (three) only sixty-eight percent of the time.[15] The EAC was fully staffed with four commissioners for just twenty-eight percent of the Commission's existence.[16]

Despite these staffing issues, in its early days the EAC was widely considered a successful enterprise, distributing billions of dollars to the states and publishing its first Voluntary Voting System Guideline by 2005.[17] However, by 2006 the EAC had distributed almost all of its original HAVA funds and its appropriations authorization was set to expire. This left it subject to Congressional whim and goodwill, the latter of which was in increasingly short supply.[18] It was at this point that the EAC appears to have lost traction and its sense of purpose.

Today, EAC efficacy is hamstrung by political gridlock, underfunding, understaffing, and a lack of any true enforcement or rulemaking authority.[19] Those who oppose the EAC have presented a variety of arguments, ranging from accusations of poor financial and managerial decision-making to cost-cutting purposes.[20] The predominant argument in recent years, however, has been that the EAC is ineffective and unnecessary, whether because of political gridlock or simply because EAC has run its course.[21]

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15 Matthew Weil, *Improve Elections, Fully Confirm Election Assistance Commission Before 2020*, BIPARTISAN POL'Y CTR. (Dec. 4, 2018), https://bipartisanpolicy.org/blog/improve-elections-fully-confirm-election-assistance-commission-before-2020/ [https://perma.cc/M2KL-GGFC].

16 *Id.*

17 *See* U.S. ELECTION ASSISTANCE COMM'N, FISCAL YEAR 2005 ANNUAL REPORT 1–2 (2006), https://www.eac.gov/sites/default/files/document_library/files/FY_2005_Annual_Report.pdf [https://perma.cc/3TB2-26RR].

18 *See* U.S. ELECTION ASSISTANCE COMM'N, ANNUAL REPORT FISCAL YEAR 2003, at 1–2 (2004), https://www.eac.gov/sites/default/files/document_library/files/FY_2003_Annual_Report.pdf [https://perma.cc/H2NQ-G625]; U.S. ELECTION ASSISTANCE COMM'N, FISCAL YEAR 2004 ANNUAL REPORT 3–5 (2005), https://www.eac.gov/sites/default/files/document_library/files/FY_2004_Annual_Report.pdf [https://perma.cc/82B5-3P2D]; U.S. ELECTION ASSISTANCE COMM'N, *supra* note 17 at 1, 15–18 https://www.eac.gov/sites/default/files/document_library/files/FY_2005_Annual_Report.pdf [https://perma.cc/R7NJ-MHNH].

19 Bill Theobald, *Gutted Federal Election Watchdog Struggles to Recover*, FULCRUM (Feb. 3, 2020), https://thefulcrum.us/voting/eac-gutted-over-decade [https://perma.cc/8SQL-TBTU].

20 *See* Pete Kasperowicz, *House Votes to End Election Commission*, HILL (Dec. 20, 2011, 2:55 PM), https://thehill.com/blogs/floor-action/house/94333-house-to-vote-on-election-commission/ [https://perma.cc/W3S3-SB4A]; Alex Knott, *Election Assistance Commission May Be Closing*, ROLL CALL (Apr. 13, 2011, 6:38 PM), https://www.rollcall.com/2011/04/13/election-assistance-commission-may-be-closing/ [https://perma.cc/C28F-DMHD].

21 *See* H.R. REP. NO. 114-361, at 1–2 (2015), available at https://www.congress.gov/114/crpt/hrpt361/CRPT-114hrpt361.pdf [https://perma.cc/FR6G-GTFR].

And these critics are not entirely wrong. The political parity requirement has severely crippled the Commission's ability to take charge, particularly as political polarization on the issue of voting reform has increased.[22] Inconsistent funding has hindered the Commission's ability to make long-term plans or to induce states to make necessary changes.[23] Perhaps most damningly, though, the Commission's lack of enforcement or rulemaking power has often rendered it a straw man.[24] Given these realities, it is not hard to understand the argument that the EAC as currently structured is, as one Congressional report put it, little more than "a bureaucracy in search of a mission."[25]

Given the current political crisis surrounding voting rights, it is more critical than ever to empower a centralized authority to set and govern the nation's best practices for voting administration and reform. The EAC, though by no means a perfect solution, is better situated than individual legislators to make reasoned judgements and to carry out and refine election policy in the long term. This Essay argues that this "bureaucracy in search of a mission"[26] is not without hope but can be revived through statutory revisions that would reorganize and re-empower the EAC to effectuate its intended purpose.

Part I of this Essay proposes three fundamental reforms to reinvigorate the EAC and endow it with the substantive powers necessary to carry out its mission: (1) adding a fifth commissioner and Chair position to break political gridlock, (2) permanently authorizing the EAC (i.e., the "carrot"), and (3) granting the EAC enforcement and rulemaking authority (i.e., the "stick"). Part II then briefly lays out a roadmap for specific areas of reform that the newly empowered EAC could address. Suggestions include automatic voter registration, absentee ballots and vote by mail, early voting, and poll worker training and recruitment.

The current hyper-partisan political climate in the U.S. unfortunately renders many of the proposals in this Essay unlikely to happen, at least at present. Prior election reforms, such as HAVA, were possible only because of their overwhelming bipartisan support.[27] By com-

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22 *See* Hannah Leibson, *A Vision for a Federal Election Agency*, REGUL. REV. (Feb. 4, 2021), https://www.theregreview.org/2021/02/04/leibson-vision-federal-election-agency/ [https://perma.cc/SH5L-ZP6F].

23 *See id.*

24 *See id.*

25 H.R. REP. NO. 114-361, *s*upra note 21, at 2.

26 *Id.*

27 The final vote in the House passed 362-63 with 196 Republicans in support and only

parison, recent congressional attempts at voting reform with the For the People Act[28] and the John Lewis Voting Rights Advancement Act[29] were highly politicized and thus failed.[30] Despite broad public support for these bills, President Trump and other members of the Republican Party crafted a successful party-line narrative that such reform was "unnecessary."[31] Thus, while the suggestions in this Essay are unlikely to move forward under the current Congress, they do represent important solutions to an ongoing and ever worsening problem. It is the author's hope that this Essay will serve as a blueprint for a future more cooperative Congress willing to act for the ultimate benefit of society and democracy itself.

I. ENVISIONING A NEW EAC

This Essay envisions an effective EAC as one which has (1) a five-member Commission structure with centralized tie-breaking power vested in a single Chair, (2) predictable and steady funding in the form of permanent authorizations, and (3) enforcement and rulemaking authority. Realistically, this type of reorganization will require Congress to pass a statutory amendment to HAVA.[32] Although

twenty Republicans opposed. HAVA passed unanimously in the Senate. *Final Vote Results for Roll Call 489*, HOUSE.GOV (Dec. 12, 2001, 3:39 PM), https://clerk.house.gov/evs/2001/roll489.xml [https://perma.cc/X9JR-7CQK].

28 For the People Act of 2021, H.R. 1, 117th Cong. (2021).

29 John Lewis Voting Rights Advancement Act, S. 4263, 116th Cong. (2020).

30 *See* Nate Cohn, *A Bill Destined to Fail May Now Spawn More Plausible Options*, N.Y. TIMES (July 12, 2021), https://www.nytimes.com/2021/06/23/us/politics/voting-rights-bill.html [https://perma.cc/7QUK-BH6N]; Erin B. Logan, *John Lewis Voting Rights Bill Fails in U.S. Senate amid Rise of GOP-Led State Restrictions*, L.A. TIMES (Nov. 3, 2021, 3:11 PM), https://www.latimes.com/politics/story/2021-11-03/john-lewis-voting-rights-bill-fails-in-senate-amid-cascade-of-gop-led-state-restrictions [https://perma.cc/6F3H-C2ZV].

31 Polling data suggested around eighty-nine percent of Democrats and fifty-six percent of Republicans supported the For the People Act. Alex Samuels, *Why Republicans Won't Support Sweeping Voting Rights Legislation Now . . . or Anytime Soon*, FIVETHIRTYEIGHT (June 22, 2021, 4:54 PM), https://fivethirtyeight.com/features/why-republicans-wont-support-sweeping-voting-rights-legislation-now-or-anytime-soon/ [https://perma.cc/A6KV-DW8P].

32 The inherent implication of this Essay is that current political realities and tensions between political parties have rendered the members of the EAC and to wit the government at large, not only unable but *unwilling* to work together. Furthermore, the implication is that existing statutory structures for commissions such as the EAC are largely premised on an assumption that parties want to achieve consensus. Recent examples have proven otherwise and commissions like the EAC increasingly find themselves populated with members who hold not just different views, but often diametrically opposed ones, leaving them with no incentive to work together and every reason to obstruct and obfuscate. The goal of the reforms proposed in this Essay are to draft revised statutory language that takes into account these new realities and to hopefully create an EAC that is able to function while still remaining accountable and equitable towards differing political views.

bipartisan support for such action is presently unlikely, if framed properly these changes have the potential to invoke the same bipartisan spirit—grounded in a desire to preserve democracy itself—that helped enact HAVA.[33]

As a general framing tactic, the changes proposed herein should be offered as ones necessary to ensure both the accessibility *and* integrity of the ballot. Historically, Republican sentiment has supported voting changes that address integrity and security, whereas Democrat sentiment has sided with accessibility issues.[34] By aligning these aspects rather than treating them as mutually exclusive, there is a greater chance of bipartisan support.

A. Commission Structure

The political parity requirement, although well-intentioned, has in practice rendered the EAC virtually useless.[35] Per HAVA, the EAC is to be headed by four commissioners.[36] Yet the EAC has had four commissioners in only nine years out of its nearly two decades of existence.[37] In fact, there was a three-year period between 2011 and 2014 during which no commissioners were appointed.[38] This was largely the result of purposeful congressional intransigence, with the Republican majority in both chambers refusing to hear or confirm either of Obama's nominees—both of whom were Democrats.[39] Moreover, even when the Commission is fully staffed, it suffers from partisan gridlock, with the two-two political parity requirement often preventing any definitive decision making.[40]

Debate over restructuring the EAC often comes down to a trade-off in independence versus efficiency.[41] For many, doing away with the

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33 Pear, *supra* note 8.

34 *See* Philip Ewing, *Voting and Elections Divide Republicans and Democrats Like Little Else. Here's Why*, NPR (June 12, 2020, 5:03 AM), https://www.npr.org/2020/06/12/873878423/voting-and-elections-divide-republicans-and-democrats-like-little-else-heres-why [https://perma.cc/4DWV-9HTC].

35 *See*, *e.g.*, Jessica Huseman, *How Voter-Fraud Hysteria and Partisan Bickering Ate American Election Oversight*, ProPublica (July 22, 2020, 5:00 AM), https://www.propublica.org/article/how-voter-fraud-hysteria-and-partisan-bickering-ate-american-election-oversight [https://perma.cc/U9WF-A5LQ].

36 52 U.S.C. § 20923(a)(1).

37 *See* Elizabeth Hudler & Rob Richie, *Not Helping America Vote: The Plight of the Un-Filled Election Assistance Commission*, FairVote (Feb. 26, 2013), https://archive3.fairvote.org/research-and-analysis/blog/eac/ [https://perma.cc/Y58J-Y4QV].

38 *See id.*

39 *Id.*

40 Huseman, *supra* note 35.

41 *See* Karen L. Shanton, Cong. Rsch. Serv., R45770, The U.S. Election Assistance

political parity requirement is tantamount to sacrilege as it would leave the agency more vulnerable to political machinations by the controlling party in Congress and the White House.[42] Agency independence is thought to help ensure stable and unbiased agency management that will remain consistent despite administrative changeover.[43]

However, an expectation of non-partisanship in the EAC is unrealistic. The EAC has been and likely always will be a political football given its nature and duties. Rather than ignore this reality, this Essay openly acknowledges the problem and strives to establish the ever-elusive balance between independence and functionality.

In working towards this balance, one can only hope that Congress will keep in mind the ultimate goal of the EAC: the preservation and protection of our democracy. Asking legislators to set aside partisan differences is a difficult task in any arena. But when democracy itself is at stake, it is both a necessary and vital task. Luckily, this Essay does not ask Congress to reinvent the wheel. Instead, it suggests looking toward a long-functioning, pre-existing bipartisan model that could serve as a basis for reforming the EAC: the Consumer Product Safety Commission ("CPSC").[44]

Unlike the EAC, the CPSC has largely avoided political gridlock despite having a similar political parity requirement.[45] CPSC has done so by utilizing an all-important tiebreaker—a Chairperson.[46] The enabling statute for the CPSC, 15 U.S.C. § 2053, provides that the com-

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COMMISSION: OVERVIEW AND SELECTED ISSUES FOR CONGRESS 21–25 (2019), https://sgp.fas.org/crs/misc/R45770.pdf [https://perma.cc/QM8B-TSST].

42 STAFF OF S. COMM. ON GOV'T OPERATIONS, 95TH CONG., STUDY ON FEDERAL REGULATION: THE REGULATORY APPOINTMENTS PROCESS 31 (Comm. Print 1977) (referring to the bipartisan membership requirement as "an important restraint on the President"); Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 103 (2000) (opining that partisan membership requirements in independent regulatory commissions may reduce an agency's tendency toward political polarization).

43 Michael Wolfe, *The Advantages of Independent Executive Agencies*, CHRON, https://smallbusiness.chron.com/advantages-independent-executive-agencies-22575.html [https://perma.cc/D2PS-G6HX].

44 "The Consumer Product Safety Commission (CPSC) protects the public from unreasonable risks of serious injury or death from thousands of types of consumer products under its jurisdiction, including products that pose a fire, electrical, chemical, or mechanical hazard or can injure children." *Consumer Product Safety Commission*, USA.GOV, https://www.usa.gov/federal-agencies/consumer-product-safety-commission [https://perma.cc/544L-3B7W].

45 *See infra* Table 1; 15 U.S.C. § 2053(c).

46 *See* 15 U.S.C. § 2053; *see also* Erin Bosman & Julie Park, *New Nomination Could Mean Partisan Tiebreaker for CPSC*, JDSUPRA (June 8, 2018), https://www.jdsupra.com/legalnews/new-nomination-could-mean-partisan-91946/ [https://perma.cc/B6LA-4FJ5].

mission shall consist of "five Commissioners who shall be appointed by the President, by and with the advice and consent of the Senate."[47] This section also provides that the President shall appoint a Chairman from among the members of the Commission, by and with the advice of the Senate.[48] The CPSC Chair has the power to break any potential partisan gridlock from the four other commissioners. Based on recent recorded votes by the CPSC, though, it appears the tiebreaking power is infrequently utilized, and most votes pass with unanimous or crossover support.[49] The CPSC model, as highlighted in further detail in Appendix Table 1, illustrates that crossover and even unanimous voting can be achieved amongst a multipartisan commission, even without a strict one-to-one political parity requirement.[50] It seems likely, therefore, that the CPSC model could be applied to the EAC without fundamentally compromising the Commission's functionality or integrity while simultaneously preserving a necessary degree of partisan balance.

The CPSC structure also importantly avoids the *Seila Law* problem. In 2020 the Supreme Court held in *Seila Law LLC v. Consumer Financial Protection Bureau*[51] that the Consumer Financial Protection Bureau's ("CFPB") removal provision providing that the CFPB Director could only be removed for inefficiency, neglect, or malfeasance violated the separation of powers principle.[52] Importantly, *Seila Law* was not broadly applicable to all agency structures, but rather was limited to independent agencies headed by a single director who exercises substantial executive power.[53] Thus, *Seila Law's* invalidation of the CFPB's removal provision did not extend to the CPSC or other similarly situated multi-member commissions. Under 15 U.S.C. § 2053, CPSC's commissioners are removable by the President only for "neglect of duty or malfeasance in office."[54] A 2001 Department of Justice ("DOJ") memorandum—written at the request of then-President Bush—determined that the CPSC Chair, unlike the regular com-

47 15 U.S.C. § 2053(a).

48 *Id.*

49 Of twenty-eight randomly selected petition, accreditation, administrative, and other various commission votes between 2018–2021, the CPSC voted unanimously on twelve votes and received crossover support on nine others. Of those twenty-eight total votes, then, only seven were voted along strict partisan lines. See *infra* Table 1 for further detail.

50 *See infra* Table 1.

51 140 S. Ct. 2183 (2020).

52 *Id.* at 2191–92.

53 *Id.* at 2191.

54 15 U.S.C. § 2053(a).

missioners, must be removable at will using similar reasoning to that in *Seila Law*.[55]

In adopting the CPSC model, the EAC would retain independence via the political parity requirement while simultaneously gaining a more effective leadership structure. A substantial restructuring of this sort would require amending Sections 201 and 203 of HAVA, codified at 52 U.S.C. §§ 20921 and 20923, respectively. Because the existing statutory language for the CPSC[56] can serve as a model and has proven to be a workable structure, it is also less likely that Congress would find this too radical a change to enact.

In addition to adding a fifth commissioner and Chair position, other proposed changes modeled on the CPSC structure would include the following:

(1) Requiring nominees to have at least ten years of experience working in local or state election administration.
(2) Creating a staggered seven-year term for all commissioners. This would require current commissioners to either resign or serve out their term, with the President then assigning new commissioners to staggered terms. Upon completion of these original shortened terms, subsequent commissioners would serve staggered seven-year terms. This structure is largely based on the CPSC's structure outlined in 15 U.S.C. § 2053(b)(1).
(3) To make up for staffing shortages, adding a section empowering the Chair to appoint specific officers with the approval of the Commission.[57] Based on the enforcement and rulemaking authority covered in Section I.C of this Essay, the EAC would also be well advised to create three new associate general counsel positions for: (1) enforcement, (2) litigation, and (3) policy and rulemaking.
(4) Adding language to allow the EAC to establish regional and state offices. This would help the EAC to better understand state and local administration problems. Proposed language is largely modeled on 15 U.S.C. § 633, establishing the Small Business Administration.
(5) Striking 52 U.S.C. § 20928, which provides that "[a]ny action which the Commission is authorized to carry out under this chapter may be carried out only with the ap-

55 Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., Dep't. of Just., to Counsel to the President (July 31, 2001), https://www.justice.gov/sites/default/files/olc/opinions/2001/07/31/op-olc-v025-p0171_0.pdf [https://perma.cc/27VG-KHCZ].

56 15 U.S.C. § 2053.

57 See *infra* Image 2 for the EAC's current organizational structure chart.

proval of at least three of its members."[58] Replacement language would be added under 52 U.S.C. § 20923 providing instead for a proportional quorum, thus allowing the Commission to function even where there are appointment gaps and disincentivizing Congressional delay.

(6) Requiring Congress to fill vacancies within 120 days, thus precluding delayed-appointment tactics.

Proposed draft language is provided below with italicized portions indicating new text.[59] Formal amendatory legislative language in bill form is included in the Appendix.[60]

52 U.S.C. § 20921. Establishment

There is hereby established as an independent entity the Election Assistance Commission (hereafter in this subchapter referred to as the "Commission"), consisting of the members appointed under this subpart. Additionally, there is established the Election Assistance Commission Standards Board (including the Executive Board of such Board) and the Election Assistance Commission Board of Advisors under subpart 2 of this part (hereafter in this subpart referred to as the "Standards Board" and the "Board of Advisors", respectively) and the Technical Guidelines Development Committee under subpart 3 of this part. *The principal office of the Commission shall be located in the District of Columbia. The Commission may establish such branch and regional offices in other places in the United States as may be determined by the Chair of the Commission. As used in this chapter, the term "United States" includes the several States, the Territories and possessions of the United States, the Commonwealth of Puerto Rico, the Trust Territory of the Pacific Islands, and the District of Columbia.*

52 U.S.C. § 20923. Membership and appointment

(a) Membership

(1) In general

The Commission shall ~~have four members appointed by the President, by and with the advice and consent of the Senate~~ *consist of five Commissioners who shall be appointed by the President, by and with the advice and consent of the Senate. In*

58 52 U.S.C. § 20928.

59 Jessica Ojeda, *Proposed Bill*, GEO. WASH. L. REV., (Sept. 19, 2022, 4:37 PM) https://www.gwlr.org/wp-content/uploads/2022/09/Jessica-Ojeda-Proposed-Bill.pdf [https://perma.cc/48J7-RGDM].

60 *See id.*

making such appointments, the President shall consider individuals who, by reason of their background and expertise in areas related to state, local, and federal election law and administration, are qualified to serve as members of the Commission. The Chair shall be appointed by the President, by and with the advice and consent of the Senate, from among the members of the Commission. An individual may be appointed as a member of the Commission and as Chair at the same time. Any member of the Commission may be removed by the President for neglect of duty or malfeasance in office but for no other cause. The President may remove the Chair alone at will.[61]

(2) Recommendations

[Unchanged.]

(3) Qualifications

Each member of the Commission shall have experience with or expertise in election administration or the study of elections *and will have worked in local or state election administration in some capacity for at least ten years.*

(4)Date of appointment

[unchanged]

(b) Term of service*; Vacancies*

~~**(1) In general**~~

(1) Except as provided in paragraphs (2) and (3), ~~members shall serve for a term of seven years and may be reappointed for not more than one additional term.~~ *the Commissioners first appointed under this revised section shall be appointed for terms ending three, four, five, six, and seven years, respectively, after [anticipated date of confirmations], the term of each to be designated by the President at the time of nomination; and each of their successors shall be appointed for a term of seven years from the date of the expiration of the term for which their predecessor was appointed.*

(2) Any Commissioner appointed to fill a vacancy occurring prior to the expiration of the term for which their predecessor was appointed shall be appointed only for the remainder of such term. A Commissioner may continue to serve after the expiration of this term until

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61 *See* Yoo, *supra* note 55 and accompanying text (concluding that the CPSC Chair must be removable at will in order to comply with the President's duties under the Take Care Clause, U.S. Const. art. II, § 3, whereas "inferior" officers such as the regular commissioners can be subject to for-cause removal provisions).

their successor has taken office, except that they may not so continue to serve more than one year after the date on which their term would otherwise expire under this subsection.

(3) A vacancy on the Commission shall not affect its powers and shall be filled in the manner in which the original appointment was made. The appointment of the replacement member shall be made not later than 120 days after the date on which the vacancy occurs.

Striking in their entirety paragraphs (2) Terms of Initial Appointees and (3) Vacancies. Striking subsections (c) Chair and Vice Chair and (d) Compensation, and replacing with the following:

(c) ***Restrictions on Commissioners' outside activities***

Not more than three of the Commissioners shall be affiliated with the same political party. No member appointed to the Commission under subsection (a) of this section may engage in any other business, vocation, or employment while serving as a member of the Commission and shall terminate or liquidate such business, vocation, or employment before sitting as a member of the Commission.

(d) ***Quorum; seal; Vice Chair***

No vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission, but three members of the Commission shall constitute a quorum for the transaction of business, except that if there are only three members serving on the Commission because of vacancies in the Commission, two members of the Commission shall constitute a quorum for the transaction of business, and if there are only two members serving on the Commission because of vacancies in the Commission, two members shall constitute a quorum for the six month period beginning on the date of the vacancy which caused the number of Commission members to decline to two. The Commission shall have an official seal of which judicial notice shall be taken. The Commission shall annually elect a Vice Chair to act in the absence or disability of the Chair or in case of a vacancy in the office of the Chair.

(e) Compensation

~~(1) In general.~~ Each member of the Commission shall be compensated at the annual rate of basic pay prescribed for level IV of the Executive Schedule under section 5315 of title 5, United States Code.

(2) ~~**Other activities.** No member appointed to the Commission under subsection (a) of this section may engage in any other business, vocation, or employment while serving as a member of the Commission and shall terminate or liquidate such business, vocation, or employment before sitting as a member of the Commission.~~

(f) ***Functions of Chair; request for appropriations***

(1) The Chair of the Commission shall be the principal executive officer of the Commission, and shall exercise all of the executive and administrative functions of the Commission, including functions of the Commission with respect to the appointment and supervision of personnel employed under the Commission (other than personnel employed regularly and full time in the immediate offices of commissioners other than the Chair) as outlined in subsection (g)(1); the distribution of business among personnel appointed and supervised by the Chair and among administrative units of the Commission; and the use and expenditure of funds.

(2) In carrying out any of their functions under the provisions of this subsection the Chair shall be governed by general policies of the Commission and by such regulatory decisions, findings, and determinations as the Commission may by law be authorized to make.

(g) Executive Director; officers and employees

(1) ***Appointments.*** *The Chair, subject to the approval of the Commission, shall appoint as officers of the Commission an Executive Director, a General Counsel, a Chief Operating Officer, a Chief Financial Officer, a Staff Director, a Communications and Clearinghouse Director, a Voting Systems Certifications Director, an Election Administration Research and Programs Director, and a Grants Administrator. Any other individual appointed to a position designated as an Associate Executive Director shall be appointed by the Chair, subject to the approval of the Commission.*

(2) ***Term of Appointments.***

(A) No individual may be appointed to such a position on an acting basis for a period longer than 90 days unless such appointment is approved by the Commission.

(B) The Chair, with the approval of the Commission, may remove any individual serving in a position appointed under paragraph (1).

(3) Paragraph (1) shall not be construed to prohibit appropriate reorganizations or changes in classification.
(4) The Chair, subject to subsection (f)(2), may employ such other officers and employees (including attorneys) as are necessary in the execution of the Commission's functions.
(5) The appointment of any officer (other than a Commissioner) or employee of the Commission shall not be subject, directly or indirectly, to review or approval by any officer or entity within the Executive Office of the President.

~~52 U.S. Code § 20928. Requiring majority approval for actions~~
Striking in its entirety and replacing with 52 U.S.C. § 20923(d) Quorum; seal; and Vice Chair.

B. Permanent Authorization

HAVA only expressly authorized and appropriated funds to the EAC for a limited three-year period between fiscal year ("FY") 2003 and FY 2005, meaning the program's operations are currently funded on an annual basis.[62] The appropriation process requires the EAC to annually justify its requested budget and leaves the Commission in the tenuous position of never knowing what funding it will receive, if any.[63] This situation has been made even more perilous in recent years by an increasingly polarized Congress unwilling to act even on broadly popular federal election reform and a surge of state efforts aimed at curbing any federal intervention in election administration.[64]

Although Congress continued to appropriate perfunctory sums to the EAC after the initial express authorization lapsed in FY 2006, funding stagnated and then declined for a ten-year period between 2009 and 2019.[65] Within those ten years, the EAC experienced a

62 52 U.S.C. § 20930.

63 *See Budget and Finance*, U.S. ELECTION ASSISTANCE COMM'N, https://www.eac.gov/about-eac/budget-and-finance [https://perma.cc/C58B-BBM7] (compiling annual EAC Congressional Budget Justifications from FY 2009 through present).

64 *See* Memorandum from States United Democracy Ctr., Protect Democracy & L. Forward to Interested Parties (June 10, 2021), https://statesuniteddemocracy.org/wp-content/uploads/2021/06/Democracy-Crisis-Part-II_June-10_Final_v7.pdf [https://perma.cc/A5HT-56EW]; *Voting Laws Roundup: October 2021*, BRENNAN CTR. FOR JUST. (Oct. 4, 2021), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2021 [https://perma.cc/YM66-V5AB]; Richard Cowan & Moira Warburton, *U.S. Senate Democrats Fail in Bid to Pass Voting Rights Bill*, REUTERS (Jan. 20, 2022, 12:44 PM), https://www.reuters.com/world/us/voting-rights-brawl-takes-center-stage-us-senate-2022-01-19/ [https://perma.cc/R3W5-SRP9].

65 Matthew Weil, *Now Is the Time to Fully Fund Election Assistance Commission*, BIPARTISAN POL'Y CTR. (Oct. 21, 2019), https://bipartisanpolicy.org/blog/now-is-the-time-to-fully-fund-election-assistance-commission/ [https://perma.cc/SZP6-ZR89]; U.S. ELECTION ASSISTANCE

nearly fifty percent decline in annual appropriations, dropping from a high of $17.9 million in 2009 to a historic low of $9.2 million in 2019.[66]

In recent years, claims of election interference in both the 2016 and 2020 elections, as well as emergency funding from the Coronavirus Aid, Relief, and Economic Security ("CARES") Act[67] to address voting changes induced by the COVID-19 pandemic, resulted in small boosts to EAC funding.[68] Funding has still not returned to pre-2009 levels, however, and civil rights organizations routinely have to lobby Congress to fully fund the agency.[69] Likewise, although President Biden's most recent budget proposal would allocate almost twenty-three million dollars to the EAC, there is no guarantee this amount will be able to pass through the current Congress. Without a permanent appropriation, future funding remains uncertain and contingent upon congressional good will, which increasingly appears in short supply when it comes to election reform. In fact, several bills have been introduced in the two decades since HAVA's enactment that would permanently terminate the EAC.[70]

Part of the difficulty in funding the EAC is the difficulty in calculating the true cost of election administration. Few studies exist on this issue, but reported state expenditures on staffing, office spaces, administrative costs, and other election administration expenses are often in the six digits and can vary enormously by locality and year.[71]

COMM'N, REPORT TO CONGRESS ON STATE GOVERNMENTS' EXPENDITURES OF HELP AMERICA VOTE ACT FUNDS (2007), https://www.eac.gov/sites/default/files/eac_assets/1/6/EAC%20Report%20to%20Congress%20on%20State%20Expenditures%20of%20HAVA%20Funds%202003-2006.pdf [https://perma.cc/DUK3-LTG8].

66 Weil, *supra* note 65.

67 15 U.S.C. § 9001–9111.

68 *See* U.S. Gov't Accountability Off., GAO-22-104313, Election Assistance Commission: Assessment of Lessons Learned Could Improve Grants Administration 1 (2021), available at https://www.gao.gov/assets/gao-22-104313.pdf [https://perma.cc/VU6A-MBHC]; *Election Security Funds*, U.S. ELECTION ASSISTANCE COMM'N, https://www.eac.gov/payments-and-grants/election-security-funds [https://perma.cc/UX2A-YKXH].

69 *See*, *e.g.*, Letter from Wade Henderson, President & CEO, & Nancy Zirkin, Exec. Vice President, Leadership Conf. on Civ. & Hum. Rts, to Hon. John Boozman, Chair, & Hon. Christopher Coons, Ranking Member, Subcomm. on Fin. Servs. & Gen. Gov't (July 21, 2015), http://civilrightsdocs.info/pdf/policy/letters/2015/2015-07-21-EAC-Senate-Letter.pdf [https://perma.cc/B7HF-SAS7]; Weil, *supra* note 65; Letter from Am. C.L. Union et al. to Hon. Richard Shelby, Chairman, S. Comm. on Appropriations, et al. (Dec. 10, 2020), https://www.lwv.org/league-petitions-senate-election-assistance-appropriations [https://perma.cc/BDG4-RQJG].

70 *See*, *e.g.*, H.R. 672, 112th Cong. (2011); H.R. 195, 114th Cong. (2015).

71 ZACHARY MOHR, MARTHA KROPF, JOELLEN POPE, MARY JO SHEPHERD & MADISON ESTERLE, ELECTION ADMINISTRATION SPENDING IN LOCAL ELECTION JURISDICTIONS: RESULTS FROM A NATIONWIDE DATA COLLECTION PROJECT 21 (2018), https://esra.wisc.edu/wp-content/uploads/sites/1556/2020/11/mohr.pdf [https://perma.cc/U59X-QB27].

One recent 2018 study by the University of Wisconsin-Madison calculated the average cost of election administration at just over eight dollars per voter.[72] When multiplied by the current voting age population, this would suggest a necessary budget of more than two billion dollars ($2,066,618,496) per election.[73] It is extremely unlikely for Congress to appropriate such a large sum to the EAC, and states are generally expected to assume at least part of the financial responsibility of election administration, but these numbers indicate an obvious need for increased federal funding of election administration if we are to ensure the safety and efficiency of our voting systems.

The current underfunding and uncertainty inherent in annually appropriating the EAC means that it is often unable to plan properly for the future, nor can it rely on guaranteed funding to induce states to make necessary changes. Years of budget cuts have also left the EAC understaffed and under-resourced, meaning that it is both unable to effectively carry out already developed plans and unable to conduct new research on existing and emerging areas of concern.[74] Ongoing election issues over the last two decades have highlighted uneven and confused application of widely disparate election administration laws and the need for a more uniform process.[75] The current annual appropriations process, however, constrains the EAC's ability to address these issues.

To induce necessary changes in election administration, punishment alone is insufficient; the EAC must be able to also *incentivize* states to change. This type of incentive is generally provided through direct funding—what this Essay refers to as the "carrot." Entrusting the EAC with permanent authorizations is one way to acquire necessary funding for this effort.

In addition to providing discretionary funds for state re-distribution, permanent authorization would also ensure that the EAC can maintain basic operating costs and expand its staff to keep up with its new rulemaking and enforcement duties. Part II details some of the

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72 *Id.* at 1.

73 *See* Estimates of the Voting Age Population for 2021, 87 FED. REG. 18,354 (Mar. 30, 2022).

74 Courtney Bublé, *Distrust, Staffing and Funding Shortages Imperil Election Security*, GOV'T EXEC. (Sept. 5, 2019), https://www.govexec.com/management/2019/09/distrust-staffing-and-funding-shortages-imperil-election-security/159647/ [https://perma.cc/EX3V-U7S8]; Theobald, *supra* note 19; *see also infra* Table 2.

75 *Election Administration at State and Local Levels*, NAT'L CONF. STATE LEGISLATURES (Feb. 3, 2020), https://www.ncsl.org/research/elections-and-campaigns/election-administration-at-state-and-local-levels.aspx [https://perma.cc/W6DG-FDAJ].

specific ways in which the EAC could use this funding capacity as a "carrot" to induce the states to make recommended changes and help bring about more uniform election administration policies.

This Essay suggests a slightly higher but still politically feasible permanent annual appropriation of twenty million dollars. This number accounts for both inflation and increased costs associated with new enforcement and rulemaking powers discussed *supra* at Section I.C. This authorization level would also be automatically adjusted for future inflation and would be revisable to provide additional funds as necessary. The following proposed draft language would amend HAVA section 257, codified at 52 U.S.C. § 21007. This language is modeled on similar provisions in the Social Security Act,[76] H.R. 4296, 103rd Cong. (1994),[77] 26 U.S.C. § 179D,[78] and 26 U.S.C. § 1.[79]

This authorization level would also be subject to a sunset provision requiring Congress to reconsider the appropriate funding level after ten years. Although sunset provisions are common in Congress, most do not last longer than two or three years and are utilized as short-term compromises.[80] A ten-year term, however, would span over several congressional cycles and thus could be considered excessively long and undesirable by members of Congress, many of whom would rather do away with EAC funding entirely.

Although they are rare, there is important precedent for longer sunset provisions in pieces of legislation that require multi-year analysis and planning. They are also common in the voting rights context, notably the 2006 amendments to the Voting Rights Act, which provided for a twenty-five-year extension of the coverage formula.[81] The

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76 42 U.S.C. § 1381 ("[T]here are authorized to be appropriated sums sufficient to carry out this subchapter.").

77 Section 6 serves as a model for the sunset provision.

78 Subsection (g) serves as a model for inflation adjustment.

79 Subsection (f)(3) serves as a reference for cost-of-living adjustment language.

80 Chris Mooney, *A Short History of Sunsets*, LEGALAFFAIRS (Feb. 2004), https://www.legalaffairs.org/issues/January-February-2004/story_mooney_janfeb04.msp [https://perma.cc/6ZW9-6V4E].

81 *See Voting Rights Act: What Expires and What Does Not*, ACLU (Mar. 4, 2005), https://www.aclu.org/press-releases/voting-rights-act-what-expires-and-what-does-not [https://perma.cc/Y5NR-DQ5W]; Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L No. 109-246, 120 Stat. 577 (2006). The "coverage formula" refers to a procedure laid out in Section 4(b) of the Voting Rights Act used to determine which jurisdictions would be subject to special provisions of the act, primarily the preclearance requirement. Application of the coverage formula was generally limited to states that had engaged in the most egregious discriminatory voting practices. *See, e.g.*, *Section 4 of the Voting Rights Act*, U.S. DEP'T JUST. (May 5, 2020), https://www.justice.gov/crt/section-4-voting-rights-act [https://perma.cc/ZTT8-VD7Y].

ten-year provision thus seeks to strike a balance between political palatability and endowing the EAC with essential funding for long-term planning, research, and development.

SEC. 257. AUTHORIZATION OF APPROPRIATIONS.

(a) IN GENERAL. ~~In addition to amounts transferred under section 104(c), there are authorized to be appropriated for requirements payments under this part the following amounts:~~

~~(1) For fiscal year 2003, $1,400,000,000.~~

~~(2) For fiscal year 2004, $1,000,000,000.~~

~~(3) For fiscal year 2005, $600,000,000.~~

There are authorized to be appropriated such sums as may be necessary to carry out this section:

(1) $20,000,000.00 for fiscal year 20(xx); and

(2) Such sums as may be necessary for each succeeding fiscal year.

(b) INFLATION ADJUSTMENT AND ROUNDING. In the case of any calendar year after 20(xx), the $20,000,000 amount in subsection (a)(1) shall be increased by an amount equal to—

(1) such dollar amount, multiplied by—

(2) the cost-of-living adjustment determined under subsection (c) for such calendar year with any increase determined under this clause being rounded to the nearest multiple of $100,000.

(c) COST OF LIVING ADJUSTMENT.—

(1) *IN GENERAL.—For purposes of this section, the cost-of-living adjustment for any calendar year is the percentage (if any) by which—*

(i) the C-CPI-U for the preceding calendar year, exceeds

(ii) the CPI for calendar year 20(xx), multiplied by the amount determined under paragraph (2).

(2) AMOUNT DETERMINED.—The amount determined under this clause is the amount obtained by dividing—

(i) the C-CPI-U for calendar year 20(xx), by

(ii) the CPI for calendar year 20(xx).

(3) CPI FOR ANY CALENDAR YEAR.—For purposes of paragraph (2), the CPI for any calendar year is the average of the Consumer Price Index as of the close

of the 12-month period ending on August 31 of such calendar year.

(4) CONSUMER PRICE INDEX.—For purposes of paragraph (3), the term "Consumer Price Index" means the last Consumer Price Index for all-urban consumers published by the Department of Labor. For purposes of the preceding sentence, the revision of the Consumer Price Index which is most consistent with the Consumer Price Index for calendar year 1986 shall be used.

(5) C-CPI-U.—

(i) IN GENERAL.—The term "C-CPI-U" means the Chained Consumer Price Index for All Urban Consumers (as published by the Bureau of Labor Statistics of the Department of Labor). The values of the Chained Consumer Price Index for All Urban Consumers taken into account for purposes of determining the cost-of-living adjustment for any calendar year under this subsection shall be the latest values so published as of the date on which such Bureau publishes the initial value of the Chained Consumer Price Index for All Urban Consumers for the month of August for the preceding calendar year.

(ii) DETERMINATION FOR CALENDAR YEAR.—The C-CPI-U for any calendar year is the average of the C-CPI-U as of the close of the 12-month period ending on August 31 of such calendar year.

(d) AVAILABILITY. Any amounts appropriated pursuant to the authority of subsection (a) or as adjusted by subsection (b) shall remain available without fiscal year limitation until expended.

(e) EFFECTIVE DATE. This Act and the amendments made by this Act—

(1) shall take effect on the date of the enactment of this Act; and

(2) are repealed effective as of the date that is 10 years after that date.

C. Enforcement and Rulemaking Authority

With the EAC consistently underfunded and its original purpose of distributing technology grants having run its course, the EAC has

been confined to mostly advisory duties.[82] Granting the EAC enforcement and rulemaking authority could provide a renewed sense of purpose. Unfortunately, HAVA specifically precluded these powers.[83] Recent attempts to empower the EAC have thus been mostly restricted to expanding the EAC's funding and research capacity.[84]

Under this Essay's proposal, the EAC would be granted substantive enforcement and rulemaking authority—i.e., the "stick." These powers would overcome the existing statutory preclusion under HAVA and enable the EAC to assist the Department of Justice in enforcing relevant federal law, including the Voting Rights Act ("VRA")[85] and the National Voter Registration Act ("NVRA").[86] It would also allow the EAC to develop *enforceable*—as opposed to voluntary—policies and practices for clearer, more uniform federal election administration.[87]

Importantly, the EAC's authority to regulate and enforce would remain constrained to federal elections pursuant to Article I, Section 4, Clause 1—otherwise known as the Elections Clause. The Elections Clause provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of ch[oo]sing Senators."[88] In statutorily granting the EAC rulemaking and enforcement authority, Congress would delegate the powers reserved to it by the Elections Clause to the EAC to "make or alter such [r]egulations."[89]

The Constitution and a large subset of the American people still largely contemplate the states as the proper vehicle for most election reform.[90] Therefore, the EAC must continue to strike a balance be-

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82 *See* H.R. REP. NO. 114-361, at 2, 7 (2015), https://www.congress.gov/114/crpt/hrpt361/CRPT-114hrpt361.pdf [https://perma.cc/997S-AV5G].

83 52 U.S.C. §§ 20925, 20929.

84 *See, e.g.*, Automatic Voter Registration Act of 2016, S. 3252, 114th Cong. § 8 (2016); For the People Act of 2021, S. 1, 117th Cong. §§ 1051, 1505, 1921–1925 (2021); Freedom to Vote Act, S. 2747, 117th Cong. §§ 1107, 1611–1613, 3905 (2021).

85 Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(e), 79 Stat. 437, 439 (codified as amended in scattered sections of 52 U.S.C.).

86 National Voter Registration Act of 1993, 52 U.S.C. §§ 20501–20511.

87 *See Election Administration at the State and Local Levels*, *supra* note 75 (stating there are currently more than 10,000 unique election jurisdictions in the United States, each of which is subject to various, and often divergent, election rules and procedures).

88 U.S. CONST. art. I, § 4, cl. 1.

89 *Id.*

90 *See* Hans A. von Spakovsky, *The Left's Fight Against Election Reforms Is a Trojan Horse*, HERITAGE FOUND. (Aug. 4, 2021), https://www.heritage.org/election-integrity/commen-

tween federally necessary reforms and those decisions that can be encouraged or discouraged but ultimately left to the states to decide. This Essay argues that the federal government has for too long been precluded from making necessary interventions in election administration, and that the changes proposed herein strike a balance that will allow the EAC and the states to function in harmony, rather than in opposition.

1. Federal Election Commission Model

The enforcement and rulemaking powers of the EAC as envisioned by this Essay are largely modeled on those of the Federal Election Commission ("FEC"), codified at 52 U.S.C § 30109. Although often confused with the EAC, the FEC is a distinct elections agency responsible primarily for campaign finance law enforcement.[91] The FEC originally had some jurisdiction over election administration pursuant to the NVRA, but HAVA transferred this authority to the EAC.[92] Thus, the EAC is now the sole authority for all election administration issues.

The FEC has generally been a more effective agency than the EAC, largely because it is able to promulgate necessary rules and limitations and to enforce these regulations through a range of judicial and administrative means, including injunctions, hearings, fines, and civil and criminal penalties.[93] Admittedly, the FEC also suffers similar problems of quorum and gridlock induced by its own political parity requirement.[94] Even so, when able to overcome such problems, it has

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tary/the-lefts-fight-against-election-reforms-trojan-horse [https://perma.cc/E8UJ-LQ2G]; U.S. CONST. art. I, § 4, cl. 1.

91 *Mission and History*, FED. ELECTION COMM'N, https://www.fec.gov/about/mission-and-history/ [https://perma.cc/9NE4-77SD].

92 *Final Rules on Reorganization of National Voter Registration Act Regulations*, FED. ELECTION COMM'N (Sept. 1, 2009), https://www.fec.gov/updates/final-rules-on-reorganization-of-national-voter-registration-act-regulations/ [https://perma.cc/WEP2-WHP4].

93 FED. ELECTION COMM'N, THE FIRST 10 YEARS 2 (1985), https://www.fec.gov/resources/cms-content/documents/firsttenyearsreport.pdf [https://perma.cc/GA4M-NKP5]; FED. ELECTION COMM'N, TWENTY YEAR REPORT 8 (1995), https://www.fec.gov/resources/cms-content/documents/20yearreport.pdf [https://perma.cc/MGN9-JWPJ]; FED. ELECTION COMM'N, THIRTY YEAR REPORT 1 (2005), https://www.fec.gov/resources/cms-content/documents/30year.pdf [https://perma.cc/6EM6-VXGB]; *40th Anniversary Timeline*, FED. ELECTION COMM'N, https://transition.fec.gov/pages/40th_anniversary/40th_anniversary.shtml [https://perma.cc/T5MW-MST2].

94 Brian Naylor, *The Federal Election Commission Can Finally Meet Again. And it Has a Big Backlog*, NPR (Dec. 24, 2020, 5:00 AM), https://www.npr.org/2020/12/24/949672803/the-federal-election-commission-can-finally-meet-again-and-it-has-a-big-backlog [https://perma.cc/WM4G-FHUF].

a more effective route for regulation and enforcement of its rules and policies.[95] Given their similar election-based contexts, it is logical to look to the FEC's statutory language as a model for EAC enforcement and regulation powers.

One important benefit of the FEC enforcement language is its adaptability. 52 U.S.C § 30106(b) provides for the FEC's enforcement powers as follows:

> **(b) Administration, enforcement, and formulation of policy; exclusive jurisdiction of civil enforcement; Congressional authorities or functions with respect to elections for Federal office**
>
> (1) The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act and chapter 95 and chapter 96 of title 26. The Commission shall have exclusive jurisdiction with respect to the civil enforcement of such provisions.
>
> (2) Nothing in this Act shall be construed to limit, restrict, or diminish any investigatory, informational, oversight, supervisory, or disciplinary authority or function of the Congress or any committee of the Congress with respect to elections for Federal office.[96]

To adopt this structure, two changes would be made to HAVA. First, 52 U.S.C. § 20929 would be stricken in its entirety to remove the limitation on rulemaking authority. Second, language under 52 U.S.C. § 20925 would be replaced and amended to provide express enforcement authority as follows:

> **(a) Administration, enforcement, and formulation of policy; exclusive jurisdiction of civil enforcement; Congressional authorities or functions with respect to elections for Federal office.—**
>
> (1) The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act and Chapter 20 of Title 42, and Subtitles I and II of Title 52. The Commission shall have concurrent jurisdiction with the Department of Justice with respect to the civil enforcement of such provisions.
>
> (2) Nothing in this Act shall be construed to limit, restrict, or diminish any investigatory, informational, oversight, supervisory, or disciplinary authority or function of the

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95 *See 40th Anniversary Timeline*, *supra* note 93.

96 52 U.S.C. § 30106(b).

> Congress or any committee of the Congress with respect to elections for Federal office.
>
> **(b) Specific Powers.—The specific powers of the Commission as in accordance with subsection (a) include, but are not limited to:**
>
> (1) *HEARINGS AND SESSIONS.*—The Commission may hold such hearings for the purpose of carrying out this chapter, sit and act at such times and places, take such testimony, and receive such evidence as the Commission considers advisable to carry out this chapter. The Commission may administer oaths and affirmations to witnesses appearing before the Commission.
> (2) *INFORMATION FROM FEDERAL AGENCIES.*—The Commission may secure directly from any Federal department or agency such information as the Commission considers necessary to carry out this chapter. Upon request of the Commission, the head of such department or agency shall furnish such information to the Commission.
> (3) *POSTAL SERVICES.*—The Commission may use the United States mails in the same manner and under the same conditions as other departments and agencies of the Federal Government
> (4) *ADMINISTRATIVE SUPPORT SERVICES.*—Upon the request of the Commission, the Administrator of General Services shall provide to the Commission, on a reimbursable basis, the administrative support services that are necessary to enable the Commission to carry out its duties under this chapter.
> (5) *CONTRACTS.*—The Commission may contract with and compensate persons and Federal agencies for supplies and services without regard to section 6101 of title 41.

2. Enforcement Scope and Guidelines

Under this new enforcement framework, the EAC should issue (1) a general enforcement policy akin to the Environmental Protection Agency's (EPA) policy and (2) a new set of voting system guidelines. On the first point, the EPA was established by presidential directive,[97] meaning its administrative structure and enforcement pow-

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[97] *See* Creation and Authority, 40 C.F.R. § 1.1 (2022) (stating "Reorganization Plan 3 of 1970, established the U.S. Environmental Protection Agency"); *EPA Order 1110.2, Initial Organization of the EPA*, EPA (June 24, 2022) https://www.epa.gov/archive/epa/aboutepa/epa-order-11102-initial-organization-epa.html [https://perma.cc/QZ7P-CS7B].

ers were largely developed through internal policymaking.[98] Because of this, it has published a highly detailed General Civil Enforcement Penalty Policy ("GCEPP") that could serve as a useful model for the EAC in defining the scope and specifics of its new enforcement intentions.[99]

a. General Enforcement Policy

One specific area of the EPA's GCEPP that could be useful for the EAC is its policy on civil penalty enforcement and evaluation, which provides for flexible analysis and regulation according to the circumstances of the violation.[100] There are three core areas to the EPA GCEPP for civil penalties: (1) Deterrence, (2) Fair and Equitable Treatment of the Regulated Community, and (3) Swift Resolution.[101] Under the first, the EPA emphasizes two types of deterrence: "persuade the violator to take precautions against falling into noncompliance again (specific deterrence) and dissuade others from violating the law (general deterrence)."[102]

In pursuing a deterrence policy, the goal should be to create penalties that "place[] the violator in a worse position than those who have complied in a timely fashion."[103] The EPA's GCEPP does not provide for a specific civil penalty amount or scale, but rather suggests a calculation based on case specific "benefit" and "gravity" components.[104] The "benefit" component is based on the idea that a penalty should, "at a minimum, remove any significant economic benefits resulting from failure to comply with the law . . . [and should] require that the penalty include an additional amount to ensure that the violator is economically worse off than if it had obeyed the law."[105] The "gravity" component, on the other hand, depends on the seriousness

98 *See* Off. of Inspector Gen., EPA, Rep. No. 2006-P-0029, Studies Addressing EPA's Organizational Structure 1–4 (2006), https://www.epa.gov/sites/default/files/2015-11/documents/20060816-2006-p-00029.pdf [https://perma.cc/ES7J-EZ9D].

99 EPA, GEN. ENFORCEMENT POL'Y NO. GM-21, POLICY ON CIVIL PENALTIES 1 (Feb. 16, 1984), https://www.epa.gov/sites/default/files/documents/epapolicy-civilpenalties021684.pdf [https://perma.cc/2PAM-KPJA].

100 *See generally id.* (establishing a single set of goals for penalty assessment in EPA administrative and judicial enforcement actions based on three primary goals: (1) deterrence, (2) fair and equitable treatment of the regulated community, and (3) swift resolution of environmental problems).

101 *Id.* at 3–6.

102 *Id.* at 3–4.

103 *Id.* at 1.

104 *Id.* at 2–3.

105 *Id.* at 3.

of the noncompliance at issue and whether "normal penalty assessments had not been achieving general deterrence."[106]

The GCEPP's section on Fair and Equitable Treatment of the Regulated Community is particularly important in the election administration context given the vastitudes of jurisdictions and preexisting rules. This GCEPP section provides additional factors in determining preliminary deterrence penalties, specifically: (1) degree of willfulness and/or negligence, (2) history of noncompliance, (3) ability to pay, (4) degree of cooperation/noncooperation, and (4) other unique factors specific to the violator of the case.[107]

Interestingly, several of these factors echo those considered in the voting rights context for Section 2 violations of the VRA.[108] Specifically, in their 1982 amendments to the VRA, the Senate created a list of factors—now collectively referred to as the Senate Report Factors—to be examined when analyzing a potential Section 2 violation, including

> (1) the history of official voting-related discrimination in the state or political subdivision;
> (2) the extent to which voting in the elections of the state or political subdivision is racially polarized;
> (3) the extent to which the state of political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority-vote requirements, and prohibitions against bullet voting;
> (4) the exclusion of members of the minority group from candidate slating processes;
> (5) the extent to which minority group members bear the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process;
> (6) the use of overt or subtle racial appeals in political campaigns; and
> (7) the extent to which members of the minority group have been elected to public office in the jurisdiction.[109]

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106 *Id.*

107 *Id.* at 5.

108 *See Section 2 of the Voting Rights Act*, U.S. DEP'T JUST., https://www.justice.gov/crt/section-2-voting-rights-act [https://perma.cc/LT69-2DRG].

109 S. Rep. No. 97-417, at 28–29 (1982), reprinted in 1982 U.S.C.C.A.N. 177, at 206–07.

Given that election administration is so intertwined with the voting process itself and that many issues stem from VRA violations, combining the GCEPP and Senate Report factors in the EAC's own policy guidance would be both appropriate and useful to extending the life of the constitutional democracy.

Lastly, the GCEPP states that swift compliance is an "important goal of any enforcement action . . . [and helps] conserve[] Agency personnel and resources."[110] In furtherance of this goal, the EPA GCEPP provides for two approaches: (1) provide incentives to settle and institute prompt remedial action, and (2) provide disincentives to delaying compliance.[111] Translating this aspect of the GCEPP to the EAC is of critical importance and the primary reason why a greater enforcement power is necessary.

History has shown that the power to entice is often insufficient to induce states to change—and that is when the power to punish becomes necessary. Issues of voting rights in particular have long been plagued by a harmful reticence to change and discriminatory application, making this careful balance of incentive and disincentive even more necessary.[112] By entrusting the EAC with a powerful but still limited enforcement and rulemaking power, the EAC gains a necessary ability to create change. In utilizing these powers, the EAC may want to take a lighter-handed approach in disincentivizing behavior, remembering the adage that you "catch more flies with honey than with vinegar." Examples of specific incentives and disincentives that could be adopted are discussed in more detail in Part III.

b. Voting System Guidelines

In issuing new Voluntary Voting System Guidelines ("VVSG") under the above proposed changes, the EAC could continue to utilize an incentivized funding approach, but it would now also have the option to make *mandatory* guidelines. The EAC is responsible for issuing VVSG under HAVA.[113] Unfortunately, stalled appointments and a

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110 EPA *supra* note 99, at 5.

111 *Id.* at 6.

112 *See Voting Rights and Election Administration in America: Hearing Before the Subcomm. on Elections of the H. Comm. on H. Admin.*, 116th Cong., 67, 101–02, 114, 116, 120–21, 216 (2019), https://www.govinfo.gov/content/pkg/CHRG-116hhrg38145/pdf/CHRG-116hhrg38145.pdf [https://perma.cc/WU37-PYGG].

113 *Voluntary Voting System Guidelines*, U.S. ELECTION ASSISTANCE COMM'N, https://www.eac.gov/voting-equipment/voluntary-voting-system-guidelines [https://perma.cc/LBV4-3Y2Z].

lack of quorum have prevented regular updates and only two VVSGs have been developed since the EAC was first formed in 2002.[114]

In fact, there was a gap of more than *sixteen years* between the first VVSG published in December 2005 and the second, which is still undergoing final public comment before official publication.[115] The first VVSG was broad and encompassed many HAVA recommended changes, but the second VVSG appears to be limited to problems induced by claims of election fraud, cybersecurity updates, and COVID-19-related voting system changes.[116] Although such guidelines were made voluntary per HAVA, many states were quick to comply so as to accept accompanied funding.[117]

It may then be best for the EAC to apply a mixture of both voluntary and mandatory VVSGs. Whereas voluntary VVSGs could be more frequently issued for long-term research and best practices, mandatory VVSGs might be better limited to time sensitive or disputed issues where uniformity is necessary. For instance, a mandatory VVSG on absentee and vote-by-mail procedures could help resolve ongoing conflicts between the states on what procedures and methods are the most reliable and effective in ensuring both access to and the integrity of the ballot.

II. New Areas of Authority

If the suggested changes to the EAC as proposed in Part I are adopted, the Commission will be empowered to act in a variety of new election administration areas. This section provides a brief, nonexhaustive subset of some of the riper areas of concern for a newly empowered EAC to address. In most cases, these proposals simply

114 When the EAC regained quorum for the first time after an eight-month gap, there were 446 pending matters and 275 staff reports that needed review. Thirty-five of those staff reports were within eighteen months of the agency's five-year statute of limitations. Courtney Bublé, *Election Commission Regains Quorum and Resumes Full Duties, Facing a Massive Backlog of Work*, Gov't Exec. (Dec. 10, 2020), https://www.govexec.com/management/2020/12/election-commission-regains-quorum-and-resumes-full-duties-facing-massive-backlog-work/170680/ [https://perma.cc/P2S4-J27E]; *see also Voluntary Voting System Guidelines*, *supra* note 113.

115 An intermediate VVSG 1.1 was released in 2015 that "clarified the [first VVSG's] guidelines to make them more testable; enabled the National Institute of Standards and Technology *(NIST)* to create test suites for the proposed revisions; and improved portions of the guidelines without requiring massive programmatic changes." *Voluntary Voting System Guidelines*, *supra* note 112.

116 *See* Press Release, U.S. Election Assistance Comm'n, Major Updates of the Voluntary Voting System Guidelines 2.0 (Feb. 2021), https://www.eac.gov/sites/default/files/TestingCertification/VVSG_2_Major_Updates.pdf [https://perma.cc/5ZX9-HHJ3].

117 *See* Kathleen Hale & Mitchell Brown, *Adopting, Adapting, and Opting Out: State Response to Federal Voting System Guidelines*, 43 Publius 428, 433 (2013).

expand on preexisting jurisdiction for the EAC and envision a more active means of regulation and enforcement by the Commission. In so acting, the EAC would be working toward a two-fold goal: (1) increasing ease and equality of access to the ballot, and (2) election security.

A. Automatic Voter Registration

Automatic Voter Registration ("AVR") is the "direct enrol[l]ment of citizens onto the electoral register by public officials, without the need for pro-active action by citizens."[118] In the United States, this would provide for the automatic registration of all eligible voters via interaction with relevant agency services, like state motor vehicle authorities.[119] AVR would thus invert the current "opt-in" system with an "opt-out" method, meaning that those who do *not* wish to register would have to act.[120] Improving AVR would be one means of improving ongoing problems of low voter turnout—the United States currently ranks thirtieth out of thirty-five countries polled for voter turnout.[121]

The EAC can be helpful in two respects regarding AVR. First, it could require that all states adopt some type of AVR program, while leaving it to the individual states to determine what program type best suits their needs. Various models have been adopted by the twenty states that already utilize AVR, providing a variety of options for other states to draw on.[122] Analyzing the problems and successes of these varying methods could also serve as a research project for the EAC, who could help identify and share best practices and model statutory language. Second, the EAC can help subsidize the cost of developing new AVR programs, which according to a recent study by Common Cost have an average startup cost of around five hundred million dollars.[123] It should also be noted that although Republican

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118 TOBY S. JAMES & PAUL BERNAL, IS IT TIME FOR AUTOMATIC VOTER REGISTRATION IN THE UK? 4 (2020), https://tobysjamesdotcom.files.wordpress.com/2020/04/is-it-time-for-automatic-voter-registration-double-sides.pdf [https://perma.cc/7UZK-EKBJ].

119 *Automatic Voter Registration, a Summary*, BRENNAN CTR. FOR JUST. (June 30, 2021), https://www.brennancenter.org/our-work/research-reports/automatic-voter-registration-summary [https://perma.cc/B26H-X4Z2]; *see Automatic Voter Registration*, NAT'L CONF. STATE LEGISLATURES (June 23, 2022), https://www.ncsl.org/research/elections-and-campaigns/automatic-voter-registration.aspx [https://perma.cc/2C5M-J9KS].

120 *Automatic Voter Registration, supra* note 119.

121 Drew DeSilver, *In Past Elections, U.S. Trailed Most Developed Countries in Voter Turnout*, PEW RSCH. CTR. (Nov. 3, 2020), https://www.pewresearch.org/fact-tank/2020/11/03/in-past-elections-u-s-trailed-most-developed-countries-in-voter-turnout/ [https://perma.cc/XG7G-U2P7].

122 *See Automatic Voter Registration*, *supra* note 119.

123 *See* COMMON CAUSE MASS., THE MINIMAL COSTS OF AUTOMATIC VOTER REGISTRA-

support for AVR has declined since 2020, a majority of voters—sixty-one percent to be precise—still support adopting AVR programs.[124]

B. Absentee Ballots and Vote-by-Mail

Absentee ballots and vote-by-mail ("VBM")[125] have become particularly contentious issues in the wake of the 2020 election, and a newly empowered EAC could go a long way in helping to resolve widening disparities in state VBM procedures.[126] In pursuing this issue, the EAC would ideally continue to serve in an advisory capacity while also utilizing its newly endowed permanent appropriations. Enforcement authority can also play an important role in general and specific deterrence, particularly on issues arising from discrimination. Specific areas of ongoing VBM reform that are frequently subject to allegations of discrimination and which the EAC may want to monitor for potential rulemaking include (1) ballot tracking methods,[127] (2) availability of remedy or cure periods,[128] (3) mail by and postmark

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TION IMPLEMENTATION (2018), https://www.commoncause.org/massachusetts/wp-content/uploads/sites/3/2018/05/AVR-Cost-Report-May-2018.pdf [https://perma.cc/8C9X-7AY3].

124 Prior to 2020 and related claims of election fraud, Republican support for AVR was actually increasing. *Republicans and Democrats Move Further Apart in Views of Voting Access*, PEW RSCH. CTR. (Apr. 22, 2021), https://www.pewresearch.org/politics/2021/04/22/republicans-and-democrats-move-further-apart-in-views-of-voting-access/ [https://perma.cc/8Y97-EQMR].

125 *See generally* Lisa Danetz, *Mail Ballot Security Features: A Primer*, BRENNAN CTR. FOR JUST. (Oct. 16, 2020), https://www.brennancenter.org/our-work/research-reports/mail-ballot-security-features-primer [https://perma.cc/ZKU7-M5RX] (providing a history and explanation of mail ballot systems).

126 *Cf. Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options*, NAT'L CONF. STATE LEGISLATURES (Mar. 15, 2022), https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx [https://perma.cc/45RM-4DLC] (detailing the various approaches that states take toward non-traditional voting and the varying levels of acceptance among states, indicating that this is a contentious issue with much disagreement). See the linked tables for state-specific comparisons of various election administration practices. *Id.*

127 Geoffrey A. Fowler, *How to Track Your Ballot Like a UPS Package*, WASH. POST (Sept. 18, 2020, 8:00 AM), https://www.washingtonpost.com/technology/2020/09/18/online-ballot-tracking/ [https://perma.cc/S4BX-47KZ].

128 *Table 15: States with Signature Cure Processes*, NAT'L CONF. STATE LEGISLATURES (Jan. 18, 2022), https://www.ncsl.org/research/elections-and-campaigns/vopp-table-15-states-that-permit-voters-to-correct-signature-discrepancies.aspx [https://perma.cc/R6CN-9B7K].

deadlines,[129] (4) Dropbox availability and security,[130] and (5) affidavit, signature, notary, and other witness requirements.[131]

In the area of rulemaking, the EAC could develop critically needed uniform best practices and sample statutory language for the states. States have enacted increasingly divergent legislation on this issue, exacerbating existing confusion and potentially discriminatory application of the laws.[132] Although the EAC is constrained by the Elections Clause in terms of state and local elections, the EAC can determine a singular proper course of action for federal elections that would, hopefully, have a subsequent trickle-down effect on all election administration.

Given the history of reticence many states have towards VBM and increasing evidence of discriminatory administration of VBM laws, disincentive-style enforcement may also be necessary.[133] The EAC should be cautious in pursuing this approach, however, so as to not encroach upon the states' Election Clause authority. With this in mind, enforcement should generally be limited to cases of proven discriminatory intent or effect, something that a robust Research and Litigation department could help determine.[134] Once a positive

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129 *Table 11: Receipt and Postmark Deadlines for Absentee/Mail Ballots*, NAT'L CONF. STATE LEGISLATURES (Mar. 15, 2022), https://www.ncsl.org/research/elections-and-campaigns/vopp-table-11-receipt-and-postmark-deadlines-for-absentee-ballots.aspx [https://perma.cc/2LG4-F67X].

130 Lane Baker, Gabriella Garcia, Axel Hufford, Garrett Jensen & Alexandra Popke, *Ballot Drop-Off Options in All 50 States*, LAWFARE (Oct. 14, 2020, 10:38 AM), https://www.lawfareblog.com/ballot-drop-options-all-50-states [https://perma.cc/9FKS-NV6N].

131 *Table 14: How States Verify Voted Absentee/Mail Ballots*, NAT'L CONF. STATE LEGISLATURES (Mar. 15, 2022), https://www.ncsl.org/research/elections-and-campaigns/vopp-table-14-how-states-verify-voted-absentee.aspx [https://perma.cc/T3CE-22NZ].

132 *See Voting Outside the Polling Place*, *supra* note 126.

133 Jane C. Timm, *A White Person and a Black Person Vote by Mail in the Same State. Whose Ballot Is More Likely to Be Rejected?*, NBC NEWS (Aug. 9, 2020, 11:34 AM), https://www.nbcnews.com/politics/2020-election/white-person-black-person-vote-mail-same-state-whose-ballot-n1234126 [https://perma.cc/MAR6-NSWN].

134 The EAC already has an existing Research & Data department. *See* Image 2. Its duties and responsibilities are not laid out by statute, however, and appear to be decided internally. It is therefore difficult to determine the scope or size of the department. Additionally, because the EAC does not currently have any enforcement authority, it does not have a litigation department. 52 U.S.C. §20924(a)(4) does, however, provide for the appointment of a singular General Counsel and §20924(a)(5) for the appointment of "other staff" as deemed appropriate by the Executive Director. As of August 2022, the EAC does not have a formally appointed General Counsel—Amanda Joiner, formally an Assistant General Counsel, appears to be serving in the role of Acting General Counsel—and is hiring for the position. *Amanda Joiner,* LinkedIn (Sept. 3, 2022), https://www.linkedin.com/in/amanda-joiner-549b0a199/ [https://perma.cc/R546-QE2E]. By comparison, the FEC's Office of the General Counsel is composed of five internal units each headed by a Deputy or Associate General Counsel (Administration, Law, Enforcement, Policy,

determination has been made of such, appropriate punishments based on the factors discussed *supra* in Section I.C.2.a should be applied. Injunctions of the discriminatory practice would be one such type of appropriate enforcement action. Alternatively, in those cases where noncompliance can be shown to be the result of a lack of funding or resources, other actions should be considered to not unnecessarily punish merely underfunded districts.

Agency action on these issues can also help alleviate the flood of VBM litigation that opened up in 2020.[135] Although courts generally dislike ruling on election administration issues, particularly changes made in close proximity to an election, they were forced to take up a more active role in deciding VBM issues because of COVID-19.[136] Generally speaking though, courts are often slow to act on election administration problems,[137] something a more active EAC could help make up for.

C. Early Voting

Given increasing support for early voting, the EAC may also want to consider developing best practices for early voting procedures, as well as incentivizing expanded polling locations and hours. Early voting is one of the reforms with the most bipartisan support, with a 2020 Pew Research Center study showing seventy-eight percent of Americans in favor.[138] However, some concerns are worth noting. When Virginia adopted early voting in 2021, many expressed concerns about its cost to local taxpayers, with some estimating a total burden upwards of six figures.[139] The wide range of early voting periods, which are subject to local determination and availability, can also be

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and Litigation). *FEC Offices*, FED. ELECTION COMM'N, https://www.fec.gov/about/leadership-and-structure/fec-offices/ [https://perma.cc/WF9D-GXTP].

135 Austin Sarat, *Judges Used to Stay Out of Election Disputes, but This Year Lawsuits Could Well Decide the Presidency*, CONVERSATION (Oct. 16, 2020, 7:01 AM), https://theconversation.com/judges-used-to-stay-out-of-election-disputes-but-this-year-lawsuits-could-well-decide-the-presidency-147830 [https://perma.cc/8QHL-VEX2].

136 *Id.*; *see also* Election L. at Ohio State, *The Purcell Principle: A Presumption Against Last-Minute Changes to Election Procedures*, SCOTUSBLOG, https://www.scotusblog.com/election-law-explainers/the-purcell-principle-a-presumption-against-last-minute-changes-to-election-procedures/ [https://perma.cc/97U2-M9PD].

137 *Cf.* Jeffrey Kluger, *Why Is the Court System So Slow?*, TIME (June 30, 2016, 7:58 AM), https://time.com/4389196/why-is-the-court-system-so-slow/ [https://perma.cc/N8KP-KEJH] (explaining and highlighting the long length of most court cases and the delay in the court system).

138 *Republicans and Democrats Move Further Apart in Views of Voting Access*, *supra* note 124.

139 Marie Albiges, *Democrats Are Expanding Virginians' Access to Voting, but Cities Will Likely Be Stuck with the Bill*, VA. PILOT (Feb. 24, 2020, 1:06 PM), https://www.pilotonline.com/

problematic and lead to unnecessary voter confusion.[140] The EAC could help resolve these differences by setting clear minimum standards for early voting period lengths, weekend and hour availability, and number of polling locations. Additional funding could also be granted to ensure swift compliance and to help cover costs of expanded staff, new equipment, and extra ballots that are necessary for early voting programs.[141]

D. Poll Worker Recruitment and Training

States employ varying standards in recruiting and training their poll workers, leading to ineffective election administration in many instances.[142] The EAC has already conducted intensive study on this issue, but given its lack of funding and enforcement authority, it has not been able to do anything other than offer best practice recommendations.[143] In 2013, the now defunct Presidential Commission on Election Administration prepared a comprehensive report of identified problems in poll worker recruitment and training, which is now archived with the EAC.[144] Among the many issues identified by the report were

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government/elections/vp-nw-virginia-voting-rights-costs-20200224-5ckflr2a3bfylbr5nbroego5de-story.html [https://perma.cc/75S3-3UWA].

140 Early voting periods can range in (1) length—anywhere from three to forty-six days before an election—(2) location—mostly in a local clerk or registrar's office or designated satellite offices, but many counties have just one location, which can make voting in larger, more rural areas difficult—and (3) hours—most states operate during working hours with limited evening or weekend hours. *Early In-Person Voting*, NAT'L CONF. STATE LEGISLATURES (May 23, 2022), https://www.ncsl.org/research/elections-and-campaigns/early-voting-in-state-elections.aspx [https://perma.cc/JHD4-698K].

141 *See* Albiges, *supra* note 139.

142 *See generally* U.S. ELECTION ASSISTANCE COMM'N, STATE-BY-STATE COMPENDIUM: ELECTION WORKER LAWS AND STATUTES (2016), https://www.eac.gov/sites/default/files/eac_assets/1/28/Compendium.2016.pdf [https://perma.cc/L57E-JFK4]; J. MIJIN CHA & LIZ KENNEDY, MILLIONS TO THE POLLS: POLL WORKER RECRUITMENT AND TRAINING 2 (2014), https://www.demos.org/sites/default/files/publications/Millions%20to%20the%20Polls%20%20Poll%20Worker%20Recruitment%20Training.pdf [https://perma.cc/8FGV-BFXU].

143 *See, e.g.*, U.S. ELECTION ASSISTANCE COMM'N, ELECTION WORKER SUCCESSFUL PRACTICES: RECRUITMENT, TRAINING, AND RETENTION (2016), https://www.eac.gov/sites/default/files/eac_assets/1/6/Election_Worker_Successful_Practices1.pdf [https://perma.cc/A4YY-84CU].

144 BARRY C. BURDEN & JEFFREY MILYO, THE RECRUITMENT AND TRAINING OF POLL WORKERS: WHAT WE KNOW FROM SCHOLARLY RESEARCH 3 (2013), https://www.eac.gov/sites/default/files/event_document/files/Barry-Burden-Jeff-Milyo-The-Recruitment-and-Training-of-Poll-Workers.pdf [https://perma.cc/W6EB-4WK2] (report prepared for the Presidential Commission on Election Administration).

(1) lack of diversity in poll workers, who are disproportionately older females in their sixties and seventies;[145]
(2) uneven training protocols leading to nonuniform administration;[146]
(3) lack of selection criteria for choosing poll workers;[147] and
(4) low pay for poll workers.[148]

With better funding and new rulemaking authority, the EAC could finally put into action the best practices they have already developed. For instance, they could require states to implement diverse recruitment practices (while leaving up to the states the mechanics of such), help subsidize increased poll worker pay, and provide research on recommended training practices and procedures. While the primary focus would be incentive-based, enforcement may be utilized as necessary to ensure minimum standards are met.

CONCLUSION

This Essay has attempted to provide a workable framework for reforming the EAC, a task that many have dismissed as fruitless. While current political realities might render the proposed changes unlikely at present, there remains hope for a more amenable future Congress. Partisan bickering on election reform masks increasing evidence that voters want and are demanding reform. Even in the wake of the highly controversial 2020 election, a majority of voters from *both* parties still support restoring felon voting rights, expanding early in-person voting availability, and making Election Day a national holiday.[149]

Although several advocates have proposed starting from scratch and creating a new federal election agency,[150] reforming and reinvigorating the EAC is a more realistic alternative—better the devil you know. This Essay strives to create a balance that preserves states' rights but allows for federal intervention on time-sensitive and complex issues that require a deeper, national perspective to preserve con-

145 *Id.*

146 *Id.* at 15.

147 *Id.* at 16–17.

148 *Id.* at 13–14.

149 *Republicans and Democrats Move Further Apart in Views of Voting Access*, *supra* note 124.

150 *See*, *e.g.*, Hannah Leibson, *A Vision for a Federal Election Agency*, REGUL. REV. (Feb. 4, 2021), https://www.theregreview.org/2021/02/04/leibson-vision-federal-election-agency [https://perma.cc/5NPN-C93W]; LEE DRUTMAN & CHARLOTTE HILL, AMERICA NEEDS A FEDERAL ELECTIONS AGENCY (2020), https://d1y8sb8igg2f8e.cloudfront.net/documents/America_Needs_a_Federal_Elections_Agency_RAgoht5.pdf#page=15 [https://perma.cc/QBJ3-8738].

stitutional democracy. Because uneven election administration by the nation's more than 10,000 election jurisdictions has resulted in massive voter confusion, disenfranchisement, and allegations of fraud, this cherished ideal has come under threat. A reformed EAC would provide a long-needed centralized authority to bring our election administration practices into the twenty-first century while maintaining constitutional ideals of both integrity and security.

The revised EAC as proposed does not, however, create a federal veto over state voting laws. Rather, if effectively implemented, the new EAC would help support state initiatives by providing robust funding and guidance on best practices grounded in empirical research. Although the EAC would be empowered to both incentivize and disincentivize—the carrot and the stick—the Commission would only be empowered to directly intervene in cases of obvious and unconstitutional discrimination. Ultimately then, the reformed EAC strives for what should be a universally supported goal: the preservation and protection of our democracy.

APPENDIX

IMAGE 1. CONSUMER PRODUCT SAFETY COMMISSION ORGANIZATIONAL CHART (CURRENT THROUGH FY 2021)[151]

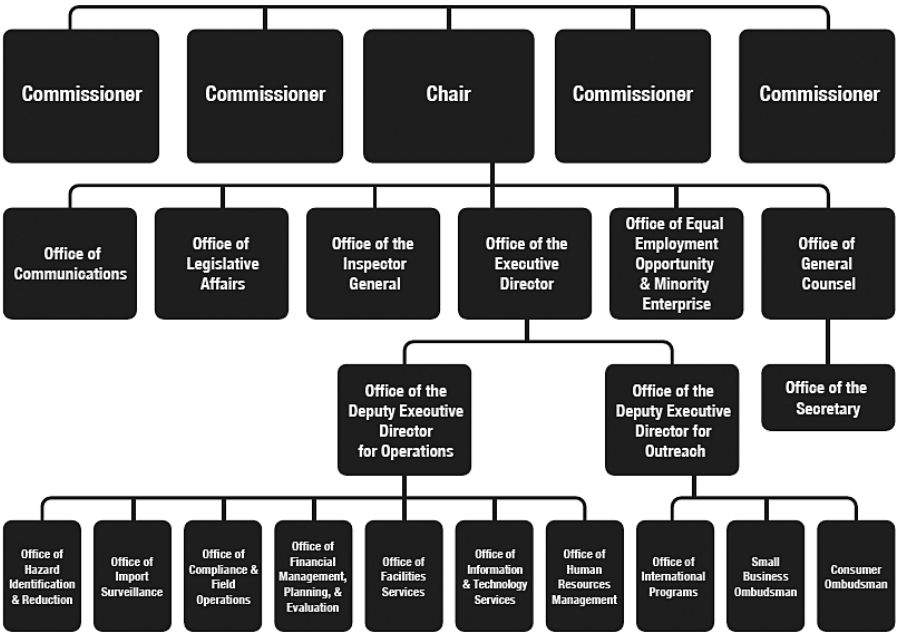
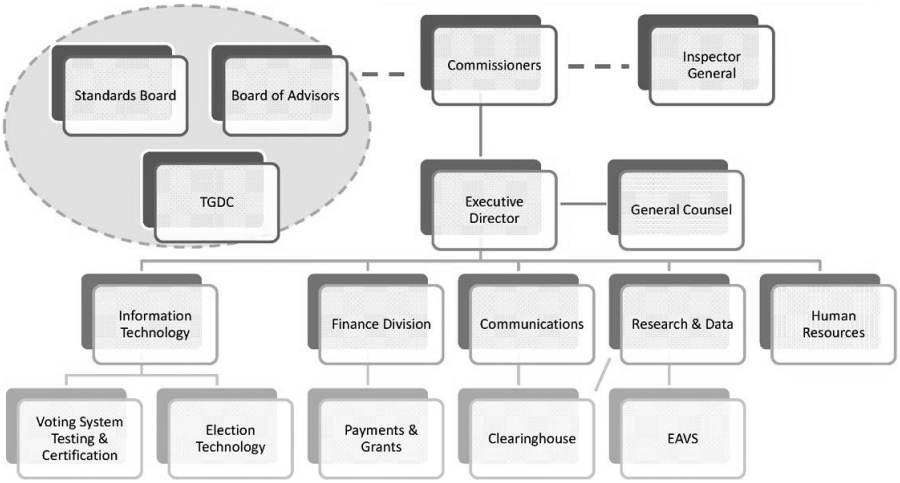


IMAGE 2. ELECTION ASSISTANCE COMMISSION ORGANIZATIONAL CHART (CURRENT THROUGH 2018)[152]



151 U.S. CONSUMER PROD. SAFETY COMM'N, AGENCY FINANCIAL REPORT, FISCAL YEAR 2021 2 (2021), https://www.cpsc.gov/s3fs-public/FY-2021-US-CPSC-Agency-Financial-Report_1.pdf?VersionId=_OE75MjPtOteHnFmQ7y7lVBd1cyl__VY. [https://perma.cc/67TN-6AWP].

152 U.S. ELECTION ASSISTANCE COMM'N, STRATEGIC PLAN 2018–2022, at 8 (2018), https://

TABLE 1. CPSC VOTES 2018–2021 (AUTHOR CREATED)[153]

Of twenty-eight randomly selected petition, accreditation, administrative, and other various commission votes between 2018 and 2021, the CPSC Commission voted unanimously on twelve votes and received cross-over support on nine others. Of those twenty-eight total votes, then, only seven were voted along strict partisan lines.

CPSC VOTES 2018–2021 *Table is a representative sample.* ** denotes acting Chair*					
VOTE	**DATE**	**ACTION**	**IN FAVOR**	**AGAINST**	**OTHER/ ABSTAIN**
Unanimous	11/12/21	ALJ Ratification, In the Matter of Thyssenkrup Access Corp.[154]	**Unanimous**		
Unanimous	9/14/21	Regulatory Agenda and Plan for Fall 2021[155]	**Unanimous**		
Split	9/8/21	Standard for the Flammability of Residential Upholstered Furniture – Termination of Rulemaking[156]	Baiocco and Feldman	*Adler**	

www.eac.gov/sites/default/files/eac_assets/1/6/strategicplan18_22.pdf [https://perma.cc/2J72-NWU2].

153 Data used to create Table 1 was drawn from *Newsroom – FOIA*, U.S. CONSUMER PROD. SAFETY COMM'N, https://www.cpsc.gov/Newsroom/FOIA/ReportList [https://perma.cc/F4SH-Q3PR]. Votes by Democratic Commissioners are noted in italics. Votes by Republican Commissioners are noted in roman type. Bipartisan votes are noted in bold.

154 Record of Commission Action, U.S. Consumer Prod. Safety Comm'n, ALJ Ratification, In the Matter of Thyssenkrup Access Corp., CPSC Docket Number 21-1 (Nov. 12, 2021) https://www.cpsc.gov/s3fs-public/RCA_ALJ_Ratification_In_the_Matter_of_ThyssenKrupp_Access_Corp_CPSC_Docket_No_21_1_In_the_Matter_of_Amazon_com_Inc_CPSC_Docket_No_21_2.pdf [https://perma.cc/7K8P-8XZS].

155 Record of Commission Action, U.S. Consumer Prod. Safety Comm'n, Regulatory Agenda and Plan for Fall 2021 (Sept. 14, 2021) https://www.cpsc.gov/s3fs-public/RCA-Regulatory-Agenda-and-Plan-for-Fall-2021.pdf?VersionId=GBGudf0i0rkFFt.dGoSoC1Y_pl470mER [https://perma.cc/U9AV-CHZ9].

156 Record of Commission Action, U.S. Consumer Prod. Safety Comm'n, Standard for the Flammability of Residential Upholstered Furniture – Termination of Rulemaking (Sept. 8, 2021) https://www.cpsc.gov/s3fs-public/RCA-Standard-for-the-Flammability-of-Residential-Upholstered-Furniture-Termination-of-Rulemaking.pdf?VersionId=NJVY69LlK4FkaGFNb8NXuI044Xmb6T1O [https://perma.cc/NPY3-XTGP].

VOTE	DATE	ACTION	IN FAVOR	AGAINST	OTHER/ ABSTAIN
Split	7/27/21	Federal Register Notice Seeking Public Comments on Petition Requesting Rulemaking on Commercially Bred Dogs Sold to Consumers[157]	*Adler**	Baiocco	**Kaye & Feldman**
Crossover	7/14/21	Vote to Issue Administrative Complaint Against Amazon.com[158]	**Adler*, Kaye, and Feldman**		
Unanimous	6/11/21	Petition Requesting Rulemaking to Establish Safety Standard for Duster Aerosol Products – Request for Comments[159]	**Unanimous**		
Crossover	3/25/21	FY 2021 Midyear Review [final vote on Plan as amended][160]	**Adler*, Kaye and Baiocco**	Feldman	
Unanimous	12/18/20	CPSC Plan to Create an eFiling Program for Imported Consumer Products[161]	**Unanimous**		
Crossover	11/10/20	Fiscal Year 2021 Operating Plan[162]	**Adler*, Kaye, Baiocco**		Feldman

157 Record of Commission Action, U.S. Consumer Prod. Safety Comm'n, Federal Register Notice Seeking Public Comments on Petition Requesting Rulemaking on Commercially Bred Dogs Sold to Consumers (July 27, 2021) https://www.cpsc.gov/s3fs-public/RCA-FRN-Petition-Requesting-Rulemaking-on-Commercially-Bred-Dogs-Sold-to-Consumers.pdf [https://perma.cc/UJP3-7SL4].

158 Record of Commission Action, U.S. Consumer Prod. Safety Comm'n, Vote to Issue Administrative Complaint Against Amazon.com (July 14, 2021) https://www.cpsc.gov/s3fs-public/RCA-Vote-to-Issue-Administrative-Complaint-Against-Amazon-com-07142021.pdf [https://perma.cc/58Z8-329T].

159 Record of Commission Action, U.S. Consumer Prod. Safety Comm'n, Petition Requesting Rulemaking to Establish Safety Standard for Duster Aerosol Products – Request for Comments (June 11, 2021) https://www.cpsc.gov/s3fs-public/RCA-Petition-Requesting-Rulemaking-to-Establish-Safety-Standard-for-Duster-Aerosol-Products.pdf [https://perma.cc/4JUS-ZM4D].

160 Record of Commission Action, U.S. Consumer Prod. Safety Comm'n, FY 2021 Midyear Review (Mar. 25, 2021) https://www.cpsc.gov/s3fs-public/RCA-Comm-Mtg-Min-FY2021-Mid-Year-Review-NOA-Alt-Test-Methods-Guidance.pdf [https://perma.cc/GNY4-DE5L].

161 Record of Commission Action, U.S. Consumer Prod. Safety Comm'n, CPSC Plan to Create an eFiling Program for Imported Consumer Products (Dec. 18, 2020) https://www.cpsc.gov/s3fs-public/RCA-CPSC-Plan-to-Create-an-eFiling-Program-for-Imported-Consumer-Products.pdf [https://perma.cc/8B5K-TGZ7].

162 Record of Commission Action, U.S. Consumer Prod. Safety Comm'n, Fiscal Year 2021

VOTE	DATE	ACTION	IN FAVOR	AGAINST	OTHER/ ABSTAIN
Split	9/22/20	Recreational Off-Highway Vehicles (ROVs)—Termination of Rulemaking[163]	*Adler* and Kaye* (not to terminate)	Baiocco and Feldman (to terminate)	
Crossover	9/10/20	CPSC Fiscal Year 2022 Performance Budget Request to Congress[164]	*Adler*, Kaye, Baiocco*		Feldman
Unanimous	9/4/20	Regulatory Agenda and Plan for Fall 2020[165]	**Unanimous**		
Unanimous	9/1/20	Accreditation of Two Conformity Assessment Bodies as "Firewalled" Third Party Laboratories and Related Delegation of Authority[166]	**Unanimous** (for accreditation of Verified Testing Services, LLC and Dongguan Baoxin Trading Co., Ltd. Commissioner Feldman was the lone vote against authorizing the the Deputy Executive Director for Operations, Office of the Executive Director, to grant or deny subsequent applications of either accredited entity)		
Crossover	6/1/20	Petition VGBA 19-1: Petition for Classification of Vacuum Diffusion Technology as an Anti-Entrapment System under the Virginia Graeme Baker Pool and Spa Safety Act[167]	**Adler*, Kaye and Baiocco**	Feldman	

Operating Plan (Nov. 10, 2020) https://www.cpsc.gov/s3fs-public/RCA-FY-2021-Operating-Plan-2.pdf [https://perma.cc/YK7V-BP9C].

163 Record of Commission Action, U.S. Consumer Prod. Safety Comm'n, Recreational Off-Highway Vehicles (ROVs)—Termination of Rulemaking (Sept. 22, 2020) https://www.cpsc.gov/s3fs-public/RCA-Recreational-Off-Highway-Vehicles-ROVs-Termination-of-Rulemaking.pdf [https://perma.cc/J4S6-BBX6].

164 Record of Commission Action, U.S. Consumer Prod. Safety Comm'n, (Sept. 10, 2020) https://www.cpsc.gov/s3fs-public/RCA-CPSC-Fiscal-Year-2022-Performance-Budget-Request.pdf [https://perma.cc/3SK7-V3AY].

165 Record of Commission Action, U.S. Consumer Prod. Safety Comm'n, Regulatory Agenda and Plan for Fall 2020 (Sept. 4, 2020) https://www.cpsc.gov/s3fs-public/RCA-Regulatory-Agenda-Fall-2020.pdf [https://perma.cc/3HE5-MT6S].

166 Record of Commission Action, U.S. Consumer Prod. Safety Comm'n, Accreditation of Two Conformity Assessment Bodies as "Firewalled" Third Party Laboratories and Related Delegation of Authority (Sept. 1, 2021) https://www.cpsc.gov/s3fs-public/rca-accreditation-of-two-firewalled-labs-9-1-2020.pdf [https://perma.cc/9SK3-CVZ2].

167 Record of Commission Action, U.S. Consumer Prod. Safety Comm'n, Petition VGBA 19-1: Petition for Classification of Vacuum Diffusion Technology as an AntiEntrapment System under the Virginia Graeme Baker Pool and Spa Safety Act (June 1, 2020) https://www.cpsc.gov/s3fs-public/RCA%20-%20Petition%20VGBA-%2019-1%20Petition%20for%20Classification

VOTE	DATE	ACTION	IN FAVOR	AGAINST	OTHER/ ABSTAIN
Crossover	11/1/19	Proposed ATV Action Plan of CRT Motor Inc. d/b/a/ CRT Moto[168]	**Adler*, Baiocco and Feldman**	*Kaye*	
Crossover	10/16/19	Fiscal Year ("FY") 2020 Operating Plan[169]	**Adler*, Buerkle, Baiocco, Feldman**	*Kaye*	
Split	9/24/19	Final Rule Review Current Fireworks Regulation[170]	Buerkle*, Baiocco and Feldman	*Adler*	*Kaye*
Split	7/26/19	Petition CP 18-2: Labeling Requirements Regarding Slip-Resistance of Floor Coverings[171]	Buerkle*, Feldman, Baiocco	*Adler and Kaye*	
Unanimous	5/22/19	FY 2019 Mid-Year Review[172]	**Unanimous**		
Unanimous	4/2/19	Petition CP 19-1 Requesting Rulemaking to Amend Safety Standard for Walk-Behind Power Lawn Mowers[173]	**Unanimous**		

%20of%20Vacuum%20Diffusion%20Technology%20as%20an%20Anti-Entrapment%20System%20under%20VGBA.pdf [https://perma.cc/Y9CX-R446].

168 Record of Commission Action, U.S. Consumer Prod. Safety Comm'n, https://perma.cc/TJT5-MW9L (Nov. 11, 2019) https://www.cpsc.gov/s3fs-public/RCA%20-%20Proposed%20ATV%20Action%20Plan%20of%20CRT%20Motor%20Inc.%20dba%20CRT%20Moto.pdf [https://perma.cc/TJT5-MW9L].

169 Record of Commission Action, U.S. Consumer Prod. Safety Comm'n, Fiscal Year ("FY") 2020 Operating Plan (Oct. 16, 2019) https://www.cpsc.gov/s3fs-public/CommMinFY2020OpPlan10_16_19.pdf [https://perma.cc/MS63-D7PM].

170 Record of Commission Action, U.S. Consumer Prod. Safety Comm'n, Final Rule Review Current Fireworks Regulation (Sept. 24, 2019) https://www.cpsc.gov/s3fs-public/CommissionMeetingMinutesDecisionalMatterFinalRuletoReviewCurrentFireworksRegulation.pdf [https://perma.cc/7FHN-UZYB].

171 Record of Commission Action, U.S. Consumer Prod. Safety Comm'n, Petition CP 18-2: Labeling Requirements Regarding Slip-Resistance of Floor Coverings (July 26, 2019) https://www.cpsc.gov/s3fs-public/RCA%20-%20Petition%20CP%2018-2%20Labeling%20Requirements%20Regarding%20Slip-Resistance%20of%20Floor%20Coverings.pdf [https://perma.cc/8ML5-AJD6].

172 Record of Commission Action, U.S. Consumer Prod. Safety Comm'n, FY 2019 Mid-Year Review (May 22, 2019) https://www.cpsc.gov/s3fs-public/FY2019MidYearReviewCommMtgMin5_22_19.pdf [https://perma.cc/5GEU-ESDZ].

173 Record of Commission Action, U.S. Consumer Prod. Safety Comm'n, Petition CP 19-1 Requesting Rulemaking to Amend Safety Standard for Walk-Behind Power Lawn Mowers (Apr. 2, 2019) https://www.cpsc.gov/s3fs-public/RCA-Petition-Requesting-Rulemaking-to-

VOTE	DATE	ACTION	IN FAVOR	AGAINST	OTHER/ ABSTAIN
Crossover	3/13/19	FY 2020 President's Budget[174]	**Kaye, Baiocco, Feldman**	**Buerkle* and Adler**	
Split	11/19/18	EKO Development, Ltd. and EKO USA, LLC - Recommendation to accept $1 million settlement for alleged violations of the Consumer Product Safety Act[175]	Buerkle*, Baiocco and Feldman	*Adler and Kaye*	
Split	11/9/18	Vote Regarding Revised Proposed Settlement of ln the Matter of Britax Child Safety, Inc., CPSC Docket No. 18-1[176]	Buerkle*, Baiocco and Feldman	*Adler and Kaye*	
Crossover	10/10/18	Fiscal Year ("'FY") 2019 Operating Plan[177]	**Buerkle*, Adler, Baiocco, and Feldman**	*Kaye*	

Amend-Safety-Standard-for-Walk-Behind-Power-Lawn-Mowers-HSK.pdf [https://perma.cc/RN6R-NZ3P].

174 Record of Commission Action, U.S. Consumer Prod. Safety Comm'n, FY 2020 President's Budget (Mar. 13, 2019) https://www.cpsc.gov/s3fs-public/2020%20Performance%20Budget%20-%20Comm.%20Meeting%20Minutes.pdf [https://perma.cc/G522-WCDY].

175 Record of Commission Action, U.S. Consumer Prod. Safety Comm'n, EKO Development, Ltd. and EKO USA, LLC - Recommendation to accept $1 million settlement for alleged violations of the Consumer Product Safety Act (Nov. 19, 2018) https://www.cpsc.gov/s3fs-public/RCA%20-%20EKO%20Settlement%20Agreement%20and%20Order%20-%20111918_0.pdf [https://perma.cc/NX8J-92W7].

176 Record of Commission Action, U.S. Consumer Prod. Safety Comm'n, Vote Regarding Revised Proposed Settlement of ln the Matter of Britax Child Safety, Inc., CPSC Docket No. 18-1 (Nov. 9, 2018) https://www.cpsc.gov/s3fs-public/RCAVoteRegardingRevisedProposedSettlement-Britax-CPSCDocketNo%2018-1_%20110918.pdf [https://perma.cc/K4DH-ZJRV].

177 Record of Commission Action, U.S. Consumer Prod. Safety Comm'n, Fiscal Year ("FY") 2019 Operating Plan (Oct. 10, 2018) https://www.cpsc.gov/s3fs-public/MinutesofCommissionMeetingFY2019OperatingPlanDecisionalOctober102018.pdf [https://perma.cc/G9NJ-KNFN].

VOTE	DATE	ACTION	IN FAVOR	AGAINST	OTHER/ ABSTAIN
Unanimous	10/2/18	Costco Wholesale Corporation - Recommendation to accept proposed $3.85 million settlement for alleged violations of the Consumer Product Safety Act[178]	**Unanimous**		
Unanimous	5/30/18	Resubmission of Petition to Mandate a Uniform Labeling Method for Traction of Floor Coverings, Floor Coverings with Coatings, and Treated Floor Coverings (CP 18-2)[179]	**Unanimous**		
Unanimous	5/17/18	Fiscal Year ("FY") 2018 Midyear Review and Proposed Operating Plan Adjustments[180]	**Unanimous**		
Unanimous	3/2/18	Petition CP 18-1 Requesting Rulemaking to Exempt Certain Head Protection Devices from the Safety Standard for Bicycle Helmets[181]	**Unanimous**		

178 Record of Commission Action, U.S. Consumer Prod. Safety Comm'n, Costco Wholesale Corporation - Recommendation to accept proposed $3.85 million settlement for alleged violations of the Consumer Product Safety Act (July 27, 2021) https://www.cpsc.gov/s3fs-public/RCA%20-%20-%20Costco%20Wholesale%20Corporation%20-%20Proposed%20Settlement%20Agreement%20and%20Order%20100218.pdf [https://perma.cc/2YRN-HDLQ].

179 Record of Commission Action, U.S. Consumer Prod. Safety Comm'n, Resubmission of Petition to Mandate a Uniform Labeling Method for Traction of Floor Coverings, Floor Coverings with Coatings, and Treated Floor Coverings (CP 18-2) (May 30, 2018) https://www.cpsc.gov/s3fs-public/RCA%20-%20Petition%20CP%2018-2%20Requesting%20Labeling%20Method%20for%20Traction%20of%20Floor%20Coverings%20053018.pdf [https://perma.cc/CLP8-9KY5].

180 Minutes of Commission Meeting, U.S. Consumer Prod. Safety Comm'n, Fiscal Year ("FY") 2018 Midyear Review and Proposed Operating Plan Adjustments (May 17, 2018) https://www.cpsc.gov/s3fs-public/Minutes%20of%20Commission%20Meeting%20-%20Decisional%20FY%202018%20Midyear%20Review%20and%20Proposed%20Operating%20Plan%20Adjustments%20051718.pdf [https://perma.cc/ABA4-ZRS4].

181 Record of Commission Action, U.S. Consumer Prod. Safety Comm'n, Petition CP 18-1 Requesting Rulemaking to Exempt Certain Head Protection Devices from the Safety Standard for Bicycle Helmets (Mar. 2, 2018) https://www.cpsc.gov/s3fs-public/RCA-Petition-CP-18-1-Requesting-Rulemaking-to-Exempt-Head-Protection-Devices-from-Bicycle-Helmet-Standard-030218.pdf?P.h6pu5x1zCp63YHa8igxSYYmL5T1wyg [https://perma.cc/YS4P-LCHV].

TABLE 2. OPERATING BUDGET & STAFFING FOR THE EAC BETWEEN FY 2004–2021 (AUTHOR CREATED)[182]

FISCAL YEAR	FULL TIME STAFF	OPERATING BUDGET
2004*	18	$1.7 million**
2005	22	$10.8 million
2006	23	$11.4 million
2007***	24	$16.2 million
2008	34	$16.5 million
2009	43	$17.9 million
2010	50	$17.9 million
2011	48	$16.2 million
2012	38	$11.5 million
2013	26	$10.8 million
2014	22	$10 million
2015	25	$10 million
2016	31	$9.6 million
2017	26	$9.6 million
2018	29	$10.1 million
2019	26	$9.2 million
2020	37	$15.1 million
2021	49	$17 million
2022	65	$22.8 million

* First year of full EAC operations.
** HAVA authorized up to $10 million but Congress appropriated less in the first year as the EAC was still organizing itself.
*** In FY 2007, the full-time equivalent staffing ceiling of 23 was lifted.

182 SHANTON, *supra* note 41, at 13, 16. Additional data sourced from reports available at *Annual Reports*, U.S. ELECTION ASSISTANCE COMM'N, https://www.eac.gov/about_the_eac/annual_reports.aspx [https://perma.cc/6N4H-JPKD], and from financial reports available at *Budget and Finance*, U.S. ELECTION ASSISTANCE COMM'N, https://www.eac.gov/about-eac/budget-and-finance [https://perma.cc/6AVY-KPUE].

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15. Extent and Nature of Circulation			Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
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a. Total Number of Copies *(Net press run)*			352	390
b. Paid Circulation *(By Mail and Outside the Mail)*	(1)	Mailed Outside-County Paid Subscriptions Stated on PS Form 3541 (Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)	228	264
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	(4)	Paid Distribution by Other Classes of Mail Through the USPS (e.g., First-Class Mail®)	0	0
c. Total Paid Distribution *[Sum of 15b (1), (2), (3), and (4)]* ▶			296	326
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e. Total Free or Nominal Rate Distribution *(Sum of 15d (1), (2), (3) and (4))*			559	490
f. Total Distribution *(Sum of 15c and 15e)* ▶			855	816
g. Copies not Distributed *(See Instructions to Publishers #4 (page #3))* ▶			37	24
h. Total *(Sum of 15f and g)*			892	840
i. Percent Paid *(15c divided by 15f times 100)* ▶			34.62%	39.95%

16. Electronic Copy Circulation	Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Paid Electronic Copies ▶	0	0
b. Total Paid Print Copies (Line 15c) + Paid Electronic Copies (Line 16a) ▶	296	0
c. Total Print Distribution (Line 15f) + Paid Electronic Copies (Line 16a) ▶	855	0
d. Percent Paid (Both Print & Electronic Copies) (16b divided by 16c × 100) ▶	34.62%	0

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