Ratification of Rules as Retroactive Rulemaking

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ABSTRACT

When a litigant challenges an agency action, such as rulemaking, based on a relevant official's unconstitutional appointment or tenure protection, another official often issues a ratification of the challenged action. In some circuits, the ratification defeats the challenge and shields the underlying constitutional defect from judicial review. But long-standing precedent teaches that retroactive government actions are disfavored and thus may be authorized by Congress only in express terms. For example, retroactive rulemaking may be undertaken only if there is clear congressional intent to authorize such rulemaking, apart from rulemaking in general. Because the ratification of rules has the effect of retroactive rulemaking, such ratification may be undertaken only with express authorization for retroactive rulemaking. Even if rule-ratification is not a species of retroactive rulemaking, it still has a retroactive character that requires clear authorization. Such authorization will usually be absent, and the ratifications should usually fail, such that the merits of appointment and removal claims should be reached despite the ratification attempt.

TABLE OF CONTENTS

* Attorney, Pacific Legal Foundation. I am grateful for the feedback of my colleagues, in particular Damien Schiff; the attendees of this symposium; and the editors of the *Georgetown Journal of Law & Public Policy*. My colleagues and I represented the plaintiffs in *Moose Jooce v. FDA*, 981 F.3d 26 (D.C. Cir. 2020), discussed herein.

INTRODUCTION

The Supreme Court has recently become very active in defining the President's appointment and removal powers, deciding seven relevant cases since 2018. Together, these powers ensure Executive Branch officials remain accountable to the President and, through him, to the electorate. The Court's contemporary cases have tended to strengthen these oversight powers, but lower courts have not followed the Court's lead. Instead, these courts, with rare exception, have found cause to dodge appointment and removal challenges. A key cause of the lower courts' neglect is their adoption of the D.C. Circuit's ratification doctrine.[1]

A litigant usually raises an official's appointment or removal defect to challenge that official's action, whether it be a rulemaking, an administrative adjudication, or an enforcement action. And under the D.C. Circuit's ratification doctrine, such a challenge may be defeated if a properly appointed and removable officer retroactively approves that action. This doctrine has significant flaws, some of which have been examined in litigation and academic works.

This Article explores a constraint on ratification that has not yet been considered. The effect of a valid ratification in the administrative context is to retroactively validate the challenged action, which, until the ratification, had been void. Such retroactive effects create the possibility for unfair surprise. For the defendant to a regulatory enforcement action, for example, ratification can retroactively impose liability for the violation of a rule that was void when the putative violation took place.

In our legal tradition, this potential for unfairness and abuse has long caused retroactivity to be regarded with distrust. Among the doctrines that have been developed in response are tools of statutory interpretation that deny retroactive effect to certain laws and rules. In a typical case, a court construes a statute to have only prospective effect in the absence of clear congressional intent to the contrary. This Article considers how these kinds of limitations apply to ratifications of rulemakings and concludes that such ratifications would generally not be permitted.

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1. The D.C. Circuit's ratification doctrine is distinct from the common law doctrine of ratification, being far more permissive and failing to incorporate traditional limitations. *See generally* Damien M. Schiff, *Neither Safe, Nor Legal, Nor Rare: The D.C. Circuit's Use of the Doctrine of Ratification to Shield Agency Action from Appointments Clause Challenges*, 44 SEATTLE U. L. REV. 771 (2021).

This Article proceeds in four parts. Part I reviews Appointments Clause and removal jurisprudence and the rise of ratification as a means of circumventing these structural protections. Part II summarizes the case law establishing presumptions against retroactivity and, in particular, retroactive rulemaking. Part III applies these principles to ratifications of rulemakings conducted by improperly appointed or tenure-protected officials.

I. RATIFICATION IN STRUCTURAL CASES

This Part begins by reviewing the justifications and practical contours of the Appointments Clause and Executive Vesting Clause doctrines. It then summarizes the origins and applications of the ratification doctrine.

A. The Appointments Clause

In the colonial era, the Crown's "manipulation of official appointments" was the grievance that appeared to have most "rankled the colonists."[2] In the colonists' eyes, the executive's unchecked appointment power enabled those with "the proper connections" and "the most flattery" to obtain powerful positions at the expense of the better qualified.[3] At the same time, "the giving of all places in a government" meant that the Crown would "always be master," no matter the contents of the laws.[4] This combination of unqualified appointees and unaccountable power "spread[] corruption throughout the entire society," letting "[t]he weeds of tyranny flourish[]."[5] The Crown's power of appointment was thus "deemed 'the most insidious and powerful weapon of eighteenth century despotism,'"[6] earning it a place amongst the grievances listed in the Declaration of Independence.[7]

The Framers responded by strictly limiting who may appoint officers and splitting the appointment power between the President and Congress. These limits are embodied in the Appointments Clause, which provides:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[8]

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2. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 79 (1969).
3. *Id.*
4. *Id.* at 143.
5. *Id.*
6. Freytag v. Comm'r, 501 U.S. 868, 883 (1991) (quoting WOOD, *supra* note 2, at 143).
7. *See* THE DECLARATION OF INDEPENDENCE para. 12 (U.S. 1776) ("He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance.").
8. U.S. CONST. art. II, § 2, cl. 2.

By its terms, the Appointments Clause applies only to "officers of the United States," that is, those officials holding significant power under federal law.[9] Significant power is not a high bar, however. Among those that the Supreme Court has determined to be officers are not only heads of agencies[10] but also postmasters first class,[11] district court clerks,[12] and election supervisors.[13] Some Justices have even concluded that the term "officers of the United States" embraces all federal officials "with responsibility for an ongoing statutory duty," whatever the significance of those duties.[14] Whatever the precise contours of the term, its broad scope reflects the Framers' intent for the Clause to impose meaningful limits on the appointment power.

By default, all officers must be nominated by the President and confirmed by the Senate. By placing the burden of nomination in the hands of the President, the Appointments Clause ensured that a single, easily identifiable person could be held responsible for the making of a bad appointment.[15] Meanwhile, Senate confirmation both served as an additional check on the President and transformed nominations into "matters of notoriety," focusing public watchfulness on appointments.[16]

While non-inferior officers must be appointed by nomination and confirmation, the Framers foresaw that Senate confirmation could become inconvenient as the government grew.[17] Thus, the Clause provides that Congress may allow inferior officers to be appointed by the President alone, a head of department, or a court of law.[18] Although this relaxes the appointment procedure, the "limited authority" to authorize alternative appointers[19] underscores the Framers' "determination to limit the distribution of the power of appointment."[20]

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9. Lucia v. SEC, 138 S. Ct. 2044, 2051 (2018).

10. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam) (Federal Election Commissioners); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 484–85 (2010) (members of the Public Company Accounting Oversight Board); Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020) (Director of the Consumer Finance Protection Bureau); Collins v. Yellen, 141 S. Ct. 1761 (2021) (Director of the Federal Housing Finance Agency).

11. Myers v. United States, 272 U.S. 52, 60 (1926).

12. Ex parte Hennen, 38 U.S. (13 Pet.) 225, 229 (1839); *accord Buckley*, 424 U.S. at 126 (reiterating that district court clerks are inferior officers).

13. Ex parte Siebold, 100 U.S. (10 Otto) 371, 397–98 (1880); *see* Edmond v. United States, 520 U.S. 651, 661 (1997) (citing *Ex parte Siebold*).

14. *Lucia*, 138 S. Ct. at 2056 (Thomas, J., concurring, joined by Gorsuch, J.) (simplified); *see also* Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443, 465 (2018).

15. THE FEDERALIST No. 76, at 563 (Alexander Hamilton) (John Church Hamilton ed., 1864).

16. THE FEDERALIST No. 77, at 570 (Alexander Hamilton) (John Church Hamilton ed., 1864).

17. United States v. Germaine, 99 U.S. (9 Otto) 508, 509–10 (1878).

18. Inferior officers are those who are "directed and supervised at some level" by non-inferior officers. *Edmond*, 520 U.S. at 663. The line between the two turns on "how much power an officer exercises free from control by a superior," United States v. Arthrex, 141 S. Ct. 1970, 1982 (2021), with the inquiry encompassing the officer's administrative oversight by a superior, susceptibility to being fired without cause, and ability to render final decisions without review, *id.* at 1981.

19. *Freytag*, 501 U.S. at 884.

20. *Id.*

An individual who was not constitutionally appointed to his putative office holds "defective title" in that position.[21] As a result, his actions are void.[22] Thus, when the Court concluded in *Lucia v. SEC* that an administrative law judge was improperly appointed, it directed that the defendant receive "a new 'hearing before a properly appointed' official."[23] The remedy in *United States v. Arthrex*,[24] though slightly different, remained consistent with the principle that actions taken by improperly appointed officials are void. There, administrative patent adjudicators were held to be non-inferior officers because they could issue final patentability decisions without review.[25] The adjudicators, however, had only been appointed as inferior officers.[26] Unlike in *Lucia*, the Court did not vacate the adjudicator's determination. Rather, the Court held that the Patent Director, a Senate-confirmed officer, must be able to review the adjudicators' decisions.[27] This deprived the adjudicators of their final decision-making power, such that their powers now fell within the scope of responsibilities allowed to inferior officers.[28] By thus rendering the adjudicator's decision consistent with the Appointments Clause, the Court avoided the necessity of vacating the decision.

B. The Removal Power

The President's removal power complements his appointment power. Whereas the latter makes the President responsible for choosing wise and just individuals to serve as officers,[29] his removal power enables him to supervise officers and thereby makes him responsible for their actions in office.[30] While a President has many other tools at his disposal to influence an officer, such as his influence over agency budget requests and relationships between agencies, "[t]he Framers did not rest our liberties on such bureaucratic minutiae"[31]; rather, "it is only the authority that can remove such officials that they must fear and, in the performance of their functions, obey."[32]

The Constitution does not explicitly grant the President the power to fire officers,[33] but the First Congress recognized that the power was included in the executive power vested in the President by Article II of the Constitution.[34] The view

21. Ryder v. United States, 515 U.S. 177, 185 (1995).
22. *Id.*
23. Lucia v. SEC, 138 S. Ct. 2044, 2055 (2018) (quoting *Ryder*, 515 U.S. at 183).
24. 141 S. Ct. 1970 (2021).
25. *Id.* at 1985.
26. *Id.* at 1979–80.
27. *Id.* at 1987–88.
28. *Id.*
29. THE FEDERALIST No. 76, at 563 (Alexander Hamilton) (John Church Hamilton ed., 1864).
30. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2197 (2020); Collins v. Yellen, 141 S. Ct. 1761, 1796 (2021) (Gorsuch, J., concurring).
31. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 499–500 (2010).
32. *Seila Law*, 140 S. Ct. at 2197 (simplified).
33. Myers v. United States, 272 U.S. 52, 109 (1926).
34. U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

of the First Congress, being "a Congress whose constitutional decisions have always been regarded . . . as of the greatest weight in the interpretation of that fundamental instrument,"[35] was adopted by the Supreme Court in *Myers v. United States*.[36] The First Congress and *Myers* advanced many reasons for their conclusion, but the following has been most forcefully stressed in contemporary Supreme Court cases.[37]

The Executive Vesting Clause is "a grant of the power to execute the laws."[38] This power is paired with the responsibility captured by the Take Care Clause that the President "take Care that the Laws be faithfully executed."[39] These duties, being beyond the scope of work possible to one man, required that the President be assisted by officers.[40] But to execute the laws through others, the President must be able to control those who wield power on his behalf. Without such control, the President could not be held responsible for his officers or their actions.[41] Accountability for the executive branch thus must be obtained through the President's removal power, such that "the chain of dependence be preserved; the lowest officers, the middle grade, and the highest will depend, as they ought, on the President, and the President on the community."[42]

Aside from the requirements of accountability, the practical functioning of the Executive Branch also required that the President be able to remove officers. If the President were unable to remove officers, he would effectively have foisted upon him officers in whom he had lost confidence and on whom he cannot rely.[43] For example, an incoming President may inherit officers appointed by a prior President whose policies the incoming President had been elected to oppose.[44] In such a situation, the President may conclude that he "could not, consistent with his duty, and a proper regard to the general welfare, . . . intrust [the officer] with full communications relative to the business of his department."[45] The result is a shattering of the "'great principle of unity'" in the Executive Branch, creating dysfunction that would "thwart[] the executive in the exercise of his great powers."[46]

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35. *Myers*, 272 U.S. at 174–75; *see* Comptroller of Treasury of Md. v. Wynne, 575 U.S. 542, 580 (2015) (Thomas, J., dissenting) (The decisions of the First Congress are "powerful evidence of the original understanding of the Constitution."). *But cf. Myers*, 272 U.S. at 136 (stressing that the Court did not blindly adopt the First Congress's interpretation but "because of [the Court's] agreement with the reasons" given by the First Congress).

36. *See generally Myers*, 272 U.S. 52.

37. *See, e.g.*, *Seila Law*, 140 S. Ct. at 2191; Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 496–98 (2010).

38. *Myers*, 272 U.S. at 117.

39. U.S. CONST. art. II, § 3.

40. *Myers*, 272 U.S. at 117.

41. *Id.* at 117, 124, 132.

42. *Id.* at 131 (quoting 1 ANNALS OF CONGRESS 499).

43. *Id.* at 131–32.

44. Collins v. Yellen, 141 S. Ct. 1761, 1796 (2021) (Gorsuch, J., concurring).

45. *Myers*, 272 U.S. at 124.

46. *Id.* at 131 (first quotation quoting 1 ANNALS OF CONGRESS 499).

The Court's removal jurisprudence has evolved since *Myers*. Shortly after *Myers* was decided in 1926, the Court began carving out exceptions to the President's removal power. Most significantly, the New Deal-era *Humphrey's Executor v. United States* limited the President's removal power for officers serving in agencies that are "wholly disconnected from the executive department" and possess "legislative and judicial powers."[47] For such officers, *Humphrey's* permitted Congress to immunize an officer from removal except for cause,[48] precipitating the rise of independent agencies.

Since 2010,[49] however, the Court has moved back toward *Myers*. In *Seila Law*, the Court restricted *Humphrey's* to its facts[50] and made clear that the exceptions to *Myers* would not be expanded.[51] Perhaps more importantly, these contemporary cases adopted in near-absolute terms the reasoning of *Myers* and the First Congress. In *Collins v. Yellen*, for example, the Court declared that the President's removal power "serves vital purposes," such as its "essential" role in "subject[ing] Executive Branch actions to a degree of electoral accountability."[52] And "[t]hese purposes are implicated whenever an agency does important work,"[53] undercutting *Humphrey's* premise that exceptions to the President's unrestricted removal power are permissible.

The force with which the Court has recently framed the removal doctrine has not translated to the relief granted when the doctrine is violated. Whereas an improperly appointed official does not "lawfully possess" his power, "there is no basis for concluding that [an officer] lack[s] the authority to carry out the functions of the office" when he is merely improperly shielded from removal—at least when considering the propriety of "retrospective relief."[54] Thus, although the Court in *Collins v. Yellen* concluded that Congress had improperly shielded the Director of the Federal Housing Finance Agency from at-will removal, there was "no reason to regard any of the actions taken by the FHFA . . . as void."[55] In some circumstances, retrospective relief may be available if the plaintiff could show that an officer took the challenged action *because* of his tenure protection,[56] but this narrow path to relief only underscores the anemia of the remedies for removal

47. Humphrey's Ex'r v. United States, 295 U.S. 602, 630 (1935).

48. *Id.* at 630–31.

49. *See generally* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010).

50. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2198 (2020). The Court also indicated that the reasoning underlying *Humphrey's* was faulty, suggesting even a limited *Humphrey's* may not be long for this world. *Id.* at 2198 n.2.

51. *Id.* at 2199–2200.

52. Collins v. Yellen, 141 S. Ct. 1761, 1784 (2021).

53. *Id.*

54. *Id.* at 1787–88. Some have contended, however, that an action taken by an improperly tenure-protected official may still be void prospectively. *See, e.g.*, Petition for Writ of Certiorari, Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., No. 22-448 (U.S. Nov. 14, 2022).

55. *Collins*, 141 S. Ct. at 1787.

56. *Id.* at 1788–89.

violations.[57] As a result, parties have few incentives to bring removal claims, even supposing that they will have standing to bring such claims after *Collins*.[58]

C. Ratification

Although the Supreme Court has moved to enforce the President's appointment and removal powers more strictly, the lower courts have lagged behind. Perhaps driven by concern over the practical effects of invalidating an agency's structure,[59] the lower courts have often found cause to avoid reaching the merits of an appointment or removal claim. Chief amongst those causes is the D.C. Circuit's ratification doctrine.

Ratification in the appointments and removal contexts is an atextual creation of the D.C. Circuit. In the typical case, an administrative action is challenged as having been taken by an officer whose appointment or removability is defective. The challenge might be brought offensively, in a suit filed against the agency, or defensively, as a response to an enforcement action. Once the challenge is raised, another officer—one properly appointed and removable and empowered to take the challenged action—issues a ratification, adopting the challenged action, retroactive to when the action was originally taken. Under D.C. Circuit case law, the ratification authorizes the original action and causes the challenge to fail.

This idea first appeared in the 1996 case *FEC v. Legi-Tech*, in which the Federal Election Commission brought a civil enforcement action against a database service provider for misuse of FEC data.[60] While *Legi-Tech* was pending in district court, the D.C. Circuit decided *FEC v. NRA Political Victory Fund*, holding that the Commission's structure violated the separation of powers because it included non-voting members appointed by Congress.[61] *NRA* concluded that this defect deprived the agency of the authority to bring the enforcement action there and granted judgment for the defendants.[62] After *NRA*, the FEC reconstituted itself to exclude the congressional appointees and ratified the decision to bring the action against Legi-Tech.[63]

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57. *Id.* at 1795–99 (Gorsuch, J., concurring in part) ("Instead of applying our traditional remedy for constitutional violations like these, the Court supplies a novel and feeble substitute.").

58. Bhatti v. Fed. Hous. Fin. Agency, 15 F.4th 848, 852 (8th Cir. 2021) (holding that the plaintiffs "have standing to seek retrospective, but not prospective, relief" for their removal claims). *But see* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2196 (2020) (holding that an improper removal provision "inflicts a 'here-and-now' injury" that satisfies standing, so that "private parties aggrieved by an official's exercise of executive power" may "challenge the official's authority to wield that power while insulated from removal").

59. *Cf. Collins*, 141 S. Ct. at 1799 (Gorsuch, J., concurring in part) (attributing the Court's meager remedy in *Collins* to the Court's reluctance to order the "unwinding or disgorging hundreds of millions of dollars that have already changed hands").

60. 75 F.3d 704, 705–06 (D.C. Cir. 1996).

61. Fed. Election Comm'n v. NRA Pol. Victory Fund, 6 F.3d 821, 827 (D.C. Cir. 1993), *cert. dismissed*, 513 U.S. 88 (1994).

62. *Id.* at 822; *Legi-Tech*, 75 F.3d at 706, 706 n.2.

63. *Legi-Tech*, 75 F.3d at 706. Note that the constitutional defect in *Legi-Tech* and *NRA* was not strictly an Appointments Clause or removability violation but rather a violation of the prohibition

Legi-Tech moved for dismissal and, relying on *NRA*, the district court obliged.[64] The D.C. Circuit reversed.[65] Although the court had issued judgment for the *NRA* defendant, where no ratification had been at issue, the court determined ratification could cure the constitutional violation if it sufficiently reduced "the degree of continuing prejudice" to Legi-Tech.[66] Whether that condition was satisfied, however, was never directly answered by *Legi-Tech*. Though the court acknowledged that "some" degree of continuing prejudice may be assumed, there was nonetheless "no ideal solution to the remedial problem."[67] That's because even if the action were dismissed without prejudice,[68] it was "virtually inconceivable" that the FEC would drop the matter.[69] Rather, the FEC would simply bring suit again, in part to demonstrate that its unconstitutional structure had not affected its prior decision-making.[70] To avoid the futility of dismissal, the practical choice "[u]nder the circumstances" was simply to "treat [the ratification] as an adequate remedy" as an exercise of the court's "discretion . . . in the selection of remedies."[71] The court therefore affirmed.

This equivocal first step gave rise to much more confident strides. Just two years later, the D.C. Circuit applied *Legi-Tech* in *Doolin Security Savings Bank v. Office of Thrift Supervision* to reject an Appointments Clause defense against an agency order finding the defendant liable for unlawful banking practices.[72] The court also continually expanded the scope of the ratification doctrine. With *Legi-Tech* and *Doolin*, the court at first employed ratification to reject structural challenges raised in defense against an enforcement action, but the court then expanded the doctrine by concluding in *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board* that the logic of ratification may also defeat an Appointments Clause challenge to an agency adjudicatory decision.[73] Most recently, in *Moose Jooce v. FDA*, the court allowed ratification to defeat an offensive Appointments Clause challenge to an agency rule promulgated by an FDA employee pursuant to a delegation from the FDA Commissioner.[74]

The court did not simply expand ratification to cover different administrative actions; it also expanded its effect. Usually, when the issues presented in a case are no longer live, the suit is dismissed as moot.[75] But when exceptions to

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against inter-branch appointments. *See NRA Pol. Victory Fund*, 6 F.3d at 826 ("[I]t is also settled that Congress may not appoint the voting members of . . . any agency with executive powers.").

64. *Legi-Tech*, 75 F.3d at 706.

65. *Id.* at 705.

66. *Id.* at 708.

67. *Id.* at 708–09.

68. The court ruled out dismissal with prejudice as a plausible remedy, given that the FEC had properly restructured itself. *Id.* at 708.

69. *Id.* at 708–09.

70. *Id.*

71. *Id.* at 709.

72. 139 F.3d 203 (D.C. Cir. 1998).

73. 796 F.3d 111, 119 (D.C. Cir. 2015).

74. 981 F.3d 26, 28 (D.C. Cir. 2020).

75. Already, LLC v. Nike, Inc., 568 U.S. 85, 90 (2013).

mootness are present, courts proceed to decide the merits. For example, when a defendant voluntarily ends its challenged conduct and thereby extinguishes a plaintiff's injury, courts still proceed to the merits.[76] This voluntary-cessation exception to mootness prevents manipulative litigants from abandoning challenged behavior just long enough for a suit to be dismissed and then resuming that behavior.[77] This doctrine has plain application where ratification conforms a specific agency action to constitutional requirements while keeping in place the powers and structure of the defective office that issued the agency action. Nevertheless, in *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, the court held that ratification not only defeats an Appointments Clause claim but it also "resolves the claim on the merits" rather than mooting the claim.[78] The effect is to avoid the mootness inquiry and its exceptions altogether, meaning ratification prevents any decision on the merits of appointments and removal claims and persistent violations can consistently avoid judicial review.

This ratification doctrine did not remain confined to the D.C. Circuit. In 2016, the Ninth Circuit took up the doctrine in *Consumer Financial Protection Bureau v. Gordon*, holding that a CFPB Director properly ratified his own prior decision, made before he had been properly appointed, to bring the enforcement action in that case.[79] Just one week later, the Third Circuit held in *Advanced Disposal Services East, Inc. v. NLRB* that an NLRB Regional Director properly ratified a unionization election he conducted while he had been improperly appointed.[80] The appointment argument had been raised by the employer in defense against an NLRB order finding it in violation of the National Labor Relations Act for failing to collectively bargain with the union.[81]

Interestingly, while courts have accepted ratifications in defensive contexts like those discussed above, I have identified no cases where they accepted ratifications of *rulemakings* in defensive contexts. But when structural challenges have been brought against rules in an offensive context, where the challenger's past liability was not at stake, some courts have been receptive to ratification. An example is *Moose Jooce v. FDA*.[82] There, the Senate-confirmed FDA Commissioner had

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76. *Id.*

77. *Id.*

78. 920 F.3d 1, 13 (D.C. Cir. 2019). This conclusion resulted in a unique treatment of structural challenges. In every other context, courts have treated ratification of a challenged action as going to mootness. *See, e.g.*, Isbrandtsen-Moller Co. v. United States, 300 U.S. 139, 149 (1937) (Maritime Commission's ratification of subpoena issued, without authorization, by Secretary of Commerce "render[ed] moot" a shipper's challenge to the subpoena.); EEOC v. First Citizens Bank of Billings, 758 F.2d 397, 399–400 (9th Cir. 1985) (Congressional ratification of President's reorganization plans mooted issues of the plans' potential unconstitutionality.).

79. 819 F.3d 1179, 1191–92 (9th Cir. 2016).

80. 820 F.3d 592, 602 (3d Cir. 2016). Notably, this was not an Appointments Clause or removal case. Rather, the Director was alleged to be improperly appointed because he had been selected for his position by an NLRB that lacked a quorum and thus the power act.

81. *Id.* at 597.

82. 981 F.3d 26 (D.C. Cir. 2020).

delegated rulemaking power—a significant power[83]—to a career FDA employee.[84] The employee then issued a rule subjecting vaping products to regulation under the Family Smoking Prevention and Tobacco Control Act.[85] Vape retailers, manufacturers, and a nonprofit challenged the rule under the Appointments Clause, arguing that the employee wielded powers that required her appointment as a principal officer, but an FDA Commissioner then issued a ratification.[86] Noting that the Commissioner appeared to have made an independent judgment in favor of the rule, the D.C. Circuit upheld the ratification.[87] Then, applying *Guedes*, it rejected the plaintiffs' attempt to seek review under mootness exceptions.[88]

Moose Jooce demonstrates the most significant danger of ratification: its insulation of persistent Appointments Clause violations from judicial review. In *Moose Jooce*, it was the FDA Commissioner's wrongful delegation of rulemaking power to the employee that created the Appointments Clause violation. Yet under the D.C. Circuit's reasoning, the Commissioner was able to shield his own unlawful action from review by ratifying the challenged rule. In so doing, the Commissioner was able to maintain the diffusion of appointment power—and thus the diffusion of significant authority—that the Appointments Clause was created to prevent.[89] In effect, immunization of the Commissioner's delegation from judicial review meant he was able to "erect[] [a] New Office[]" without the authorization of Congress and without the check of presidential appointment to the office.[90] And while the Commissioner's appointment by the President with the consent of the Senate means the President may be held responsible for the Commissioner's own regulatory actions, it will be more difficult to hold the President accountable for regulations issued by the FDA employee, which continue unabated.[91]

II. RETROACTIVITY

Our legal tradition regards retroactivity with "a singular distrust."[92] The unfairness of holding an individual to a law that did not exist when he acted "neither accord[s] with sound legislation nor with the fundamental principles of the social

83. Buckley v. Valeo, 424 U.S. 1, 140–41 (1976) (per curiam).
84. *Moose Jooce*, 981 F.3d at 27.
85. *Id.*
86. *Id.* at 28.
87. *Id.* at 29.
88. *Id.* at 30.
89. This distinguishes *Moose Jooce* from cases like *Legi-Tech*, in which the underlying constitutional violation was cured by reforming the office to comply with constitutional requirements. In contrast, the ratification in *Moose Jooce* allowed the violation to persist.
90. THE DECLARATION OF INDEPENDENCE para. 12 (U.S. 1776).
91. *See, e.g.*, Food Additives Permitted in Feed and Drinking Water of Animals; Fumonisin Esterase, 87 Fed. Reg. 47,343 (Aug. 3, 2022); Indirect Food Additives: Adhesives and Components of Coatings; Paper and Paperboard Components; Polymers; Adjuvants, Production Aids, and Sanitizers, 87 Fed. Reg. 31,080 (May 20, 2022).
92. E. Enters. v. Apfel, 524 U.S. 498, 547 (1998) (Kennedy, J., concurring).

compact."[93] Because of this, disapproval of retroactivity is "as ancient as the law itself."[94]

This disapproval has found expression in five provisions of the Constitution. The Ex Post Facto Clauses[95] forbid Congress and the states from adopting retroactive criminal statutes.[96] The Constitution also forbids the issuance of bills of attainder to punish specific people for past behavior.[97] The Takings Clause limits the disturbance of vested property rights to those for public uses and paired with just compensation, while the Contracts Clauses restrict legislation that interferes with preexisting contracts.[98] Finally, the Due Process Clauses provide a general limit on retroactive civil and criminal lawmaking.[99] The disapproval of retroactivity has extended beyond constitutional restrictions, however. The Court has also developed several lines of precedent that create presumptions against retroactivity when interpreting statutes. These presumptions are the focus of this Article.

This Part begins by discussing due process constraints on explicitly retroactive statutes and regulations, proceeds to an in-depth exploration of the presumptions that apply to statutes and regulations that are not explicitly retroactive, and concludes with an examination of different approaches to defining retroactivity.[100]

A. Explicitly Retroactive Statutes

Due process limitations on explicitly retroactive statutes are not significant. Despite concerns over the unfairness of disturbing settled expectations, the courts are hesitant to override Congress's judgment that a statute should be retroactive, in the absence of a specific constitutional provision to the contrary.[101] In part, this hesitation has stemmed from the beneficial uses of retroactive legislation, such as responding to emergencies and correcting mistakes.[102] Thus, where Congress has made a determination that retroactivity is worth the cost of unfair surprise, courts generally defer to that determination.[103]

Usery v. Turner Elkhorn Mining Co. made clear the low bar required of explicitly retroactive statutes by the Due Process Clause.[104] The case arose from mine operators' challenge to the Coal Mine Health and Safety Act of 1969, which

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93. *Id.* (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1398 (5th ed. 1891)).

94. Landgraf v. USI Film Prods., 511 U.S. 244, 265 n.17 (1994) (quoting Dash v. Van Kleeck, 7 Johns. 477, 503 (N.Y. 1811)).

95. U.S. CONST. art. I, § 9, cl. 3, and § 10, cl. 1.

96. *Landgraf*, 511 U.S. at 266; *cf. E. Enters.*, 524 U.S. at 538–39 (Thomas, J., concurring) (suggesting that the Ex Post Facto Clauses may also forbid retroactive civil laws).

97. U.S. CONST. art. I, § 9, cl. 3, and § 10, cl. 1.

98. *Landgraf*, 511 U.S. at 266.

99. *See* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15–17 (1976).

100. Notably, this Part does not address retroactivity in administrative contexts other than rulemaking, *i.e.*, adjudications and enforcement actions.

101. *Landgraf*, 511 U.S. at 267.

102. *Id.* at 267–68.

103. *Id.* at 268.

104. 428 U.S. 1.

made the operators liable for the work-related disabilities of their past employees.[105] The operators challenged this retroactive aspect of the statute under the Due Process Clause.[106] The Court recognized that the imposition of liability for past employees "upsets otherwise settled expectations," but nevertheless ruled against the operators.[107] It held that the "retrospective aspects" of a statute must be justified separate from the "prospective aspects,"[108] but those retrospective aspects satisfy due process if they merely avoid being "arbitrary and irrational."[109] Thus, while the *Usery* statute's retroactivity could not be justified on deterrence or punitive grounds, it was justifiable as a way to "to spread the costs of the employees' disability" and so satisfied due process.[110]

B. Statutes and Rules That Are Silent as to Retroactivity

As *Usery* demonstrates, due process hurdles for explicitly retroactive statutes are low. The Court is more circumspect, however, when Congress does not explicitly direct that a statute be retroactive. In such situations, a question of statutory interpretation arises: When a statute is enacted after suit is filed or after a defendant's relevant act or omission, should courts apply the old law in effect at the time of a relevant past action or the new law in effect at the time of the court's decision? The same question arises when a regulation is silent as to its retroactive effect.

The Court initially developed conflicting presumptions but has since settled, with some exceptions, on a presumption against retroactive application of statutes and regulations where retroactivity is not the clear intent of Congress or the issuing agency.

The modern line of cases began with *Greene v. United States*,[111] in which the issue was whether an older or newer regulation should govern the claim of restitution brought by a government contractor's employee. The government had improperly revoked the employee's security clearance, causing him to lose his job.[112] In 1959, the employee sought restitution for lost earnings from the Department of Defense under a DOD regulation issued in 1955.[113] In 1960, however, DOD replaced the 1955 regulation with a new rule that conditioned restitution on a claimant's current eligibility for a security clearance. The Court determined that the 1955 regulation governed, because "retrospective operation will not be given to a statute which interferes with antecedent rights unless such be the unequivocal and inflexible import of the terms, and the manifest intention of

105. *Id.* at 5.
106. *Id.* at 14–15.
107. *Id.* at 16.
108. *Id.* at 17.
109. *Id.* at 15.
110. *Id.* at 17–18.
111. 376 U.S. 149 (1964).
112. *Id.* at 150.
113. *Id.* at 155–56.

the legislature," and this rule applied also to regulations.[114] Since the employee had asserted his rights while the 1955 regulations were still in effect, and the 1960 regulations were not explicitly retroactive, the 1955 regulations governed. *Greene* thus established a presumption against reading a statute to have retroactive effect.

Just five years later, however, the Court appeared to take a contrary stance in *Thorpe v. Housing Authority of City of Durham*.[115] The case was an eviction proceeding brought by a housing authority against a tenant in a federally assisted housing project. The housing authority initiated eviction proceedings without first notifying the tenant of the reasons for eviction or giving her an opportunity to respond to those reasons.[116] Such procedures were not required at the time the authority began the eviction proceedings, but a Housing and Urban Development regulation issued thereafter imposed those requirements.[117] The tenant argued that these new procedures must first be followed before any eviction proceeding may be instituted, and the Court agreed. It reasoned that "[t]he general rule . . . is that an appellate court must apply the law in effect at the time it renders its decision."[118] And while *Greene* might appear to the contrary, the Court cast *Greene* as representing an exception from the general rule where "manifest injustice" would otherwise occur.[119]

The Court appeared to reconcile *Greene* and *Thorpe* in *Bennett v. New Jersey*.[120] In *Bennett*, the then–Office of Education had provided federal funds to states pursuant to the Elementary and Secondary Education Act of 1965, to be used in accordance with the statute's eligibility criteria.[121] In 1976, the Office of Education determined that New Jersey had spent its funds outside of those statutory criteria and demanded repayment.[122] In 1978, however, Congress revised the statutory criteria, and New Jersey argued that the amended criteria should retroactively govern the question of whether the state had misspent its funds.[123] The Supreme Court disagreed. While the Court acknowledged the "general principle that a court must apply the law in effect at the time of its decision," it pointed out that it has refused to do so where it would "infringe upon . . . a right that had matured."[124] Instead, "statutes affecting substantive rights and liabilities are presumed to have only prospective effect."[125] Observing that the federal government's "right to recover any misused funds preceded the 1978 Amendments," the

114. *Id.* at 160 (simplified).
115. 393 U.S. 268 (1969).
116. *Id.* at 269.
117. *Id.* at 269–70.
118. *Id.* at 281.
119. *Id.* at 282.
120. 470 U.S. 632 (1985).
121. *Id.* at 634–35.
122. *Id.* at 636.
123. *Id.* at 637.
124. *Id.* at 639 (second quotation quoting Bradley v. Sch. Bd. of City of Richmond, 416 U.S. 696, 720 (1974)).
125. *Id.* at 639–40 (citing, among other cases, Greene v. United States, 376 U.S. 149, 160 (1964)).

Court concluded that the retroactive application of the amended criteria would interfere with a "matured" right so that the original criteria governed the Office of Education's claim of repayment.[126]

Greene, *Thorpe*, and *Bennett* would appear to suggest a presumption for retroactive application of laws and regulations, except where retroactive application would interfere with substantive rights, that is, it would cause "manifest injustice." But just three years after *Bennett*, the Court muddied the waters again.

Bowen v. Georgetown University Hospital[127] posed a slightly different question than the three cases above. *Greene*, *Thorpe*, and *Bennett* considered whether a regulation or statute, though silent as to retroactive application, should nonetheless be applied retroactively. *Bowen* focused on an explicitly retroactive rule and asked whether the rule was supported by a statutory provision that authorized rulemaking but was silent as to whether it authorized *retroactive* rulemaking.

The rule in question had been issued by the Secretary of Health and Human Services to retroactively change how Medicare reimbursements were calculated. The reimbursement calculations took into consideration the wage index, a figure that reflects the salary requirements of hospital employees in a geographical region.[128] In 1981, the HHS Secretary issued a prospective rule that had the effect of reducing the wage index and Medicare reimbursements compared to the pre-1981 rule.[129] In issuing the rule, however, the Secretary had failed to comply with the Administrative Procedure Act's notice-and-comment requirements, and hospitals successfully challenged the 1981 rule on this ground.[130] The HHS Secretary then paid the higher reimbursements required by the pre-1981 rule.[131] But then in 1984, the Secretary reissued the 1981 rule with notice and comment and made the rule retroactive to the original issuance of the 1981 rule.[132] The "net result was as if the original rule had never been set aside."[133] The reimbursements already paid became overpayments, and the Secretary subsequently attempted to claw back the difference.[134]

The Court held that the Medicare Act did not authorize the Secretary to issue the 1984 rule. It started with the principle that "[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."[135] The Court supported this statement by citing *Greene*.[136] But recall that *Greene* held that "retrospective operation will not be given to a statute *which interferes*

126. *Id.* (second quotation quoting *Bradley*, 416 U.S. at 720).
127. 488 U.S. 204 (1988).
128. *Id.* at 206.
129. *Id.*
130. *Id.* at 206–07.
131. *Id.* at 207.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.* at 208.
136. *Id.*

with antecedent rights."[137] *Bowen*'s exclusion of this proviso created a presumption against retroactivity and set up *Bowen*'s conflict with *Greene*, *Thorpe*, and *Bennett*.[138]

This evolution from *Greene*, however, was only a steppingstone in the Court's reasoning. The Court went on to extend the presumption against retroactivity: Just as rules and statutes will not be presumed to have retroactive effect, grants of rulemaking power "will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."[139] Because the Medicare Act's general grant of rulemaking power did not expressly provide for retroactive rulemaking,[140] and what retroactive rulemaking authority the Act *did* authorize was limited to modifications of reimbursements on a case-by-case basis,[141] there was no statutory authority for the 1984 rule. Thus, *Bowen* created a second anti-retroactivity constraint against regulations: to be retroactive, regulations must both demonstrate clear intent of retroactivity (under the *Greene* line of cases) *and* be supported by statutory authority that clearly provides for retroactive rulemaking.

The conflict between *Bowen* and the older precedents came to a head in *Landgraf v. USI Film Products*.[142] In *Landgraf*, a worker sued her former employer under Title VII of the Civil Rights Act of 1964, alleging that she was forced to resign because of her co-worker's sexual harassment. The district court determined at trial that, while the former employee had been harassed, the harassment had not caused her resignation. Because Title VII at the time authorized only equitable relief, no relief was available to her, and the court dismissed the suit. While the appeal was pending, Congress amended Title VII to allow for compensatory and punitive damages, which the plaintiff asserted should be available to her. Nevertheless, the circuit court affirmed the district court's dismissal, reasoning that it would be unjust to subject the employer to damages that were not authorized at the time of the harassment.

The Supreme Court characterized the issue as "whether the Court of Appeals should have applied the law in effect at the time the discriminatory conduct occurred, or at the time of its decision in July 1992."[143] The Court acknowledged that its precedents had "left doubts" about whether and when to apply statutes and regulations retroactively,[144] and it set out to reconcile its "seemingly contradictory statements."[145] After a thorough discussion of the importance of prospectivity,

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137. Greene v. United States, 376 U.S. 149, 160 (1964) (simplified and emphasis added).

138. Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 837 (1990) (noting "apparent tension" between the two lines of cases).

139. *Bowen*, 488 U.S. at 208.

140. *Id.* at 213.

141. *Id.* at 211.

142. 511 U.S. 244 (1994).

143. *Id.* at 250.

144. *Id.* at 261.

145. *Id.* at 264.

settled expectations, and fairness,[146] the Court settled on a "default rule" of prospectivity in the absence of "clear congressional intent authorizing retroactivity."[147] Such a rule, it reasoned, was most in line with "the approach taken in decisions spanning two centuries" and limited retroactivity to situations where Congress had determined that it was worth the cost of unsettling expectations.[148]

Landgraf reconceptualized the *Greene*, *Thorpe*, and *Bennett* line of cases as recognizing exceptions to the rule of prospectivity. These exceptions included statutes affecting prospective relief, jurisdiction, and procedural rules. The Court explained that matters of prospective relief cannot be retroactive at all, since it "operates *in futuro*."[149] Alterations of jurisdictional rules, meanwhile, change the power of a court to hear a case and do not affect substantive rights. And procedural rules, applying only to "secondary conduct," do not implicate reliance concerns to the same degree.[150] As an example, the Court categorized the eviction-notification requirements in *Thorpe* as a procedural issue that affected the propriety of prospective relief, *i.e.*, eviction.[151]

According to the Court, these circumstances lack "genuinely retroactive effect,"[152] because they do not "affect[] substantive rights, liabilities, or duties."[153] But where a statute "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past,"[154] there is true "retroactive effect" and the presumption against retroactivity applies.[155]

C. Competing Definitions of Retroactivity

Although the Supreme Court has concluded that there is a presumption against retroactivity, one issue remains: What counts as retroactivity? The *Landgraf* majority gave us one answer, but Justice Scalia's concurrence provided another. And given changes in Court personnel over time, Justice Scalia's position may now have the upper hand. It is therefore useful to briefly consider the conflict.

As reviewed above, the *Landgraf* majority—authored by Justice Stevens and joined by Justices who are likewise no longer on the Court—relied on a formulation that distinguished between substantive and procedural provisions.[156] In the majority's view, only substantive changes can be "genuinely" retroactive.[157]

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146. *Id.* at 265–68.
147. *Id.* at 272.
148. *Id.*
149. *Id.* at 273–74 (quoting Am. Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 201 (1921)).
150. *Id.* at 275.
151. *Id.* at 276.
152. *Id.* at 277 (quotation marks omitted).
153. *Id.* at 278.
154. *Id.* at 269 (quoting Soc'y for Propagation of the Gospel v. Wheeler, 22 F. Cas. 756, 767 (No. 13,156) (CCNH 1814) (Story, J.)).
155. *Id.* at 280.
156. *See id.* at 277–80.
157. *Id.* at 245.

Justice Scalia criticized this distinction in his concurrence, pointing out that even the majority acknowledged that some procedural rules should not be applied retroactively, *e.g.*, where a complaint has already been properly filed, a new rule changing how complaints are to be filed would not apply.[158]

Joined by Justices Kennedy and Thomas, Justice Scalia advanced an alternative view of retroactivity: "The critical issue . . . is . . . what is the relevant activity that the rule regulates."[159] If the activity occurred before the effective date of the rule, the rule is retroactive and the presumption against retroactivity would apply regardless of whether the rule is substantive or procedural. Thus, in the example regarding the filing of a complaint, the relevant activity regulated by the new rule is the filing of a complaint. Where a complaint had already been filed, the application of the rule would be retroactive and would therefore be barred absent clear intent that the rule be retroactive.

Though the disagreement between Justice Scalia and the majority made no difference to the outcome in *Landgraf*, the two positions resulted in different outcomes in *Vartelas v. Holder*.[160] The *Vartelas* majority, which followed the *Landgraf* formulation of retroactivity, was written by Justice Ginsburg and joined by, of those still on the Court, Chief Justice Roberts and Justices Sotomayor and Kagan. Justice Scalia's dissent was joined by Justices Thomas and Alito.

The case concerned a provision of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) that limited the re-entry of permanent-resident aliens who had been convicted of certain crimes.[161] Such permanent residents were required to formally seek admission into the United States if they left for even a short period.[162] Vartelas had been convicted of a qualifying crime before Congress had adopted IIRIRA and, upon returning from a brief trip to see his parents in Greece, he was classified as seeking admission and ordered removed to Greece.[163]

The *Vartelas* majority concluded that the IIRIRA admissions requirement would be retroactive if applied to Vartelas, because it would attach a "new disability" to Vartelas's conviction under *Landgraf*.[164] The Court therefore applied the presumption against retroactivity and held that the admissions requirement should not apply to Vartelas.[165]

Justice Scalia, as in *Landgraf*, focused on "the activity a statute is intended to regulate."[166] If that activity occurred before IIRIRA's effective date, the statute is

158. *See id.* at 275 n.29 ("Of course, the mere fact that a new rule is procedural does not mean that it applies to every pending case."); *id.* at 290 (Scalia, J., concurring).
159. *Id.* at 291 (Scalia, J., concurring).
160. 566 U.S. 257 (2012).
161. *Id.* at 260.
162. *Id.*
163. *Id.*
164. *Id.* at 269–70.
165. *Id.* at 272.
166. *Id.* at 277 (Scalia, J., dissenting).

retroactive under Justice Scalia's framework.[167] Otherwise, it is prospective. In Justice Scalia's view, "the *regulated activity* is reentry into the United States," even though the class of aliens for whom formal admission is required was defined by a past crime.[168] Since Vartelas's attempted reentry took place after IIRIRA's effective date, the statute's application to him would not be retroactive. This was demonstrated by the fact that Vartelas could have avoided the admissions requirement after IIRIRA became effective by remaining in the United States.[169] That the statute was triggered by a "postenactment activity" showed that it was not retroactive.[170]

III. RATIFICATION AND RETROACTIVITY

Ratification as a method of curing appointments and removal defects has been thoroughly criticized. The government, however, has successfully advanced the doctrine in some lower courts, thereby avoiding merits determinations on various unconstitutionally structured offices.[171] This maneuver has succeeded, in part, because the primary arguments against the D.C. Circuit's ratification doctrine are based on offering a competing version of ratification from the common law. Although the Supreme Court has indicated that common law principles apply to ratifications of executive officials' actions,[172] the lack of Supreme Court case law directly on point in appointments and removal cases has prompted some lower courts to follow the D.C. Circuit's lead instead.

The presumption against retroactivity, however, is not so easy to ignore. Not only does it apply no matter which version of ratification a court adopts, but there is extensive case law on the matter at every level of the federal judiciary. This Part will explore how the presumptions apply to rule-ratifications, ultimately concluding that whether or not rule-ratifications are conceived as retroactive rulemaking, the presumptions would usually require concluding rule-ratifications are not authorized by statute.

A. Ratifications as Retroactive Rulemaking

When a rule is ratified, the presumptions considered by *Greene*, *Thorpe*, and *Landgraf* do not have direct application, as they only apply in the absence of clear intent of retroactivity. And ratification is inherently retroactive. By definition, it is "the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all

167. *Id.*
168. *Id.*
169. *Id.* at 278.
170. *Id.*
171. *See generally* Damien M. Schiff, *Neither Safe, Nor Legal, Nor Rare: The D.C. Circuit's Use of the Doctrine of Ratification to Shield Agency Action from Appointments Clause Challenges*, 44 SEATTLE U. L. REV. 771 (2021).
172. *See* Fed. Election Comm'n v. NRA Pol. Victory Fund, 513 U.S. 88, 98 (1994).

persons, is given effect as if originally authorized by him."[173] Thus where ratification is clearly intended, the ratifier necessarily also clearly intends for the ratification to be retroactive to the time that the ratified action was taken.

Bowen, however, applies whether or not clear intent of retroactivity exists. Recall that *Bowen* held that a retroactive regulation—even an explicitly retroactive regulation such as the one in *Bowen*[174]—must be supported by "an express statutory grant" of retroactive-rulemaking power, because a plain grant of rulemaking authority "will not, as a general matter, be understood to encompass the power to promulgate retroactive rules."[175]

Bowen conditions effective ratification on authority for retroactive rulemaking, because ratification is effectively retroactive rulemaking. Before a ratification is issued, a rule issued by an improperly appointed or tenure-protected official has no effect.[176] Because the rule's issuer did not possess his power constitutionally, the rule is no more valid than one purported to be issued by students playacting as government officials.[177] Only with effective ratification does the rule, retroactively, validly impose obligations and liabilities on regulated parties. Ratification of a rule thus has the effect of retroactive rulemaking.

Consider the case of a defendant in an enforcement action who raises an Appointments Clause challenge to the rule under which the agency presses his liability. Assuming the challenge is meritorious, the rule is void, and he had no obligations and liabilities thereunder when he took the actions for which the agency has sued him. Upon ratification, however, the rule is given effect.[178] His past actions now become subject to the obligations created by the ratification. The rule did not constitutionally exist before; now it does. In *Landgraf*'s language, the ratification, by way of a rule, "creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations

173. RESTATEMENT (SECOND) OF AGENCY § 82 (1958).

174. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 207 (1988).

175. *Id.* at 208–09.

176. As previously discussed, the Supreme Court has recently indicated that officers improperly shielded from removal, unlike those improperly appointed, do not "lack[] the authority to carry out the functions of the office," so that their actions are not "void"—at least when considering whether to grant "retrospective relief." Collins v. Yellen, 141 S. Ct. 1761, 1787–88 (2021). Justice Gorsuch pointed out that the Executive Vesting Clause conditions an official's exercise of Executive authority on his control by the President through removability. *Id.* at 1795 (Gorsuch, J., concurring in part). In the absence of proper removability, such an official has "no authority at all." *Id.* Nevertheless, *Collins* necessitates a caveat that actions taken by improperly tenure-protected officials are not necessarily void, at least retrospectively. Whether the action is void prospectively is an open question. *See* Petition for Writ of Certiorari, Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., No. 22-448 (U.S. Nov. 14, 2022). This discussion continues on the assumption that, at least under some circumstances, removal violations cause the relevant actions to be void. This wrinkle also does not affect our consideration of Appointments Clause challenges, as it is undisputed that actions taken by improperly appointed officials are void. *See Collins*, 141 S. Ct. at 1787–88.

177. *Cf. Model Congress*, WIKIPEDIA, https://en.wikipedia.org/wiki/Model_Congress.

178. Assuming, that is, that there are no bars to the ratification's effectiveness. *See* Schiff, *supra* note 171.

already past."[179] Or in Justice Scalia's words, the ratification, through the ratified rule, "intend[s] to regulate" behavior predating the ratification by validating a regulation as of the regulation's own issuance.[180] Because the enforcement-action defendant's liability depends on his pre-ratification actions rather than "post-enactment activity," the ratification clearly retroactively imposes liability through the rule.[181]

In fact, the retroactive regulation in *Bowen* was very similar to a ratification. After the 1981 rule had been invalidated by a court, the Secretary of Health and Human Services simply reissued the rule in 1984 with retroactive effect from 1981 to 1982, allowing her to claw back payments made under the regulations preexisting the 1981 rule.[182] "In effect, the Secretary had promulgated a rule retroactively, and the net result was as if the original rule had never been set aside."[183] So too with ratification, which has the effect of promulgating a rule retroactively, with the net result of giving effect to a rule that was previously void.

Not only does ratification have the *effect* of a retroactive rule but contained within a ratification is the essential step of a rulemaking. In a proper rulemaking, a constitutionally appointed and removable officer authorizes the issuance of a rule, whereupon another official may take the ministerial steps to see it published in the Federal Register. In that process, the substantive exercise of rulemaking power is not in the publication of the rule but in its authorization, which is why an officer must do the latter but an employee may do the former. When a rule is ratified, the officer retroactively supplies that missing substantive step.[184] Of the steps involved in rulemaking, then, *Bowen*'s restriction on the adoption of a retroactive rule should apply most of all to the officer's retroactive authorization.

Under this analysis, *Bowen*'s requirement of an explicit authorization for retroactive rulemaking will normally disallow the ratification of rules. Statutes generally authorize rulemaking by reference to section 553 of the Administrative Procedure Act, and that section supplies no congressional intent, clear or otherwise, to allow retroactive rules.[185] In fact, as Justice Scalia pointed out in his *Bowen* concurrence,[186] the APA specifically defines "rule" as statements with "future effect."[187] Though agencies' organic statutes or other substantive statutes

179. Landgraf v. USI Film Prods., 511 U.S. 244, 269 (1994) (simplified).
180. Vartelas v. Holder, 566 U.S. 257, 277 (2012) (Scalia, J., dissenting).
181. *Id.* at 278.
182. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 207 (1988).
183. *Id.*
184. Cook v. Tullis, 85 U.S. 332, 338 (1873) (It is "well settled" that ratification "operates upon the act ratified precisely as though authority to do the act had been previously given[.]"); RESTATEMENT (SECOND) OF AGENCY § 82 (1958) (A ratified act "is given effect as if originally authorized by" the ratifier.).
185. 5 U.S.C. § 553.
186. *Bowen*, 488 U.S. at 216 (Scalia, J., concurring).
187. 5 U.S.C. § 551(4).

may explicitly authorize retroactive rules and of course would require specific analysis in any given situation, such provisions are rare.[188]

Consider, for example, *Moose Jooce*. Recall that the rule at issue subjected vaping products to the FDA's authority under the Family Smoking Prevention and Tobacco Control Act.[189] The Act states that its provisions "shall apply to . . . any other tobacco products that the Secretary by regulation deems to be subject" to the statute[190] and that "[e]ach rulemaking under this subchapter shall be in accordance with chapter 5 of Title 5," that is, rulemaking shall be conducted pursuant to the APA.[191] Plainly, these provisions do not provide clear intent (or any suggestion at all) that the Secretary or the FDA Commissioner, who had ratified the rule in *Moose Jooce*, may "deem" tobacco products retroactively. Yet, that was the effect of the ratification. Under *Bowen*, therefore, the ratification would have been *ultra vires*.[192]

If *Bowen*'s requirement for statutory authority for retroactive rulemaking did not apply, the results in *Moose Jooce* and elsewhere would be absurd. In *Bowen*, the Secretary for Health and Human Services argued that the Court should allow, even in the absence of statutory authorization for retroactive rulemaking, "reasonable 'curative' rulemaking—that is, the correction of a mistake in an earlier rulemaking proceeding."[193] The Court rejected this view, and Justice Scalia in concurrence stressed that "acceptance of the Secretary's position would make a mockery of the APA, since agencies would be free to violate the rulemaking requirements of the APA with impunity if, upon invalidation of a rule, they were free to reissue that rule on a retroactive basis."[194] So too where ratification is used to correct a structural violation in an earlier rulemaking proceeding. With ratification available, unauthorized persons could purport to issue any number of rules, none of which would have any effect. Yet mindful regulated parties would be compelled to conform their behavior to these void rules because, at any moment, a properly appointed and removable officer could adopt any of these rules with retroactive effect—all without clear authorization for retroactivity from Congress. This too would "make a mockery of" the Appointments Clause and the President's removal powers.[195]

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188. *Bowen*, 488 U.S. at 224 (Scalia, J., concurring) (pointing out that very few cases have approved retroactive regulations and concluded that such regulations "are evidently not a device indispensable to efficient government").

189. Moose Jooce v. Food & Drug Admin., 981 F.3d 26, 27 (D.C. Cir. 2020).

190. 21 U.S.C. § 387a(b).

191. *Id.* § 387a(d).

192. Since the statute is enforced with criminal penalties, the retroactive "deeming" of a tobacco product may also face restrictions from the Ex Post Facto Clause. *See* Beazell v. Ohio, 269 U.S. 167, 169 (1925) (The Ex Post Facto Clause prohibits "any statute which punishes as a crime an act previously committed, which was innocent when done.").

193. *Bowen*, 488 U.S. at 225 (Scalia, J., concurring).

194. *Id.* (simplified).

195. *Id.*

B. Ratification as a Non-Rulemaking Action

If ratification of rules were not treated as rulemaking at all, such that *Bowen*'s requirement for retroactive rulemakings were inapplicable, ratification's validity would be even more tenuous. Framing rule-ratification as a kind of rulemaking supplies ratification with a plausible statutory basis in rulemaking authorizations like that contained in the APA (even if that statutory basis is constrained by *Bowen*) and would allow a rule-ratification where an underlying statute authorized retroactive rules. But if rule-ratifications are not rulemakings, such ratifications would lack any statutory hook at all, retroactive or not. Agencies and agency officials have only the powers that Congress grants them, and if rule-ratification lacks statutory support, it is *ultra vires*.[196]

To be sure, Congress is sometimes understood to have impliedly authorized certain related agency actions. For example, when Congress grants power to an official, some courts, including the D.C. Circuit, treat that grant as also impliedly authorizing the official to delegate that authority to a subordinate official.[197]

But the ratification power cannot be granted to an official in the absence of clear intent to do so because it is retroactive, with all the potential for unfairness that entails. *Bowen*'s limitation on retroactive rules was derived from the more general principle, stemming from the *Landgraf* line of cases, that "congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result."[198] Thus, where statutes authorizing administrative actions are silent as to retroactivity, they do not authorize retroactive administrative action. So whether ratification is considered a kind of rulemaking, departmental housekeeping such as that authorized under 5 U.S.C. § 301, some other kind of agency action, or simply its own category of agency action, it is forbidden in the absence of express authority for retroactive action.[199]

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196. West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022).

197. *See* U.S. Telecom Ass'n v. FCC, 359 F.3d 554, 565 (D.C. Cir. 2004).

198. *Bowen*, 488 U.S. at 208.

199. This answers the contention that, of agency actions, anti-retroactivity restrictions apply only to rulemaking—with the result that, if ratification is not rulemaking, anti-retroactivity restrictions (from the lines of cases under discussion) do not apply. The contention is a reasonable one, as the presumption against applying a regulation retroactively was derived as a corollary from the anti-retroactivity presumption for legislation, relying on the similarity between legislation and regulation. Hence Justice Scalia's emphasis that "[i]t is important to note that the retroactivity limitation applies *only* to rulemaking," whereas agency adjudications may be retroactive. *Bowen*, 488 U.S. at 224 (Scalia, J., concurring). But these arguments only address the *direct* application of the anti-retroactivity presumption against agency actions. The presumption also applies against agency actions indirectly, through the statute authorizing the agency action. By requiring that statutes not be considered to have retroactive effect, including through the agency action it authorizes, unless there is clear intent to the contrary, the presumption has effect on all agency actions. Although administrative "adjudications" are beyond the scope of this Article, further application of this reasoning may show that, despite *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947) (*Chenery II*) (justifying adjudicatory rulemaking on the need to solve "problems . . . which the administrative agency could not reasonably foresee"), rulemaking-by-adjudication is usually not authorized by statutory authorizations of adjudications—even if such authorizations inherently allow plain adjudication of past liabilities based on established standards.

C. Treating Ratifications as Prospective?

In the *Landgraf* line of cases, when courts refuse to apply a regulation or statute retroactively under the anti-retroactivity presumption, the measure's prospective validity or operation is not affected.[200] Likewise, when courts applying *Bowen* find that a statutory grant of rulemaking power does not authorize retroactive rules, the courts—at least in those circuits that subscribe to severability analysis for regulations[201]—do not typically invalidate the rules completely.[202] Rather, in the absence of statutory authority for retroactivity, courts applying severability would be expected to preserve the rules' prospective effect.[203] Thus, the question might be fairly posed: Even if a rule-ratification's retroactive effect is impermissible, should courts treat the ratification as prospectively validating a rule?

Allowing ratification to prospectively validate a rule would not alter the outcome where a structural challenge is raised in defense against an enforcement action, because the question there is the challenger's past liability under the rule. But recall that rule-ratification historically has taken place where the structural challenge is raised offensively.[204] Consider again *Moose Jooce*. Above, we concluded that the application of *Bowen*'s rule would disallow the ratification there for lack of statutory authority for retroactive rulemaking. But the *Moose Jooce* plaintiffs requested only prospective relief: declaratory judgment that the rule there was unlawful and an injunction setting the rule aside and forbidding its enforcement. In such cases, if the ratified rule was valid from the moment of ratification, prospective relief may be improper, and the suit would be in danger of mootness.[205]

But the idea of allowing ratifications to prospectively (though not retrospectively) validate rules falls apart on closer examination. When evaluating a *rule*, the fact that there are two parts to, or two applications of, the rule—"a part of the rule that has a solely prospective effect" and "another part [that] gives the rule a

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But see Bowen, 488 U.S. at 222 (Scalia, J., concurring) ("[I]t is obviously available to the agency to 'make' law retroactively through adjudication . . . .").

200. INS v. St. Cyr, 533 U.S. 289, 320 n.45 (2001) ("[A] statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously prospective[.]").

201. *E.g.*, Am. Petroleum Inst. v. EPA, 862 F.3d 50, 71 (D.C. Cir. 2017).

202. *See* Cath. Soc. Serv. v. Shalala, 12 F.3d 1123, 1126 (D.C. Cir. 1994) (upholding "a part of the rule that has a solely prospective effect" despite the impermissible retroactive effect of another part of the rule). This was not done in *Bowen* itself, because the 1984 rule there was purely retroactive, operating between 1981 and 1982. *Bowen*, 488 U.S. at 207. The removal of the retroactive portion of the rule left no rule at all.

203. It is arguable that courts may not temporally slice up a rule in this way. After all, rules successfully challenged under the APA must be "set aside." 5 U.S.C. § 706(2). Nevertheless, some courts have interpreted that requirement as allowing only the offending portions of a rule to be set aside. *See* Ariz. Pub. Serv. Co. v. U.S. EPA, 562 F.3d 1116, 1122 (10th Cir. 2009) ("We may partially set aside a regulation if the invalid portion is severable.").

204. *See supra* pp. 434–35.

205. Barring, of course, exceptions to mootness. *See, e.g.*, Already, LLC v. Nike, Inc., 568 U.S. 85, 90 (2013).

retroactive character"[206]—makes severability analysis theoretically possible. That's because having those two parts makes it possible to ask whether they "operate entirely independently of one another," whether the agency "would have adopted the severed portion on its own," and so ultimately whether the two parts should be severed.[207]

A ratification, however, has no parts. It is "the affirmance by a person of a prior act . . . whereby the act . . . is given effect as if originally authorized by him."[208] An affirmance, that is an authorization, is a single act. And it operates upon a single act: the issuance of a rule. This is key. Because the affirmance operates just once by retroactively authorizing the issuance of a rule, the affirmance has no temporal applications by which to be divided.[209] Furthermore, ratification does not act upon regulated parties prospectively or retroactively, because it does not act upon regulated parties at all but rather acts upon the issuance of a rule; and so it cannot be divided by its application to parties either. Finally, even the ratified act—the issuance of the rule—has no parts. There do not exist retroactive and prospective parts of the *issuance* of a rule, even if there may be such parts to a *rule*. The affirmance thus also cannot be divided between the affirmance of some part of the rule's issuance and some other part.[210]

Of course, I previously described ratification as effectively creating a retroactive rule. But that is not true for all purposes. Ratification creates rights and imposes liabilities where before there had been none, and it does so through the operation of a rule (rather than, *e.g.*, an adjudication). In that sense, it has the effect of retroactive rulemaking from the standpoint of rights and liabilities. But that does not mean it *is* a rule with multiple parts that might be severed.

The impulse to allow ratification to operate prospectively is implicitly based on treating the ratification and the original issuance of the rule as combining to produce, at the moment of ratification, a ratified rule and *only then* interrogating the retroactivity of the ratified rule, whereupon one thinks to discard the effectively retroactive part of the ratified rule. That chain of logic errs at the first step: For a ratification to act on the original issuance of a rule at all, there must be statutory authorization for that retroactive action. In the absence of such authorization, there is no ratification and no ratified rule.

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206. *Cath. Soc. Serv.*, 12 F.3d at 1126.

207. Am. Petroleum Inst. v. EPA, 862 F.3d 50, 71 (D.C. Cir. 2017) (simplified and alteration omitted).

208. RESTATEMENT (SECOND) OF AGENCY § 82 (1958).

209. It is unsurprising that ratification cannot be divorced from its retroactive effect. The nature and purpose of ratification is its retroactive effect. If a principal required only prospective effect, he could simply take the action himself in the present.

210. *See* RESTATEMENT (SECOND) OF AGENCY § 96 (1958) ("A contract or other single transaction must be affirmed in its entirety in order to effect its ratification.").

CONCLUSION

The adoption and spread of the D.C. Circuit's doctrine of ratification shields from judicial review persistent violations of structural constitutional violations meant to keep powerful federal officials accountable to the people. Perhaps the doctrine is motivated by the sense that no harm is done when a properly appointed and removable officer has ratified the agency action at hand. In such circumstances, courts are likely reluctant to allow litigants to question the constitutionality of government positions, with the potentially significant consequences that follow.[211]

But as this discussion shows, the harm is real, particularly in the rulemaking context.[212] The plain fact is that, prior to a ratification, no valid rule exists to impose obligations and liabilities on a regulated party; and ratification purports to validate those obligations and liabilities retroactively. This has all the potential for unfairness and abuse meant to be prevented by "a legal doctrine centuries older than our Republic."[213] Litigants and courts faced with ratification should take heed of that doctrine and, applying it, conclude that rule-ratification is not permitted except where authorized by the clear intent of Congress. Only then can courts know that "Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness."[214]

211. *Cf.* Collins v. Yellen, 141 S. Ct. 1761, 1799 (2021) (Gorsuch, J., concurring in part) (attributing the majority's weak remedy to "blanch[ing]" at "unwinding or disgorging hundreds of millions of dollars that have already changed hands").

212. *But cf.* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 225 (1988) (Scalia, J., concurring) ("The issue is not whether retroactive rulemaking is fair . . . . The issue is whether it is a permissible form of agency action . . . .").

213. Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994).

214. *Id.* at 268.