ARTICLES

The Existential Challenge to the Administrative State

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A set of constitutional claims today strikes at the heart of the administrative authority of the federal government. Claims regarding administrative policymaking, interpretation, adjudication, and official removal variously reject agencies' legal powers or their insulation from the President. These claims together pose an existential challenge to the administrative state. If they were all successful, agencies would cease to exercise independent, legally binding powers.

This Article diagnoses and responds to this existential challenge. It shows how the discrete claims that comprise the challenge are each grounded in a legal theory that treats the administrative state as antithetical to constitutional structures and values. This existential challenge is not merely a creature of conservative constitutional politics, however. It is also facilitated by a judicial self-conception—transcending political ideology—that readily entertains and obliquely supports the categorical rejection of administrative authority.

Insofar as the existential challenge threatens the very survival of the administrative state, it presents the opportunity to consider why this state matters. The state under threat serves democratic constitutional values, namely, to protect the people against harm, to recognize the distinct public interests requiring protection, and to provide such protection in an impartial manner. While the administrative state does not always live up to these commitments, it gives our polity at least the capacity to realize them. If the existential challenge succeeds, the people will lose core facilities of democratic law.

The Article therefore proposes some legislative, executive, and judicial reforms that would respond to the existential challenge while remedying

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some deficiencies of administrative law's current rule structure. These proposals include explicit statutory recognition of public rights to health, safety, and equality; statutory rejection of the major questions doctrine; curbed pre-enforcement judicial review; appointment of administrative officials by a special Article III court rather than the President or department heads; and a distributed, rather than unitary, approach to executive-branch management.

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INTRODUCTION

The Supreme Court is steadily eroding the regulatory powers and structures of the federal government. It has set aside specific administrative measures to protect public health and welfare, including responses to the COVID-19 pandemic,[1] climate change,[2] water pollution,[3] and education debt.[4] But the judicial incursion on the administrative state is more general and totalizing than its interventions in particular policy disputes. The Court has narrowed the powers of agencies across the board with a new rule that they cannot exercise "major" power without express congressional authority.[5] It has held legislation insulating agencies from presidential directive unconstitutional[6] and immunized the President from prosecution for any criminal conduct related to the supervision of executive officers.[7] It has abandoned deference to agency interpretations on questions of law.[8] It has limited agencies' powers to adjudicate private rights.[9] Core administrative powers are falling, one after another. Many more challenges are on their way.[10]

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1. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758 (2021); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 595 U.S. 109 (2022).

2. West Virginia v. EPA, 597 U.S. 697 (2022).

3. Sackett v. EPA, 598 U.S. 651 (2023).

4. Biden v. Nebraska, 600 U.S. 477 (2023).

5. *See West Virginia*, 597 U.S. at 723–24. On the newness of this rule, see Daniel T. Deacon & Leah M. Littman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1023–48 (2023).

6. *See, e.g.*, Seila L. LLC v. CFPB, 591 U.S. 197 (2020).

7. Trump v. United States, 603 U.S. 593, 608–09 (2024).

8. Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

9. *See* SEC v. Jarkesy, 603 U.S. 109, 128–32 (2024).

10. Many other challenges are percolating up from the district courts. *See, e.g.*, Texas v. Biden, 694 F. Supp. 3d 851, 869 (S.D. Tex. 2023) (enjoining minimum wage directive on major questions grounds); Energy Transfer, LP v. NLRB, 742 F. Supp. 3d 755 (S.D. Tex. 2024) (enjoining National Labor Relations Board Act given constitutional infirmity of administrative law judges); Space Expl. Techs. Corp. v. NLRB, 741 F. Supp. 3d 630, 641 (W.D. Tex. 2024) (same); Burgess v. Fed. Deposit Ins. Corp., 639 F. Supp. 3d 732, 749 (N.D. Tex. 2022) (Federal Deposition Insurance Corporation enforcement likely violated Seventh Amendment right to jury trial); Chamber of Com. of U.S. of Am. v. CFPB, 691 F. Supp. 3d 730, 746 (E.D. Tex. 2023) (enjoining Consumer Financial Protection Board from enforcing its unfairness authority against discriminatory financial practices on major questions grounds); *see also* Todd Phillips & Beau J. Baumann, *The Major Questions Doctrine's Domain*, 89 BROOK. L. REV. 747, 751 (2024) (describing major questions challenges to SEC enforcement actions regarding crypto currency). Shortly before this Article went to print, the Court allowed further inroads on administrative powers and independence in Trump v. Wilcox, 145 S.Ct. 1415, 1415 (2025) (staying district court injunctions of presidential removal of members of Merit Systems Protection Board and National Labor

The Court recently described some of these challenges against agencies as "existential."[11] Litigants allege, and the Court sometimes agrees, that "an agency is wielding authority unconstitutionally in all or a broad swath of its work."[12] Such constitutional and quasi-constitutional claims would deprive administrative agencies of their "essential features,"[13] namely, their independent powers to act with legally binding force.[14] In any particular case brought before the Court, an agency's existence is rarely put at risk. But if one looks at the pattern of claims from a higher altitude, a more far-reaching campaign of constitutional politics comes into view. The trend of litigation and adjudication at the high court is to replace the independent officers and plural values of administrative agencies with a "unitary Executive" in which the President wields unilateral, discretionary power over all law enforcement.[15] Agencies would lose their agency and become merely the President's creatures. At the same time, the Court increasingly deprives administrative agencies of binding policymaking and adjudicatory powers that not only underwrite regulatory capacity but also condition such capacity on impartial process. Legal and social power consequently shift from the administrative agencies established by Congress to other actors—well-resourced regulated parties, the courts, and the President. These trends together constitute an existential challenge to the administrative state: they strike at the independent, legally binding powers that are characteristic of administrative power.

In the opening months of the second Trump Administration, the President has pressed the advantage afforded to him by this existential challenge. President Trump has fired administrative officials contrary to statutory requirements, and his administration has argued that such statutory provisions are unconstitutional.[16] His

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Relations Board) and Trump v. Am. Fed'n Gov. Emp., No. 24A1174, 2025 WL 1873449, at *1 (July 8, 2025) (staying district court injunctions of Executive Order 14,210 and implementing memorandum to initiate "large-scale reductions in force" and effect a "critical transformation of the Federal bureaucracy"). However, the Court also reversed the Fifth Circuit Court of Appeals and, over the dissent of Justices Gorsuch, Thomas, and Alito, rejected a nondelegation challenge to the Federal Communications Commission's "universal service" program. FCC v. Consumers' Rsch., 145 S.Ct. 2482, 2492 (2025). These cases together show the "existential challenge" this Article describes, infra, proceeding apace, even as the results in particular cases are not foreordained.

11. Axon Enter., Inc. v. FTC, 598 U.S. 175, 180 (2023).

12. *Id.* at 189.

13. *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1232 (1994).

14. *See id.* at 1231–32, 1241–42, 1246–47 (detailing the "essential features of the modern administrative state"—including its legislative power to make important policy, its adjudicatory power to render final fact-finding judgments concerning life, liberty, or property, and its independence from presidential control—but arguing these features are unconstitutional); JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 2 (1938) (describing "administrative law" as law made by "agencies, tribunals, and rule-making boards" that do not fall neatly under the exclusive head of legislative, executive, or judicial power).

15. *See* Morrison v. Olson, 487 U.S. 654, 727 (1998) (Scalia, J., dissenting); MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 161–69 (2020).

16. *See* Email from Trent Morse, Deputy Dir., Off. of Presidential Pers., to Jennifer Abruzzo, Gen. Couns., NLRB & Gwynne Wilcox, Bd. Member, NLRB (Jan. 28, 2025, 03:38 AM), https://www.nlrbedge.com/p/read-the-trump-email-firing-member [https://perma.cc/N7RK-LTJZ] (purporting to remove Abruzzo and Wilcox from their offices because "[t]he aims and purposes of the Administration . . . can be carried out most

officers and employees have attempted to dismantle some agencies, such as the Consumer Financial Protection Bureau (CFPB), wholesale.[17] Concluding that members of the Trump Administration had likely taken "concrete steps to dismantle and shut down"[18] the CFPB, the District Court for the District of Columbia issued a preliminary injunction that "maintains the agency's existence."[19]

The second Trump Administration's attempts to hobble and eliminate agencies are largely beyond the scope of this Article, which was composed almost entirely before President Trump again took office. Instead, this Article focuses on the jurisprudential developments that enable and facilitate the current and ongoing destruction of federal regulatory powers and agency independence. The Trump Administration's actions rely, more or less explicitly, on the critique of administrative power and agency independence that has developed in Supreme Court case law.[20] The current political effort to dismantle administrative agencies

effectively with personnel of my own selection" and stating that the statutory removal protections for NLRB members, 29 U.S.C. § 153(a), are "inconsistent with the vesting of the executive Power in the President and his constitutional duty to take care that the laws are faithfully executed"); Letter from Sarah M. Harris, Acting Solic. Gen., DOJ, to Hon. Richard J. Durbin, Ranking Member, Comm. on the Judiciary, U.S. S. (Feb. 12, 2025), https://fingfx.thomsonreuters.com/gfx/legaldocs/movawxboava/2025.02.12-OUT-Durbin-530D.pdf [https://perma.cc/J7SF-35KE] (providing notice that "the Department of Justice has determined that certain for-cause removal provisions that apply to members of multi-member regulatory commissions are unconstitutional"); *see also* Jack Goldsmith, *Trump Fired 17 Inspectors General—Was It Legal?*, LAWFARE (Jan. 27, 2025, 9:25 AM), https://www.lawfaremedia.org/article/trump-fired-17-inspectors-general-was-it-legal [https://perma.cc/2DVB-T2S3] (arguing that, under current constitutional case law, the firing were "probably lawful" because the removal restrictions are "probably unconstitutional").

17. *See, e.g.*, Laurel Wamsley, *New CFPB Chief Closes Headquarters, Tells All Staff They Must Not Do 'Any Work Tasks'*, NPR (Feb. 10, 2025, 10:47 AM), https://www.npr.org/2025/02/08/nx-s1-5290914/russell-vought-cfpb-doge-access-musk [https://perma.cc/M6C5-JLBG]; Hugh Son, *Trump Administration, Musk's DOGE Plan to Fire Nearly All CFPB Staff and Wind Down Agency, Employees Say*, CNBC (Feb. 28, 2025, 12:39 PM), https://www.cnbc.com/2025/02/28/cfpb-leaders-and-elon-musk-doge-planned-to-fire-nearly-all-staff.html [https://perma.cc/P9FC-22PU]; Anna Maria Barry-Jester & Brett Murphy, *In Breaking USAID, the Trump Administration May Have Broken the Law* (Feb. 9, 2025, 1:15 PM), https://www.propublica.org/article/usaid-trump-musk-destruction-may-have-broken-law [https://perma.cc/2ABB-Z2YF]; Fatma Tanis, *USAID Terminates Nearly All of Its Remaining Employees*, NPR (Mar. 28, 2025), https://www.npr.org/sections/goats-and-soda/2025/03/28/g-s1-56968/usaid-terminates-nearly-all-its-remaining-employees [https://perma.cc/7LN9-V9YM].

18. Nat'l Treasury Emps. Union v. Vought, No. 25-0381, 2025 WL 942772, at *43 (D.D.C. Mar. 28, 2025).

19. *Id.* at 46. As of this writing, the preliminary injunction has largely been administratively stayed pending appeal "in light of appellants' representations that, absent congressional action, the Consumer Financial Protection Bureau will remain open and will perform its legally required functions." Nat'l Treasury Emps. Union v. Vought, No. 25-5091, 2025 WL 996856, at *1 (D.C. Cir. Apr. 3, 2025).

20. *See, e.g.*, Email from Trent Morse to Jennifer Abruzzo & Gwynne Wilcox, *supra* note 16 (citing Seila L. LLC v. CFPB, 591 U.S. 197 (2020) in support of proposition that the President has authority to remove officers contrary to statutory restriction); Letter from Sarah M. Harris to Hon. Richard J. Durbin, *supra* note 16 at 1–2 (citing *Seila Law* to support argument that removal restrictions on members of independent regulatory commissions are unconstitutional). *Compare Seila Law*, 591 U.S. at 240 (Thomas J., concurring) ("Congress has increasingly shifted executive power to a *de facto* fourth branch of Government—independent agencies . . . . Because independent agencies wield substantial power with no accountability to either the President or the people, they 'pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances.'" (quoting PHH Corp. v. CFPB, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J., dissenting))), *with* NBC News, *Trump and Musk Take Questions from Reporters in Oval Office*, YOUTUBE, at 3:17–3:39 (Feb. 11, 2025), https://

therefore takes advantage of preexisting challenges within constitutional jurisprudence to the existence of the administrative state.

This Article diagnoses, critiques, and responds to this existential challenge. It documents not only "the Court's resolve to roll back agency authority" but also the ideological commitments, professional networks, and judicial self-understandings that support and enable it.[21] The challenge comprises a set of claims that together would deprive agencies of their independent, legally binding powers. Each of these claims denies the constitutionality of specific, widely replicated features of agencies on the basis of a legal and political ideology that treats "constitution" and "administration" as diametrically opposed, contrary modes of government that cannot coexist within the same legal order.[22] The administrative state figures in these claims as an alien imposition that deprives the three branches of their vested powers and citizens of their natural rights.[23] The Court's theories of judicial supremacy and presidential democracy then converge to prevent Congress from authorizing agencies. To accomplish this structural revolution, the Justices recognize justiciable "rights" against "subjection to all agency authority."[24] The Court acts as a forum in which to alter fundamental governance arrangements.[25] The question becomes whether the Court is making sound constitutional policy and, if not, what other legal actors ought to do about it.

In recent years, scholars have diverged in their assessment of the scope of and justification for the Court's changes to administrative law doctrine. Gillian Metzger sounded the alarm in 2017 about an ideologically motivated "judicial attack on the administrative state."[26] More recently, Kristin Hickman has endorsed the Court's "incremental" approach to constraining administrative arbitrariness.[27] This Article offers four critical and constructive contributions to this debate.

First, it shows that the mismatch between sweeping constitutional objections and comparatively modest judicial remedies is a feature, not a bug, of the

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www.youtube.com/watch?v=A5RPfe5coe8 (statement from Musk that, "We have this unelected, fourth unconstitutional branch of government, which is the bureaucracy, which has, in a lot of ways, currently more power than any elected representative, and this is, this is not something that people want, and it's . . . not, it does not match the will of the people.").

21. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 479 (2024) (Kagan, J., dissenting).

22. *See* Lawson, *supra* note 13, at 1253 ("[O]ne cannot have allegiance both to the administrative state and to the Constitution."); Jonathan Allen, *Awaiting Possible Indictment, Trump Rallies in Waco and Vows to 'Destroy the Deep State'*, NBC NEWS (March 25, 2023, 11:00 PM), https://www.nbcnews.com/politics/awaiting-possible-indictment-trump-rallies-waco-rcna75684 [https://perma.cc/J6M9-TPB5] ("'Either the deep state destroys America or we destroy the deep state,' Trump said of the stakes of his bid for a return to the Oval Office.").

23. *See generally* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014) (arguing that agencies' binding powers are categorically unconstitutional).

24. *See* Axon Enter., Inc. v. FTC, 598 U.S. 175, 191–95 (2023).

25. *See* AZIZ Z. HUQ, THE COLLAPSE OF CONSTITUTIONAL REMEDIES 8–9 (2021) (noting how the Court's "present system of constitutional remedies" enables entities to bring "challenges to regulation" in a way that has an overall "regressive" effect on governance).

26. Gillian E. Metzger, *The Supreme Court 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 6, 17–33 (2017).

27. Kristin E. Hickman, *The Roberts Court's Structural Incrementalism*, 136 HARV. L. REV. F. 75, 76–77 (2022).

existential challenge. The challenge is unlikely to succeed in its wildest ambitions to fully extinguish administrative power. Destroying the Federal Reserve, for instance, could pose such serious risks for economic stability, national governance, and the Court's political legitimacy as to militate against total victory. Moreover, there is no particular legal change that can meet the exacting demands of a constitutional ideology that treats all administrative authority as antithetical to the Constitution.[28] Grandiose constitutional arguments write checks that specific holdings are unable to cash. The challenge, therefore, is not a static legal proposition, triggering the outright destruction of all agencies at once. It is rather a dynamic process of institutional obstruction and destruction, calling for the constant diminution of administrative authority at its increasingly contested constitutional margins.

This ongoing dynamic pays dividends to the opponents of the federal government's regulatory power. The distant, almost unreachable, objective of nullifying administrative power licenses claimants and courts to make ever more consequential inroads into the bureaucratic interior of the federal government. The very "depth" and complexity of the administrative state[29] presents an indefinitely large set of marginal constitutional infirmities that aggrieved parties can assert. As the Court entertains and develops legal theories that render such objections plausible,[30] it gives regulated parties an almost inexhaustible arsenal of defensive strategies against agency rulemaking, adjudication, and enforcement. Agencies must bear the rising reputational and litigation costs of ever more colorable allegations that their "very existence" affronts the Constitution.[31] Administrative power is not quite left for dead but rather, as Justice Gorsuch once put it, "maimed and enfeebled—in truth, zombified."[32]

The effects of this existential challenge are likely to be unevenly distributed across different kinds of agencies. It likely poses the greatest risk to agencies, such as the Federal Trade Commission and the Environmental Protection Agency, that exhibit the core legal powers and features that characterize traditional administrative authority.[33] That is to say, it threatens agencies that engage in binding rulemaking and adjudication.[34] By contrast, the effects on what Emily Chertoff calls "force agencies," such as Customs and Border Patrol, which rely

28. I use "constitutional ideology" to mean a pattern of constitutional thought made up of common values, tensions, critiques, and institutional implications. The exemplary study deploying such an understanding of ideology is BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967).

29. *See* STEPHEN SKOWRONEK, JOHN A. DEARBORN & DESMOND KING, PHANTOMS OF A BELEAGUERED REPUBLIC: THE DEEP STATE AND THE UNITARY EXECUTIVE 4–6 (2021).

30. *See infra* Section I.C.

31. Axon Enter., Inc. v. FTC, 598 U.S. 175, 189 (2023).

32. Kisor v. Wilkie, 588 U.S. 558, 592 (2019) (Gorsuch, J., concurring) (discussing the weakening of *Auer* deference to an agency's interpretation of its own regulation).

33. *See, e.g.*, 15 U.S.C. §§ 45(b), 46(g) (authorizing the FTC to adjudicate issues regarding unfair methods of competition and unfair or deceptive acts or practices affecting commerce, and to have general rulemaking power); 42 U.S.C. §§ 7409(a), 7413(d) (granting the EPA rulemaking authority over national ambient air quality standards, and authority to adjudicate and assess civil penalties for violation of state implementation plans to meet such standards).

34. 5 U.S.C. §§ 553, 554 (Administrative Procedure Act requirements for agency rulemaking and adjudication).

more heavily on discretionary coercive powers than on legally binding authorities, are likely to be more minimal.[35] On the margins are agencies like the Social Security Administration or the Executive Office of Immigration Review, which might or might not be at risk, depending on how courts characterize the interests they adjudicate.[36] The existential challenge is thus not a challenge to all forms of enforcement power in each and every agency. Rather, it promises to reshape the procedural form and the substantive locus of federal executive power. It portends an executive branch that is less predictable and rule-bound; more discretionary and potentially arbitrary; less able to regulate market relations; but perhaps still competent to prosecute and police offenses and to distribute largesse.

The second contribution of this Article is to demonstrate that the existential challenge is not merely a creation of the conservative legal movement. It also draws support from some of the liberal justices. Justice Kagan's opinion for the Court in *Axon Enterprise, Inc. v. FTC* allows "existential" claims to bypass agency enforcement processes if they advance radical claims that the agency's basic functions or features are inconsistent with the Constitution.[37] The opinion, further, cognizes "injury" from mere exposure to administrative power.[38] In so doing, Justice Kagan's opinion practically invites regulated parties to paint agencies as fundamentally incompatible with the Constitution, so as to more readily obtain judicial review. Beyond *Axon*, and across her career as Solicitor General, as a scholar, and as a justice, Justice Kagan has advocated broad conceptions of executive power that undercut agency independence.[39] Justice Breyer, likewise, has developed theories of statutory interpretation, such as the major questions doctrine,[40] that now threaten agencies' authority to make policy in "all corners of the administrative state."[41] He has also articulated a full-throated defense of the "authority of the Court" in the face of widespread concerns about judicial aggrandizement and inadequate, politically motivated judicial reasoning.[42]

35. Emily R. Chertoff, *Violence in the Administrative State*, 112 CALIF. L. REV. 1941, 1946–47 (2024) (distinguishing the traditional coverage of administrative law as concerned with bureaucracies that "appl[y] standardized rules and procedures to process evidence and make reasoned decisions" from "force agencies" that rely on discretionary enforcement and violence, in domains such as policing, immigration, and incarceration); *see also* Emily R. Chertoff & Jessica Bulman-Pozen, *The Administrative State's Second Face*, 100 N.Y.U. L. REV. (forthcoming 2025) (manuscript at 3) (on file with author) (distinguishing between "the benefits and regulatory state," on the one hand, and "agencies that govern through physical force and surveillance" on the other).

36. *Compare* Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 YALE L.J. 1769, 1803–09 (2023) (describing debate over the application of due process to immigration adjudications and suggesting there is little ground for treating deportation proceedings as involving mere privileges), *with* Sessions v. Dimaya, 584 U.S. 148, 210–15 (2018) (Thomas, J., dissenting) (arguing that the original understanding of due process did not apply to removal proceedings).

37. 598 U.S. 175, 180 (2023).

38. *Id.* at 191.

39. *See infra* Section I.C.1.

40. *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986).

41. West Virginia v. EPA, 597 U.S. 697, 721 (2022); *see infra* Sections I.B.2–I.C.

42. *See generally* STEPHEN BREYER, THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS (2021) (presenting the argument that Supreme Court Justices avoid deciding cases on the basis of ideology, rather than law).

These moves are surely not motivated by agreement with constitutional objections to administrative authority. Justices Kagan and Breyer have dissented, sometimes strenuously, from the Court's administrative law holdings, offering often brilliant defenses of traditional administrative law principles.[43] Nonetheless, they have continued to support the Court's preemptory authority over contested questions of constitutional value and structure.[44] This suggests that deep and general commitments to judicial supremacy trump their more specific and substantive legal philosophies. Cross-ideological judicial role-moralities and institutional commitments have thus contributed to the existential challenge's success.[45] A shared belief in judicial supremacy leads even those Justices who are deeply invested in traditional administrative law to assent to the Court's authority to uproot it. The existential challenge may thus provide a case study of the way judicial self-conceptions, as well as professional or institutional solidarity, may work against other legal as well as political interests.

Third—turning from critique to reconstruction—this Article argues that the administrative state under threat serves crucial constitutional values. Recall that the existential challenge threatens agencies' essential features: their independent powers to act with legally binding force. Building on prior scholarship, I argue that these core agency characteristics enable the federal government to protect the people's sovereign interests.[46] Through legislation and administrative practice, the people have expressed interests in public health and safety, various forms of economic and social equality, and market fairness.[47] Article II of the Constitution contemplates that such interests will be structurally disaggregated

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43. *See, e.g.*, *West Virginia*, 597 U.S. at 753 (Kagan, J., dissenting); Seila L. LLC v. CFPB, 591 U.S. 197, 261 (2020) (Kagan, J., concurring in part and dissenting in part); Loper Bright Enters. v. Raimondo, 603 U.S. 369, 448 (2024) (Kagan, J., dissenting); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 514 (2010) (Breyer, J., dissenting).

44. *See infra* Section I.D.

45. On the importance of judges' "images of the judicial role" in the historical development of administrative law, see Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 70s*, 53 ADMIN. L. REV. 1139, 1143 (2001). On "judicial role morality" in general, see Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality*, 102 TEX. L. REV. 221, 292–302 (2023).

46. Blake Emerson, *Vindicating Public Rights*, 26 U. PA. J. CONST. L. 1424, 1430–31 (2024) (administrative law is "concerned not merely with bridling the exercise of power but with enabling government to secure the political community against substantial risks to its wellbeing and integrity . . . . The departments of the federal government have the power and the obligation to remove obstructions and abate hazards that impede the nation's shared civic life."). See *infra* Section II.A for further detail. This argument contributes to the literature on administrative constitutionalism, which describes how agencies fulfill important constitutional roles as well as engage in constitutional arguments. *See, e.g.*, JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 13 (2012); Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 801 (2010); Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1897 (2013); JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC 8–9, 22 (2017); WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 31 (2010); Bertrall L. Ross II, *Embracing Administrative Constitutionalism*, 95 B.U. L. REV. 519, 520 (2015); Brian J. Cook, THE FOURTH BRANCH: RECONSTRUCTING THE ADMINISTRATIVE STATE FOR THE COMMERCIAL REPUBLIC 16 (2021).

47. Emerson, *supra* note 46, at 1452–57.

into discrete "executive Departments," led by officers with duties determined primarily by statutory law rather than presidential will.[48] The people's ability to realize their collective interests depends on the delegation of binding power to these specialized institutions that are each competent to promote discrete public values in an impartial manner.

By disabling administrative agencies, the existential challenge threatens the state's capacity to safeguard the public.[49] Administrative law scholarship to date has only partially recognized these substantive ends of administrative structure. It has long emphasized due process concerns, such as rights to notice, hearing, and reason-giving.[50] As important as these procedural protections are, the predominant scholarly focus on them has drawn attention away from the ultimate interests that the federal government has the power and duty to advance, such as the health, safety, and equal standing of the people. I follow the work of William N. Eskridge Jr., John Ferejohn, and Peter Shane in shifting attention towards such substantive interests that the administrative state protects.[51] Building on my prior scholarship, I argue that these interests do not solely originate in statutory law but are grounded more fundamentally in the collective rights that Congress is authorized, and arguably obligated, to protect. The executive departments contemplated by the Constitution then represent and give effect to these distinct, collective rights recognized in legislation.

This normative reconstruction does not deny recurrent pathologies of the administrative state, such as the dignitary harms it inflicts, the forms of social exclusion it enables or fails to prevent, and the biases it sometimes harbors toward powerful and wealthy actors.[52] Rather, critiques of the administrative state along these lines tend implicitly to rely on the state's legitimating principles to criticize its failures. They identify ways in which the state acts unfairly, or without justification, or deprives the public of its protection against social risk or domination. An agenda for structural reform can then take shape in the gap between the institution's ideals and its concrete practices. The existential challenge, by contrast, would not cure the American government of these ills. Rather, the

48. *See* U.S. CONST. art. II, § 2, cl. 1 (The President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments."); Blake Emerson, *The Departmental Structure of Executive Power: Subordinate Checks from Madison to Mueller*, 38 YALE J. ON REGUL. 90, 93–94 (2021).

49. On "state capacity" and administrative power, *see* Theda Skocpol & Kenneth Finegold, *State Capacity and Economic Intervention in the Early New Deal*, 97 POL. SCI. Q. 255, 260–61 (1982).

50. *See, e.g.*, Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 487, 492 (2010); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 470 (2003); JERRY MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 2 (1985).

51. *See* ESKRIDGE, JR. & FEREJOHN, *supra* note 46, at 31–34; PETER M. SHANE, DEMOCRACY'S CHIEF EXECUTIVE: INTERPRETING THE CONSTITUTION AND DEFINING THE FUTURE OF THE PRESIDENCY 161–75 (2022).

52. *See, e.g.*, Bijal Shah, *Administrative Subordination*, 91 U. CHI. L. REV. 1603, 1603 (2024); Christopher S. Havasy, *Relational Fairness in the Administrative State*, 109 VA. L. REV. 749, 820–21 (2023).

destruction of the administrative state would deeply impair, if not foreclose, the political community's ability to realize its collective interests in an impartial manner. Without the essential facility of administrative power, there is little hope that the people of the United States will have the wherewithal to determine the conditions of our economic and social life.

The fiercest critics of the administrative state trumpet related democratic ideals as they inveigh against the administrative state. For instance, in his concurring opinion in *West Virginia v. EPA*—a case in which the majority limited the Environmental Protection Agency's power to address climate change—Justice Gorsuch argued that "the Framers believed that a republic—a thing of the people—would be more likely to enact just laws than a regime administered by a ruling class of largely unaccountable ministers."[53] The ideal of a publicly created and just government is indeed intrinsic to the American constitutional project. But the administrative state is itself a "thing of the people." It is the legislative creation of officials elected by the people, and it is bound by law to serve the people's collective interests, as they are recognized in statute. The protection of the public depends upon agencies that are responsive to, but not dominated by, either political influence or professional knowledge. It requires a pluralistic administrative structure that implements the multiple values encoded in law rather than reducing all of law to the President's will. And it demands impartial processes that condition the exercise of power on notice, participation, and sound reasoning. The Court is currently dismantling and disabling these essential features of the state. Its life-tenured justices, rather than the administrative state, risk becoming a "ruling class of largely unaccountable ministers."[54]

The fourth and final contribution this Article makes is a set of institutional responses to the existential challenge. The goal here is not to "restore" the administrative state as it existed prior to the challenge. It is neither possible nor desirable to put things back precisely as they were.[55] Not only has the existential challenge begun to render much of the conventional rule structure of administrative law unworkable; more than this, traditional administrative law doctrine has often failed to live up to the principles of popular sovereignty, democratic pluralism, and impartiality that animated it. But those core principles remain as vital as ever. The response to the existential challenge must deploy new structures to better honor these fundamental commitments.

In formulating an appropriate response, the most important institution is Congress, which has vast economic regulatory powers and controls the judiciary's jurisdiction.[56] While there may be reason to doubt Congress' capacity to respond ably to the existential challenge, there is no getting around the need for a legislative

53. 597 U.S. 697, 737 (2022) (Gorsuch, J., concurring) (internal quotations and citation omitted).

54. *See id.*

55. *Cf.* G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 23 (Allen W. Wood ed., H.B. Nisbet trans., 1991) ("[A] shape of life has grown old, and it cannot be rejuvenated.").

56. U.S. CONST. art. I, § 8, cl. 1 (Powers of Congress); *id.* cl. 3 (Regulation of Commerce); *id.* cl. 18 (Necessary and Proper Clause); *id.* art. III, § 1 (Judicial Power, Tenure, and Compensation); art. III, § 2, cl. 2 (Jurisdiction); *see* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1362–63 (1953) (noting that federal judicial

response to judicial decisions that threaten the powers and duties the Constitution assigns to Congress. Acquiescence might mean a permanent loss of federal administrative power. Congress should therefore render explicit the public rights to health, safety, and equality that implicitly underlie administrative law to justify procedural rules that increase the weight of such rights in governmental action and upon judicial review. It should then shift the timing and scope of review to enhance deference to administrative regulations, while paring back deference to adjudicatory orders, at least in cases where dignitary concerns predominate. Congress should also shift rules around the creation and relation of executive offices to guard them against presidential arbitrariness, in particular by relying more routinely on judicial appointment and removal of professional civil servants. Presidents, meanwhile, should rely on public statements and executive orders to bolster administrative law principles, such as reasoned deliberation. Administrators should articulate their policy agendas without reference to the President's directives, articulating their own commitments and developing their own social constituency and political perspective within the governing coalition. Finally, dissenting Justices on the Court should better articulate the legally protected interests that justify the exercise of administrative power, to provide Congress with appropriate language to statutorily override the majority's holdings.

This Article proceeds as follows. Part I describes the existential challenge, identifying its key claims, the underlying constitutional theory it advances, and its unfolding logic. Part II identifies the affirmative constitutional value of the administrative state that the existential challenge targets. Part III outlines legislative, executive, and judicial responses to the existential challenge.

I. UNDERSTANDING THE EXISTENTIAL CHALLENGE

The existential challenge is comprised of a set of constitutional and quasi-constitutional claims, supported by an anti-statist constitutional ideology, that rejects agencies' legal personality and essential powers. The discrete claims do not generally involve the destruction of any one agency, much less the administrative state as a whole. But they each rely on broad assertions of administration's constitutional infirmity to reject particular, constitutive features of agency authority: the insulation of administrative officers from presidential control,[57] the power to decide questions of law and even fact,[58] and the power to make rules that bind persons outside the government and to address major questions of policy.[59] If all such claims were to succeed, the administrative state as we know it would cease to exist. But the existential challenge need not achieve its grandest ambitions to fundamentally alter the structure of government. Whether or not administrative

decisions often make "unqualified statements of the power of Congress to regulate the jurisdiction of the federal courts").

57. *See infra* Section I.C.1.

58. *See infra* Section I.C.2.

59. *See infra* Section I.C.3.

power is fully extinguished, the radical charge of administration's incompatibility with the Constitution licenses ever more costly challenges to agency action.

Section A of this Part sets out from Kagan's identification of the "existential" challenge in *Axon Enterprise v. FTC*,[60] a 2023 Supreme Court decision involving the jurisdictional boundaries of administrative and judicial power. This little-discussed case is in fact a watershed, as it transcends the usual partisan alignment in the Court's administrative law docket to recognize and partially legitimate the wholesale constitutional rejection of traditional administrative law. In recognizing the existential challenge, the Court takes notice of—and ultimately facilitates—a pattern of constitutional politics that aims to deprive agencies of their legal identity and authority.

Section B then maps the wider universe of the existential challenge, including not only claims concerning removal restrictions but also legislative delegation of major policymaking powers and binding adjudicatory powers. These cases are backed, intellectually and institutionally, by an ideology of constitutional power that would radically reduce the regulatory powers of Congress and of administrative agencies, while heightening the discretionary authority of the President, the courts, and well-resourced regulated parties. The existential challenge is at the same time facilitated by more generic, cross-ideological tendencies in contemporary judicial reasoning, which treat the courts as the final arbiter of structural-constitutional design, standing above and beyond the other two Branches in the system of checks and balances.

Section C shows how, in performing that institutional self-conception, the Court gives hearing rights to a political ideology that finds administrative authority repugnant. The Court then becomes a forum, not for the adjudication of individual claims of right, but rather to achieve the collective constitutional vision of a legal and political movement.[61]

A. THE PUZZLING EMERGENCE OF THE EXISTENTIAL CLAIM

Axon characterizes certain constitutional challenges to administrative power as "existential,"[62] threatening the very survival of the agencies before the Court. At first blush, the label seems like a gross exaggeration. The claims at issue in the case concerned only the removability of agency adjudicators. While such claims are by no means trivial, they do not threaten the existence of the agencies. There is an air of constitutional alarm about the case that seems disproportionate to its stakes. But there is, indeed, a reason for alarm if one looks beyond *Axon* itself to the deeper constitutional ideology that underlies both this particular case and many other pending cases challenging interrelated facets of administrative power.[63] Justice Kagan's opinion for the Court takes notice of a far-reaching project to

60. 598 U.S. 175, 180 (2023).

61. *Cf.* Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1347 (2006).

62. *Axon*, 598 U.S. at 180.

63. *See, e.g.*, cases cited *supra* note 10.

reshape the structures of government as well as the social order it regulates. All of the Justices recognize and enable a broader constitutional politics that is aggrieved by administrative power as such.

Axon resolved a circuit split concerning jurisdiction over constitutional challenges to the Securities and Exchange Commission (SEC) and the Federal Trade Commission (FTC). Each of these commissions' organic acts provided only for appellate review of their final orders.[64] This is a long-established, standard model of judicial review across the administrative state, which carves out a space for agency policymaking prior to and outside of the judicial process.[65] Yet, the Court held that the targets of SEC and FTC enforcement—an accountant accused of violating auditing standards and a company accused of antitrust violations—could bring their constitutional complaints about these agencies to a district court as soon as the agencies issued them a complaint.[66] After *Axon*, a party might forgo the administrative process altogether if they make certain kinds of constitutional arguments against the agencies that investigate them.[67] They need not wait until an administrative hearing has begun—much less concluded—to raise their constitutional claims. In a context where there are many live constitutional arguments against agencies, this holding significantly increases the cost of agency enforcement. It might also induce agencies such as the SEC and FTC to avoid administrative adjudication altogether.

The opinion for the Court by Justice Kagan drew no dissents—a rare moment of cross-ideological consensus in an often contentious administrative-law docket. Justice Kagan concluded that the statutory review schemes for the FTC and SEC did not displace the district courts' jurisdiction over these constitutional challenges because "the challenges are fundamental, even existential. They maintain in essence that the agencies, as currently structured, are unconstitutional in much of their work."[68] The 16-page opinion goes on to describe the claims as going to the "existence" of the agency six times.[69] Under Justice Kagan's logic, because the claims go to the agency's "very existence," the agencies are unsuited to

64. *Axon*, 598 U.S. at 181 (citing 15 U.S.C. § 78y(a)(1) (appellate review of SEC orders) and 15 U.S.C. §45(c) (same for FTC orders)).

65. Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 964, 998 (2011).

66. *Axon*, 598 U.S. at 183–85.

67. This holding departed from precedent that channeled constitutional claims through the agencies' process and subsequent appellate review. *See* Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 216 (1994) (federal-question jurisdiction over due process claims against Federal Mine Safety Health Review Commission precluded by statutory review scheme); Elgin v. Dep't of the Treasury, 567 U.S. 1, 11–12 (2012) (statutory review scheme for Merit System Protection Board precluded federal question jurisdiction over equal protection claims related to federal employment action). *But see* McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 496–97 (1991) ("pattern and practice" due process claims to an immigration program not precluded in part because, absent district court review, "respondents would not as a practical matter be able to obtain meaningful judicial review").

68. *Axon*, 598 U.S. at 180.

69. *Id.* at 188, 189, 193, 194, 195.

decide those claims.[70] If the agency ought not to exist, then it cannot render any legally meaningful orders at all. It would be useless at best, and oppressive at worst, for Congress to make a party tarry with an agency whose very being affronts the Constitution.

The Court's existential characterization of the specific claims before it is a substantial exaggeration, however. The common constitutional claim preserved by the *Axon* petitioners below was that the administrative law judges (ALJs) who would preside over their hearings were unconstitutionally separated from presidential control.[71] This argument[72] is grounded in a unitary theory of the executive, which asserts that the President alone exercises executive power and thus must be able to control all administrative officers.[73] I will discuss the history and implications of that theory in Section I.C.1. For now, note that the particular claim here—that ALJs are not sufficiently controlled by the President—would not result in the destruction of the agency, if successful. The claim certainly does challenge key aspects of agencies' adjudicatory structures. But the remedy provided in similar cases is the severance of removal restrictions on particular officials, not the outright disempowerment or invalidation of the agency.[74] Both the SEC and the FTC could persist in legally authoritative form if some of the ALJs' removal protections were eliminated. Even if ALJs were effectively barred from issuing orders altogether, the agencies could continue bringing civil enforcement actions and making legislative rules.[75] So it's puzzling, on its face, that Justice Kagan and the Court would settle on this ontological conception of the relevant claims.[76]

The Court's hyperbolic conception of the existential stakes in *Axon* is linked with its novel conception of the injury petitioners suffered at the agencies' hands. To reach the conclusion that the statutory review scheme did not displace the district court's jurisdiction, Justice Kagan reasoned that such a reading would "foreclose all meaningful judicial review"[77] because it would be "impossible to remedy"[78] the

70. *Id.* at 189.

71. *Id.* at 180.

72. For the argument that ALJs' appointment structure is unconstitutional, see generally Linda D. Jellum, *"You're Fired!" Why the ALJ Multi-Track Dual Removal Provisions Violate the Constitution and Possible Fixes*, 26 GEO. MASON L. REV. 705 (2019).

73. *See infra* Section I.C.1.

74. *See, e.g.*, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 508 (2010); Seila L. LLC v. CFPB, 591 U.S. 197, 234, 238 (2020); *see also* William Baude, *Severability First Principles*, 109 VA. L. REV. 1, 37–41 (2023).

75. *See, e.g.*, 15 U.S.C. §§ 78u, 80b-11(a) (outlining the SEC's powers to investigate violations, bring civil enforcement actions, and make legislative rules).

76. The notion of an existential claim against agency structures originates in *Free Enterprise Fund,* 561 U.S. at 490–91 (affirming that district court had federal-question jurisdiction to entertain constitutional claims against the Public Company Accounting Oversight Board in part because "petitioners object to the Board's existence, not to any of its auditing standards."). *Axon* transforms this unexplained, fleeting description into a cornerstone of the analysis.

77. Axon Enter., Inc. v. FTC, 598 U.S. 175, 186 (2023) (quoting Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 212–13 (1994)).

78. *Id.* at 191.

injury of "subjection to an illegitimate proceeding"[79] after the administrative proceeding had concluded.

The notion that an illegitimate proceeding cannot be remedied after it has concluded is a bold newcomer to administrative law.[80] Procedural objections are the bread and butter of this body of law and review after binding action is taken is the norm, including as to constitutional claims.[81] The Administrative Procedure Act generally postpones review until the agency has taken a "final agency action,"[82] meaning that the agency action has reached "the consummation of the agency's decisionmaking process" and altered "rights or obligations" or created other "legal consequences."[83] That approach gives agencies a practical and temporal advantage with regard to private parties. They must typically tarry with the agency's process first, and undergo the expense and delay of doing so, before they may seek review in court.[84]

Justice Kagan cast serious doubt on the propriety of these conventional temporalities and rhythms of the administrative process: "Axon and Cochran will lose their rights not to undergo the complained-of agency proceedings if they cannot assert those rights until the proceedings are over."[85] This was not because of any physical or economic harm the petitioners would suffer as a result of the unconstitutional structure. Indeed, the Court has previously rejected the claim that a party could obtain pre-enforcement review based on the "irreparable harm" of undergoing

79. *Id.*

80. *Compare* FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 244 n.11 (1980) (finding an issuance of an administrative complaint not a reviewable "final agency action"), *with* Seila L. LLC v. CFPB, 591 U.S. 197, 212 (2020) (internal quotations and citations omitted) (recognizing "here-and-now injury" in a separation of powers violation) *and Axon*, 598 U.S. at 192 (recognizing, in the case of qualified immunity, the defendant's "certain rights 'not to stand trial' or face other legal processes" and that "those rights are 'effectively lost' if review is deferred until after trial") (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)).

81. *See* 5 U.S.C. § 706(2) (stating that a reviewing court may "set aside agency action," including where it is unconstitutional); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (reversing criminal conviction of slaughterhouse operators who violated unconstitutionally authorized industrial code). *But see Free Enter. Fund*, 561 U.S. at 508 (severing the removal restriction for Board members after Board commenced investigation against member of petitioner association).

82. 5 U.S.C. § 704.

83. Bennett v. Spear, 520 U.S. 154, 178 (1997) (internal quotations omitted).

84. A prominent exception to this approach is where a party levies a due process objection against the agency. *See, e.g.*, Am. Fed'n of Gov't Emps. v. Acree, 475 F.2d 1289, 1292 (D.C. Cir. 1973) (finding administrative exhaustion not required to bring due process claim challenging civil service procedures); Mathews v. Eldridge, 424 U.S. 319, 331–32 (1976) (finding statutory exhaustion requirement did not bar district court's jurisdiction over due process objection to Social Security disability determination hearings). In such cases, immediate access to judicial review may be necessary to avoid subjecting the individual to the very unfair administrative procedures that they challenge. As Section I.D explores, however, the common claim up for review in *Axon* did not concern due process, but rather that the agency's adjudicators were "insufficiently accountable to the President, in violation of separation-of-powers principles." 598 U.S. at 180. *Axon*'s treatment of this structural objection—concerning political control over adjudication—as meriting the same immediate access to court is novel and not supported by the same sort of fairness rationales as the due process cases. Quite the contrary. As Section II.C details, enhanced political control threatens the due process concern with impartial adjudication.

85. *Axon*, 598 U.S. at 192.

"the expense and disruption" of the administrative process.[86] Justice Kagan instead held that the *Axon* petitioners would suffer a "here-and-now injury" from threatened exposure to a supposedly unconstitutional decision structure, "irrespective of its outcome" and regardless of the costs it imposes.[87]

Why would the Court treat the petitioners as suffering an irreparable injury from the threat of undergoing a garden-variety administrative adjudication with ample opportunity for judicial review of any constitutional claims? Why would it understand these claims as striking at the existence of agencies, even though the existence of agencies was not at issue? Perhaps all the Justices simply got it wrong and failed to appreciate the limited scope of the claims, the interests, and the likely remedies. But there is a more plausible—and troubling—explanation for the Court's radical conception of the challenges.

B. CONFRONTING THE BROADER EXISTENTIAL CHALLENGE

Looking at the claims and opinions below in *Axon*, as well as the heated, ideological tenor of the constitutional arguments brought before the Court against agencies in *Axon* and other cases,[88] it was natural for Justice Kagan to treat the claim as part and parcel of a campaign against administrative power in all its guises. This is not to say that Justice Kagan meant to signal agreement with the existential challenge on the merits. Rather, she rightly interpreted the claims up for review in *Axon* as two arrows in a quiver of claims that together strike at the essential components of administrative authority. As the following Sections detail, there is a set of claims which cohere not only in their effects on administrative power but also in the constitutional ideology that underlies them. Sitting on the high court, as perhaps its most competent expositor of traditional administrative law doctrine, Justice Kagan has been uniquely positioned to see the bigger picture. Thus, when the Court went on to overrule *Chevron* the year after *Axon*, she observed, "it is impossible to pretend that today's decision is a one-off, in

86. FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 244 (1980).

87. *Axon*, 598 U.S. at 192 (internal quotations omitted).

88. *See*, *e.g.*, Brief for Pacific Legal Foundation as Amicus Curiae Supporting Petitioner at 3, Seila L. LLC v. CFPB, 591 U.S. 197 (2020) (No. 19-7) ("The modern administrative state is more a government within a government—and one that threatens to overwhelm the government the constitution created."); Brief for Justice Society as Amicus Curiae Supporting Petitioner at 25, *Axon*, 598 U.S. 175 (No. 21-86) ("Without such early intervention by the Article III courts, non-agency parties are herded into the administrative killing fields from which they can never emerge without grievous, often fatal, injury."); Brief for Americans for Prosperity Foundation as Amicus Curiae Supporting Petitioners at 11–12, West Virginia v. EPA, 597 U.S. 697 (2022) (Nos. 20-1530, 20-1531, 20-1778, 20-1780) ("[T]he [Clean Power Plan] is not an isolated instance of unelected bureaucrats purporting to stand in Congress's shoes; it is a symptom of a . . . broader trend in recent years of federal agencies wresting from the People's elected representatives the power to make major policy choices among competing societal visions in politically divisive contexts."); Brief for The Buckeye Institute as Amicus Curiae Supporting Petitioners at 4, *West Virginia*, 597 U.S. 697 (Nos. 20-1530, 20-1531, 20-1778, 20-1780) ("[T]he executive agency is always—to some extent—at odds with the Constitution[] . . ."); Brief for New Civil Liberties Alliance as Amicus Curiae Supporting Petitioners at 8, *West Virginia*, 597 U.S. 697 (Nos. 20-1530, 20-1532, 20-1778, 20-1780) (alleging that the nondelegation doctrine betrays "both the Constitution and the truth" because "[u]nder the Constitution, individuals are to be bound only by laws made with their consent through their elected legislature.").

either its treatment of agencies or its treatment of precedent."[89] She described the Court's overruling of this "cornerstone of administrative law" as "yet another example of the Court's resolve to roll back agency authority, despite congressional direction to the contrary."[90]

That "resolve" is motivated by long-running trends in conservative legal thought, which have now entered explicit judicial reasoning. Consider the remarkable concurring opinion from Judge Oldham of the Fifth Circuit in *Cochran v. SEC*,[91] one of the two decisions up for review in *Axon*. Oldham ties the narrow jurisdictional question at issue in the case to a world-historical narrative about how "Progressives" like Woodrow Wilson and James Landis corrupted the Constitution by creating regulatory agencies.[92] Oldham claims that Wilson and Landis "fundamentally disagreed with the Founders' vision" of the separation of powers.[93] Instead, they thought that the

> accumulation of all powers into one set of hands was—far from a vice—a virtue. And they wanted those all-powerful hands connected to an administrative agency, far away from the three branches of government the Founders worked so hard to create, separate, and balance. And most of all, Wilson and Landis wanted power as far away from democracy and universal suffrage as possible.[94]

Oldham here faults agencies like the SEC not only for their independence from the presidency, but also from the courts and Congress, and, moreover, for their combined legislative, adjudicatory, and enforcement power. Oldham links this constitutional anathema to the ideas of "German historicists," particularly those of G.W.F. Hegel, about using "administration" to reach an "idealized future."[95] The jurisdictional question at issue in *Cochran* thus barely scratches the surface of Oldham's categorical constitutional rejection of administrative agencies. He wants to extirpate this un-American invasive species, root and branch. Enabling parties to bring their constitutional claims in district court merely facilitates that project.

Oldham's opinion is not anomalous but is rather informed by conservative constitutional scholarship, counsel, advocacy organizations, and Supreme Court reasoning, which converge in their antipathy to the administrative state. Oldham cites scholars such as Philip Hamburger and Ronald Pestritto to make the case that the administrative state is tied to antidemocratic, unconstitutional, and

89. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 479 (2024) (Kagan, J., dissenting).
90. *Id.*
91. 20 F.4th 194, 213–36 (5th Cir. 2021).
92. *Id.* at 214–21.
93. *Id.* at 215.
94. *Id.*
95. *Id.*; *see also* BLAKE EMERSON, THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY 72–84 (2019) (arguing that American Progressives democratized Hegel's vision of the modern constitutional state and that both Hegel and the Progressives were fundamentally concerned with the value of political freedom).

foreign ideas smuggled into the U.S. legal order by the Progressives.[96] Hamburger is one of the most influential in a cadre of conservative intellectuals who reject traditional principles of administrative law wholesale.[97] He argues that agencies' power to issue binding rules and adjudicatory orders is "contrary to the very nature of Anglo-American constitutional law and society."[98] An attorney from Hamburger's own litigation and advocacy organization, the New Civil Liberties Alliance (NCLA),[99] represented one of the challengers in *Axon* in district court and on appeal to the Fifth Circuit.[100] NCLA also represented one of the petitioners who succeeded in swaying the Court to overrule *Chevron*.[101]

Hamburger's polemics resonate with and amplify deep-running currents in conservative and classical-liberal intellectual history. Over a century ago, stalwarts of English constitutionalism like A.V. Dicey rejected administrative law, or "*droit administratif*," as a continental import, inimical to the English tradition of exclusive judicial and parliamentary lawmaking.[102] In 1938, Harvard Law School Dean Roscoe Pound took up this view when he inveighed against the New Deal state's "administrative absolutism" and accused its proponents of "Marxian" sympathies.[103] Friedrich Hayek's 1944 *The Road to Serfdom* condemned the New Deal's "planning" state in part for its connection to the German-idealist statism and to its extremist offshoots, Nazism and Soviet Communism.[104] Michael

96. *See Cochran*, 20 F.4th at 215 (citing RONALD J. PESTRITTO, WOODROW WILSON AND THE ROOTS OF MODERN LIBERALISM 14 (2005) and HAMBURGER, *supra* note 23, at 458).

97. *See generally* HAMBURGER, *supra* note 23 (exploring the "extralegal" nature of administrative agency actions); *see, e.g.*, West Virginia v. EPA, 597 U.S. 697, 750 n.6 (2022) (Gorsuch, J., concurring) (citing HAMBURGER, *supra* note 23, at 377–402 (discussing the unconstitutionality of the nondelegation doctrine)).

98. HAMBURGER, *supra* note 23, at 511.

99. *Our Mission*, NEW C.L. ALL., https://nclalegal.org/who-we-are [https://perma.cc/9XY5-4QL5] (last visited May. 1, 2025) ("NCLA is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar Philip Hamburger to protect constitutional freedoms from violations by the Administrative State. NCLA's public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans' fundamental rights.").

100. *Cochran*, 20 F.4th at 197.

101. Relentless, Inc. v. U.S. Dep't of Com., 62 F.4th 621, 624 (1st Cir. 2023), *cert. granted in part* Relentless, Inc. v. U.S. Dep't of Com., 144 S. Ct. 325 (2023), *vacated and remanded sub nom.* Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024), *and vacated sub nom.* Relentless Inc. v. U.S. Dep't of Com., No. 21-1886, 2024 WL 3647769 (1st Cir. July 31, 2024).

102. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 324–401 (8th ed. 1915). For discussion of Dicey's position, see Kevin M. Stack, *Overcoming Dicey in Administration Law*, 68 U. TORONTO L.J. 293, 294–95 (2018).

103. *Report of the Special Committee on Administrative Law*, 63 ANN. REP. A.B.A. 331, 340 (1938).

104. F.A. HAYEK, THE ROAD TO SERFDOM 135 (1944); *see also* Gautam Bhatia, *The Politics of Statutory Interpretation: The Hayekian Foundations of Justice Antonin Scalia's Jurisprudence*, 42 HASTINGS CONST. L.Q. 525, 526 (2015) (arguing that Scalia's theory of statutory interpretation aims to reduce "discretion" in order to promote "a particular deep idea of liberty that was originated and defended by the noted political thinker Friedrich Hayek"). For an example of this mode of argument late in Scalia's administrative-law jurisprudence, see Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 112 (2015) (Scalia, J., concurring) (arguing, with reference to the APA's interpretive rules exemption, and deference to such rules, "there are weighty reasons to deny a lawgiver the power to write ambiguous laws and then be the judge of what the ambiguity means").

Oakeshott and Isaiah Berlin likewise drew contrasts between individualist principles they associated with Anglo-American constitutionalism and collectivist principles they associated with the German state, privileging the value of the former over the latter.[105] These arguments, with varying degrees of stridency and scholarly care, linked administrative agencies created during the New Deal with a totalitarian impulse to stifle individuality and, its material foundation, "freedom in economic affairs."[106]

Classical liberals like Pound and Hayek were not categorically averse to regulatory and welfare agencies.[107] Today, likewise, there are many right-of-center scholars who question the legality of particular aspects of administrative power without calling the administrative system into question altogether.[108] But many figures in the current firmament concur with Hamburger and Oldham in taking a more unyielding stance. Richard Epstein, for instance, argues that the modern administrative state is generally inconsistent with "the rule of law," given the broad discretion vested in agencies and their power to disturb the common-law baselines he associates with private liberty.[109] Gary Lawson, similarly, treats agencies' independent, legally binding powers as antithetical to the Constitution. His influential 1994 article *The Rise and Rise of the Administrative State* argued that the administrative state violated the legislative powers of Article I, the executive powers of Article II, and the judicial powers of Article III.[110] For Lawson, the issue was black and white: "[O]ne cannot have allegiance both to the administrative state and to the Constitution."[111] Administration was not merely unlawful but treasonous. More recently, he and Steven G. Calabresi have reiterated these objections with equal force and more color: "[L]iberty and republicanism . . . are under siege today from a bloated, arbitrary and capricious, dictatorial, elitist, electorally unaccountable, and largely unconstitutional administrative state."[112]

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105. ISAIAH BERLIN, *Two Concepts of Liberty*, *in* LIBERTY 166, 207 (Henry Hardy ed., 2002); ISAIAH BERLIN, FREEDOM AND ITS BETRAYAL: SIX ENEMIES OF HUMAN LIBERTY 80–141 (Henry Hardy ed., 2002) (1952); MICHAEL OAKESHOTT, ON HUMAN CONDUCT 274–79 (1975). On Berlin, see SAMUEL MOYN, LIBERALISM AGAINST ITSELF: COLD WAR INTELLECTUALS AND THE MAKING OF OUR TIMES 39–87 (2023).

106. *See* HAYEK, *supra* note 104, at 10, 67.

107. *See, e.g.*, F.A. HAYEK, *'Free Enterprise' and Competitive Order*, *in* ESSAYS ON LIBERALISM AND THE ECONOMY 90, 93–94 (Paul Lewis ed., 2022) (arguing against a view of "liberalism as absence of state activity rather than as a policy which deliberately adopts competition, the market, and prices as its ordering principle"). On Pound, see Blake Emerson, *"Policy" in the Administrative Procedure Act: Implications for Delegation, Deference, and Democracy*, 97 CHI.-KENT. L. REV. 113, 128 (2022) (recounting Pound's argument for a turn towards rulemaking to regularize the exercise of administrative discretion).

108. *See, e.g.*, John O. McGinnis & Xiaorui Yang, *The Counter-Reformation of American Administrative Law*, 58 WAKE FOREST L. REV. 387, 392–98 (2023); Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron*'s Domain*, 70 DUKE L.J. 931, 938–40 (2021).

109. Richard A. Epstein, *Why the Modern Administrative State is Inconsistent with the Rule of Law*, 3 N.Y.U. J.L. & LIBERTY 491, 494–95 (2008).

110. Lawson, *supra* note 13, at 1233–49.

111. *Id.* at 1253.

112. Steven G. Calabresi & Gary Lawson, *The Depravity of the 1930s and the Modern Administrative State*, 94 NOTRE DAME L. REV. 821, 824 (2018).

Scholarship of this kind now buoys a flotilla of constitutional challenges to administrative agencies, often finding a sympathetic ear on the Fifth Circuit Court of Appeals as well as on the Supreme Court.[113] By communicating its willingness to entertain constitutional challenges against agencies—early and often—the Court encourages existential challengers to come forth and be heard. A defense-side regulatory attorney today would not be doing their job if they did not identify plausible constitutional objections to an agency that investigates their client—claims that would have been near frivolous in the late twentieth century.[114] A feedback loop among scholars, judges, advocates, and regulated entities thus drives a pattern of legal deconstruction.[115]

The specific legal issue addressed is not always earth shattering. Not every case risks destroying the agency altogether or preventing it from taking any meaningful kind of action.[116] But granular complaints about issues like removal or rulemaking or adjudicatory powers rely, more or less explicitly, on an increasingly mainstream view that the entire enterprise of administrative law is unconstitutional. If all such particular claims prove to be successful, agencies would indeed cease to exist in a legally meaningful sense; they would not be legally distinct entities with the power to act with legally binding force.

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113. *See, e.g.*, Collins v. Yellen, 594 U.S. 220, 250–51 (2021) (holding removal restriction on head of Federal Housing Finance Agency violates Article II); Jarkesy v. SEC, 34 F.4th 446, 457, 460 (5th Cir. 2022) (holding SEC enforcement unconstitutional on nondelegation, Seventh Amendment, and separation of powers grounds), *aff'd*, 603 U.S. 109, 120–21 (2023) (not reaching the nondelegation issue); Kaufmann v. Kijakazi, 32 F.4th 843, 847–48 (9th Cir. 2022) (concluding removal restriction on Commissioner of Social Security Administration violated Article II); Chamber of Com. of U.S. v. CFPB, 691 F. Supp. 3d 730, 741, 743 (E.D. Tex. 2023) (enjoining CFPB from enforcing its unfairness authority against discriminatory financial practices on major questions grounds); Space Expl. Tech. Corp. v. NLRB, 741 Supp.3d 630, 637, 641 (W.D. Tex. 2024) (preliminary enjoining NLRB proceedings on grounds that the Board's ALJs were unconstitutionally insulated from removal).

114. *See* Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 474–75 (2001) (rejecting nondelegation challenge to EPA rulemaking under capacious statutory standard and noting that "we have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law'" (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting))); Morrison v. Olson, 487 U.S. 654, 659–60 (1988) (rejecting Article II and separation of powers challenge to removal restrictions on an officer of the United States); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 857 (1986) (rejecting Article III challenge to administrative adjudication of common-law counterclaims).

115. *See, e.g.*, Jon D. Michaels, *Baller Judges*, 2020 WIS. L. REV. 411, 427–28 (discussing the feedback loop that developed in the early 2000s as judges and Justices cited to anti-administrative-state academics and advocates to bolster legal opinions which unsettled longstanding doctrines in administrative law). For similar dynamics in the domain of campaign finance and the First Amendment, see ANN SOUTHWORTH, BIG MONEY UNLEASHED: THE CAMPAIGN TO DEREGULATE ELECTION SPENDING (2023) (detailing the development of First Amendment arguments against campaign finance regulation among members of the conservative legal movement and how these arguments influenced the courts).

116. Notably, in one case where an agency might have been fully destroyed, the Court demurred and rejected the Appropriations Clause challenge to the CFPB's funding structure. CFPB v. Cmty. Fin. Servs. Ass'n of Am., 601 U.S. 416, 435 (2024). The case may show that the Court is reticent, at least in some cases, to fully dismantle an agency all at once, and more willingly to make a series of decisions that collectively imperil their survival. The latter strategy has much less salience and still deeply impairs regulatory capacity.

This is not to say that the challenge will fully extinguish administrative power in this way. Rather, the radical charge that agencies are categorically unconstitutional provides continuous and intensifying pressure, as well as ideological justification, for an arsenal of increasingly plausible claims against agencies. The Court invokes lofty, non-negotiable constitutional ideals—such as democracy, separation of powers, or liberty—as it cleaves away agencies' authorities.[117] But each of the claims that make up the challenge falls far short, on its own, of meaningfully protecting the asserted constitutional interests. This should hardly come as a surprise. Few, if any, justiciable claims can live up to the requirements of an ideology that treats *all* of agencies' independent, binding authorities as antithetical to the Constitution. For instance, while the Court makes it easier for the President to fire a particular kind of administrative official, it does not come close to giving the President unilateral command over law enforcement, given the suite of protections on other surrounding officers as well as the administrative processes that constrain law enforcement officers' acts.[118] No singular holding is enough to complete the project. As precedent builds up and the ideology gains purchase within judicial consciousness, each success augments rather than diminishes the ideology's power.

For this reason, when Justice Kagan and the Court recognize an existential challenge to the agencies in *Axon*, they are wrong about the claims concerning ALJ independence in isolation. The SEC and FTC will surely survive if their adjudicators are subject to more intense political control. But the "existential" characterization has merit when these particular claims are placed in the context of the pattern of litigation they emerged from: an antiregulatory constitutional politics with the judiciary at its center. The next section describes the specific legal claims that comprise this challenge and their symbiotic relation to Justices Kagan and Breyer's respective theories of presidential and judicial power.

C. ELEMENTS OF THE EXISTENTIAL CHALLENGE

The Court is currently entertaining and encouraging a set of claims that, taken together, would prevent agencies from independently exercising legally binding powers. The unitary executive theory strikes at the independence of administrative officials from the President. Other cases challenge agencies' judicial authority to interpret law and to adjudicate the rights of private parties. The nondelegation and major questions doctrine attack agencies' quasi-legislative authority to make important policy decisions through rulemaking. If all of these lines of attack prove successful, agencies will no longer have the essential characteristics they have had

117. *See, e.g.*, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 501 (2010) (arguing that "structural protections against abuse of power were critical to preserving liberty" when striking down a for-cause removal provision on an administrative commission) (internal citations and quotations omitted).

118. *See, e.g.*, *id.* at 524 (Breyer, J., dissenting) ("In practical terms no 'for cause' provision can, in isolation, define the full measure of executive power."); *id.* at 507 ("nothing in [the opinion of *Free Enterprise Fund* regarding dual for-cause removal] should be read to cast doubt on the use of what is colloquially known as the civil service system within independent agencies").

since at least the Progressive Era and, in some respects, since the Founding.[119] If agencies exist at all, it will be only as shadows of their former selves, without normative power to change the legal status, obligations, and interests of people outside the government. Liberal as well as conservative jurisprudence has placed agencies in such precarity.

1. Rejecting Agency Independence from the President

One key element of the existential challenge is the unitary theory of the executive, which generally holds that the President must have "direct control" over all executive officials.[120] This unitary theory does not, on its own, take away agencies' binding powers. Rather, it identifies what powers agencies have with those of the President, such that agencies lose their separate legal personality and become merely ciphers for the Chief Executive. As two prominent proponents of the unitary theory put it, "executive officers can act only in the President's stead."[121] Taken to its logical extreme, the theory would destroy decisional independence in agency adjudication, as well as the civil service as a whole. Justice Kagan and other liberal jurists have abetted the rise of this theory with milder cognate theories of presidential control over agencies. Presidents are then able to enhance their power over administration as the constitutional opportunity structure shifts. The changing constitutional rules give the Chief Executive wider and more far-reaching control over the agencies and departments in and around the Executive Branch.

In his dissent in *Morrison v. Olson*,[122] Justice Scalia famously articulated a "unitary theory" of the Executive that had been percolating within the Reagan Administration.[123] Justice Scalia argued that Article II of Constitution gave the President not "*some of* the executive power, but *all of* the executive power."[124] In order to exercise this power, Reagan had to have unrestricted authority to remove the Special Counsel who had been appointed to investigate charges of executive branch misconduct.[125] Justice Scalia's formal reasoning stretched far beyond this particular office and investigation: if the President's "executive power" meant the

119. I exclude from this discussion challenges to agency funding schemes that only strike at particular agencies, such as the Consumer Financial Protection Bureau, and do not imperil structures that are replicated widely across the administrative state. *See Cmty. Fin. Servs. Ass'n of Am.*, 601 U.S. at 435.

120. Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165 (1992).

121. Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 595 (1994).

122. 487 U.S. 654, 697–735 (1988) (Scalia, J., dissenting).

123. *See* Amanda Hollis-Brusky, *Helping Ideas Have Consequences: Political and Intellectual Investment in the Unitary Executive Theory, 1981–2000*, 89 DENV. U. L. REV. 197, 201–10 (2011); Ashraf Ahmed, Lev Menand & Noah A. Rosenblum, *The Making of Presidential Administration*, 137 HARV. L. REV. 2131, 2133, 2173 (2024); Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070, 2096–100 (2009).

124. *Morrison*, 487 U.S. at 705 (Scalia, J., dissenting).

125. *See id.* at 723–27.

power to fire anyone who exercises such power,[126] then it would seem that any and all executive-branch removal restrictions subvert the Constitution.

Justice Kagan once described Justice Scalia's *Morrison* dissent as "one of the greatest dissents ever written and every year it gets better."[127] Her career as an attorney in the Clinton Administration, as a scholar of administrative law, and as a Supreme Court Justice has helped put it into practice. As Solicitor General, she argued *Free Enterprise Fund* before the Court, defending removal restrictions on the Public Company Accounting Oversight Board within the SEC.[128] At oral argument, then-Solicitor General Kagan rested her argument largely on the precedent set by *Humphrey's Executor*,[129] which upheld removal restrictions on the commissioners of the FTC in 1935.[130] *Humphrey's Executor* has served as the constitutional backbone for administrative independence, indicating more clearly than any other precedent a distinction between presidential and administrative authority. Pressed by Chief Justice Roberts on whether that precedent covered the *two* layers of for-cause removal at issue in *Free Enterprise Fund*, Kagan quipped, "I understand the temptation to say something like, well, we don't really much like Humphrey's Executor, but we are stuck with it, but not an inch further."[131] Sitting from the position of the Solicitor General, and having served in the Clinton White House, Kagan could sympathize with Chief Justice Roberts' discomfort with a precedent that impaired the President's control over the executive. But the Chief Justice at the time objected that he "didn't say anything bad about *Humphrey's Executor*," to which Justice Scalia rejoined, "I did."[132]

Chief Justice Roberts' opinion in *Free Enterprise Fund* ultimately drew a line in the sand around the holding of *Humphrey's Executor*, refusing to license further restrictions on the President's ability to fire officers.[133] But the opinion's unitary logic, borrowed from the *Morrison* dissent, erodes the foundations of *Humphrey's Executor* as well.[134] As now-D.C. Circuit Judge Neomi Rao argued,

126. *Id*. at 705–09.

127. *Justice Kagan and Judges Srinivasan and Kethledge Offer Views from the Bench*, STAN. LAW. (May 30, 2015), https://law.stanford.edu/stanford-lawyer/articles/justice-kagan-and-judges-srinivasan-and-kethledge-offer-views-from-the-bench [https://perma.cc/EX5X-QWWG]. I am grateful to Cary Franklin for the reference.

128. Transcript of Oral Argument at 1, Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010) (No. 08-861).

129. *Id*. at 32, 43.

130. Humphrey's Ex'r v. United States, 295 U.S. 602, 632 (1935).

131. Transcript of Oral Argument, *supra* note 128, at 44.

132. *Id*. at 44. Justice Scalia presumably was referring to his discussion of *Humphrey's Executor* in dissent in *Morrison v. Olson*, 487 U.S. 654, 725–26 (Scalia, J., dissenting) ("One can hardly grieve for the shoddy treatment given today to *Humphrey's Executor*, which, after all, accorded the same indignity (with much less justification) to Chief Justice Taft's opinion 10 years earlier in *Myers v. United States*—gutting, in six quick pages devoid of textual or historical precedent for the novel principle it set forth, a carefully researched and reasoned 70–page opinion. It is in fact comforting to witness the reality that he who lives by the *ipse dixit* dies by the *ipse dixit*. But one must grieve for the Constitution." (internal citations omitted)).

133. *Free Enter. Fund*, 561 U.S. at 493–95.

134. *See id*. at 498–500.

Chief Justice Roberts' reasoning outlines a "modest proposal for abolishing agency independence."[135] If the executive power is exclusively the President's and requires that the President have power to control and fire, independent commissions lose all constitutional foundation except bare stare decisis. *Seila Law LLC v. Consumer Financial Protection Bureau* took the next step in that direction by holding the single-director structure of the CFPB unconstitutional,[136] while calling into question the constitutionality of the FTC as currently constituted.[137] More cases have followed suit.[138]

Each of these decisions removes a brick from the wall of precedents, statutes, regulations, and conventions that distinguish administrative law from presidential prerogative. Justice Kagan herself helped to disassemble the edifice with her decision for the Court in *Lucia v. Securities and Exchange Commission*.[139] *Lucia* held that the SEC's administrative law judges (ALJs) were unconstitutionally appointed by the staff of the agency rather than the SEC itself.[140] To reach this conclusion, Justice Kagan held that ALJs were "Officers of the United States."[141] That conclusion has invited the challenges brought in *Axon* and related cases. If ALJs are officers of the United States, and if, as *Free Enterprise Fund* holds, an officer cannot be insulated by two layers of for-cause removal protection, then ALJs generally exercise unconstitutional authority. That is because ALJs can only be removed for good cause by the Merit Systems Protection Board, which is composed of officials only removable for good cause.[142] With *Lucia*, *Free Enterprise Fund*, and *Seila Law* in place, the unitary theory is finally poised to take major, rather than interstitial, inroads into administrative independence. According to Justice Thomas and scholar Jennifer Mascott, practically all federal civil servants are constitutional "officers."[143] If that is right, the civil service system is unconstitutional in large part as well.

The strident theory of presidential power that Justice Scalia introduced in *Morrison* received its most full-throated endorsement—and even expansion—in *Trump v. United States*, where the Court held that former presidents enjoyed "absolute" immunity for official acts within the "core" of their executive power.[144] Relying on *Seila Law*, the Court held that "[t]he President's power to

135. Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in* Free Enterprise Fund v. PCAOB, 79 FORDHAM L. REV. 2541, 2541 (2011).

136. 591 U.S. 197, 204–05 (2020).

137. *Id.* at 215 (noting that the *Humphrey's Executor* Court "viewed the FTC (as it existed in 1935) as exercising 'no part of the executive power.'" (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935)).

138. *See, e.g.*, Collins v. Yellen, 594 U.S. 220, 250–51 (2021) (holding as unconstitutional the "for cause" restriction on the President's power to remove the single head of the Federal Housing Finance Agency); Kaufmann v. Kijakazi, 32 F.4th 843, 848–49 (9th Cir. 2022) (same regarding the single head of the Social Security Administration).

139. 585 U.S. 237 (2018).

140. *Id.* at 243, 247–51.

141. *Id.* at 251.

142. *Id.* at 259–60; 5 U.S.C. § 7521(a).

143. *Lucia*, 585 U.S. at 253 (Thomas, J., concurring) (citing Jennifer L. Mascott, *Who Are "Officers of the United States?"*, 70 STAN. L. REV. 443, 564 (2018)).

144. 603 U.S. 593, 606 (2024).

remove—and thus supervise—those who wield executive power on his behalf" fell within these core powers that were "within the scope of his exclusive authority" and thus beyond the reach of criminal accountability.[145] In so doing, the Court cast into severe doubt its holdings in *Humphrey's Executor*[146] and *Morrison*.[147] Going far beyond even Justice Scalia's *Morrison* dissent, the *Trump v. United States* Court held that the President's control over executive officers extended to orders and directives that amount to crimes.[148]

While the ascendant modern unitary theory of the executive has its origins in conservative legal thinking,[149] more modest versions of it have been embraced by liberal scholars like Lawrence Lessig and Cass Sunstein[150] and, most significantly, by Justice Kagan herself.[151] Her landmark article, *Presidential Administration*, captured a cross-ideological reformation of administrative legitimacy, which tied agency authority closely to the democratic warrant of the presidency. Justice Kagan's argument was not that the Constitution mandates that the President have a right to fire and control all administrative officers. Rather, she argued that where statutes do not restrict the President's ability to remove an officer, the President has the right to control that officer.[152]

The current effort to undermine independent agencies goes far beyond Justice Kagan's scholarly position and aims to eliminate the separation between presidential and administrative power altogether. Justice Kagan strenuously dissented from the merits in *Seila Law v. CFPB*,[153] where the Court held that a removal restriction on the head of the CFPB violated the separation of powers.[154] But even her brilliant defense of congressional power and administrative independence carried a key concession. In a footnote she acknowledged that "today we view *all* the activities of agencies as exercises of 'the executive Power.'"[155] Even as Justice Kagan sought to defend the holding of *Humphrey's Executor* against further erosion, she entered a unanimous verdict against its reasoning—that independent agencies were "wholly disconnected from the executive department."[156]

As Justice Kagan has sought to defend agencies' policymaking powers against the major questions doctrine (to be discussed in Section 3 below), so too has she embraced a unitary conception of the President that goes beyond the claims of her scholarship. When the Court rejected the Biden Administration's student debt relief program in *Biden v. Nebraska*,[157] Justice Kagan's dissent emphasized the

145. *Id.* at 608–09.
146. 295 U.S. 602 (1935).
147. 487 U.S. 654 (1988).
148. *See Trump*, 603 U.S. at 609.
149. *See* Hollis-Brusky, *supra* note 124, at 198–99, 201–06.
150. Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2–3 (1994).
151. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2251 (2001).
152. *Id.*
153. 591 U.S. 197, 261 (Kagan, J., concurring in part and dissenting in part) (emphasis in original).
154. *Id.* at 205.
155. *Id.* at 278 n.7 (citations omitted).
156. *See id.*; Humphrey's Ex'r v. United States, 295 U.S. 602, 630 (1935).
157. 600 U.S. 477, 506 (2023).

"democratic" warrant of the President to undertake such a significant policy change: "agency officials, though not themselves elected, serve a President with the broadest of all political constituencies."[158] The notion that "agency officials" in general "serve" the President, rather than render independent judgment concerning legal obligations, is a proposition that constitutional case law had never previously endorsed.[159] But it is in keeping with the unitary theory Justice Scalia expressed in *Morrison*. Day by day, Justice Kagan has helped to make Justice Scalia's *Morrison* dissent—if not "better"—then at least more controlling. In so doing, she has cast increasing doubt on all the legal rules that distinguish the President's authority and interests from those of other officials and departments.

Presidents have taken advantage of this line of constitutional development. The first Trump Administration heightened the control of political appointees over ALJs,[160] while also rescheduling civil servants with policymaking responsibilities as at-will employees.[161] While the Biden Administration backtracked from the reclassification, it retained the steps Trump had taken to increase political control over ALJs.[162] The Biden Administration also acted in reliance on *Seila Law* to fire the Trump-appointed head of the Social Security Administration without asserting good cause.[163] As noted in the Introduction, in the first months of his second term, President Trump has also relied on *Seila Law* to remove administrative officials at the National Labor Relations Board (NLRB) and to question the constitutionality of agency independence more broadly.[164] It is clear why presidents have short-term incentives to dismantle these cornerstones of administrative independence. Striking (or ignoring) removal protections around administrative officials visibly maximizes the President's policymaking and enforcement power, enabling him to implement and take credit for policy before the next election comes along. With the Court's current removal jurisprudence, presidents are now pushing against an open door.

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158. *See id*. at 544 (Kagan J., dissenting).

159. *See Humphrey's Ex'r*, 295 U.S. at 624 (reasoning, in the course of upholding statutory removal restrictions on FTC commissioners, that the FTC is "charged with the enforcement of no policy except the policy of the law"); Collins v. Yellen, 594 U.S. 220, 223–24 (2021) (reasoning that Congress sometimes does, and sometimes does not, intend that officers serve "at the President's pleasure").

160. Exec. Order No. 13,843, 83 Fed. Reg. 32755 (July 10, 2018).

161. Exec. Order No. 13,957, 85 Fed. Reg. 67631 (Oct. 21, 2020).

162. *See* Exec. Order No. 14,029, 86 Fed. Reg. 27025, 27026 (May 14, 2021); Exec. Order No. 14,003, 86 Fed. Reg. 7231, 7231 (Jan. 22, 2021).

163. Constitutionality of the Comm'r of Soc. Sec.'s Tenure Prot., 45 Op. O.L.C., slip op. at 1 (July 8, 2021); *see* Jim Tankersley, *Biden Fires Trump Appointee as Head of Social Security Administration*, N.Y. TIMES (Oct. 13, 2021), https://www.nytimes.com/2021/07/09/business/biden-social-security-administration.html.

164. *See, e.g.*, Email from Trent Morse to Jennifer Abruzzo & Gwynne Wilcox, *supra* note 16 (purporting to remove NLRB officials because "[t]he aims and purposes of the Administration . . . can be carried out most effectively with personnel of my own selection" and stating that the statutory removal protections for board members, 29 U.S.C. § 153(a), are "inconsistent with the vesting of executive Power in the President and his constitutional duty to take that care that the laws are faithfully executed"); Letter from Sarah M. Harris to Hon. Richard J. Durbin, *supra* note 16, at 1–2 (providing notice that "the Department of Justice has determined that certain for-cause removal provisions that apply to members of multi-member regulatory commissions are unconstitutional").

2. Foreclosing Agencies' Judicial Powers

Another set of constitutional claims strikes at agencies' power to exercise adjudicatory power, either by issuing binding orders against private parties or by interpreting law. Both claims would eliminate core features of numerous administrative agencies. Here, too, the liberal justices have helped pave the way for the challenge by casting doubt on the propriety of judicial deference to agency conclusions of law.

a. The Challenge to Agency Statutory Interpretation

Scholars like Lawson and Hamburger as well as Justices Thomas and Gorsuch have denied or questioned the constitutionality of *Chevron* deference.[165] *Chevron* famously held that courts must defer to agencies' reasonable interpretations of statutory ambiguities.[166] The case was a cornerstone of administrative law doctrine, relied on routinely by inferior federal courts, even as it fell into disuse at the Supreme Court.[167] The nub of conservative criticism of *Chevron* generally focuses on a concern that Article III courts have exclusive power to interpret law, which they may not "abdicate" to agencies.[168] Last term, in *Loper Bright Enterprises v. Raimondo*, the Court overruled *Chevron*.[169] While the opinion by Chief Justice Roberts only held that *Chevron* was contrary to the Administrative Procedure Act (APA),[170] rather than flatly unconstitutional, both the concurrences and the logic of the majority opinion itself suggest that the Constitution may forbid judicial deference to agencies on questions of law.[171] Like other aspects of the existential challenge, *Loper Bright* draws strength from liberal as well as conservative jurists[172] and

165. Lawson, *supra* note 13, at 1247; HAMBURGER, *supra* note 23, at 315–17; Baldwin v. United States, 140 S. Ct. 690, 691 (2020) (Thomas, J., dissenting from denial of certiorari); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

166. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

167. *See* Nicholas R. Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1395, 1403 (2017).

168. *See, e.g.*, *Baldwin*, 140 S. Ct. at 691 (Thomas, J. dissenting from denial of certiorari); Craig Green, *Deconstructing the Administrative State:* Chevron *Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619, 673 (2021) ("In 2016, then-Judge Neil Gorsuch became the second jurist in history to attack *Chevron*'s constitutionality."); *see also* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 919 (2017) (arguing that *Chevron*'s generic deference rule runs contrary to the constitutionally "proper relationship between courts and the executive on matters of statutory interpretation").

169. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024).

170. *Id.* at 412–13.

171. *See id.* at 384–86 (majority opinion framing discussion of *Chevron* deference and the APA by noting Article III requirements); *id.* at 413 (Thomas, J., concurring) ("*Chevron* deference also violates our Constitution's separation of powers); *id.* at 440–41 (Gorsuch, J., concurring) (arguing that under "the Constitution, the APA, and our longstanding precedents . . . agencies cannot invoke a judge-made fiction to unsettle our Nation's promise to individuals that they are entitled to make their arguments about the law's demands on them in a fair hearing, one in which they stand on equal footing with the government before an independent judge.").

172. *See id.* at 401 (quoting Justice Kagan's opinion in *Kisor v. Wilkie*, 588 U.S. 558, 578 (2019) for the proposition that "interpretive issues arising in connection with a regulatory scheme often 'may fall more naturally into a judge's bailiwick' than an agency's").

makes possible, without fully accomplishing, a much more radical destruction of administrative power.

Despite the current conservative valence of opposition to *Chevron*, opposition to the doctrine was not a purely ideological phenomenon.[173] In a famous 1986 article, *Judicial Review of Questions of Law and Policy*, then-Judge Breyer argued against a strong, formalist reading of *Chevron* that finds an ambiguity once statutory text alone has been exhausted.[174] For Breyer, such a reading of *Chevron* embraced an overly "simple" approach that avoided a number of contextual clues, as well as administrative history, about the nature and scope of the authority the agency exercises.[175] Breyer did not categorically deny the need for judicial deference on questions of law. But the complex approach to statutory interpretation he advocated, and applied on the bench, gives the judge wide discretion over whether and when the agency's interpretation qualifies for deference.[176] Nice judgments about legislative purpose and structure, the history and duration of administrative programs, and the practicalities of administration are unlikely to yield clear cases for deference to an agency's policy judgment. Instead, Justice Breyer envisions herculean judges capable of weighing an indefinite set of imponderables to determine the degree of fit between an agency's action, the statutory framework, and the judge's own conception of sound public policy.

There is therefore an elective affinity between Justice Breyer's purposivist skepticism of *Chevron* and Hamburger, Justice Gorsuch, and Justice Thomas's formalist revulsion: they all have heroic confidence in judicial superintendence of government policymaking. Both Justice Breyer and the conservative majority on the Roberts Court embrace a broad conception of judicial authority that is inconsistent with a substantial degree of agency authority over statutory meaning. Justice Breyer's contextual rejoinder to *Chevron* was motivated by a sense that *Chevron* and related cases suggest "a greater abdication of judicial responsibility to interpret the law than seem[s] wise."[177] For Justices Gorsuch and Thomas, it is not a question of wisdom but rather of constitutional requirement. Deference on questions of law conflicts with the judiciary's duty to determine the law's meaning.[178] The conservatives have rendered absolute a claim that, for Justice Breyer, was relative.

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173. *See* Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 VAND. L. REV. 475, 513–15 (2022); Green, *supra* note 168, at 623 (highlighting how lawyers across the political spectrum "have argued different sides of *Chevron* deference" and suggesting that "partisan politics should not determine *Chevron*'s constitutional status").

174. Breyer, *supra* note 40, at 377–79.

175. *See id.* at 377.

176. *See, e.g.*, Barnhart v. Walton, 535 U.S. 212, 222 (2002) ("In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.").

177. Breyer, *supra* note 40, at 381.

178. *E.g.*, Michigan v. EPA, 576 U.S. 743, 761–62 (2015) (Thomas, J., concurring).

The recent overruling of *Chevron* deference in *Loper Bright Enterprises, Inc. v. Raimondo* shows how Justice Breyer's nuanced critique of deference aligns functionally with a more radical rejection of deference altogether.[179] *Loper Bright* and its companion case[180] concern a fishery monitoring scheme that requires boat operators to pay the costs of on-board monitors.[181] The statute in question grants the agency authority to "require that one or more observers be carried on board a vessel" and to take "necessary and appropriate" steps to implement the program.[182] The D.C. Circuit below upheld the program under a conventional *Chevron* analysis.[183] It rejected the appellants' contention that the express authorization of such monitoring costs in other provisions impliedly barred the imposition of such costs in the program at issue.[184]

The Supreme Court then granted certiorari[185] to determine whether to "overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency."[186] To merely "clarify" *Chevron* in the manner petitioners suggest would be consistent with Justice Breyer's modest conception of deference, as it would broaden the reach of traditional tools of construction—in the case at hand, the *expressio unius* canon—and narrow the range of agencies' interpretive discretion. But a clarification of *Chevron* of this sort would not have been so different from overruling it. It would invite judges to look far and wide for "clues" and "cues" as to the statute's meaning and to deploy textual and substantive canons inventively, rather than restrict their inquiry to question that are "clear." A thousand more qualifications to deference would sprout in the Federal Reporter.

In the event, the Court took the bold step and overruled *Chevron* altogether. Rather than deferring on questions of law, *Loper Bright* holds that "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority."[187] Overruling C*hevron* was a symbolically momentous event, given the decision's status as a "cornerstone of administrative law."[188] But, on closer inspection, the Court's position in *Loper Bright* was not all that different from Justice Breyer's restrained view of deference. It continued to acknowledge that administrative interpretations should be accorded "respect,"[189] particularly where these interpretations were "issued contemporaneously with the

179. 603 U.S. 369 (2024).
180. Relentless, Inc. v. Dep't of Com., 144 S. Ct. 325 (2023).
181. *Loper Bright*, 603 U.S. at 382.
182. 16 U.S.C. § 1853(b)(8), (b)(14).
183. Loper Bright Enters. v. Raimondo, 45 F.4th 359, 365–70 (D.C. Cir. 2022).
184. *Id.* at 366–67.
185. Loper Bright Enters. v. Raimondo, 143 S. Ct. 325 (2023) (No. 22-451) (granting writ of certiorari only as to the second question presented by petitioners).
186. Petition for Writ of Certiorari, Loper Bright Enters. v. Raimondo, 603 U.S. 369 (No. 22-451).
187. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024).
188. *See id.* at 448 (Kagan, J., dissenting).
189. *Id.* at 413.

enactment of the statute" or "factbound."[190] It also acknowledges that statutes may "delegate[] discretionary authority to an agency,"[191] in which case the reviewing court's role is to ensure the agency has acted within the bounds of that delegation. While Justice Breyer's approach may differ in some particulars from the Court's here,[192] both acknowledge a range of considerations that warrant greater or lesser attention and respect to the agency's interpretation. Indeed, the *Loper Bright* Court cites to a prior dissent by Justice Breyer in noting that "we have spent the better part of four decades imposing one limitation on *Chevron* after another, pruning its presumption on the understanding that 'where it is in doubt that Congress actually intended to delegate particular interpretive authority to an agency, *Chevron* is inapplicable.'"[193]

Loper Bright similarly draws some support from Justice Kagan's majority opinion in *Kisor v. Wilkie*, which preserved but narrowed judicial deference to an agency's interpretation of its own regulations.[194] Justice Kagan's opinion in *Kisor* preserved this form of deference in the face of a skeptical Court by "reinforc[ing] its limits," and "somewhat expand[ing]" on existing qualifications.[195] This expansive reinforcement held that the regulation in question must be "genuinely ambiguous," and that the agency's interpretation must be "reasonable," "authoritative," "implicate" the agency's "substantive expertise" and "reflect fair and considered judgment."[196] Interpretations do not implicate the agency's expertise in cases where the "interpretive issues . . . fall more naturally into a judge's bailiwick," such as when the regulation deploys common law concepts.[197] Justice Gorsuch in his *Kisor* concurrence described Justice Kagan's majority opinion as "more a stay of execution than a pardon," which had left the doctrine "maimed and enfeebled—in truth, zombified."[198] Some commentators accordingly suggested that the Court in *Loper Bright* might follow Justice Kagan's lead and "*Kisor*ize" *Chevron*, meaning that the Court would impose a similar set of restrictions on the *Chevron* doctrine without overruling it outright.[199]

The Court did not take that tack. It did, however, rely expressly on Justice Kagan's view of the judge's natural "bailiwick" to argue that administrative expertise cannot justify *Chevron's* generic deference rule.[200] Justice Kagan viewed

190. *See id.* at 388–89.

191. *See id.* at 395.

192. *See, e.g.*, Barnhart v. Walton, 535 U.S. 212, 222 (2002) (considering the "interstitial nature of the legal question," the agency's expertise, the "importance" of the question, the "complexity" of the administration of the statute, and "the careful consideration the Agency has given the question over a long period of time" in ultimately concluding that *Chevron* provides the "appropriate legal lens through which to view the legality of the Agency interpretation").

193. 603 U.S. at 404 (internal quotations omitted).

194. 588 U.S. 558 (2019).

195. *Id.* at 563, 574.

196. *Id.* at 574–75, 577–79 (internal quotations and citations omitted).

197. *Id.* at 578.

198. *Id.* at 592 (Gorsuch, J., concurring).

199. *See, e.g.*, Louis J. Virelli III & Richard W. Murphy, *Tea Leaves and Maybe a Stay*, 49 ADMIN. & REG. L. NEWS, Winter 2024, at 19, 21.

200. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 401 (2024) (citing *Kisor*, 588 U.S. at 578).

that "bailiwick" as limited to areas of law over which the Court traditionally exercised authority.[201] Chief Justice Roberts in *Loper Bright* goes further and extends the Court's jurisdiction over all interpretive questions, presumptively relegating agencies to the role of providing expert fact-finding and opinions that may be relevant to the Court's exercise of final interpretive authority.[202] Justice Kagan's effort in *Kisor* to preserve traditional deference in the face of her colleagues' anti-administrative hostility, thus, ends up playing a supporting role in the Court's effort to cut to the root of the deference doctrine.

Justice Kagan, of course, dissented in *Loper Bright*, objecting strenuously to the Court overruling a "cornerstone of administrative law" in an act of "judicial hubris."[203] Seeing the fruition of the "existential" challenge she had identified in *Axon*,[204] Justice Kagan recognized that it was "impossible to pretend that today's decision is a one-off."[205] It had to be seen alongside *SEC v. Jarkesy*,[206] to be discussed in the next Section, as "yet another example of the Court's resolve to roll back agency authority, despite congressional direction to the contrary."[207] In *Kisor*, the then-current state of the law and composition of the Court had permitted Justice Kagan to salvage aspects of the preexisting deference rule with regard to agency regulatory interpretation. But, as the challenge to agency authority gained momentum in *Loper Bright*, she was unable to even slow the advance of this more fundamental and consequential assault on agency statutory interpretation.

Loper Bright does not completely abolish agencies' interpretive powers.[208] Rather, like other existential challenges to agencies' interpretive power, it leverages a broad constitutional objection to justify significant reduction in that power, while at the same time leaving open pathways for eroding agency authority in future cases. A number of open-ended questions concerning "delegation" to and "respect" for agency interpretation[209] will create grist for future litigation, making any number of plausible objections to agency statutory interpretation plausible, and thus throwing sand in the gears of the administrative process. The gravity of this constitutional objection, grounded in an expansive conception of judicial authority, is likely to draw the boundaries of case law closer and closer in around agencies' delegated sphere of discretion. Whatever the precise meaning of the Court's qualifications to overruling *Chevron*, there is little doubt that overruling such a landmark decision sends a loud signal to lower courts to significantly tighten up their review of administrative interpretations of statutes and administrative authority. Moreover, as the next Sections show, the Court has other levers to deprive agencies of the fact-finding and policymaking authority it left intact in

201. *Kisor*, 588 U.S. at 578 (for example, "elucidation of a simple common-law property term").
202. *Loper Bright*, 603 U.S. at 401.
203. 603 U.S. at 448, 450 (Kagan, J., dissenting).
204. Axon Enter., Inc. v. FTC, 598 U.S. 175, 180 (2023).
205. *Loper Bright*, 603 U.S. at 479 (Kagan, J., dissenting).
206. SEC v. Jarkesy, 603 U.S. 109 (2024).
207. *Loper Bright*, 603 U.S. at 479 (Kagan, J., dissenting).
208. *Id.* at 412–13.
209. *Id.* at 413.

Loper Bright. As this Article has argued, one cannot look at *Loper Bright* or any other case in isolation. Rather, we must consider their combined effect.

b. The Challenge to Adjudicatory Fact-Finding

A different kind of Article III objection takes aim at agencies' adjudicatory fact-finding authority. A number of scholars, including William Baude,[210] Caleb Nelson,[211] and Philip Hamburger[212] cast doubt on, or forthrightly deny, the constitutionality of statutes that allocate final fact-finding authority to agencies where their acts burden private property. This argument is now picking up steam in the courts. In *SEC v. Jarkesy*, the Court held that the SEC could not constitutionally impose a civil penalty for securities fraud because this was a "common law" claim, sounding in "private rights," which is generally reserved for jury trial in Article III courts.[213]

These adjudication challenges reveal the constitutional ideology underlying the existential challenge in its purest form. In *Jarkesy*, Chief Justice Roberts explained that because the SEC was attempting, in its own administrative courts, to "regulate transactions between private individuals interacting in a pre-existing market," it was impermissibly adjudicating the sort of claim that "typically must be adjudicated in Article III courts."[214] The Court here resurrected *laissez-faire* notions of a realm of private, even natural rights that exist prior to and apart from the exercise of governmental power.[215] It then positioned the judiciary to defend these fundamental rights. According to Justice Thomas in his concurrence in *Axon*, "absolute rights" to "life, liberty, and property" that exist in a "Lockean state of nature" are likely immune from administrative adjudication.[216] Relying again on Hamburger, Justice Thomas combined a natural-law argument that such rights are "unalienable" with a historical argument that such rights cannot be adjudicated by agencies.[217] He thus questioned the propriety of the entire scheme of administrative adjudication when it comes to economic regulation. While agencies might adjudicate "public rights" concerning government-granted benefits and privileges, they cannot determine or adjust entitlements grounded in common law.

This private-rights theory imposes a significant structural bar on the federal government's capacity to regulate economic affairs. Administrative courts with final fact-finding powers have been at the core of federal regulation at least since

210. William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1577–81 (2020) (arguing for constitutional limits on agency adjudication).

211. Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 594–602 (2007).

212. HAMBURGER, *supra* note 23, at 227–77.

213. 603 U.S. 109, 127–28 (2024).

214. *Id.* at 135.

215. *See* Emerson, *supra* note 46, at 1427.

216. *See* Axon Enter., Inc. v. FTC, 598 U.S. 175, 198–99 (2023) (Thomas, J., concurring) (internal quotations omitted).

217. *Id.* at 199, 202.

Congress bolstered the powers of the Interstate Commerce Commission in the Hepburn Act of 1906 in response to judicial resistance to railroad regulation.[218] Administrative adjudication was the central economic–regulatory method established in the New Deal.[219]

While rulemaking today shares a much larger piece of the action, administrative adjudication continues to play a substantial role. Not just the SEC and the FTC, but also the NLRB,[220] the EPA,[221] the Centers for Medicare and Medicaid Services,[222] and the Commodity Futures Trading Commission,[223] adjudicate, burden, and intervene in property relations in various respects. It is uncertain, as of yet, how and whether the holding of *Jarkesy* will apply to agencies other than the SEC. A narrower approach would restrict it to cases where the agency imposes penalties for conduct closely analogous to common law offences. But the Court could plausibly extend, or otherwise rely on, the holding to strike at agencies' adjudicatory power more broadly. Already, SpaceX has relied on *Jarkesy* to challenge the constitutionality of the NLRB.[224] Taking *Jarkesy* to its fullest extent, the APA[225] itself would become unconstitutional as applied to any agency with formal adjudicatory authority related to property, contract, and whatever else the Court conceives to be "core" common-law rights.

Jarkesy and the public/private distinction also suggest some tools the Court may rely on to partially insulate portions of the administrative state from the existential challenge. Justice Thomas has suggested, for instance, that due process does not apply to immigration removal proceedings, since these concern public rights or privileges rather than genuine private rights.[226] Baude's analysis, likewise, suggests that public benefits adjudications may not require judicial adjudication, since they do not involve a deprivation of constitutionally protected life, liberty, or property interests.[227] If adopted by the Court, such moves would shield the Executive Office of Immigration Review (EOIR)[228] and the Social Security Administration (SSA)[229]

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218. *See* Merrill, *supra* note 65, at 955–63 (discussing the legislative history of the Hepburn Act and the more limited role of Article III courts in reviewing findings of administrative courts in the post-Hepburn Act era).

219. *See* Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 412 (2007).

220.

221. *See* 42 U.S.C. § 7413.

222. *See* 42 U.S.C. § 300gg–18(b)(3).

223. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 857 (1986).

224. *See* Space Expl. Techs. Corp. v. NLRB, 741 F. Supp. 3d 630, 636 (W.D. Tex. 2024).

225. 5 U.S.C. § 706(2)(E) (providing for deferential substantial evidence review of formal adjudicatory fact-finding).

226. Sessions v. Dimaya, 584 U.S. 148, 210–13 (2018) (Thomas, J., dissenting).

227. *See* Baude, *supra* note 210, at 1541–47, 1578.

228. *See* 8 C.F.R. § 1003 (outlining the organization and responsibilities of the EOIR); 8 U.S.C. § 1252(a)(2) (describing EOIR orders which are "not subject to judicial review"); *see also* Jill E. Family, *A Lack of Uniformity, Compounded, in Immigration Law*, 98 NOTRE DAME L. REV. 2115, 2125–26, 2126 nn.78–80 (2023) (describing this statutory review scheme codified at 8 U.S.C. § 1252 which "narrow[s] the ability of courts of appeals to review both deportation and exclusion decisions").

229. 42 U.S.C. § 405(b), (g).

from challenges to their power to issue final adjudicatory orders that courts must, to some extent, defer.

Matters are more complicated when it comes to the unitary-executive aspect of the existential challenge. SSA ALJs are currently independent from presidential control, as they enjoy for-cause removal protections and can only be removed after a hearing before the Merit Systems Protection Board (MSPB), whose members also enjoy for-cause protections.[230] As noted in the above discussion of the unitary executive theory, these protections are threatened by the combined holdings of *Lucia*, which concludes that ALJs are constitutional "officers," [231] and *Free Enterprise Fund*, which bars more than one layer of for-cause removal protection for such officers. [232] Immigration judges, by contrast, are subject to removal by the Attorney General,[233] and immigration courts are "known as markedly political bodies" in appointment and review procedures.[234] As a result, the existential challenge would shift Social Security adjudication from relatively politically independent and impartial adjudication to what Adam Cox and Emma Kaufmann call the "presidential adjudication" model already regnant in the context of immigration.[235]

One can only speculate how far the existential challenge will or will not proceed along these lines. Its boundaries are uncertain. As noted, that uncertainty is a feature, not a bug. It casts a pall of illegitimacy on agency procedures and programs, without destroying them outright, such that they remain targets to energize ongoing political and legal mobilization. Agencies then operate under both generalized judicial suspicion and a continuous threat of legal challenge.

3. Disabling Agency Policymaking

A final set of claims that strikes at the heart of agencies are those that would divest them of authority to make significant policy decisions. These sorts of claims take two forms. The first is an outright constitutional challenge: the nondelegation doctrine, which alleges that Congress cannot delegate to agencies its power to make "controlling general policy."[236] The other sort of claim is statutory, denying agencies the power to address a "major question" without express

230. 42 C.F.R. § 405.904 (Social Security Administration ALJs exercise independence from presidential control by conducting hearings of appeals from Medicare benefits determinations); 5 U.S.C. § 7521(a) ("good cause" restriction on removal of ALJs); 5 U.S.C. § 1202(d) (for-cause restrictions on removal of members of MSPB).

231. Lucia v. SEC, 585 U.S. 237, 247–49 (2018).

232. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 492 (2010).

233. *See* Duenas v. Garland, 78 F.4th 1069, 1074 (9th Cir. 2023) ("[T]here can be no doubt that the Attorney General enjoys the power to remove Immigration Judges and members of the BIA, just as he or she enjoys the power to appoint them."). *But see* Labor Agreement Between National Association of Immigration Judges and USDOJ, Executive Office of Immigration Review art. 10 (April 3, 2018), https://www.aila.org/files/o-files/view-file/2D42966A-6466-418C-9281-CCC7FCDD9B8D [https://perma.cc/KG8E-3XG7] ("Disciplinary and adverse actions will be taken only for such cause as will 'promote the efficiency of the service.'"). I am grateful to Dean Kent Barnett for the latter reference.

234. Cox & Kaufman, *supra* note 36, at 1802.

235. *Id*. at 1773.

236. Gundy v. United States, 588 U.S. 128, 157 (2019) (Gorsuch, J., dissenting).

statutory authorization.[237] Here, like with his critique of *Chevron* deference,[238] Justice Breyer authored a relatively modest approach[239] that the conservative majority has radicalized. Together, with the other claims described above, these nondelegation and major questions challenges would shut down all the channels of binding administrative authority, instead channeling discretionary power into its least constrained, most potentially arbitrary medium—presidentially controlled prosecution.[240]

Strengthened nondelegation requirements would pose a categorical threat to administrative rulemaking power. In its strongest form, articulated by Justice Thomas and Philip Hamburger, the nondelegation doctrine provides that agencies cannot make any general rules having the force of law over persons outside of the government.[241] In a somewhat weaker variant, endorsed by Justice Gorsuch, agencies cannot make "policy decisions" to regulate private conduct and can only engage in "fact-finding."[242]

While the nondelegation doctrine poses a strategic threat to agencies' regulatory and regulating powers, the major questions doctrine (MQD) arguably poses a more significant tactical threat. This doctrine holds that agencies cannot make "major policy decisions" or exercise "highly consequential power" without express statutory authorization.[243] Because the MQD does not demand wholesale destruction of statutory schemes, the Court can deploy the doctrine more surgically and with less political salience, while still achieving significant deregulatory fallout. Agencies now face acute litigation risk whenever they make any significant new policies.

The Court is willing to invoke the doctrine when the argument for broad policymaking authority is at its height. In the major questions cases on regulations related to COVID-19, agencies relied on statutory authorities that explicitly concern emergencies.[244] Emergencies are unpredictable, high-risk events that often require broad scale government response and elude precise and timely legislative measures.[245] If there is any case for legislative delegation of policymaking

237. West Virginia v. EPA, 597 U.S. 697, 724, 732 (2022).

238. *See supra* notes 176–81 and accompanying text.

239. Breyer, *supra* note 40, at 370–71.

240. The Court's decision in Corner Post, Inc. v. Bd. of Governors. of the Fed. Rsrv. Sys., 603 U.S. 799 (2024), exacerbates the threat to agencies policymaking powers. *Corner Post* enables litigants to bring facial challenges to regulations enacted well before the standard six-year statute of limitations on civil actions against the United States, 28 U.S.C. § 2401(a), on the theory the right of action does not "accrue" until the plaintiff suffers an injury from the regulation. *Id.* at 825.

241. Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 78–79, 82, 86 (2015) (Thomas, J., concurring); HAMBURGER, *supra* note 23, at 83–128.

242. *See* Gundy v. United States, 688 U.S. 128, 157–58 (2019) (Gorsuch, J., dissenting).

243. West Virginia v. EPA, 597 U.S. 697, 723–24 (2022).

244. *E.g.*, Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin., 595 U.S. 109, 114 (2022) (invalidating vaccine or testing mandate pursuant to "emergency temporary standard" authority at 29 U.S.C. § 655(c)); Biden v. Nebraska, 600 U.S. 477, 485 (2023) (invalidating student debt relief in response to COVID-19 pursuant to "specific waiver authority to respond to conditions in the national emergency").

245. *See* KARIN LOEVY, EMERGENCIES IN PUBLIC LAW: THE LEGAL POLITICS OF CONTAINMENT 119–21 (2016).

authority to agencies, it is in emergency situations. And yet, the Court has relied on the major questions doctrine to read emergency provisions quite narrowly so as to preclude agency action. If the major questions doctrine can invalidate agency action under emergency authorities, it will have all the greater reach with regard to policymaking of the everyday variety, where emergency logics are absent.

It could be argued that the MQD makes room for agencies to make more routine, minor, or interstitial policy decisions and that, in that realm, the doctrine allows agencies' policymaking powers to perdure. To the extent that the MQD genuinely preserves that small space for binding agency policymaking, it is indeed more modest in scope than the most strident versions of the nondelegation doctrine. But the vagueness of the doctrine leaves agencies no safe harbor. Because it is unclear what actions are major or minor and, because it is unclear how explicit the statute must be to authorize major actions, there is no reliable boundary within which administrative authority remains intact. Anything that "raises" a majority of the reviewing court's "eyebrow" may be a no-go.[246] Moreover, the Court now takes "earnest and profound debate across the country" concerning the administrative power at issue to be an indication of major-ness.[247] Citizens, representatives, lobbyists, advocacy organizations, and opinion media may then take away a power an agency would otherwise have simply by speaking out loudly against it, without going through the constitutionally required legislative process.[248] Administrative authority simply evaporates as political winds shift. For these reasons, as Justice Kagan has observed, the major questions doctrine seems like a "rule specially crafted to kill significant regulatory action."[249] Perhaps agencies may scrape together some meager existence under it, but only if they never do anything important or controversial.

While the current incarnation of the MQD is an instrument of conservative legal politics, its origins are not so ideologically charged. The evolution of the doctrine rather shows how a self-assured judicial role-morality, which both liberal and conservative Justices often share, tends over time to desiccate the discretionary authority of Legislature and the Executive. Just as Justice Kagan's opinions in *Axon* and *Lucia*[250] enabled the existential challenge without embracing its most ambitious claims on the merits, Justice Breyer encouraged the early development of the major questions doctrine. In the same article in which he critiqued *Chevron* deference, Justice Breyer also opined that "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."[251] Minor questions simply "answer themselves."[252] The agency need not

246. *West Virginia*, 597 U.S. at 730 (internal quotations omitted).
247. *Nebraska*, 600 U.S. at 504 (quoting *West Virginia*, 597 U.S. at 732).
248. *See* Deacon & Littman, *supra* note 5, at 1058–59, 1061.
249. *Nebraska*, 600 U.S. at 549 (Kagan, J., dissenting).
250. *See supra* notes 139–43 and accompanying text.
251. Breyer, *supra* note 40, at 370.
252. *Id*.

exercise any substantial legal authority or discretion to answer them. It can simply fill in the blanks in a statutory game of hangman. Genuine policymaking is not the preserve of the agency at all. The Court would go on to cite this passage from Justice Breyer's article in one of the early, and still leading, MQD cases, *FDA v. Brown & Williamson Tobacco Corp.*,[253] even over Justice Breyer's dissent.[254]

The MQD has expanded markedly from Justice Breyer's original conception, which cautioned against deference on major issues, rather than denying the agency the authority to take major action under ambiguous authority.[255] Nonetheless, the current MQD is but a more virulent strain of a doctrine rooted in Justice Breyer's skepticism about agencies' normative powers. Justice Breyer and the Court presume that agencies have little to no discretion to make significant value choices and at most only have the discretion to make technical implementation decisions. Agencies have no agency.

Note the pincer movement of the claim that agencies cannot exercise legislative policymaking power, on the one hand, or interpretive or fact-finding power on the other. If both the Article I and the Article III claims succeed, agencies regulating private rights will not be able to engage in *any* form of binding action, whether it be on questions of fact, of policy, or of law. This elimination of agencies' adjudicatory, interpretive, and policymaking power would then compound, rather than delimit, unitary executive power. After all, regulations and adjudicatory orders bind not only the regulated public but the agency itself.[256] They delimit the scope of discretion the statute otherwise conveys, by elucidating abstract provisions with either concrete regulatory requirements or else adjudicatory applications. If, however, agency rules and internal precedent lose their binding power, agencies will be less interested in constraining themselves. That is because, in the absence of the ability to bind the public through rules and orders, the agency has little incentive to delimit its own discretion through the same. Instead, the agency, acting at the behest of the White House, would simply threaten enforcement actions in Article III courts. The likely result would be a greater role for prosecutorial coercion similar to that present in criminal law plea bargaining.[257] Rather than relying on administrative hearings and implementing regulations that provide an internal legality check on Executive Branch enforcement, agencies would simply wield the threat of suit against private parties on the basis of broad and numerous statutory authorities and prohibitions. Power would then shift away from agencies in two directions: upwardly, toward the President, who can elect how to bring coercive pressure to bear using the full arsenal of the

253. 529 U.S. 120, 159 (2000).

254. *Id.* at 161 (Breyer, J., dissenting).

255. *See generally* Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475 (2021) (articulating the distinction between the stronger and the weaker MQD).

256. *See, e.g.*, United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 266–67 (1954).

257. *See generally* Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223 (2006) (identifying due process problems in those cases where prosecutors engage in coercive plea bargaining).

U.S. Code; and laterally, toward the courts, which will adjudicate any charges or complaints filed.

D. THE REVIEWABILITY OF THE EXISTENTIAL CHALLENGE: STRUCTURAL INJURIES AND CONSTITUTIONAL POLITICS

In formulating and recognizing the existential challenge, the Court opens up the Judiciary as a forum for structural-constitutional politics. It does so, in part, by recognizing justiciable "injury" in separation-of-powers violations.[258] Such structural injuries, as the Court acknowledged in *Axon*, may "sound a bit abstract."[259] Indeed, the notion of suffering an injury from a separation-of-powers violation does not square easily with the Court's restrictive approach to standing. The Court's standing jurisprudence generally limits access to judicial review only to those who suffer "concrete and particularized" and "actual and imminent" harm to a "legally protected interest."[260] It dismisses "generalized grievances,"[261] purely procedural injuries,[262] "intangible" injuries not "traditionally recognized" in courts,[263] and "speculative"[264] claims about future harm. But, as Aziz Huq has observed, the Court is open to conceiving injury in a more diffuse and ideal register in order to "empower" structural constitutional claims against regulatory agencies.[265] Jurists articulate harms that citizens suffer as a political class as a result of violations to the constitutional order as a whole, regardless of any personal interest or concrete stake a particular party has in compliance with its provisions.[266] The Court, disregarding its own stated conception of the role of the Judiciary, effectively "convert[s] the undifferentiated interest" in maintaining the separation of powers into an "individual right vindicable in the courts."[267] Litigants then act as "private attorneys general," suing to vindicate a public interest in the preservation of the constitutional scheme.[268]

Seila Law and *Axon* recognized a "here-and-now injury" in the threat of enforcement by an agency whose structure violates the separation of powers.[269] In *Seila*

258. *See, e.g.*, Seila L. LLC v. CFPB, 591 U.S. 197, 212 (2020).

259. Axon Enter., Inc. v. FTC, 598 U.S. 175, 191 (2023).

260. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

261. United States v. Richardson, 418 U.S. 166, 175 (1974) (quoting Flast v. Cohen, 392 U.S. 83, 106 (1968)).

262. *See Lujan*, 504 U.S. at 571–72.

263. TransUnion LLC v. Ramirez, 594 U.S. 413, 427 (2021). On the Court's treatment of tangibility, see generally Rachel Bayefsky, *Constitutional Injury and Tangibility*, 59 WM. & MARY L. REV. 2285 (2018).

264. City of Los Angeles v. Lyons, 461 U.S. 95, 109 (1983).

265. HUQ, *supra* note 25, at 3–4, 146.

266. *See id.* at 146.

267. Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992) (internal quotation marks omitted).

268. *See, e.g.*, Associated Indus. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943).

269. Axon Enter., Inc. v. FTC, 598 U.S. 175, 191 (2023); Seila L. LLC v. CFPB, 591 U.S. 197, 212 (2020). The concept of a "here-and-now" injury is traceable to a D.C. District Court per curiam opinion cosigned by then-Judge Scalia on the unconstitutionality of the Comptroller General's powers and accountability to Congress under the Balanced Budget and Emergency Deficit Control Act of 1985. Synar v. United States, 626 F. Supp. 1374, 1392 (D.D.C. 1986), *aff'd sub nom.* Bowsher v. Synar, 478 U.S. 714 (1986). The panel concluded the suit was ripe for review, even though a removal restriction

Law, the prospect of such a present injury made the suit ripe for review, even though the challenged removal restriction hadn't been tested.[270] In *Axon*, the separation-of-powers injury helped to establish district court jurisdiction on the theory that the injury of undergoing an unconstitutional administrative process couldn't be remedied on subsequent appeal of an agency adjudication to a circuit court.[271] This new and expansive understanding of injury converts a collective interest in the preservation of constitutional structure into an individuated rights claim. Beyond the removal context, major questions cases like *West Virginia v. EPA* and *Biden v. Nebraska* have also stretched the bounds of justiciability, enabling state governments with relatively speculative and abstract injuries to obtain review of agency policy in federal court.[272] As a result, the Judiciary gains power to directly administer its conception of structural constitutional principles at the expense of the powers and procedures of Congress and the Executive.

The injury the Court recognized in *Axon* and *Seila Law* would not be novel if the alleged constitutional defects concerned particularized rights of the sort that constitutional litigation traditionally protects.[273] For instance, a litigant may have standing to vindicate their interest in free expression where the government merely threatens to investigate or charge conduct that is arguably constitutionally protected because their speech may be chilled by such a threat.[274] But in *Axon* and *Seila Law*, the underlying constitutional interest does not concern an individual liberty, such as a right to free expression.[275] Nor is there a recognized due process interest—such as the interest in accurate adjudication or protection against unjustified material deprivation—that would be vitiated once these formal adjudicatory proceedings take place.[276] The common claims in the suits in *Axon*, *Seila Law*, and *Free Enterprise Fund* are structure-based, not rights-based. They concern inadequate presidential control and undue congressional interference in the organization

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on the Comptroller's powers had not been tested, because "it is the Comptroller General's presumed desire to avoid removal by pleasing Congress, which creates the here-and-now subservience to another branch that raises separation-of-powers problems." *Id.* The Court affirmed the panel's conclusion and quoted the phrase in *Bowsher*, 478 U.S. at 720, 727 n.5 (1986). *Seila Law* then converted "here-and-now subservience" into a "here-and-now injury." 591 U.S. at 212.

270. 591 U.S. at 212.

271. 598 U.S. at 195–96.

272. *West Virginia v. EPA*, 597 U.S. 697, 755–56 (2022) (Kagan, J., dissenting) ("The Court today issues what is really an advisory opinion on the proper scope of the new rule EPA is considering."); *Biden v. Nebraska*, 600 U.S. 477, 523 (2023) (Kagan, J., dissenting) ("The plaintiffs in this case are six States that have no personal stake in the Secretary's loan forgiveness plan. They are classic ideological plaintiffs.").

273. *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 885 (1983).

274. *See, e.g.*, Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158–59, 165–66 (2014).

275. *See* Justin Weinstein-Tull, *The Experience of Structure*, 55 ARIZ. ST. L.J. 1513, 1531–32 (2023); *see also* Axon Enter., Inc. v. FTC, 986 F.3d 1173, 1183 (9th Cir. 2021) (finding that Axon did "not face such a dire risk requiring pre-enforcement relief" compared to other cases where, for example, petitioners would voluntarily submit to deportation), *rev'd and vacated*, 598 U.S. 175 (2023).

276. *See* Mathews v. Eldridge, 424 U.S. 319, 332–35 (1976) (determining what type of process is due to participants in administrative adjudications).

of the Executive Branch. On its face, it is unclear what that structural constitutional claim has to do with any particular party's "liberty" interests.[277]

A line of authority going back to Justice Scalia's dissent in *Morrison* maintains that presidential control over administrative agencies is a safeguard of "liberty."[278] The theory is that elections can restrain a President who deploys executive power to unfairly target private parties.[279] But, in fact, the relationship between individual liberty and presidential control is, at best, weak and, at worst, inverse. A general scheme of divided and mutually restraining powers may enhance freedom from governmental coercion, generally, by preventing any one part of government from exercising unilateral authority.[280] But enhancing the President's authority over the Executive Branch does not itself restrain arbitrary power in that way. Quite the opposite—the Executive Branch provides the "energy" against which the need for republican "liberty" must be balanced.[281] As Justice Scalia himself recognized, majoritarian decision-making often runs contrary to the rights of the individual.[282] Executive power, backed as it is by the popular warrant of the presidency and the coercive capacities of the bureaucracy, is especially prone to harm minorities who run afoul of the preferences of the President's voters.[283]

It is therefore implausible that individual liberty will be better protected by increasing the scope of the President's power to fire, and thus to direct, quasi-judicial officers for any reason he pleases, including nakedly political or even personal ones. The case law has long recognized, even in cases that urge a broad reading of presidential power, that presidential control over agency adjudication is prone to impair due process.[284] The more power the President and his political

277. *Cf.* HUQ, *supra* note 25, at 3–4 (describing the claims in *Seila Law* as "structural" and contrasting these structural claims to claims involving "constitutional rights" made in other cases).

278. *See* Morrison v. Olson, 487 U.S. 654, 697, 728–29 (1988) (Scalia, J., dissenting) (quoting THE FEDERALIST NO. 47 (James Madison)).

279. *Id.* at 728–29 ("Under our system of government, the primary check against prosecutorial abuse is a political one. The prosecutors who exercise this awesome discretion are selected and can be removed by a President, whom the people have trusted enough to elect . . . . The President is directly dependent on the people, and since there is only *one* President, *he* is responsible. The people know whom to blame . . . ."). Cochran's counsel from the New Civil Liberties Alliance arguably gestured to the same argument when applying for a preliminary injunction of the SEC's proceedings, arguing that "if an injunction is not granted the SEC's ALJs will continue to be insulated from the President's power to remove them." Plaintiff's Brief in Support of Motion for Preliminary Injunction at 13, Cochran v. SEC, No. 19-cv-00066-A, 2019 WL 1359252 (N.D. Tex. Mar. 25, 2019).

280. THE FEDERALIST NO. 51 (James Madison) ("But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.").

281. THE FEDERALIST NO. 37 (James Madison) (describing the tension between "energy" and "liberty" in the constitutional scheme); THE FEDERALIST NO. 70 (Alexander Hamilton) (associating the Executive Branch primarily with "energy").

282. Scalia, *supra* note 273, at 895–97.

283. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (all but formally overruled by Trump v. Hawaii, 585 U.S. 667, 710 (2018) (describing the Korematsu decision as "gravely wrong" and "overruled in the court of history")).

284. Myers v. United States, 272 U.S. 52, 135 (1926) ("[T]here may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after

appointees have to control the disposition of particular cases, the less likely it is that individual parties will get an impartial hearing.[285]

The injury that *Axon* and *Seila Law* recognize, therefore, does not register as a harm to an individual liberty interest. If it is an injury at all, it is an injury to collective interests in the maintenance of proper constitutional structure. One gets a sense of this broad political injury from Justice Scalia's dissent in *Morrison*. He claimed that, in light of the Court's decision protecting the Independent Counsel against White House interference, "one must grieve for the Constitution."[286] A structural constitutional violation harms all citizens without any more particularized infringements on their protected interests since it takes away the form of government the people have coauthored. Judge Douglas H. Ginsburg similarly described the intangible losses suffered by, or associated with, a "Constitution-in-exile."[287] In Ginsburg's telling, doctrines such as nondelegation and liberty of contract have been ostracized by administrative law, "banished for standing in opposition to unlimited government" and "kept alive by a few scholars who labor on in the hope of a restoration, a second coming of the Constitution of liberty."[288] Bygone constitutional rules in this way are reified and fetishized. They become legal subjects whose interests are held in trust by the conservative legal movement. Gary Lawson argues in similar tones that the administrative state's "validation by the legal system amounts to nothing less than a bloodless constitutional revolution."[289] Steven G. Calabresi and Lawson together argue that "ordinary citizens are subjected to unconstitutional bureaucratic tyranny" as a result of the administrative state.[290] Likewise in Philip Hamburger's work, there is a claim of civic and public, rather than economic and private, injury where administrative law "inverts the relationship between the people and their government, reducing the people to servants and elevating government as their master."[291]

The structural injury *Axon* recognizes is thus emblematic of the cross-ideological project to preserve and indeed expand judicial control over agency action under the impetus of novel structural constitutional claims. Though Justice Kagan tends to disagree on the merits of many of these separation of powers claims, she insists that the Judiciary has a key role to play in resolving them. Her opinion for the Court in *Axon* affirmed district court jurisdiction to entertain constitutional challenges in part because the FTC "knows a good deal about

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hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control.").

285. *See* Cox & Kaufman, *supra* note 36, at 1812, 1819–20; Christopher J. Walker, *Constitutional Tensions in Agency Adjudication*, 104 IOWA L. REV. 2679, 2680 (2019).

286. Morrison v. Olson, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting).

287. Douglas H. Ginsburg, *Delegation Running Riot*, 1 REGUL. 83, 84 (1995) (reviewing DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993)).

288. *Id.*

289. Lawson, *supra* note 13, at 1231.

290. Calabresi & Lawson, *supra* note 112, at 823 n.5.

291. HAMBURGER, *supra* note 25, at 355.

competition policy, but nothing special about the separation of powers."[292] The courts, it seems, know much more about these matters.

This is an odd position for Justice Kagan to take given that she doesn't think very highly of the Court's own structural-constitutional understanding. In dissenting opinions in *Seila Law*[293] and *West Virginia v. EPA*,[294] Justice Kagan excoriated her colleagues for bad reasoning that led them to step beyond their constitutional role and infringe on the constitutional powers of Congress and the Executive. In *Loper Bright*, Justice Kagan's dissent accused the majority of turning the Court "into the country's administrative czar"[295] by giving itself a policy-making power to resolve statutory ambiguities involving political and expert judgment. She even went so far, in *Biden v. Nebraska*, as to say that the Court had "violate[d] the Constitution" by recognizing Missouri's standing to challenge student-debt relief on the basis of the injuries of a "financially independent public corporation."[296] If the Court is prone to violate the Constitution when it decides separation of powers cases, why should it have greater authority than agencies to adjudicate them? There is a deep tension between Justice Kagan's commitments concerning the Court's institutional competence over separation of powers concerns, on the one hand, and her unsparing critique of the Court's actual separation of powers reasoning on the merits. While Justice Kagan strongly disagrees with the Court's constitutional jurisprudence, she also does not wish to "disparage" its final authority over these matters.[297] The Court must retain its constitutional power even if such power is routinely abused.

Justice Breyer has a similar inclination to defend the "authority of the Court" in the face of charges that it is a nakedly political body and related proposals to expand or otherwise reform it.[298] He assures his readers that "all" of the Justices "studiously try to avoid deciding cases on the basis of ideology rather than law."[299] But it turns out, on closer inspection, that the difference between law and ideology is not all that sharp: "it is sometimes difficult to separate what counts as a jurisprudential view from what counts as political philosophy."[300]

This problem is particularly grave in the existential challenge. The Justices' objections to administrative power rely on "jurisprudential views" about the separation of powers—and the relative priority of private liberty and public power—that are difficult, if not impossible, to disentangle from political commitments about the proper limits of governmental regulation of economic relations. Law

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292. Axon Enter., Inc. v. FTC, 598 U.S. 175, 194 (2023).

293. 591 U.S. 197, 261–63 (2020) (Kagan, J., concurring in the judgement with respect to severability and dissenting in part).

294. 597 U.S. 697, 755–56 (2022) (Kagan, J., dissenting).

295. 603 U.S. 369, 450 (Kagan, J., dissenting).

296. 600 U.S. 477, 525 (2023) (Kagan, J., dissenting).

297. *Id.* at 548.

298. *See generally* STEPHEN BREYER, THE AUTHORITY OF THE COURT AND THE PERILS OF POLITICS (2021).

299. *Id.* at 53.

300. *Id.* at 57.

and politics are difficult to disentangle here because the constitutional controversies concern general and shared problems of governmental and social organization rather than discrete injuries traceable to specific official conduct. What Justice Breyer calls the "peril of politics," then, is not that the Court will be motivated by political ideology. He knows that it sometimes will, especially when it rules on matters concerning the collective rights of citizens and the general configuration of the state. The peril is, rather, that the people will come to understand that such structural decisions are political, lose "confidence" in the Court, and exercise their own political power to downsize the Court's constitutional role.[301]

Justices Breyer and Kagan's paramount concern for the Court's authority comes at a steep cost. Their belief in the Court's competence to enforce separation of powers principles has facilitated their colleagues' efforts to delegitimate and to dismantle the administrative state.

II. WHY AGENCIES MATTER

The previous Part diagnosed the existential challenge, identified its component claims, and explained its intellectual and institutional dynamics. This Part evaluates the target of the existential challenge—the administrative state itself. It identifies the principles that this state—in its broad contours and characteristic activities—instantiates and expresses. As a legal entity, the administrative state's existence is not normatively neutral. Rather, agencies' organic statutes, judicial construction, and administrative actions have repeatedly and durably recognized various fundamental needs and interests of the polity. This Part shows how the administrative state has become an essential legal facility to (A) protect the public against harm, (B) distinguish the multiple public interests requiring protection, and (C) preserve impartiality in the vindication of these interests. It is the keystone of federal capacity for economic and social governance. Without the administrative state, the government is likely to fail to protect the public interests to which public law is already committed.

This normative argument sets to the side a raft of positivist, originalist arguments—often relied on in the existential challenge—which assert that various aspects of the administrative state are inconsistent with the text of the Constitution[302] or the Administrative Procedure Act.[303] There is now a deep vein of scholarship demonstrating the flaws in each of the three main prongs of the originalist case against the administrative state.[304] As important as these interventions are, they do not join issue

301. *Id.* at 63.

302. *See, e.g.*, Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1498–503 (2021).

303. *E.g.*, Bamzai, *supra* note 168, at 985–90.

304. On the Article I, nondelegation challenge, see Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1293–317 (2021); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 279 (2021); Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81, 85–91 (2020). On the Article II, unitary executive challenge, see SHANE, *supra* note 51, at 109–25; Victoria Nourse,

with the normative mode of argument that is often braided together with originalist objections in opinions, scholarship, and legal and political advocacy.[305]

According to the political ideology backing the existential challenge, the administrative state threatens a negative, propertied form of "liberty," as well as various (and often conflicting) conceptions of electoral "democracy,"[306] such as the President's or Congress's popular legitimacy. Because agency officials are not elected, so the argument goes, they infringe on the freedom of private parties without political accountability. I have critiqued these arguments elsewhere, showing that liberty and democracy may be promoted as well as hindered by the exercise of administrative power.[307] Legislative authorization and presidential supervision can and do function to control administrative power. Administrative action can and does enhance the liberty of private parties, protecting them against coercion, deception, and domination by others.

These internal critiques of the Roberts Court's political theory only go so far, however. They come as rebuttals to the Court's constitutional charges against administrative authority, taking as a given the Court's individualistic, propertied conception of freedom and its formal, electoral conception of popular rule. But the existential challenge itself puts the Court's own formulations into question. It stakes its claims on behalf of "the people" against "the administrative state."[308] As the previous Part's discussion of structural injuries demonstrates, the challenge asserts collective, ideological injuries inflicted by the administrative state upon the citizenry writ large, rather than discrete injuries to property interests.[309] The injury cannot arise merely from a lack of formal electoral legitimacy since the administrative state was created by legislation, enacted by elected leaders, and could be abolished or altered in the same way.[310] The charge rather appears to rest on the collective interest that citizens share in the maintenance of the constitutional structure which they, as members of "the people," have co-authored.[311] That charge

Reclaiming the Constitutional Text from Originalism: The Case of Executive Power, 106 CALIF. L. REV. 1, 23–26 (2018); Joshua C. Macey & Brian M. Richardson, *Checks, Not Balances*, 101 TEX. L. REV. 89, 154 (2022); Christine Kexel Chabot, *Is the Federal Reserve Unconstitutional? An Originalist Argument for Independent Agencies*, 96 NOTRE DAME L. REV. 1, 14–15 (2020). On the Article III challenge to agencies' interpretative and fact-finding powers, see Emerson, *supra* note 46, at 1441–42; Gregory Ablavsky, *Getting Public Rights Wrong: The Lost History of Private Land Claims*, 74 STAN. L. REV. 277, 284 (2022); Ronald M. Levin, *The APA and the Assault on Deference*, 106 MINN. L. REV. 125, 168–69 (2021).

305. *See* Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court's Political Theory*, 73 HASTINGS L. J. 321, 373–98 (2022).

306. *See, e.g.*, Seila L. LLC v. CFPB, 591 U.S. 197, 223–24 (2020) (objecting to the Bureau's structural independence from the presidency on the basis of the threat it posed to "liberty" and to the president's "democratic" authority).

307. Emerson, *supra* note 305, at 408–34; *see also* Gillian E. Metzger, *The Roberts Court and Administrative Law*, SUP. CT. REV., 2019, at 7–8, 69–71.

308. *See, e.g.*, West Virginia v. EPA, 597 U.S. 697, 737, 741 (2022) (Gorsuch, J., concurring).

309. *See supra* Section I.D.

310. Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin., 595 U.S. 109, 117 (2022) ("[A]gencies are creatures of statute").

311. *See* U.S. CONST. pmbl.

shifts the terrain of legal argument from individuated legal rights to the shared political stakes of administrative power.

Precisely because the existential challenge threatens to uproot or fundamentally alter the administrative state as a whole, the challenge draws attention to the state's general, constitutive features and calls us to consider their normative significance. As the Court takes aim at the "very existence" of agencies,[312] it draws attention to the essential characteristics and motivating concerns that make agencies what they are. By evaluating the target of the existential challenge, we can better understand the character of the American state and the duties of the federal government.[313] We can then ask, why do agencies matter? What does their existence as legal entities communicate about the normative commitments of our public law system? What would their destruction mean for the path of our law?

Any attempt to assess administrative government at such a general, conceptual level is sure to erase significant historical as well as cross-institutional variation. Nonetheless, it is possible to describe certain essential features and activities of the state that had solidified by the close of the twentieth century. By that point, the Reagan Revolution had failed to displace, and even relied upon, the basic institutional architecture established during the New Deal and substantially amended during the Rights Revolution of the 1960s and 70s.[314] At the century's close, a historically layered set of structures, norms, and practices—dating variously back to the Founding, the Progressive Era, the New Deal, and the Second Reconstruction—were well-entrenched within and around the executive departments.

The existential challenge to this complex establishment threatens the government's ability to protect the people. The administrative state gives the democratic public the institutional capacity to vindicate its distinct, common rights to health, safety, equality, market fairness, and other statutorily recognized interests. Its bureaucratic structure gives institutional depth to democratic commitments that would otherwise prove shallow, ephemeral, and largely symbolic. At the same time, administrative procedure helps to ensure that agency discretion continues to consider and to track relevant legal interests.

The administrative state does not invariably live up to its distinctive capacities. Some agencies routinely fail them. But the existential challenge only makes matters worse by eliminating internal constrains on executive arbitrariness. At the same time, it would disable the primary mode by which American law expresses shared interests in the structures and actions of government. Without the administrative state, the federal government would lose many of its basic capabilities to keep the constitutional promise of popular sovereignty.

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312. Axon Enter., Inc. v. FTC, 598 U.S. 175, 189 (2023).

313. *Cf.* OAKESHOTT, *supra* note 105, at 195 (describing the "character of a modern European state," and the "office" or "engagements" of its government, with special attention to its bureaucratic structure).

314. *See* CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 18–31 (1990); BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 397 (2000).

A. PROTECTING THE BODY POLITIC

The existential challenge strikes at the capacity of the federal government to address risks and harms to the people as a whole. Consider the legislative and administrative programs at issue in the specific claims that make up the existential challenge: prevention of unfair practices and fraud in consumer credit and financial markets in the wake of the 2008 financial crisis;[315] regulation of accounting practices at public companies after the Enron scandal;[316] reduction in greenhouse gas emissions to address global warming;[317] prevention of death, injury, and financial distress due to COVID-19;[318] blocking of anticompetitive mergers;[319] and so on. The specific targets of the existential challenge draw attention to a basic, constitutive feature of the administrative state—its primary purpose is to protect the public at large against distinct social risks and harms.

Sometimes, as with regard to pandemics,[320] environmental protection,[321] or workplace safety,[322] the threatened harm is to people's bodily integrity. While the harm to be avoided would be visited on particular persons, health regulation targets the population level—the people in their collective capacity. In other cases, as with the Federal Trade Commission Act[323] or the Dodd-Frank Wall Street Reform and Consumer Protection Act,[324] the harm to be avoided is economic deception or exploitation, social subordination, or other widespread, complex, and serious risks. Here, again, it is an overall pattern of social harm, rather than specific wrongs suffered by particular parties, that administrative authority primarily aims to prevent, mitigate, and remedy. Like the existential challenge that would dismantle it, the administrative state is concerned primarily with the system of social and political relations rather than with the discrete rights of individuals.

The collective interests protected by the administrative state are recognized by the Constitution. The federal government is a "government of the people," both "[i]n form and in substance;" "[i]ts powers are granted by them, and are to be

315. Seila L. LLC v. CFPB, 591 U.S. 197, 202 (2020); SEC v. Jarkesy, 503 U.S. 109, 115 (2024).

316. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 484 (2010).

317. West Virginia v. EPA, 597 U.S. 697, 706 (2022).

318. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin., 595 U.S. 109, 114 (2022); Biden v. Nebraska, 600 U.S. 477, 486–87 (2023).

319. Axon Enter., Inc. v. FTC, 598 U.S. 175, 193 (2023).

320. *See* 42 U.S.C. § 264 (outlining the Surgeon General's authority to issue regulations to "prevent the introduction, transmission, or spread of communicable diseases").

321. *See* 42 U.S.C. §§ 7603, 7609(b), 7617(e)(2) (detailing the EPA Administrator's responsibility to "protect public health and welfare" including by bringing suit against those operating pollution sources that "substantial[ly] endange[r]" public health and publishing determinations if certain EPA policies or regulations are "unsatisfactory from the standpoint of public health").

322. 29 U.S.C. §§ 651–678 (outlining the duties of employers and employees to create and comply with occupational safety and health standards).

323. 5 U.S.C. §§ 41–58 (establishing the FTC and describing its purpose to prevent "persons, partnerships, or corporations" from engaging in "unfair methods of competition" and "unfair or deceptive" business practices).

324. 12 U.S.C. §§ 5301–5641 (describing the purpose of the Dodd-Frank Act as "prevent[ing] or mitigat[ing] risks to the financial stability of the United States").

exercised directly on them, and for their benefit."[325] Part of the "substance" of popular-sovereign power is the authority and the duty to protect the people's rights against unreasonable interference in their health, safety, and other core common interests.[326] In particular, the Court has long construed the Commerce Clause as authorizing Congress and the courts to abate public nuisances (or interferences in public rights) within interstate commerce.[327] The existence of "imperative necessity" to protect the public against physical, economic, and civic injuries could justify recourse to administrative rather than judicial resolution of disputes.[328]

Congress has accordingly resorted to administrative adjudication to protect the fisc, the civil rights of the freedmen during Reconstruction,[329] or, in the New Deal, industrial peace and the "fundamental right" to collective bargaining.[330] These bodies of law show that the rights of the sovereign people provide substantive grounding for the exercise of administrative power. Where such interests cannot be adequately protected by judicial process or by legislative specification of primary rules of conduct, Congress may afford administrative facilities to do so. The Court's decision in *Jarkesy* to strip the SEC of its adjudicatory authority opens up a vein of constitutional challenges that put these common rights at risk.[331]

Existential challengers often complain that administrative institutions oppress "the citizenry,"[332] arguing that the power that agencies wield over private parties threatens civic freedom. But in doing so, they tend to conflate the interests of particular market participants with the more widely distributed interests of the citizens as a whole. Granting legal powers and controlled discretion to administrative actors is often a necessary component of robust protection for the people. As the progenitors of antitrust regulation and the FTC—such as Justice Brandeis—understood, unbridled economic power tends to undermine the elements of social equality that make republican self-government possible.[333] It is difficult, if not impossible, for people to participate as equals in civic and political life when they live under threat of reprisal, exclusion, and deprivation for asserting their rights against employers, businesses, and other powerful social actors.[334]

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325. McCulloch v. Maryland, 17 U.S. 316, 405 (1819).

326. *See* Emerson, *supra* note 46, at 1429.

327. *See, e.g.*, Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. 518, 568 (1851) (enjoining construction of bridge over the Ohio River as a public nuisance); In re Debs, 158 U.S. 564, 586 (1895) (finding that the federal government has the "duty of keeping those highways of interstate commerce free from obstruction, for it has always been recognized as one of the powers and duties of a government to remove obstructions from the highways under its control").

328. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 282 (1855).

329. *See* Freedmen's Bureau Act, ch. 200, 14 Stat. 173, 176–77 (1866).

330. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937).

331. *See* SEC v. Jarkesy, 603 U.S. 109, 134–35 (2024). For discussion, see Emerson, *supra* note 46, at 1491–94.

332. *E.g.*, Reply Brief for Petitioner at 1, Axon Enter., Inc., v. FTC, 598 U.S. 175 (2023) (No. 21-86).

333. *See* GERALD BERK, LOUIS D. BRANDEIS AND THE MAKING OF REGULATED COMPETITION, 1900–1932, at 35–76 (2009); GANESH SITARAMAN, THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION: WHY ECONOMIC INEQUALITY THREATENS OUR REPUBLIC 59–111 (2017); K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION 54–138 (2017).

334. Emerson, *supra* note 46, at 1451–57.

The private regulations that pervade work- and marketplaces may exert binding power approaching that of the government.[335] Consider, for instance, the FTC's rulemaking with regard to non-compete clauses in employment contracts.[336] The rule is premised in part on the Commission's finding that "non-competes with workers other than senior executives [are] exploitative and coercive because in imposing them on workers, employers take advantage of their unequal bargaining power."[337] The FTC documented how, in the notice-and-comment period, "[t]housands of workers described non-competes as pernicious forces in their lives that took advantage of their lack of bargaining power and forced them to make choices detrimental to their finances, their careers, and their families. Above all, the predominant themes that emerged from the comments were powerlessness and fear."[338] The evidence adduced in the rulemaking thus shows how, at least in certain circumstances, private ordering is anything but "free."

That rule has now been set aside as unauthorized by statute.[339] But the invalidation of the rule does not necessarily lead to a reduction in coercive power writ large. Rather, regulatory power shifts back to firms with sufficient market power to coerce employees or customers. The result is an increase in the arbitrary discretion of some private parties over others with the legal protection, permission, and acquiescence of public authorities. A general pattern of social domination of one group by others may then thwart the egalitarian requisites for a republican self-government.

The common normative concern that unites agencies with distinct missions is, therefore, to protect the people at large against harms that are serious in the aggregate, but which individuals are not well positioned to address on their own initiative.[340] Since the Progressive Era, it has been clear that private enforcement alone is insufficient to protect collective health and safety against serious harms, where any particular individual often lacks the knowledge and resources to vindicate their rights.[341] As James Landis observed in his classic study, *The Administrative Process*, Congress conceived the public enforcement and adjudication structures of

335. *See* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 16 (1960) ("Within the firm individual bargains between the various cooperating factors of production are eliminated and for a market transaction is substituted an administrative decision."). *See generally* ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) (2017) (analyzing coercion and arbitrary domination by private employers).

336. FTC Non-Compete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024) (codified at 16 C.F.R. pts. 910, 912).

337. *Id.* at 38375.

338. *Id.*

339. Ryan, LLC v. FTC, 746 F. Supp. 3d 369, 374 (N.D. Tex. 2024).

340. *See* Emerson, *supra* note 46, at 1452–57.

341. *See* JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 13 (1927); *see also* ATT'Y GEN.'S COMM. ON ADMIN. PROC., U.S. DOJ, FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 16–17 (1941), https://www.regulationwriters.com/downloads/apa1941.pdf [https://perma.cc/Q3T5-6P4F] (finding that one Congressional purpose in creating administrative agencies was to enforce and effectuate legislative policies when individual injured persons were "too weak or timid or discouraged to bring the necessary proceedings").

the Federal Trade Commission, the Securities and Exchange Commission, and the National Labor Relations Board to enable the government to address numerous, relatively small-value harms that together could become harmful to the political community as a whole.[342] Administrative enforcement was needed "not so much because of the grave social import of the particular injury, but because the atmosphere and conditions created by an accumulation of such unredressed claims is of itself a serious social threat."[343]

Put in the traditional terms of the common law, Landis's argument was that agencies protect "public rights"—shared interests that concern the "body politic"—and that such rights cannot be exclusively determined by the claims that private parties happen to bring before the courts.[344] Agencies represent and implement interests that a constitutional ideology concerned with negative, propertied liberty is incapable of fully grasping. They prevent population-level harms that threaten the welfare and integrity of the polity as a whole.

By preventing agencies from making binding rules and orders, the existential challenge would eliminate or sharply curtail core, long-established powers of the federal government to address these sorts of shared, systemic, and, in some cases, life-threatening risks. A strengthened nondelegation doctrine and its statutory cousin, the major questions doctrine, each increase the costs to Congress and to administrative agencies of addressing such public problems. As Peter Shane has observed, "[w]hat is at stake" in the nondelegation debate "is the capacity of our national government in the twenty-first century to address regulatory issues that are critical to public health and social welfare."[345] Rigorous application of either the nondelegation or major questions doctrine would strike at the core of agencies, as it would nullify or quite narrowly construe any number of extant statutory powers. It would also make it more difficult for Congress to legislate by requiring legislators to bargain over highly specific statutory text. As the last part noted, the major questions doctrine has been applied to emergency authorities which presumably involve the broadest reach of governmental power and discretion. It is therefore prone to curtail, even more sharply, the routine protective measures that workaday agency rulemaking undertakes. Under existential threat, agencies increasingly have an incentive not to issue "major" or "important" policies that would otherwise fall within their statutory remit. The result is likely to be systemic underenforcement of health and safety statutes.

342. LANDIS, *supra* note 14, at 35–36.

343. *Id.* at 36.

344. HENRICI DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE: LIBRI QUINQUE IN VARIOS TRACTATUS DISTINCTI 21 (Travers Twiss, ed., 1878) ("Public right is what regards the state of the body politic . . . ."); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 284 (1856) ("[T]here are matters involving public rights . . . which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."); Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT L. 1, 36 (2011) ("[A]dministrative agencies . . . have been created to enforce public rights.").

345. SHANE, *supra* note 51, at 170.

The benefit of legislative delegation to agencies is not merely that it enables a larger quantity of public policy. As Edward Stiglitz has argued, legislative delegation to agencies is likely to, under the Administrative Procedure Act's requirements, increase the quality and impartiality of public policy.[346] Agencies' institutional capacity and legal obligation to take regulatory action based on sound knowledge is likely to make for wiser, more granular regulatory decisions than a time-constrained legislature held to a rational-basis standard or a generalist court lacking expert staff in the relevant field.[347] Indeed, by shifting away from arbitrary-and-capricious review of agencies' explanations for their decisions and towards textual and substantive canons that perpetually narrow agency authority, the existential challenge itself reduces agency's fidelity to reasoned administration.[348] Agencies will have reduced incentives not only to think big but to think carefully about social facts and public policies.

The Article III challenges to agencies' fact-finding and interpretive power also sap the federal government's capacity to make and enforce policies that vindicate various public rights. Without the power to interpret law, agencies will have great difficulty developing comprehensive national policy. They will face the routine risk that inexpert courts will determine that their policy is inconsistent with the judge's "best" understanding of the statute the agency administers. They will know that de novo review of policymaking decisions often comes down to judges' political preferences and textual casuistry rather than careful consideration of the administrative record. Without the power to find facts, likewise, agencies will not be able to redress cases of unfair or fraudulent commercial conduct without the threat of civil action. Agencies would lose not only their quantitative capacity to apply the law to particular cases, but also their qualitative capacity to bring specialized experience to bear in composing the factual record and assembling "substantial evidence" to support their orders before a reviewing court.[349] The agency would have to rely on a court lacking subject-matter experience and specialization to find facts and render judgment. Enforcement costs would markedly increase, making conduct injurious to the public that much cheaper to the wrongdoer.

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346. *See* Edward H. Stiglitz, *Delegating for Trust*, 166 U. PA. L. REV. 633, 654 (2018).

347. *See id.* at 653–62. The legislature has increased its expert specialization through the committee system and its institutional offices, such as the Congressional Research Service and the Congressional Budget Office. *See* KEITH KREHBIEL, INFORMATION AND LEGISLATIVE ORGANIZATION 22 (1991); Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541, 1560–63, 1573–78 (2020). While these legislative institutions markedly increase legislative expertise, all binding legislative action must pass through the demanding requirements of bicameralism and presentment. U.S. CONST. art. I, § 7, cl. 2. It is therefore implausible that legislative expertise, even at increased scale, could fully substitute for the closer linkage of knowledge to action in executive and independent agencies.

348. *See* David B. Froomkin, The Death of Administrative Law 1, 25–26, 33–40 (Nov. 28, 2024) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4466397 [https://perma.cc/WP39-LU4U].

349. *See* 5 U.S.C. § 706(2)(E); Universal Camera Corp. v. NLRB, 340 U.S. 474, 497 (1951).

The existential challenge thus undermines not only the democratic-process value of congressional legislation, but also the underlying legal interests in collective well-being that justify congressional action. Agencies are the institutional embodiment of our "republic of statutes" in which the people's sovereign rights are set out in statutory law.[350] Across the twentieth century, the Court and Congress have recognized the constitutionality and utility of administrative schemes in matters ranging from collective bargaining,[351] civil rights,[352] workplace safety,[353] and environmental protection.[354] Because the nature and public perception of problems like pollution, race and sex discrimination, and labor rights shift over time and across contexts, Congress cannot possibly address them all in a granular way on a rolling basis. The specific problem of workplace sexual harassment, for instance, was likely not on Congress's agenda when it enacted the Civil Rights Act of 1964. Rather, the Equal Employment Opportunity Commission served as a site for social-movement mobilization to apply the general prohibition of "sex" discrimination to patterns of exclusion, such as "hostile environment[s]."[355] Having codified in statutory law various civil and economic rights, the people must rely in part on administrative procedures to flesh out their content.

The foregoing argument relies on an ideal of what agencies can accomplish when functioning tolerably well. The reality sometimes falls far short. Agency adjudications can be inaccurate, slow, and fail to mete out mass justice to parties in the way that Congress intended.[356] The rulemaking system, likewise, is vulnerable to the undue influence of regulated parties.[357] I offer some reforms that would address these problems in the next Part, in particular by reducing the inequalities in rulemaking and enhancing due process in adjudication.[358] But these implementation failures do not cast doubt on the unique capacity of administrative institutions to protect collective interests. Administrative procedures of rulemaking and adjudication are inherently more adaptable and subject to experimentation than constitutional structures for Article I legislation and Article III adjudication; they arise from discretionary statutory and regulatory decisions rather than fixed constitutional requirements. They are thus ripe targets for creative reforms that redress the traditional regime's undeniable pathologies.

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350. *See* Eskridge & Ferejohn, *supra* note 46, at 1–22.

351. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30, 33 (1937).

352. Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971).

353. Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 461 (1977).

354. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 415 (2011).

355. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986); *Cf.* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1697, 1704–05 (1998).

356. *See* Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992, 2007–16 (2012).

357. *E.g.*, Susan Webb Yackee, *The "Science" of Policy Development During Administrative Rulemaking*, 49 POL'Y STUD. J. 146, 157–58 (2021) (explaining when certain interest groups hold influence over the content of FDA regulations).

358. *E.g.,* David Ames, Cassandra Handan-Nader, Daniel E. Ho & David Marcus, *Due Process and Mass Adjudication: Crisis and Reform*, 72 STAN. L. REV. 1, 67–76 (2020) (proposing methods to increase the quality of and equality during administrative proceedings).

If the existential challenge were successful, meanwhile, it would only compound the pathologies of the traditional system. By shifting adjudication into an ordinary court system that is over an order of magnitude smaller than the administrative adjudication system,[359] the existential challenge would grossly diminish the capacity of government to apply law ably to facts. And by pitching detailed rulemaking responsibilities back to a highly time-constrained, and often politically immobilized, Congress, the existential challenge would result in fewer, more imprecise, often less well considered, and less revisable regulatory norms concerning serious social risks. The result would be foreseeable and grave harm to public rights that administrative agencies currently, albeit imperfectly, protect.

B. ARTICULATING PUBLIC INTERESTS

The existential challenge to administrative agencies does not aim to destroy the executive power as a whole. But it would dismantle the internally differentiated structure of the executive departments, which ensures that the various laws, rather than presidential will, are put into act.[360] In so doing, it would compromise the integrity of the multiple laws, and the multiple public values underlying them, that must be executed. The administrative state secures the specific legal goals, norms, and obligations that agencies implement against arbitrary presidential interference.[361] It thereby serves the republican principle of living under a "government of laws and not of men."[362] Without the administrative state, the diversity of statutory law would collapse into the singularity of presidential will.

If carried to its logical conclusion, the challenge would give the President carte blanche authority over how the law is administered by government officials. Such a sea change would eliminate any separation within the Executive Branch between presidential preferences and the multiple norms of public law that agencies institute, express, and enforce. Four decades of growth in presidential administration and the unitary executive theory have already eroded the distinction between presidential and administrative authority.[363] But there remains in place a number of formal rules and informal conventions that distance and disaggregate

359. *See* Kent H. Barnett & Russell Wheeler, *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal*, 53 GA. L. REV. 1, 5 (2018) (more than 10,000 non-ALJ agency adjudicators); Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401, 402–03 (2013) (noting constraints on judicial time due to growth of federal appellate docket).

360. *See* Emerson, *supra* note 48, at 112.

361. *See* HEIDI KITROSSER, RECLAIMING ACCOUNTABILITY: TRANSPARENCY, EXECUTIVE POWER, AND THE U.S. CONSTITUTION 143–71 (2015) (outlining Congress's constitutional power to structure the Executive Branch in a way that serves as a check on presidential power).

362. Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J. dissenting) (quoting MASS. CONST. of 1780, pt. 1, art. XXX); *see* PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 176 (1997) (discussing the republican rationale for agencies and their ability to ensure power is not exercised arbitrarily by one singular person or group).

363. *See* SHANE, *supra* note 51, at 61–106.

agencies and the presidency.[364] Rules and conventions limiting the removal of the commissioners of independent agencies,[365] statutory removal protections for civil service members,[366] and the Administrative Procedure Act's locus of legal accountability on the "agency" rather than the Presidency[367] are but a few examples of this separation of presidency and administration.

Because administrative law recognizes a distinction between the President and each of the agencies, it institutionally guarantees distinctions among multiple legal purposes.[368] Administrative regulations create a dense network of norms and related procedures for their implementation, which preclude the government from considering a single value to the exclusion of all others.[369] The government then cannot maximize one good—be it equality, health, safety, or economic growth—to the detriment of all others because each of these goods is represented and protected by particular administrative authorities.[370] For instance, the Equal Employment Opportunity Commission and the National Labor Relations Board cover distinct aspects of fairness in the workplace, namely rights against discrimination based on race, sex, and other protected characteristics are ensured by the former[371] and protection of the right to collective bargaining and prevention of unfair labor practices are protected by the latter.[372] While these rights are not in any way incompatible, they may be in tension with one another and historically have been.[373] Institutionalizing each set of statutory rights in two different agencies ensures that they each get some level of protection in the ongoing administration of law.

The administrative-law function of distinguishing legally protected interests serves structural constitutional values. As I and others have argued,[374] Article II contemplates the existence of "executive departments," who are led by "principal

364. Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1166 (2013) (describing "unwritten conventions that constrain political actors from attempting to bully or influence" certain administrative officials).

365. *E.g.*, 15 U.S.C. § 41 (FTC removal provision that permits the President to remove commissioners only for "inefficiency, neglect of duty, or malfeasance in office").

366. *See* 5 U.S.C. § 7513(a) (outlining that an agency may take action against an employee "only for such cause as will promote the efficiency of the service").

367. *See* 5 U.S.C. § 701 (defining "agency" without mention of the president); 5 U.S.C. § 702 (providing a right of judicial review to one suffering a legal wrong because of "agency action").

368. *See generally* Blake Emerson, *The Value of Official Equality: Structuring the Execution of Democratic Law*, 13 JURIS. 73 (2021) (arguing that a plurality of independent administrative offices better respects democratic principles than a purely unitary executive).

369. *See id.* at 75.

370. *See* Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1, 81–82 (2022) (highlighting that the friction created by administrative agencies and other branches of government can be beneficial because it enhances democratic accountability).

371. 42 U.S.C. § 2000e-4.

372. *See* 29 U.S.C. §§ 159(a), 160(a).

373. *See generally* REUEL SCHILLER, FORGING RIVALS: RACE, CLASS, LAW, AND THE COLLAPSE OF POSTWAR LIBERALISM (2015) (describing tensions between labor rights and civil rights in the postwar period).

374. Emerson, *supra* note 48, at 112; SHANE, *supra* note 51, at 115.

officers" whose "duties" are determined by statutory law rather than by presidential command.[375] The Necessary and Proper Clause also authorizes Congress to "carry[] into execution" the powers of such departments.[376] Over time, the three branches have elaborated on these and related provisions by distributing power across Executive Branch institutions, including by giving the Attorney General powers of legal construction outside of the President's dictates[377] and by delegating powers to specific administrative officials others than the President.[378] The result is that the Executive Branch historically has been characterized not by a strictly unitary and hierarchical model, but instead by a "solidarity of responsibility" among the President and administrative officers.[379]

Agencies' existence matters in part because they articulate and disaggregate authority around the Executive Branch, subjecting executive power to principles of legality and reasoned deliberation.[380] The law produced within the Executive Branch (including the regulations of agencies as well as opinions issued by the Attorney General and the Office of Legal Counsel) separates the will of officials from the rules they administer.[381] Administrative law does not entirely forbid or exclude presidential control. Rather, it creates a reliable structure that presidential power at once relies on and cannot easily trespass.[382]

Beyond directly regulating the President's conduct, the administrative state separates law's administration from presidential directive. There are some agencies styled "independent," such as the Federal Trade Commission, Securities Exchange Commission, National Labor Relations Board, and the Equal Employment Opportunity Commission.[383] A common feature of an independent commission is that the principal officers of the agency cannot be removed except for good cause.[384] While most agencies are not "independent" in this formal sense, the distinction between independent agencies and "executive" departments is overdrawn.[385] Nominally, "executive" agencies retain a substantial measure of

375. *See* U.S. CONST. art. II, § 2, cl. 1.

376. U.S. CONST. art. I, § 8, cl. 18.

377. *See* Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93.

378. *See, e.g.*, 42 U.S.C. § 6912(a) (describing various authorities of the administrator of the Environmental Protection Agency)*; see also* Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 267 (2006) (arguing against the unitary view that statutes may generally be read to permit the President to direct how other officials exercise authority delegated to those other officials).

379. Relation of the President to the Executive Departments, 7 Op. Att'y Gen. 453, 478 (1856).

380. *See* ANDREW RUDALEVIGE, BY EXECUTIVE ORDER: BUREAUCRATIC MANAGEMENT AND THE LIMITS OF PRESIDENTIAL POWER 8–9 (2021) (describing the role of executive departments and agencies in formulating and revising executive orders).

381. *See* Emerson, *supra* note 48, at 123–24.

382. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 694–95 (1974) (outlining the powers granted to a special prosecutor by the Attorney General via regulations).

383. Neal Devins & David E. Lewis, *The Independent Agency Myth*, 108 CORNELL L. REV. 1305, 1327 (2023).

384. *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 625–26, 629 (1935).

385. *See generally* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769 (2013) (rejecting the binary distinction between independent and executive agencies); Peter L. Strauss, *The Place of Agencies in Government:*

independence by virtue of a complex web of subordinate removal restrictions, statutory requirements, procedural regulations, and underlying constitutional interests that separate the agency from the will of the Chief Executive.[386] The President is not statutorily restricted in his ability to remove executive department heads, such as the Secretaries of Labor and of the Treasury or the Attorney General.[387] This does not mean the President can make such officials do whatever he wants. Congress often vests these officials, rather than the President, with particular powers.[388] The long-established norm of presidential noninterference in particular prosecution decisions, for instance, separates the Department of Justice from the presidency.[389]

The constitutional ideology evident in the existential challenge treats these separations as inherently suspect.[390] According to this ideology, the President's constitutional powers of command and control grant him broad removal power.[391] Though not all proponents of unitary executive power reject all limits on presidential control, [392] it is hard to draw a principled line among them. If the vesting of "executive power" unalterably conveys to the President the power to personally carry out all the laws, then any sort of restriction that limits the President's ability to do so would seem to run afoul of the Constitution.[393] Taken to its logical

Separation of Powers and the Fourth Branch, 84 COLUM. L. REV. 573 (1984) (advocating for a shift from the binary distinction between independent and executive agencies toward a general analysis of all administrative agencies' independence in relation to the value of separated functions and checks and balances); Todd Phillips, *Commission Chairs*, 40 YALE J. ON REGUL. 277 (2023) (arguing that the power of the presidentially-controlled chairs of independent regulatory commissions reduces the significance of the distinction between such agencies and executive agencies).

386. *See generally* Datla & Revesz, *supra* note 385 (arguing that agencies do not fall into a binary category, but rather they fall on a spectrum of independence); *see also* Emerson, *supra* 48, at 142–55 (describing how even executive agencies, and thus the President, are constrained by their internal structures and regulations).

387. Statutes detail the appointment procedures for these officers but in no way restrict the president's power to remove them from their offices. *See* 28 U.S.C. § 503 (appointment of Attorney General by the President with the advice and consent of the Senate); 29 U.S.C. § 551 (same for Secretary of Labor); 31 U.S.C. § 301(b) (same for Secretary of the Treasury).

388. *E.g.*, 28 U.S.C. §§ 509, 515(a), 516 (describing prosecutorial and other powers of Attorney General).

389. *See* Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1, 38–69 (2018) (outlining the history of the division between the presidency and Department of Justice).

390. *E.g.*, William P. Barr, Att'y Gen., U.S. DOJ, Remarks at Hillsdale College Constitution Day Event (Sept. 16, 2020) (transcript available at https://www.justice.gov/archives/opa/speech/remarks-attorney-general-william-p-barr-hillsdale-college-constitution-day-event) [https://perma.cc/M3MX-838Q] (arguing for political control over prosecutorial decisions).

391. *See* Calabresi & Rhodes, *supra* note 121, at 1165–68 (describing the President's removal power under this unitary theory of executive).

392. *See id.* at 1166–68 (describing different variants of the unitary theory, ranging from a power to set aside the decision of administrative officials to the power to remove them, and noting that the Necessary and Proper Clause gives Congress power to "structure the executive department").

393. *See* Macey & Richardson, *supra* note 304, at 158–59 (suggesting that it is not clear why, according to a formalist unitary theory, a statutory removal restriction impedes the President's executive power but substantive statutory requirements governing administrative discretion do not).

extreme, each and every agency and officer in the Executive Branch would be merely a creature of the President.

Administrative independence instead vests in numerous officials the duty to exercise their own judgment as to what specific laws require. To be sure, administrators as well as presidents may abuse their discretion. But an administrator with statutory authorities over a particular domain has reason to align their conduct with those laws in a way that the President does not. Amidst the mass of laws that would be at a unitary executive's disposal, any one law loses its distinctive purchase, in favor of an all-things-considered balancing of political considerations. An agency official, by contrast, must rely on their authorizing legislation alone. They have no power other than what *that* law gives them.

This approach narrows the discretion that is vested in the executive power as a whole by preventing the President from simply invoking any legal authority vested in any executive officer that may be convenient for his political purposes. If the President wishes to rely on statutory authorities vested in other officers, they must first convince these officers to align their policy with that of the President, or else face the cost of being removed from office. For example, when President Andrew Jackson sought to remove the deposits of the United States from the Second Bank, he faced resistance from Treasury Secretary William J. Duane.[394] Jackson urged that "[a] secretary . . . is merely an executive agent, a subordinate, and you may say so in self-defence."[395] Duane replied, "In this particular case, [C]ongress confers a discretionary power, and requires reasons if I exercise it. Surely this contemplates responsibility on my part."[396] Jackson ultimately had to replace Duane with Roger Taney to accomplish his end, which itself triggered political opposition and formal Senate censure.[397] As referenced above, the departmental structure of Article II contemplates precisely such an articulation of legal interests and of authority. This permits the President to supervise the execution of law to a substantial degree but prevents him from becoming a dictator over the departments and agencies of the Branch.

The variety of commitments is visible in the titles of departments and the agencies within them, such as the Department of Transportation, with its Federal Aviation Administration and National Highway Traffic and Safety Administration;[398] and the Department of Health and Human Services, which includes the Food and Drug Administration, Centers for Disease Control and Prevention, and the Centers for

394. LEONARD D. WHITE, THE JACKSONIANS: A STUDY IN ADMINISTRATIVE HISTORY, 1829-1861, at 35 (1954).

395. *Id.* at 37.

396. *Id.*

397. *Id.* at 37, 44. The Senate subsequently expunged the censure. *Id.* at 44. In 1940, legal scholar Edward Corwin observed of this capitulation, "never before and never since has the Senate so abased itself before a President." *Id.*

398. *U.S. Department of Transportation Administrations*, U.S. DEP'T OF TRANSP., https://www.transportation.gov/administrations [https://perma.cc/EC7F-K39X] (Aug. 23, 2021).

Medicare and Medicaid Service.[399] When particular agencies act—and when the White House and press do not ascribe their action to the President—the public witnesses the distinct values, goals, and interests codified by statute in the distinct agencies of government. As Kate Jackson has argued, each agency acts as a subject-matter specific representative, not merely of the legislature, but of the popular sovereign, whose interests the legislature entrusts it to safeguard.[400] If these agencies did not exist and all power were simply vested in the President, this diversity of concern would not be manifest in the structure of government. All purposes would be fungible and tradeable by the President.[401] Given the variety and ambiguity of authorities in the statute book, the President might then find legal warrant for whatever he likes. The result would be that the distinctive norms across the law would flatten into the President's policy judgment and political calculations. The independence of agencies from presidential control, in contrast, works to maintain the distinctiveness of public commitments. Administrative law's rule-structure, which routinely separates officers from office, and law from discretion, gives institutional form to the multiple values that statutory law recognizes and that a pluralistic democratic society tends from time to time to embrace.

Such value pluralism also imports a commitment to distinct forms of subject-matter expertise accompanying each of the matters the administrative state regulates. The existential challenge dismisses those sources of accountability and information. The challenge has a specific boogeyman: the unaccountable bureaucrat.[402] It is true that civil servants are not politically accountable to a significant degree. They are instead accountable to government regulations, to various professional norms, and to social and scientific knowledge.[403] Environmental law must be administered with the help of environmental scientists and engineers, public health by medical scientists and professionals, forests by foresters, and so on.[404] The administrative state secures a place for academic training, professional norms, and disciplinary knowledge within the workings of government.

The form of expertise the administrative state acts on is not the tired stereotype of the "egghead" who knows everything about a technical problem. Instead, agencies embed and empower networks of professional "competence" relevant to

399. *HHS Agencies & Offices*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://www.hhs.gov/about/agencies/hhs-agencies-and-offices/index.html (Apr. 15, 2025).

400. Kate Jackson, *All the Sovereign's Agents: The Constitutional Credentials of Administration*, 30 WM. & MARY BILL RTS. J. 777, 783–84, 814–15 (2022).

401. *See generally* Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211 (2015) (describing the President's ability to gather together and wield powers housed in various agencies).

402. *See* Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin., 595 U.S. 109, 124–25 (2022) (Gorsuch, J., concurring).

403. *See generally* Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600 (2023) (outlining the relationships, structures, and practices of administrative agencies that promote accountability from within).

404. On the importance of disciplinary norms and academic-institutional affinity within bureaucratic settings, see HERBERT KAUFMAN, THE FOREST RANGER: A STUDY IN ADMINISTRATIVE BEHAVIOR (1960).

understanding and addressing discrete policy problems.[405] For instance, the process of revising the National Ambient Air Quality Standards at the Environmental Protection Agency involves: a planning report authored by EPA staff in consultation with external scientists, public health experts, and stakeholders; an Integrated Scientific Assessment drafted by academics contracting with the EPA, which undergoes multiple rounds of review from various agency staff who have opportunities to dissent; a risk/exposure assessment report and a policy assessment report that follow similar processes; and, finally, the drafting of a proposed rule based on these prior steps.[406] Multiple forms of knowledge and interests enter into this iterative and deliberative process. Expertise in the administrative state is collective and institutionalized, reflecting, at its best, the multiple kinds of insight that various professions, politically accountable officials, and ordinary members of the public possess.

Amidst the rise of presidential control and increased emphasis on political managerialism, the civil service nonetheless has retained a central role in policy formulation and implementation.[407] As Anya Bernstein and Cristina Rodríguez's qualitative research has shown, White House influence has not displaced the "epistemic and normative perspectives" nor the "institutional memory" of administrative staff in catalyzing agency action.[408] The result is a "disaggregated" and "diffuse" rather than "unitary" executive.[409] The challenge ignores or maligns these forms of professional accountability and competence that advance the values of statutory law.

C. PROMOTING IMPARTIALITY

The existential challenge rejects removal restrictions on administrative adjudicators and soon, perhaps, over ever larger swaths of the civil service. If the President and other political leadership can fire any and all adjudicators, they will be able to pressure them to decide particular cases in ways that favor or disfavor particular litigants. The existential challenge wields its cudgel against official impartiality, particularly insofar as it threatens the tenure protections of administrative law judges.[410]

The administrative state is shot through with due process norms.[411] The Administrative Procedure Act (APA) provides for trial-type evidentiary

405. *See* ELIZABETH FISHER & SIDNEY A. SHAPIRO, ADMINISTRATIVE COMPETENCE: REIMAGINING ADMINISTRATIVE LAW 60–61 (2020).

406. Sidney Shapiro, Elizabeth Fisher & Wendy Wagner, *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463, 493–96 (2012).

407. *See* LORENZO CASTELLANI, THE HISTORY OF THE UNITED STATES CIVIL SERVICE FROM THE POSTWAR YEARS TO THE TWENTY-FIRST CENTURY 209–11 (2021).

408. Anya Bernstein & Cristina Rodríguez, *The Diffuse Executive*, 92 FORDHAM L. REV. 363, 367 (2023).

409. *Id.* at 364–65.

410. *See supra* Section I.C.1; *see also* Metzger, *supra* note 26, at 79; Noah Rosenblum, *The Antifascist Roots of Presidential Administration*, 122 COLUM. L. REV. 1, 68–70 (2022).

411. *See* DANIEL ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940, at 60–62 (2014); Michael Asimow, *Five Models of Administrative Adjudication*, 63 AM. J. COMPAR. L. 3, 13 (2015).

hearings before impartial officials within certain agencies.[412] Though the APA's "formal" adjudication procedures are not required for all agencies or all adjudications,[413] they set a baseline for broader conventions of rule- and evidence-bound decisionmaking throughout the government.[414] By making it easier to fire even the most well-insulated adjudicators within the Executive Branch, the existential challenge would strike at impartiality norms across the board. It would send a clear, judicially sanctioned message that independent decisionmaking has no constitutional weight within the branch. What the President says goes.

The impartiality norms that currently exist not only serve individual interests such as fairness and dignity. They also realize the public interests recognized in statute by increasing the likelihood that these interests are accurately advanced across a range of cases.[415] Partial administration would routinely risk the enforcement of extraneous personal or political interests rather than legal interests. It would detract from the sound and reliable implementation of the collective rights that the administrative state embodies.[416]

The administrative state gives statutory commitments consistent and durable effect where they would otherwise fall dormant whenever political officials lost interest in or turned against them. As John Locke observed, the Executive must be "a *Power always in being*."[417] Unlike the Legislature, which sits and acts sporadically, the Executive must always be there to stand for and predictably carry out the laws, which have "constant and lasting force."[418] The continuous existence of the Executive, Locke thought, was necessary to the rule of law itself, as the law would mean nothing without officials and institutions capable of regularly ensuring compliance with its requirements.[419] The existential challenge threatens this reliable practice of official legality. As Stephen Skowronek, John Dearborn, and Desmond King have recently argued, the pervasive

412. 5 U.S.C. § 554–57; *see also* Emily Bremer, *The Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377, 446 (2021).

413. 5 U.S.C. § 554 (explaining that the APA's formal adjudication procedures only apply in "adjudication[s] required by statute to be determined on the record after opportunity for an agency hearing").

414. *See generally* MICHAEL ASIMOW, ADMIN. CONF. OF U.S., EVIDENTIARY HEARINGS OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 2, 17–35 (2016) (describing administrative adjudications not governed by the formal adjudication provisions of 5 U.S.C. §§ 554, 556–557, but which nonetheless, like formal adjudication, provide for "evidentiary hearings" and, as a matter of generally shared but not universal "best practices," provide for exclusivity of record, prohibitions on ex parte communications, separation of functions, notice, and other features of formal APA adjudication).

415. Goldberg v. Kelly, 397 U.S. 254, 267 (1970) (holding that the "one function" of a pretermination hearing is to "protect a recipient against an *erroneous* termination of his benefits") (emphasis added); *id.* at 271 (an "impartial decision maker is essential" to such a hearing); *see also* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (identifying "erroneous deprivation" of benefits as a due process concern).

416. *See* Helen Hershkoff & Judith Resnik, *Constraining and Licensing Arbitrariness: The Stakes in Debates about Substantive-Procedural Due Process*, 76 SMU L. REV. 613, 621 (2023) (describing individual and collective interests at stake in due process).

417. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 365 (Peter Laslett ed., Cambridge Univ. Press 1988) (1689).

418. *Id.* at 364.

419. *See id.* at 364–65.

economic and social regulation the Legislature intends cannot be accomplished without staff who are legally bound, professionally competent, and institutionally secure to enforce its programmatic goals routinely and accurately.[420] The administrative state's "depth . . . circumscribes authority at all levels and protects it from arbitrary decisions," making it "more likely that political leadership serves the public's purposes."[421]

This is not to suggest that the work of administrative adjudicators or other civil servants is invariably free from error and bias. In domains ranging from veterans' affairs to social security to immigration adjudication, adjudicators are prone to make factual errors, to decide cases in politically motivated ways, or even to affront the dignity of the persons they preside over.[422] But the existential challenge to agencies does nothing to address real and serious problems in agency adjudication. Quite the contrary, it markedly *increases* the risk of political interference and dilettantism in *all* administrative proceedings by rendering all adjudicators practically and symbolically subject to presidential and political appointee directive.[423]

Impartiality is at issue not only in administrative adjudication, but also in administrative rulemaking. At its broadest, the existential challenge takes aim at agencies' authority to issue rules with the force of law.[424] But such rules are necessary to reduce the government's enforcement discretion to a tolerable degree within the broad bounds established by statute.[425] Where the underlying statutory directive may be as capacious as to require the agency to take steps "requisite to protect the public health" within "an adequate margin of safety,"[426] the vagueness of the statutory standard creates a serious risk of arbitrary government action and inadequate notice.[427] Detailed regulations concretize statutory requirements, so that affected parties have more information about how to comply and what factors the government may consider in assessing their conduct. These regulations at the same time convert a pious hope such as "public health" into an actionable legal rule that will have real social impact. The administrative crystallization of

420. *See* SKOWRONEK ET AL., *supra* note 29, at 5.

421. *See id.*

422. *See, e.g.*, Ames et al., *supra* note 358, at 5, 9–15.

423. *See, e.g.*, Cox & Kaufman, *supra* note 36, at 1779–80, 1799 (explaining how a strong unitary executive theory in the Roberts Court led to the result in *United States v. Arthrex*, 594 U.S. 1 (2021), where the Court found that Patent Trial and Appeal Board judges' decisions must be subjected "to review by a political appointee").

424. Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 70 (2015) (Thomas, J., concurring in the judgment) ("[T]he discretion inherent in executive power does *not* comprehend the discretion to formulate generally applicable rules of private conduct.")

425. *See* Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 713 (1969) (proposing changes to the nondelegation doctrine such that courts can review and ensure agencies are applying "appropriate safeguards" to "confine and guide their discretionary power," including the power of selective enforcement).

426. 42 U.S.C. § 7409(b)(1).

427. *See* Am. Trucking Ass'ns v. EPA, 175 F.3d 1027, 1038 (D.C. Cir. 1999) (per curiam) (holding that EPA's interpretation of the statute violated the nondelegation doctrine but giving the agency the "opportunity to extract a determinate standard on its own"), *aff'd in part, rev'd in part sub nom*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).

legal norms in and through regulation makes those norms more meaningful, as they provide concrete guidance as to what exactly the public's collective interests demand of particular of parties.

The process agencies generally use to issue such rules—notice-and-comment rulemaking—not only apprises the public of the agencies' proposed regulations but also affords opportunity to comment on the proposal.[428] While this rulemaking process is sometimes dominated by regulated parties, capture is far from universal, and some agency processes are highly deliberative and participatory.[429] Moreover, substituting unbridled prosecutorial discretion for binding rules issued after public notice and comment would likely only worsen the problem of undue industry influence on administrative rulemaking.[430] The policies underlying the government's enforcement (or nonenforcement) of statutory norms would not be disclosed and could not be easily challenged. Industry influence would surely not be eliminated; it would merely be pushed beneath the surface into backroom bargains overseen by the President's agents.

It could be argued that the existential challenge, if successful, would substantially diminish concerns of procedural fairness by tightening rules against legislative delegation and administrative policymaking. If Congress could only act by laying out rules in minute detail, then there would be little remaining discretion for administrators to abuse and little need for individuated or public participation. There are two problems with this view. First, even the most minute detail in legislation will not eliminate prosecutorial discretion as to what enforcement actions to bring. If the President is in charge of all enforcement unconditionally, then he can subvert the constraints of law by simply picking and choosing which norms to carry out and which to let fall into disuse.[431] Second, if legislation actually went so far as to precisely prescribe all meaningful details of all regulatory programs, it would lead to the proliferation of "irrebuttable presumptions"[432] that would deprive individuals of regulatory protection or impose coercive restraints, without service to legislative objectives. For instance, a statute that conditions eligibility for public benefits on bright-line rules may not provide "a rational measure of the need" of potential households because the facts of particular cases

428. *See* 5 U.S.C. § 553; *see* Stiglitz, *supra* note 346, at 654.

429. *See generally* Wendy Wagner, William West, Thomas McGarity & Lisa Peter, *Deliberative Rulemaking: An Empirical Study of Participation in Three Agency Programs*, 73 ADMIN. L. REV. 609 (2021) (empirical account of public participation in rulemaking initiatives at EPA, OSHA, and FCC).

430. *See* SUSAN ROSE-ACKERMAN, DEMOCRACY AND EXECUTIVE POWER: POLICYMAKING ACCOUNTABILITY IN THE US, THE UK, GERMANY, AND FRANCE 171 (2021) (explaining the "disproportionate effect" that business interests sometimes have "on the outcome" of notice-and-comment rulemaking).

431. *See* Morrison v. Olson, 487 U.S. 654, 728 (1988) (Scalia, J., dissenting) ("With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone." (quoting Robert Jackson, Att'y Gen., The Federal Prosecutor, Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940))).

432. *E.g.*, Vlandis v. Kline, 412 U.S. 441, 453 (1973) (holding that a statutorily created "permanent irrebuttable presumption of nonresidence" for certain out-of-state students applying to a Connecticut state university violates the Due Process Clause of the Fourteenth Amendment).

depart from the underlying purpose of the rule.[433] Because agency regulations can be changed more readily than congressional legislation, regulations are less likely to work lasting arbitrariness than clear statutes.

III. BUILDING A NEW ADMINISTRATIVE STATE

The response to the existential challenge cannot be simply to rebuild the administrative state as it was. Despite the essential capacities described above, this state, no doubt, has often failed to exhibit equal respect for all citizens and to efficiently implement their shared interests. Certain procedures governing judicial review of administrative action have contributed to these pathologies by both increasing the cost of regulatory action, generally, and enabling well-resourced regulated parties to shape regulations in their favor. As the existential challenge takes aim at fundamental administrative-law structures, it creates some institutional space to design new rules that would better serve the underlying principles that animate administrative action.

This Part outlines (A) legislative responses, including statutory override of the major questions doctrine; (B) executive and administrative responses, including executive orders that would protect independent agency decisionmaking; and (C) judicial responses, including dissenting opinions in existential cases that focus on the substantive public interests at risk rather than formal arguments concerning legislative power and technocratic arguments for administrative expertise. The prospects of many of these changes coming to pass in the immediate future are, admittedly, dim. Nonetheless, my aim is to lay out a longer-term reform agenda that would reconstruct the administrative state now that its longstanding foundations are giving way.

A. LEGISLATIVE RESPONSES

The most important avenue of response to the existential challenge is the Legislature. The Supreme Court, of course, may continue to press constitutional objections to the administrative state in the face of statutory language. But several of the Court's objections to the administrative state are quasi-constitutional rather than explicitly constitutional.[434] The Court reads ambiguous statutory language in ways that limit the power of agencies, while increasing the power of courts,[435] the President,[436] and well-resourced private parties.[437] Congress can respond by

433. *See* U.S. Dep't of Agric. v. Murry, 413 U.S. 508, 513–14 (1973).

434. *See, e.g.*, West Virginia v. EPA, 597 U.S. 697, 723 (2022) (referring to how "separation of powers principles" bear on correct statutory construction of the Clean Air Act); Loper Bright Enters. v. Raimondo, 603 U.S. 369, 384, 396 (2024) (framing overruling of *Chevron* as consistent with the APA but alongside discussion of Article III of the Constitution).

435. *See, e.g.*, *Loper Bright*, 603 U.S. at 412–13 (finding that the APA requires Article III courts—not executive agencies—to "exercise their independent judgement" to interpret ambiguous provisions of congressional statutes).

436. *See, e.g.*, Seila L. LLC v. CFPB, 591 U.S. 197, 205 (2020) (expanding the President's removal power to include the ability to remove the single head of an independent agency at will).

437. *See, e.g.*, Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 765–66 (2021) (invalidating Centers for Disease Control and Prevention eviction moratorium, thus permitting covered

explicitly stating its preferences in favor of administrative power. Moreover, Congress can restructure accountability mechanisms in ways that promote equal concern for citizens' interests while disarming the Judiciary of its tools of obstruction and interference.

These proposals build on administrative law's robust departmentalist tradition, in which Congress has repeatedly responded to either judicial or executive aggrandizement with statutory schemes—like the Hepburn Act of 1906,[438] the Administrative Procedure Act of 1946,[439] and the Ethics in Government Act of 1978[440]—that reassert its constitutional jurisdiction over the administrative sphere. In these and other cases, the Court has responded to Congress's non-acquiescence by adjusting the parameters of its own and the President's power.[441] It is past time for Congress to turn to constitutional politics to respond to the existential challenge.[442]

1. Making Public Rights Explicit

Regulatory statutes typically invoke various sorts of public interests that the administrative state ought to implement. The Clean Air Act, for instance, states that its purpose is to "promote the public health and welfare and the productive capacity of [the Nation's] population."[443] But today these sorts of collective interests are rarely if ever treated as *entitled* to protection. Some regulatory statutes dating back to the "rights revolution" of the 1960s and 70s—such as the Occupational Safety and Health Act—recognize individual rights to regulatory protection.[444] But this approach came under criticism during the neoliberal era as unduly categorical and insensitive to the costs of categorical rights enforcement.[445] We are now left with a thinner conception of the "public interest," which over time has become identified with an unduly narrow conception of economic efficiency[446] rather than with analytically distinct norms of

landlords to evict their tenants). For discussion of this and other cases where the Court "shifts discretion from state to non-state actors," see Emerson, *supra* note 46, at 1442–45.

438. *See* Merrill, *supra* note 65, at 953, 955–59.

439. *See generally* George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996) (outlining the judicial, historical, and legislative context in which the APA was passed); S. REP. NO. 76-442, at 5 (1939) (describing the Walter-Logan Bill, which contributed to the ultimate passage of the APA, as a response to "the entire subordination of both the legislative and judicial branches of the Federal Government to the executive branch wherein are included the administrative agencies and tribunals of that Government").

440. SKOWRONEK ET AL., *supra* note 29, at 52.

441. *See, e.g.*, Merrill, *supra* note 65, at 959–63.

442. On departmentalism and constitutional politics generally, see KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999).

443. 42 U.S.C. § 7401(b)(1).

444. *See, e.g.*, 29 U.S.C. § 651(b)(2) (confirming that both employers and employees have certain rights and responsibilities to achieve "safe and healthful work conditions"). For discussion of the context in which these types of social regulations and statutes arose in the 1960s and 70s, see ELIZABETH POPP BERMAN, THINKING LIKE AN ECONOMIST: HOW EFFICIENCY REPLACED EQUALITY IN U.S. PUBLIC POLICY 156–59 (2022).

445. *See* SUNSTEIN, *supra* note 314, at 29, 90–91.

446. *See* Jodi L. Short, *In Search of the Public Interest*, 40 YALE J. ON REGUL. 759, 772–73, 829 (2023).

health, safety, equality, or justice. The result has been a lack of attention to (and even bias against) values other than wealth maximization.[447]

A response to the existential challenge should opt neither to return to the individual-rights framework of the 1960s and 70s nor to double-down on efficiency-oriented regulation. Instead, legislation ought to recognize and obligate agencies to protect "public rights" that are held jointly by the people as a whole, based on the model of common-law public nuisance.[448] Explicit recognition of public rights to regulatory protection would have two benefits. First, it would locate regulatory action within the common law, which is particularly fruitful within the current, traditionalist legal landscape. The existential challenge has reverted to common-law institutions, such as private property rights,[449] to circumscribe administrative power. Congress can respond by deploying other resources within the common law to articulate the popular sovereign's countervailing legal interests.

At the same time, the express recognition of public rights would break through the warped conceptual structure of contemporary public law. Administrative law today explicitly centers the rights of regulated parties, on the one hand, and the discretionary powers of Congress and of agencies, on the other. A shift to a public rights framing would assert collective entitlements as the basis for regulatory power. Because rights would be at issue on both sides of the equation in agency action—a public right to health and safety against a private right of property or contract—the Court could not rely, rhetorically or logically, on the priority of "right" over "power" to destroy administrative institutions. Recognition of public rights would, then, justify the specific procedural changes in the following sections. In order to protect rights that are collective in their nature, Congress could diminish the role of judicial review and increase the salience and quality of political participation in administrative policymaking.

The Court might, of course, elect to read rights-creating language as hortatory and continue to privilege private over public autonomy without constitutional or statutory basis. But statutory recognition of such rights would send a clear signal of public commitment to regulatory action that the Court, already fretting over its legitimacy,[450] might think twice before rejecting.

2. Altering the Scope of Review

Congress should take steps to narrow and shift the scope of review to make greater space for agencies to exercise legal power through appropriate procedural

447. *See* Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649, 1650–51, 1656 (2018); *see also* Zachary Liscow, *Equity in Regulatory Cost-Benefit Analysis*, L. & POL. ECON. PROJECT (Oct. 4, 2021), https://lpeproject.org/blog/equity-in-regulatory-cost-benefit-analysis [https://perma.cc/6R9J-5WEW].

448. *See* RESTATEMENT (SECOND) OF TORTS § 821(B) (AM. L. INST. 1979). For a more detailed argument, see generally Emerson, *supra* note 46.

449. *See, e.g.*, Axon Enter., Inc. v. FTC, 598 U.S. 175, 198 (2023) (Thomas, J., concurring); Sackett v. EPA, 598 U.S. 651, 679 (2023).

450. *See* Jess Bravin, *Kagan v. Roberts: Justices Spar over Supreme Court's Legitimacy*, WALL ST. J. (Sept. 28, 2022, 6:46 PM), https://www.wsj.com/articles/kagan-v-roberts-justices-spar-over-supreme-courts-legitimacy-11664394642.

forms. It should amend the APA to read: "A reviewing court shall not set aside an administrative interpretation of law set forth in a substantive rule unless the interpretation is manifestly contrary to statute, notwithstanding that the interpretation may raise questions of vast or deep economic or political significance." Congress should retain but reform reform arbitrary-and-capricious review to ensure the quality of its policy reasoning.[451] But it should push back forcefully against the Court's attempt to substitute its policy judgment for that of the authorized agency.

This approach would only broaden deference in some procedural contexts, however. For regulations, it would go beyond the bygone *Chevron* reasonableness standard[452] to a "manifestly contrary" standard,[453] conveying a legislative intent to strengthen, rather than merely affirm, the role of the administrative state in interpreting law. Such a move would implement the shift from a concern with mere public "interests" to public "rights," giving agencies the requisite power to meet their obligations toward regulatory beneficiaries. At the same time, however, such an amendment to the APA would imply relatively lesser deference with regard to other agency interpretations, in particular those issued in the course of administrative adjudication. This adjustment would respond to legitimate criticism of deference to adjudicatory interpretations, which do not benefit from the same open and participatory processes as do rules issued through notice and comment.[454] In the immigration context, especially, retroactive, adjudicatory interpretation poses a risk of serious unfairness, given the weight of the personal interests at issue in deportation, asylum, and other claims.[455]

Statutorily amending judicial deference rules would be consistent with the major questions doctrine, which permits agencies to address major issues with explicit legislative authority.[456] It is possible, of course, that the Court would respond to such a statutory provision by holding it unconstitutional under the vesting clause of Article I or Article III. In the face of explicit congressional action, such a move would escalate the constitutional confrontation substantially. It is far from clear that the Court would take such a step given the risks to its legitimacy and the threat of legislative backlash to reduce its jurisdiction or remedial authority.

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451. On value-based reform of arbitrary and capricious review, see EMERSON, *supra* note 95, at 176–81. "Narrow judicial emphasis on agencies' scientific or economic reasoning has pushed agencies to explain themselves in purely technical terms even when normative judgments are at play." *Id.* at 180.

452. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412–13 (2024) ("*Chevron* is overruled.").

453. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 843–44 (1984) (drawing distinctions between the "implicit" delegation that triggers *Chevron* and an "explicit" delegation where the "manifestly contrary" standard applies).

454. *See* Hickman & Nielson, *supra* note 108, at 938–39.

455. Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against* Chevron *Deference in Immigration Adjudication*, 70 DUKE L.J. 1197, 1226–27 (2021).

456. West Virginia v. EPA, 597 U.S. 697, 732, 735 (2022) ("A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.").

3. Enhanced Public Participation Without Pre-Enforcement Review

Congress should also generally eliminate pre-enforcement review of administrative regulations while enhancing the quality of public participation and administrative deliberation.[457] This approach would require litigants to await an enforcement action before being able to obtain judicial review of the underlying regulation—a standard mode of proceeding prior to the development of the presumption of pre-enforcement reviewability in *Abbott Laboratories v. Gardner*.[458] Justice Fortas's indictment of pre-enforcement review in his dissent in the companion case to *Abbott Laboratories* has proved prescient:

> The Court's validation of this shotgun attack upon this vital law and its administration is not confined to these suits, these regulations, or these plaintiffs—or even this statute. It is a general hunting license; and I respectfully submit, a license for mischief because it authorizes aggression which is richly rewarded by delay in the subjection of private interests to programs which Congress believes to be required in the public interest.[459]

The Court today frets over private parties' "subjection to an illegitimate proceeding"[460] more so than it does over the public's subjection to private interests by way of judicial review. The rise of the nationwide injunction as a standard remedy has vested inordinate power in district court judges to thwart regulatory action.[461] In the hands of judges aligned with social movements—who have become political players rather than umpires within our constitutional system—this extraordinary remedy routinely paralyzes the government's capacity to meet its regulatory responsibilities.[462]

Pushing review back until the agency has applied the law to particular parties surely would coerce private compliance with regulatory mandates. But "the expense and annoyance of litigation 'is part of the social burden of living under government.'"[463] The costs that administrative review schemes impose on regulated parties often create substantial benefits for the public. They give the agency

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457. This approach is less radical than simply stripping courts of jurisdiction over agencies. For a proposal along those lines, see Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703 (2021). Jurisdiction stripping might deprive agencies of their recourse to civil or even (in the case of the Department of Justice) criminal proceedings against regulated parties. Eliminating only *pre*-enforcement review does not have that disadvantage. *See also* Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285 (2014) (arguing against the presumption of reviewability).

458. 387 U.S. 136, 140 (1967).

459. Gardner v. Toilet Goods Ass'n, 387 U.S. 167, 183 (1967) (Fortas, J., concurring in part and dissenting in part).

460. *See* Axon Enter., Inc. v. FTC, 598 U.S. 175, 191 (2023).

461. *See generally* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017) (describing and critiquing the nationwide injunction).

462. *See* Michaels, *supra* note 115, at 414–18; Robert L. Tsai & Mary Ziegler, *Abortion Politics and the Rise of Movement Jurists*, 57 U.C. DAVIS L. REV. 2149, 2153–54 (2024).

463. FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 244 (1980) (quoting Petroleum Expl., Inc. v. Pub. Serv. Comm'n, 304 U.S. 209, 222 (1938)).

opportunity to develop the factual record in light of its expertise and policy priorities.[464] They give enforcement initiatives time to percolate and set in before the courts review them and perhaps set them aside.[465]

There would certainly be a downside, however, to removing pre-enforcement review. If review were limited to the enforcement stage, regulated parties would much more easily be able to challenge regulations which directly affect them, but beneficiaries of the regulatory programs would still face numerous obstacles to obtaining a judicial hearing if they found regulations to be under-protective.[466] Without such review, public interest organizations would be at an even greater disadvantage to regulated parties than they currently are in challenging regulatory actions.

The solution to this problem is to make obligations of public participation and administrative contestation more robust, rather than leave the courts' current stranglehold in place. Congress should, for instance, require and fund equitable representation in the administrative process, including through officially designated proxy organizations.[467] An administrative, rather than judicial, review scheme should be put in place to determine whether or not the agency has responded adequately to public comment, hearings, and listening sessions, either by way of an internal agency ombudsperson or a centralized administrative court with specialized competency in reviewing the deliberative quality of agency rules. There are numerous ways, in other words, for Congress to "unstack" the deck to protect regulatory common interests other than resorting to ordinary judicial proceedings.[468]

4. Restructuring Appointment

Congress should seek out new methods to distinguish the will of the President from the administration of law. Traditional removal restrictions like those affirmed in *Humphrey's Executor v. United States*[469] are not a promising avenue given the trajectory of unitary executive theory in current case law, which not only holds some such restrictions unconstitutional but also expands the class of officials who qualify as "Officers of the United States" subject to the Appointments Clause.[470] Instead, as Dean Kent Barnett has already suggested, Congress could rely on an Article III court to appoint and remove administrators and insulate them from political

464. *See, e.g.* Universal Camera Corp. v. NLRB, 340 U.S. 474, 496 (1951).

465. *See* Daniel Epps & Alan M. Trammel, *The False Promise of Jurisdiction Stripping*, 123 COLUM. L. REV. 2077, 2144, 2146 (2023).

466. The problem is similar to that which arises with regard to pre-enforcement review of guidance documents, as described in Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 412–15 (2007).

467. *See* Jim Rossi & Kevin M. Stack, *Representative Rulemaking*, 109 IOWA L. REV. 1, 8 (2023).

468. *See* Matthew D. McCubbins, Roger G. Noll, & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 255, 261 (1987) (describing how administrative procedure "stacks the deck" in favor of particular parties).

469. 295 U.S. 602, 629, 632 (1935) (upholding the constitutionality of for-cause removal restrictions for FTC Commissioners).

470. *See, e.g.*, Lucia v. SEC, 585 U.S. 237, 253 (2018) (Thomas, J., concurring).

capture.[471] The Article II Appointments Clause specifically provides that Congress might provide for the appointment of inferior officers by the "Courts of Law."[472] The Court upheld a similar scheme created by the Ethics in Government Act in *Morrison v. Olson*.[473] Similarly, Congress should create a special Article III court to appoint and remove all administrative adjudicators, not just those administrative law judges whose current removal protections are constitutionally imperiled. That approach would separate these officers from the President's control. Congress could even go further and create a special Article III court with responsibilities over the entire merit system, akin to the existing but imperiled Merit Systems Protection Board,[474] to adjudicate all disciplinary claims and efforts to remove civil servants, adjudicators, and other inferior officers.

There would be some irony in relying on the Judiciary to protect the administrative state when the Supreme Court itself has enabled the existential challenge. But the Judiciary is not a monolith. Not all courts and judges have an aggrandized sense of institutional competence that would threaten the administrative state. To the contrary, administrative law has long relied on thoughtful judges to police arbitrariness. A properly constituted court with appropriate jurisdiction and process could protect administrative adjudicators and the civil service against the corrosive effect of arbitrary presidential will.

B. EXECUTIVE AND ADMINISTRATIVE RESPONSES

Though the existential challenge has been led by the Supreme Court and by conservative opponents of the administrative state, it has drawn support from presidents of both major political parties.[475] They have embraced various aspects of the unitary executive theory out of a desire to enact their political agenda. An effective response to the existential challenge would need to ween presidents away from their plebiscitary dogmas and instead enlist them in efforts to uphold interests in the rule of law and collective well-being that the administrative state embodies.[476] Though this realignment would be exceedingly difficult, it is not hopeless. An enlightened conception of presidential self-interest might lead chief executives to rely on administrative law to entrench their policies and keep the courts—and future presidents—at bay. By relying on administrative law norms, they might help to create distance between presidential will and administrative agencies over time. Administrative officials who lead particular agencies,

471. Kent Barnett, *Resolving the ALJ Quandary*, 33 J. NAT'L ASS'N ADMIN. L. JUDICIARY 644, 684 (2013).

472. U.S. CONST. art. II, § 2, cl. 2.

473. 487 U.S. 654, 659–60 (1988).

474. See discussion of *Lucia* and *Free Enterprise Fund supra* Section I.C.2.b.

475. 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. 104, 109–17 (2021) (describing pursuit of enhanced presidential power over agencies by both Democrats and Republicans).

476. *Id.* at 1117–32 (describing reforms to unwind presidential administration); *see also* Peter M. Shane, *Concerted Civic Administration*, 92 FORDHAM L. REV. 551, 553–54 (2023) (synthesizing theories of presidential policy supervision and decentralized deliberation between and among agencies).

meanwhile, should explain their actions in terms of statutory law, the underlying public right at issue, and their own governing philosophy, rather than in terms of presidential directive.

1. Enlightened Presidential Administration

Presidents have reason to bolster administrative law to defend their policymaking prerogatives. For instance, when a federal district court ruled that the FDA had unlawfully approved the medical abortion drug mifepristone,[477] President Biden released a statement saying,

> [t]he Court in this case has substituted its judgment for FDA, the expert agency that approves drugs. If this ruling were to stand, then there will be virtually no prescription, approved by the FDA, that would be safe from these kinds of political, ideological attacks.[478]

The injunction against a court "substitut[ing] its judgment for that of the agency" is a hallmark of administrative law, articulated most famously in *Motor Vehicle Manufacturers BAss'n v. State Farm Mutual Automobile Insurance Co*.[479] President Biden's statement was a rare moment where a president explicitly relied on administrative law standards of review to criticize a judicial order. Presidents might do so more regularly, in oral as well as written form. When the Court or inferior courts step outside the bounds of traditional administrative law, the President can vocally embrace principles of administrative legality to criticize the decision. They might rely on the "rhetorical" powers of the Presidency to raise the political salience of administrative law norms[480] and to stake a claim in favor of expert judgment, governmental effectiveness, and restrained political supervision.

Presidents can take more concrete steps to protect the administrative state. They can issue executive orders to insulate agencies from arbitrary political interference rather than subject them to it. Consider, for instance, how the regulatory impact analysis required by the Office of Information and Regulatory Affairs—which originally served the purpose of presidential control and deregulation—can and has constrained unjustified, presidentially directed deregulatory action.[481] The Biden Administration made efforts to refine regulatory impact analysis with a more pluralistic form of review that considers multiple values other than efficiency, such as racial and distributive justice, and to enhance equitable participation in

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477. All. for Hippocratic Med. v. FDA, 668 F. Supp. 3d 507 (N.D. Tex. 2023), *aff'd in part*, *vacated in part*, 78 F.4th 210 (5th Cir. 2023), *rev'd and remanded* 602 U.S. 367 (2024), *vacated and remanded*, 117 F.4th 336 (5th Cir. 2024).

478. Presidential Statement on the United States District Court for the Northern District of Texas Decision in *Alliance for Hippocratic Medicine v. U.S. Food and Drug Administration*, 2023 Daily Comp. Pres. Doc. 284 (Apr. 7, 2023).

479. 463 U.S. 29, 43 (1983).

480. On the historical development of the president's rhetorical powers, see JEFFREY K. TULIS, THE RHETORICAL PRESIDENCY (1987).

481. *See* Caroline Cecot, *Deregulatory Cost-Benefit Analysis and Regulatory Stability*, 68 DUKE L.J. 1593, 1606 (2019).

administrative programs.[482] It also revised its guidance on the performance of regulatory impact analysis to pay greater heed to such qualitative values.[483] Executive orders—especially those containing requirements that agencies issue implementing regulations—can be used to delegate discretion towards other actors within the Executive Branch in the service of fulfilling the President's and his party's longer term agenda.[484]

Such a reconstruction of the administrative state is more likely to appeal to Democratic rather than Republican presidents given the current ideological alignment of the parties. However, there is some attraction, even for opponents of economic and social regulation, to keeping the administrative state in working order. Consider, for instance, the first Trump Administration's Executive Order on Promoting the Rule of Law Through Improved Agency Guidance Documents.[485] Unlike President Trump's ham-fisted orders on cost-benefit analysis,[486] this order was a fairly thoughtful (if restrictive) attempt to improve the processes around the use of nonbinding guidance documents. It provided for public comment and formalized opportunities to deviate from major guidance documents. This Order was consonant with (and apparently informed by) the Administrative Conference of the United States' recommendations.[487] It went further and required agencies to issue binding procedural rules to implement their provisions. The Trump Administration had a political incentive to issue this order, since it would make policy change under the Biden Administration more difficult. But many of its provisions would genuinely bolster rule-of-law norms by balancing the benefits of predictability and notice against the coercive powers of agency pronouncements.[488] If the Trump Administration could be swayed by political incentives to attempt to pre-commit its successors to salutary administrative-law constraints, it is not implausible to expect such pressures to operate more regularly in the future.

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482. *See* Modernizing Regulatory Review, 86 Fed. Reg. 7223 (Jan. 20, 2021).

483. *See* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB CIRCULAR A-4, REGULATORY ANALYSIS (2023), https://bidenwhitehouse.archives.gov/wp-content/uploads/2023/11/CircularA-4.pdf [https://perma.cc/DJ6F-X6VH].

484. *See, e.g.*, Emerson & Michaels, *supra* note 475, at 122–23 (arguing that Presidents can issue executive orders to "center the civil service" to distribute power across various actors in the Executive Branch); *see also* James Goodwin, *The Quiet Resurgence of the Administrative State*, NEW REPUBLIC (Aug. 30, 2023), https://newrepublic.com/article/175239/biden-save-civil-service-2024 [https://perma.cc/W8E9-3XD2] (describing how President Biden's executive order on Modernizing Regulatory Review "begins the process of unshackling agency decision-making from [a] technocratic focus" and instead "putting the 'public' back into 'public policy'").

485. Exec. Order No. 13,891, 84 Fed. Reg. 55235 (Oct. 9, 2019), *revoked by* Exec. Order No. 13,992, 86 Fed. Reg. 7049 (Jan. 20, 2021).

486. *See, e.g.*, Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017).

487. Admin. Conf. of the U.S., Recommendation 2017-5, 82 Fed. Reg. 61734 (Dec. 29, 2017).

488. While the Biden Administration rescinded the Trump Administration's Executive Order 13,891, revoked by Exec. Order 13,992 *supra* note 485, many agencies had already issued procedural rules to comply with the Trump Administration's order. *See, e.g.*, 12 C.F.R § 1704 (2021) (CFPB's regulation revising the role of supervisory guidance for the agency); *see also* Camille Chambers, *Agencies are Rescinding Guidance Regulations at a Rapid Pace*, GEO. WASH. U. REGUL. STUD. CTR. (July 7, 2021), https://regulatorystudies.columbian.gwu.edu/agencies-are-rescinding-guidance-regulations-rapid-pace [https://perma.cc/V5D9-SYUR].

2. Disaggregating the Administrative Regime

Principal officers who lead agencies can respond to the existential challenge by grounding their actions and expressing their commitments in terms of fundamental public interests recognized in statutory law and their own official judgment, rather than in the unilateral authority of presidential directive. Cristina Rodríguez has developed a theory of administrative "regime change, or the replacement within the Executive Branch of one set of constitutional, interpretive, philosophical, and policy commitments with another."[489] Rodríguez's theory helpfully complicates presidential theories that emphasize the Chief Executive alone, rather than the broader coalition of actors that lead the executive departments under the umbrella of partisan commitments. Even in today's highly polarized environment, neither party is a monolith, and the people chosen to lead agencies often have perspectives, interests, and constituencies that differ from the President's. Each principal officer acting according to their own judgment and according to principles of statutory law would emphasize the pluralistic character of the administrative state.

Even in the first Trump Administration, there were notable exceptions to presidential subservience. Attorney General Jeff Sessions' recusal from overseeing the Special Counsel investigation offered non-trivial protection against the authoritarian turn. [490] Department of Homeland Security officials, such as Elaine Duke, resisted and arguably sabotaged President Trump's attempt to rescind the Deferred Action for Childhood Arrivals program.[491] Pluralism could be seen in less high-profile contexts as well. The then-FTC Chair, Joe Simons,[492] and the Federal Communications Commission Chair, Ajit Pai, publicly declined to follow President Trump's directives.[493] A president who sought to institute the fullest extent of the unitary theory was unable to actually exercise anything close to complete control over the Executive Branch.

During the Biden Administration, there was less visible disagreement between officers and the White House on domestic policy. President Biden bought into Justice Kagan's approach to presidential administration, taking personal

489. Cristina M. Rodríguez, *The Supreme Court 2020 Term—Foreword: Regime Change*, 135 HARV. L. REV. 1, 7 (2021).

490. *See* Mark Landler & Eric Lichtblau, *Jeff Sessions Recuses Himself from Russia Inquiry*, N.Y. TIMES (Mar. 2, 2017), https://www.nytimes.com/2017/03/02/us/politics/jeff-sessions-russia-trump-investigation-democrats.html. Attorney General Barr also criticized President Trump's falsehoods about the election before ultimately resigning. *See* Allie Malloy, Devan Cole, Christina Carrega & Kevin Liptak, *Attorney General William Barr Resigns*, CNN (Dec. 15, 2020, 4:30 AM), https://www.cnn.com/2020/12/14/politics/william-barr-out-as-attorney-general/index.html [https://perma.cc/MS39-2TMS].

491. Michael D. Shear, *Leading Homeland Security Under a President Who Embraces 'Hate-Filled' Talk*, N.Y. TIMES (July 28, 2020), https://www.nytimes.com/2020/07/10/us/politics/elaine-duke-homeland-security-trump.html.

492. Leah Nylen, Betsy Woodruff Swan, John Hendel & Daniel Lippman, *Trump Aides Interviewing Replacement for Embattled FTC Chair*, POLITICO (Aug. 28, 2020, 2:28 PM), https://www.politico.com/news/2020/08/28/trump-ftc-chair-simons-replacement-404479 [https://perma.cc/2KG8-ZV6W].

493. Harry Neidig, *FCC Chief Stands by Sinclair Decision Despite Criticism from Trump*, THE HILL (July 25, 2018, 2:13 PM), https://thehill.com/policy/technology/398830-fcc-chair-stands-by-sinclair-decision-following-trump-tweet [https://perma.cc/PN52-JZ78].

ownership over policies like student debt relief.[494] At the same time, however, the Administration's approach to social policy gave voice to different coalitions within the Democratic Party, including much more aggressive enforcement of antitrust and consumer protection law at the FTC, on the one hand, with aggressive supply-side liberalism through infrastructure investment, on the other.[495] Officials who broadly align with a governing partisan philosophy are likely to have different ethical values, priorities, and professional and institutional incentives than the President and White House staff. If they stand their ground, they can help to ensure that administration reflects the pluralistic interests the law itself codifies.

C. JUDICIAL RESPONSES

This Article begins and ends with the Supreme Court's role in the existential challenge. So far it has been an enabler. The conservative Justices have voiced criticisms of agencies that would, if fully implemented, destroy agencies' independent powers. Their antipathy to administrative power encourages specific changes in legal rules that substantially diminish legislative and administrative authority while enhancing that of the courts, the President, and well-resourced private parties. The liberal Justices do not generally embrace the merits of the existential challenge. But they have sometimes facilitated it with arguments about presidential power, the scope of review, and reviewability that either make these claims easier to bring or obliquely support them on the merits.

There is little hope that the conservative super-majority will reverse course and abandon their anti-statist constitutional ideology. But perhaps they might be dissuaded from the outright destruction of agencies by the legitimacy losses that might attend such an extreme step, at least in the face of politically salient issues like climate change or antitrust enforcement. Or they might return to traditional administrative law norms—as they did occasionally during the first Trump Administration—when they find that presidential arbitrariness in action is a rather frightening proposition.[496]

Whether or not such institutional self-interest has purchase, the dissenting Justices have an obligation to better articulate the constitutional value of the administrative state. Justice Kagan to date has been its most vocal defender. The concluding lines to her dissent in *West Virginia v. EPA* show the thrust of her critique: "The Court appoints itself—instead of Congress or the expert agency—the

494. *See* Press Release, White House Off. of the Press Sec'y, FACT SHEET: President Biden Announces Student Loan Relief for Borrowers Who Need It Most (Aug. 24, 2022), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most [https://perma.cc/3Q9K-EXPC].

495. Brian Callaci, *Biden Says Goodbye to Tweezer Economics*, ATLANTIC (Oct. 26, 2023), https://www.theatlantic.com/ideas/archive/2023/10/us-economy-biden-administration-tweezers/675767.

496. *See, e.g.*, Dep't of Com. v. New York, 588 U.S. 752, 785 (2019); DHS v. Regents of the Univ. of Cal., 591 U.S. 1, 29 (2020).

decisionmaker on climate policy. I cannot think of many things more frightening. Respectfully, I dissent."[497]

Despite Justice Kagan's often forceful prose, she usually grounds her criticism in terms of congressional, presidential, and expert competence, which lack the normative and motivational force of the existential challenge.[498] Claims about institutional competence, without deeper grounding, do not have comparable moral standing to the Court's repeated invocation of the value of "liberty." Within American legal culture, liberty is sure to win out over claims of expertness or legislative or presidential discretion.

What is missing, then, is an affirmative account of similarly weighty interests that authorize and necessitate the exercise of administrative power. This Article has identified such substantive foundations for administrative law. In a case like *West Virginia v. EPA*, the claims of coal interests and coal-producing states confront the fundamental, sovereign interest in the people's health and safety that climate change implicates.[499] Judicial impairment of the powers of Congress and of the EPA puts these interests at risk. Justice Kagan has been willing to say that the Court "violates the Constitution" in its standing analysis.[500] But the greater and underlying constitutional violation is its failure to recognize the claims of the public to protect itself against substantial harm. What Justice Kagan calls the "existential" challenge doesn't merely imperil the survival of agencies. It imperils the project of self-government that such agencies arise from and contribute to.

Arguments like this will not persuade the Court's majority. But that is not their point. Rather, it is to rebuild a conception of the administrative state that legislators can put to use. The dissent can provide express language for legislators to deploy that would rebut the majority's constitutional default rules. Congress may take that language up in law. The administrative state might then be reconstructed in dialogue between judicial dissents and congressional majorities.

CONCLUSION

It is an open question, as of this writing, how far the second Trump Administration will go in seizing upon the existential challenge to uproot and transform the fundamental commitments and structures of the federal administrative state. The first six months of Trump's term suggest the destruction will be substantial. But whether or not agencies retain some independent, legally binding powers, the continuous, grave charges of unconstitutionality, and the practical impediments they create for agencies, are sure to frustrate the people's capacity to exercise effective and impartial self-government. At the same time, the charge that administrative independence affronts the separation of powers will enable the President to work his will directly on economic and social life, outside the

497. 597 U.S. 697, 784 (2022) (Kagan, J., dissenting).
498. *See* Michaels, *supra* note 115, at 427–28.
499. *See* 597 U.S. 697 (2022).
500. Biden v. Nebraska, 600 U.S. 477, 525 (2023) (Kagan, J., dissenting).

steady channels the administrative process has long required. This Article has described the legal dynamics through which this threat has materialized, recovered the normative commitments of our administrative state, and offered some programmatic responses. The existential challenge to the administrative state might, then, provide an opportunity to rediscover and redeploy its democratic potential.