Unconstitutional Federalism: A Call to Reinvigorate the Appointments Clause

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ABSTRACT

The Appointments Clause is one of the United States Constitution's vital structural limits on government power—it protects liberty by helping to enforce the separation of powers. Over time, as the federal government has continued to grow, conflicts with the structural limits on government power have inevitably increased, and will continue to do so. In response, Congress has increasingly tried to work around those limits, including through the increased use of state actors to achieve federal policy goals under the guise of "cooperative federalism." In the Appointments Clause context, this can lead to constitutional problems where state actors are taking actions only allowed by Officers of the United States who are appointed pursuant to the Appointments Clause. This paper looks at the historical underpinnings of the clause and the caselaw that has developed around it. The paper then turns to various statutes adopted under the guise of cooperative federalism and calls for a reinvigoration of the Appointments Clause as a means of pushing federal policy back toward competitive federalism and thereby reining in the ever-growing federal administrative state.

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INTRODUCTION

"If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."[1] For this reason, "[a]mbition must be made to counteract ambition."[2] These are the baseline arguments for the separation of powers, which serves as the cornerstone of our federal republic.

The separation of powers in our federal constitution protects liberty by ensuring that too much power is not concentrated in one place, and that those who exercise those powers are accountable for their actions. Our Constitution creates a number of structural safeguards in furtherance of the separation of powers. There are the obvious ones: vesting the legislative, executive, and judicial power in the three branches of government. And there are the less obvious. The Appointments Clause falls into the latter category.

Yet, there can be little doubt that the Appointments Clause is "among the significant structural safeguards of the constitutional scheme."[3] Indeed, "[t]he principle of separation of powers is embedded in the Appointments Clause."[4]

The text of the Appointments Clause[5] provides that the President:

> . . . shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Hamilton argued the Appointments Clause was the best method to accomplish its purpose: "It is not easy to conceive a plan better calculated than this to promote a judicious choice of men for filling the offices of the Union."[6]

Our Supreme Court has further explained: "The Framers understood, however, that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people."[7] So viewed, the

1. THE FEDERALIST No. 51 (James Madison).
2. *Id.*
3. Edmond v. United States, 520 U.S. 651, 659 (1997).
4. Freytag v. Comm'r, 501 U.S. 868, 882 (1991).
5. U.S. CONST. art II, § 2, cl. 2.
6. THE FEDERALIST No. 76 (Alexander Hamilton).
7. *Freytag*, 501 U.S. at 884.

Appointments Clause is a vital protection on liberty, intended to ensure government officials are controlled and accountable to the people they serve.

As the behemoth that is the federal bureaucracy continues to grow year after year, conflict with the structural limits on government has become inevitable and occurs often. As the federal bureaucracy continues to grow, Congress has implemented more and more "cooperative federalism" programs wherein states are incentivized[8] to do the bidding of the federal government and help achieve federal policy goals. As will be discussed later in this paper, healthcare, various permitting programs, even educational programming, have all been worked into cooperative federalism schemes by Congress to achieve their goals.

But when do cooperative federalism schemes go too far? Courts have struck down some congressional actions as too coercive on the states.[9] But relying on the Court to limit the commerce power still leaves Congress with tremendous leeway to turn states into de facto federal administrators. The Appointments Clause, at its core, is designed to ensure that those who act on behalf of the federal government are held accountable for their actions in furtherance of federal laws. But all too often cooperative federalism schemes empower state actors to achieve federal policy goals, and in so doing effectively dilute or eliminate this accountability altogether.

This paper begins by looking at the Appointments Clause in its historical context, and the development of major caselaw changes over time through today. With that foundation, the paper turns to look at how the Appointments Clause has been interpreted in situations where federal power has been devolved down to state actors and the legal principles that govern such delegations of power. This caselaw review spanning hundreds of years shows that Courts have largely failed to adequately police the Appointments Clause, and how a complete and clear test is still not available.

Next, the paper reviews federal statutes to explain how these cooperative federalism principles work in practice, with the results suggesting that Courts need to seriously re-engage the Appointments Clause and clearly state the line between a valid congressional program and unconstitutional federal avoidance of the Appointments Clause.

Finally, the paper suggests ways that courts could develop a test to reinvigorate the Appointments Clause and live up to the founders' promise to embrace a future where *competitive* federalism rules the day and rather than control how states achieve federal policy goals, federal laws would instead unleash the laboratories of democracy in the states to innovate as the founders intended. This outcome would not only better protect liberty, but it would ensure our constitutional principles remain intact.

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8. *See* Richard Epstein & Mario Loyola, *Saving Federalism*, NAT'L AFFS., Summer 2014, at 2.

9. *See, e.g.*, NFIB v. Sebelius, 567 U.S. 519 (2011) (striking down part of the Affordable Care Act as an improper use of the commerce clause to coerce states).

BACKGROUND ON THE APPOINTMENTS CLAUSE

A. The Founders' View

Any review of the Appointments Clause must necessarily begin with some historical context regarding what the individuals who developed that clause intended for it to mean. The Supreme Court has highlighted such historic knowledge throughout several of its Appointments Clause opinions, as discussed *infra*.

"The 'manipulation of official appointments' had long been one of the American revolutionary generation's greatest grievances against executive power . . . because 'the power of appointment to offices' was deemed 'the most insidious and powerful weapon of eighteenth century despotism.'"[10]

It is likely for this reason that one of the charges brought in the Declaration of Independence was that the King "has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance."[11] The creation of new offices and appointment of government officials to restrict individual liberty was at the forefront of the minds of the founders when they met to form our republic.

For the founders, separating the powers of government (including the appointment power) was one way to help ensure liberty: "The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787."[12]

In *Freytag v. Commissioner of Internal Revenue,* the Supreme Court explained the historical development of the Appointments Clause from the constitutional convention:

> Although the debate on the Appointments Clause was brief, the sparse record indicates the Framers' determination to limit the distribution of the power of appointment. The Constitutional Convention rejected Madison's complaint that the Appointments Clause did "not go far enough if it be necessary at all": Madison argued that "Superior Officers below Heads of Departments ought in some cases to have the appointment of the lesser offices." The Framers understood, however, that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people. Thus, the Clause bespeaks a principle of limitation by dividing the power to appoint the principal federal officers—ambassadors, ministers, heads of departments, and judges—between the Executive and Legislative Branches. Even with respect to "inferior Officers," the Clause allows Congress only

10. *Freytag*, 501 U.S. at 883 (quoting Gordon S. Wood, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 79 (1969)).

11. THE DECLARATION OF INDEPENDENCE para. 12 (U.S. 1776).

12. Buckley v. Valeo, 424 U.S. 1, 124 (1976).

> limited authority to devolve appointment power on the President, his heads of departments, and the courts of law.[13]

While the original liberty-protecting purposes of the clause are clear, it is less clear how the clause itself was intended to be applied to individual positions in the federal government. How far the founders intended for the Appointments Clause to go, and whom it covers, have also been subject to some debate over the ensuing centuries since the constitutional convention that drafted it.

Perhaps out of necessity due to the sheer size of the federal bureaucracy,[14] it is the view of the Court in *Germaine* that is followed today. The Supreme Court, Justice Thomas' viewpoint aside, has recognized that not all federal employees are "officers" subject to the Appointments Clause.

B. The Text of the Clause

With that background, the paper now turns to the text of the clause itself. The text itself breaks appointments into one of two categories of offices which must be established by federal law: (1) principal officers such as "Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for" who may only be Nominated by the President and with the advice and consent of the Senate appointed; and (2) "inferior officers" whose appointment Congress may vest, "as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."[15]

The Constitution's text provides no explanation as to how to differentiate between the two, and as will be discussed *infra*, the Supreme Court has interpreted this provision and developed the law in this area over time. The current caselaw instructs that an "inferior" officer is one who is a subordinate to a principal officer, while a "principal" officer answers to no one (except, of course, the President).[16]

The text of the Appointments Clause itself provides no other guidance, and beyond the limited debate at the constitutional convention, there is little else to analyze with regards to the meaning of these clauses. As a result, over the ensuing centuries the Supreme Court has issued a number of opinions building a basis of Appointments Clause jurisprudence in an attempt to shed some light on the meaning of these provisions and provide some guidance to Congress.

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13. *Freytag*, 501 U.S. at 883–84 (citations omitted).

14. According to the federal Office of Personnel Management, the United States currently employs 1,869,986 civilians across all agencies. OFFICE OF PERSONNEL MANAGEMENT, FEDERAL CIVILIAN EMPLOYMENT (2017).

15. U.S. CONST. art. 2, § 2, cl. 2.

16. *See* Edmond v. United States, 520 U.S. 651, 661 (1997).

C. Caselaw Development

The development of the caselaw in this area has been a slow slog in the history of the Court; the two seminal cases on the topic came to the court nearly a hundred years apart,[17] and there are still some significant questions that must be answered.

1. *Marbury v. Madison*

One of, if not the, most famous cases in Supreme Court history was at its core an Appointments Clause case: *Marbury v. Madison*.[18] Most remembered for its role in establishing the concept of judicial review, many are not familiar with the specifics of the case, in which the Court explained the process of making an appointment under the Constitution.

The dispute before the Court in *Marbury* was the result of some lame-duck appointments by outgoing President Adams and the Federalist Congress. The Federalists had created several new offices, and President Adams, with the advice and consent of the Senate, appointed individuals to those various offices in an attempt to thwart their successors.

Many such offices were filled, but several individuals had gone through the complete appointment process without actually *receiving* their commissions. As a result, Marbury and several other of the new appointees brought an action seeking to compel the new Secretary of State to deliver their commissions. The Supreme Court looked at the Appointments Clause and explained the steps involved, and concluded that they ordinarily would be entitled to their commissions, because delivering the commissions was a "duty" rather than a "voluntary" act.[19]

However, as every first-year law student has learned, rather than actually ordering such relief the Court instead declared the law under which relief was sought conflicted with the Constitution, and the concept of judicial review was established.

In doing so, however, the Court added some analytical structure to the Appointments Clause. In *Marbury*, Chief Justice John Marshall summarized the constitutional steps for appointing an Officer of the United States:

> 1st. The Nomination. This is the sole act of the President, and is completely voluntary. 2nd. The Appointment. This is also the act of the President, and is also a voluntary act, though it can only be performed with the advice and consent of the senate. 3d. The Commission. To grant a commission to a person appointed, might perhaps be deemed a duty enjoined by the Constitution. 'He shall,' says that instrument, 'commission all Officers of the United States.'[20]

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17. *See infra*, pp. 344–47.
18. Marbury v. Madison, 5 U.S. 137 (1803).
19. *Id.* at 158–59.
20. *Id.* at 155–56.

2. *United States v. Germaine*

Seven decades later the Court issued what has become one of its two seminal Appointments Clause cases. In *United States v. Germaine*, 5 U.S. 508 (1878), the Court discussed *who* is an officer of the United States, as well as the difference between inferior and principal officers.[21]

The facts of *Germaine* are straightforward. A surgeon who did work for the federal government was indicted for extortion of the people the government sent him to examine. The federal statute upon which the surgeon was charged punished any "Officers of the United States" who were found guilty of extortion. So, the question the Court was tasked with answering was: is the Defendant an "officer" such that he could be prosecuted under that statutory provision, or not?

The Court in *Germaine*, citing the Appointments Clause, divided all federal office holders into two categories: principal officers and inferior officers. "That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt."[22] As noted *supra*, neither category includes mere employees of the federal government, who were not considered to be "officers" by the Court in *Germaine*.[23]

Principal officers, the Court wrote, "require[] a nomination by the President and confirmation by the Senate."[24] Inferior officers are those whose appointment is vested "in the President alone, in the Courts of law, or in the heads of departments."[25] Since the Defendant was appointed by neither the President nor the head of a Department (but rather, by the Commissioner of Pensions), the Court reasoned that he could not be an officer of the United States based upon those grounds.

Beyond simply applying this procedural appointment test, the Court also applied a more substantive test which looked more closely at the office and the duties assigned to it. For that test, the Court looked at "the nature of defendant's employment" and ultimately determined "it [was] equally clear that he is not an officer."[26] In making this determination under its substantive analysis, the Court looked at the "tenure, duration, emolument, and duties" of the office in question.[27] With regard to the "duties" assigned to an official, the court noted that to be an officer an individual must have "continuing and permanent" duties, whereas the surgeon's duties in that case were merely "occasional and intermittent."[28] Further, the Court noted that there was no regular appropriation made to pay

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21. *See* United States v. Germaine, 99 U.S. 508 (1878).
22. *Id.* at 510.
23. *Id.* (explaining the punishments under the statute only apply to "officers" and that if Congress intended it to apply to all federal employees, it would have stated as much).
24. *Id.* at 509–10.
25. *Id.* at 510.
26. *Id.* at 511.
27. *Id.*
28. *Id.* at 512.

compensation for the surgeon's position, and that he was "but an agent of the commissioner, appointed by him, and removable by him at his pleasure to procure information needed to aid in the performance of his own official duties."[29] That is, since the position was "intermittent" and not a regularly occurring duty, the court weighed that against his position being that of an "Officer of the United States." Taken together, these factors all indicated the defendant was an employee or an agent, and *not* an officer of the United States under the Court's substantive test, and as a result he could not be prosecuted under the statute at issue in the case.

Perhaps the biggest takeaway from *Germaine* is the Court's position that the duties assigned to an "Officer of the United States" must be ongoing—a concept that has come up again and again in more recent cases.

Finally, in one last takeaway from the opinion, the Court also made clear that when Congress creates a "department" it does so by giving to each of them the name of a "department" such as "Department of State or of the Treasury."[30] That is, the Court concluded in *Germaine* that for purposes of the Appointments Clause, a "department" is an entity deliberately created by Congress as such, which is important for analysis as to whether an individual has been lawfully appointed as an inferior officer or not.

3. *Shoemaker v. United States*

Some fifteen years after *Germaine* the Court considered the powers and duties of officers again. In *Shoemaker v. United States*,[31] the Court probed the constitutionality of a commission set up by Congress to oversee the acquisition of land for the creation of a public park in the District of Columbia. This commission consisted of "chief of engineers of the United States army, the engineer commissioner of the District of Columbia, and three citizens to be appointed by the president by and with the advice and consent of the senate, be, and they are by the act, created a commission . . . ."[32] In *Shoemaker*, the petitioner challenged that act of Congress, and one of the grounds by which the act was challenged was that including the grounds that Congress had "appointed" two individuals to the commission in violation of the Appointments Clause.[33] This was because two of the commissioners were the chief engineer of the army and the engineer commissioner of D.C.—offices that already existed.[34]

However, the Court rejected this argument on the grounds that those two individuals had already previously been nominated and appointed by the President with advice and consent of the Senate, and that, therefore, they were already

29. *Id.*
30. *Id.* at 510–11.
31. Shoemaker v. United States, 147 U.S. 282 (1893).
32. *Id.* at 284.
33. *Id.* at 300.
34. *Id.*

"Officers of the United States."[35] As a result, the Court held that those officers did not need to go through that full appointment process again simply because "additional duties, germane to the offices already held by them, were devolved upon them by the act . . . ."[36] The Court, summarizing its holding, stated that "Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed."[37]

Thus, the powers and duties that would indicate whether someone is an officer can change over time without impacting an individual's status as an officer, so long as the changes themselves are germane to those which the officer already possessed.

4. *Buckley v. Valeo*

Around eighty years after *Shoemaker*, the Supreme Court took up its second seminal Appointments Clause case. While the Court undertook other minor issues related to the Appointments Clause in the eighty years after it decided *Shoemaker*, the Court did not issue a significant decision in this area until its second seminal Appointments Clause case: *Buckley v. Valeo*.[38]

Like *Marbury*, *Buckley v. Valeo* is a hugely important Appointments Clause case that is often remembered only for the other issues that Court examined: In this instance, the First Amendment and campaign finance law dimensions of the controversy. *Buckley* involved a challenge to the Federal Elections Campaign Act of 1971 ("FECA"),[39] as amended in 1974.[40] That act (and its amendments) made a number of changes to federal election law, including by establishing certain limits on election donations and expenditures, by enacting new disclosure requirements, and by creating the Federal Elections Commission ("FEC") in order "to administer and enforce the legislation."[41]

In *Buckley*, the Court considered a number of challenges to FECA. As relevant for the purposes of this paper, one of the claims was that the manner of appointing the commissioners to the (then) newly-created FEC violated the Appointments Clause.

As originally created, the FEC was made up of six members: two were appointed by the Speaker of the House upon the recommendation of the majority leader and minority leader of the House; two by the President pro tempore of the Senate upon the recommendations of the majority leader and minority leader of the Senate; and the last two by the President. All such appointments required confirmation by a majority of both houses of the Congress.[42]

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35. *Id.* at 301.
36. *Id.*
37. *Id.*
38. Buckley v. Valeo, 424 U.S. 1 (1976).
39. *See* Pub. L. No. 92–225, 86 Stat. 3 (codified as amended 52 U.S.C. § 30101).
40. *See* Pub. L. No. 93–443, 88 Stat. 1263.
41. *Buckley*, 424 U.S. at 7.
42. *See* § 310(a)(1)(A)–(C), 88 Stat. at 1280–81.

Like in *Germaine*, the Court began its analysis in *Buckley* with a procedural appointment test, albeit in a somewhat different fashion than in *Germaine*. The Court's procedural analysis considered the structure of the FEC in light of the Appointments Clause and found it to be unconstitutional. Noting that there is "no provision of the Constitution remotely providing any alternative means for the selection of the members of the Commission or for anybody like them," the Court concluded that the FEC commissioners themselves must be subject to the Appointments Clause requirements.[43]

Next, the Court conducted the more substantive analysis of the specific powers and duties granted to the FEC Commissioners. The Court determined that some of those powers were of the kind that could "be discharged only by persons who are 'Officers of the United States' within the language of [the Appointments Clause]."[44] Since some of the powers granted to FEC Commissioners were only available to officers of the United States, those provisions of the act, the Court opined, "violate [the Appointments Clause]."[45]

The obvious question then is: what makes the power of an Officer of the United States distinct among the range of powers that the officers possess? The *Buckley* court did not provide a detailed answer, other than to say that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed . . . ."[46] This "significant authority" test would become a cornerstone of Appointments Clause jurisprudence going forward.

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These historic cases laid the foundation for the Court's ongoing understanding of how to construe the Appointments Clause: an officer of the United States is someone who occupies a "continuing and permanent" position,[47] and who is "exercising significant authority" on behalf of the United States.[48] That authority is allowed to change over time, so long as changes were germane to the original authority granted.[49]

D. Current Status

Building upon the foundation laid by *Germaine*, *Shoemaker*, *Buckley*, and other related cases throughout the Court's history, over the past approximately thirty years the Court has taken a relatively large number of Appointments Clause cases, further clarifying the meaning and scope of the Appointments Clause in more individualized and specific situations.

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43. *Buckley*, 424 U.S. at 127.
44. *Id.* at 140.
45. *Id.*
46. *Id.* at 126.
47. United States v. Germaine, 99 U.S. 508, 511 (1878).
48. *Buckley*, 424 U.S. at 126.
49. *See* Shoemaker v. United States, 147 U.S. 282, 301 (1893).

As the size of the federal bureaucracy continues to grow, it necessarily comes in conflict with the various structural limits on government contained in the Constitution. Therefore, it is not surprising that the Court has seemingly taken more and more cases dealing with the Appointments Clause—issues are arising more and more as the size of government continues to grow.

It is safe to assume that the founders would never have anticipated a federal government as large as we have now. Though the Court has opined that part of the Appointments Clause was the result of the founders "foreseeing that when offices became numerous" there would need to be different methods of appointing officers,[50] the sheer magnitude of the federal administrative state, and the breadth of issues that the federal government would involve itself in on a day-to-day basis, would certainly not have been foreseeable. The case law from the last three decades bears this out.

1. *Freytag v. Commissioner*

In 1991, the Supreme Court decided *Freytag v. Commissioner*,[51] which dealt with a question as to whether a particular federal official was an "inferior officer" subject to the Appointments Clause or a mere employee of the federal government.

The case itself involved a tax dispute that Freytag had appealed to the United States Tax Court, an Article I court created by Congress to hear such disputes.

Pursuant to federal law, the chief judge assigned the appeal to a "special trial judge" ("STJ"). The STJ heard the case and ultimately upheld the charges against Freytag. Freytag then appealed to the Fifth Circuit, arguing the appointment of the STJ in the case was not in compliance with the Appointments Clause and was therefore invalid.

Freytag argued that the STJ could not merely be an "employee" of the federal government because, like the FEC commissioners in *Buckley*, it had been given the powers and duties of Officers of the United States. For that reason, the STJ was not appointed in compliance with the Appointments Clause, meaning its decision was invalid.

On appeal, the government argued the STJ was just an employee, not an officer, because it lacked the authority to enter a final decision—that is, the government believed the STJ lacked the "significant authority" required under *Buckley* in order to identify it as an Officer of the United States.

The Court rejected the government's argument. After engaging in a substantive review of the STJ's specific duties and powers, the Court determined it was, in fact, an Officer of the United States. Specifically, the Court noted that the STJ position had been established by law, had duties and functions delineated by statute, and exercised significant authority (the Court explained: "[t]hey take testimony, conduct trials, rule on the admissibility of evidence, and have the power to

50. *Germaine*, 99 U.S. at 510.
51. Freytag v. Comm'r, 501 U.S. 868 (1991).

enforce compliance with discovery orders").[52] Further, the Court explained that "[i]n the course of carrying out these important functions, the special trial judges exercise significant discretion."[53]

Notably, the Court also opined that the fact that an inferior officer also performed duties ordinarily assigned to a regular employee was immaterial to the officer's status under the Appointments Clause. "The fact that an inferior officer on occasion performs duties that may be performed by an employee not subject to the Appointments Clause does not transform his status under the Constitution."[54]

Having concluded that STJs *were* inferior officers for purposes of the Appointments Clause analysis, the Court then reviewed whether STJs in that case were properly appointed.

The Court began its analysis by noting that "[i]t is beyond question in this litigation that Congress did not intend to grant to the President the power to appoint special trial judges."[55] Thus, to comply with the Appointments Clause's requirements the Tax Court must either be a "Department" or a "Court of Law," otherwise "it would follow that the appointment power could not be vested in the Chief Judge of the Tax Court."[56]

Citing *Germaine*, the Court rejected the idea that the Tax Court could be a Department, noting "[a]ccordingly, the term 'Heads of Departments' does not embrace 'inferior commissioners and bureau officers.'"[57] Recall that in *Germaine* the Court clarified that when Congress creates a "department" it does so by including in its name the word *department*.[58]

Because the Tax Court was not a "department" under *Germaine,* the only way the STJ's appointment could comport with constitutional requirements was if the Tax Court was a "Court of Law" as that term is used in the Appointments Clause.

Freytag had argued that for Appointments Clause purposes, only Article III courts could qualify as a "Court of Law." The Court rejected that argument, stating "[t]he text of the Clause does not limit the "Courts of Law" to those courts established under Article III of the Constitution."[59]

Having determined that STJs were inferior officers, and that the Tax Court which appointed them was a "Court of Law" within the meaning of the Appointments Clause, the Court affirmed the decision of the Court of Appeals.

Justice Scalia authored a concurring opinion in which he agreed with the outcome, but disagreed with the Court's determination that Tax Court was a "Court of Law," noting: "'the Heads of Departments' must reasonably be understood to

52. *Id.* at 881–82.
53. *Id.* at 882.
54. *Id.*
55. *Id.* at 884.
56. *Id.*
57. *Id.* at 886 (citing United States v. Germaine, 99 U.S. 508, 511 (1878)).
58. *Germaine,* 599 U.S. at 510–11.
59. *Freytag*, 501 U.S. at 888.

refer exclusively to the Executive Branch (thereby excluding officers of Congress) because 'the Courts of Law' obviously refers exclusively to the Judicial Branch."[60]

This distinction is largely irrelevant for purposes of this paper, but Justice Scalia's concurrence is nonetheless included because it shows that even after some two hundred years or so of jurisprudence there were still significant uncertainties about the application and understanding of the Appointments Clause and what the individual terms mean in practical application.

2. *Edmond v. United States*

In *Edmond v. United States*[61] the Court was asked to further clarify the difference between principal officers and inferior officers for Appointments Clause purposes.

Edmond dealt with the appointments of judges to the Coast Guard Court of Criminal Appeals. The Court's decision in *Edmond* was a welcome development because up until that point, as the Court noted, the caselaw did "not set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes."[62]

The Court discussed the history of the Appointments Clause, noting that the clause was "designed to preserve political accountability relative to important Government assignments . . . ."[63] With that purpose in mind, the Court then set forth a relatively simple test for differentiating between inferior and principal officers under the Appointments Clause, stating: "'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."[64]

In *Edmond,* the Court also reiterated some of the long-held principles of Appointments Clause jurisprudence, stating that the exercise of "'significant authority pursuant to the laws of the United States' marks, not the line between principal and inferior officer for Appointments Clause purposes, but rather, as we said in *Buckley*, the line between officer and nonofficer."[65]

This discussion of *Buckley* (and notably, the absence of the "continuing authority" test from *Germaine*[66]) is interesting and suggests perhaps that the "significant authority" test from *Buckley* had subsumed *Germaine's* "ongoing duties" test (in that to be significant, the duties had to be ongoing). If nothing else, the Court's

60. *Id*. at 903 (Scalia, J, concurring).
61. Edmond v. United States, 520 U.S. 651 (1997).
62. *Id*. at 661.
63. *Id*. at 664.
64. *Id*. at 663.
65. *Id*. at 662.
66. In fact, the *Edmond* Court did not mention *Germaine* at all, except to cite it for its statement that the Appointments Clause's "obvious purpose is administrative convenience." *Id*. at 660.

failure to mention *Germaine* underscores the need for a more straightforward enforcement of the Appointments Clause.

3. *Lucia v. United States*

Recently the Court took up another Appointments Clause case, *Lucia v. SEC*,[67] which involved a somewhat similar set of facts that we saw in *Freytag*.

Lucia was an investment advisor who was charged by the SEC with providing misleading investment information. An SEC Administrative Law Judge ("ALJ") was assigned to the case and ultimately determined Lucia had violated the law. In response, the ALJ issued fines and additional punishments against him.

Lucia appealed the case to the SEC itself, arguing that the ALJ was an "officer of the United States" who was not appointed pursuant to constitutional requirements, meaning the ALJ was not authorized to issue the ruling against Lucia. The SEC determined the ALJ was simply an employee of the agency and denied Lucia's appeal. In so doing, the SEC reasoned that because the SEC itself reviews all of the ALJ's decisions, the ALJ was not acting as an officer of the United States.

Lucia appealed to the D.C. Circuit, which upheld the SEC's determination that the ALJ was not an officer of the United States. Meeting *en banc*, the D.C. Circuit split 5–5 and the Supreme Court then took the case on certiorari.

The Supreme Court began its analysis by doing what it refused to do in *Edmond*, reiterating the current tests as established by both *Germaine* ("an individual must occupy a "continuing" position established by law to qualify as an officer") and *Buckley* (the "significant authority" test).[68]

Many outside Court watchers saw this case as an opportunity for the Court to finally expound on those tests (in particular, the *Buckley* significant authority test) and to provide some meaningful clarity for litigants and government officials alike, but the Court had other plans: "Both the amicus and the Government urge us to elaborate on Buckley's 'significant authority' test, but another of our precedents makes that project unnecessary."[69]

Instead of expounding on any of the existing Appointments Clause jurisprudence, the Court simply applied its prior decision from *Freytag*, said the ALJ in *Lucia* was essentially the same as the STJ in *Freytag*, and found them to be Officers of the United States.

Perhaps the most interesting piece of the case came on the question of remedy, where the Court ordered a re-hearing of the case and banned the same ALJ from participating in that endeavor.[70]

Another interesting element of the opinion, as noted *supra*, was that Justice Thomas wrote a concurring opinion joined by Justice Gorsuch. That concurrence

67. Lucia v. SEC, 138 S. Ct. 2044 (2018).
68. *Id*. at 2051.
69. *Id*.
70. *Id*. at 2055–56.

argued that the Court was far too limited in its Appointments Clause jurisprudence.[71] Justice Thomas also added a historical tidbit that "[e]arly congressional practice reflected this understanding. With exceptions not relevant here, Congress required all federal officials with ongoing statutory duties to be appointed in compliance with the Appointments Clause."[72]

While some have argued *Lucia* opened the floodgates for some kind of significant swing in Appointments Clause jurisprudence,[73] the Court decidedly went in the *other* direction. Certainly, *Lucia* had consequences for ALJs in that the Court did provide some added clarity for those officers, although it is of limited value elsewhere in the federal administrative state outside of those quasi-judicial roles.

The Court had the opportunity to explain the concepts of significant authority, or to set forth the requirements of a "continuing" position, and it decidedly did not do so. *Lucia*, from that standpoint, is an important case, but one that highlights the need for the Court to re-engage and rethink its approach to the Appointments Clause.

4. *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC*

Shortly after *Lucia*, the Court took up *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC*,[74] this time dealing with the territory of Puerto Rico.

The basic background facts are laid out in the case: Congress attempted to help deal with Puerto Rico's financial crisis from the past decade by creating a Fiscal Control Board ("FCB") to oversee restructuring of Puerto Rico's debts. The Act creating the FCB gave "the President of the United States the power to appoint the Board's seven members without Senate confirmation, so long as he selects six from lists prepared by congressional leaders."[75]

The structure of the FCB was challenged on Appointments Clause grounds, arguing that the individual appointees had to be confirmed by the Senate. Reviewing the Appointments Clause, the Court discussed its important role in in the separation of powers and noted:

> The Founders addressed their concerns with the appointment power by both concentrating it and distributing it. On the one hand, they ensured that primary responsibility for nominations would fall on the President, whom they deemed

71. *Id.* at 2056 (Thomas, J., concurring).

72. *Id.* at 2057 (footnote and citations omitted).

73. *See, e.g.*, Steven D. Schwinn, *Lucia v. SEC and the Attack on the Administrative State*, AM. CONST. SOC'Y SUP. CT. REV. (2017–2018) (arguing "*Lucia* has significant implications for presidential authority and the separation of powers"). But Professor Schwinn's "concern" is misplaced; the Court in *Lucia* merely applied their longstanding (albeit, confusing and cumbersome) precedent, and the holding in *Lucia*, although significant, is largely limited.

74. Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020).

75. *Id.* at 1655.

> 'less vulnerable to interest-group pressure and personal favoritism' than a collective body. . . . On the other hand, they ensured that the Senate's advice and consent power would provide "an excellent check upon a spirit of favoritism in the President and a guard against the appointment of unfit characters.[76]

Bizarrely, the Court acknowledged that "the Appointments Clause has no Article IV exception"[77] but nonetheless upheld the appointments as a valid exercise under Congress' article IV powers (the Court held that the Appointments Clause "does not restrict the appointment of local officers that Congress vests with primarily local duties under Article IV, § 3, or Article I, § 8, cl. 17").[78]

In so doing, the Court found that even though those individuals were appointed pursuant to a federal law, because they were primarily local in nature, the Appointments Clause did not apply. While the application of this case is limited to territories and federally managed lands, it adds a bit of confusion to Appointments Clause jurisprudence and generally underscores the subjective nature of these cases, and once again, the need for greater clarity on enforcement from the Supreme Court overall.

5. *United States v. Arthrex*

Shortly thereafter, the Court took yet another Appointments Clause case, *United States v. Arthrex*.[79] The facts in this case were somewhat similar to those in *Freytag* and *Lucia*, and involved patent judges, and the validity of the appointments of newly created administrative patent judges ("APJs") within the Patent Trial and Appeal Board ("PTAB").

Arthrex, a medical device company, brought a claim that others were infringing on Arthrex's patent. The case went to a panel of APJs in PTAB, who ruled against Arthrex, and the appeal was taken to the Federal Circuit.

The Federal Circuit found the APJs were, in fact, principal officers of the United States under the Appointments Clause. To remedy this, the Federal Circuit ordered that the APJs would be "removable at will by the Secretary," thus making them "inferior" officers and in compliance with the Appointments Clause.[80]

In a rather confusing opinion from the Supreme Court which involved various majorities coming together for various parts of the opinion, five Justices never clarified whether they were actually principal officers or inferior officers but seemed to indicate they could not be the latter if their authority was "unreviewable," noting "the unreviewable authority wielded by APJs during *inter partes* review is incompatible with their appointment by the Secretary to an inferior office."[81] That is, while it did not say what type of officers the APJs were, the

76. *Id.* at 1657 (citations omitted).
77. *Id.* at 1657.
78. *Id.* at 1661.
79. United States v. Arthrex, 141 S. Ct. 1970 (2021).
80. *Id.* at 1978.
81. *Id.* at 1985.

Court did say that inferior officers could not have unreviewable authority, which suggested under such a scheme they would instead be considered "principal" officers.

The Court expressly stated, however, it was not trying to draw a clear difference between principal and inferior officers.[82]

As for remedy, a different majority ordered that the decisions must be reviewed by the Director of the patent office, thus removing, in the Court's view, any Appointments Clause concerns since there would no longer be unreviewable decisions.

Arthrex shows the Court continues to refuse to provide any actual meaningful guidance on the Appointments Clause, and instead, apparently, prefers to take a large amount of Appointments Clause cases on an *ad hoc* basis, with a focus on administrative judges in the Executive Branch.

* * *

That is the current state of Appointments Clause jurisprudence. The Court has focused heavily on administrative judges at various agencies, and that is where much of the impact from recent cases is felt.

Based on the most recent precedent, the Court seems content to rely upon the "continuing authority" argument form *Germaine* and the "significant authority" test from *Buckley,* although it is somewhat unclear if the later subsumes the former.

Additionally, the most recent cases all seem to focus on remedy, which is interesting, and of course, incredibly important, yet still limited to only the context of administrative law judges.

DEVOLVING FEDERAL AUTHORITY ONTO STATE ACTORS

A. Introduction

Having established the baseline of current Appointments Clause jurisprudence, and in so doing, made the case for the need for additional clarity or for the Court to step up its enforcement of Appointments Clause issues, the paper now turns to applying the Appointments Clause in various contexts. It begins with general devolutions of federal authority onto *state* actors (not to be confused with the local federal actors from *Aurelius*).

It should be noted at the outset that there is dispute as to whether any such devolutions can *ever* raise issues with the Appointments Clause, which itself is yet another reason why the Court needs to increase its involvement when it comes to the Appointments Clause. For example, the United States Department of Justice's Office of Legal Counsel has argued that non-federal actors can *never* raise concerns under the Appointments Clause, while on the other side, some

82. *Id.*

federal appellate circuits have implicitly recognized that they can by considering challenges on those grounds.

This paper takes the position that non-federal actors can, in fact, be empowered with significant authority under the laws of the United States, and that this is exactly what happens when Congress adopts various cooperative federalism schemes to achieve its stated policy goals. Such state officers thus become de facto federal officers in such a way that ought to require them to be appointed as Officers of the United States.

Where the individuals wielding the power of Officers of the United States are not appointed as provided for in the Appointments Clause, those laws are unconstitutional. A reinvigorated Appointments Clause must recognize this fact, and would have the effect of forcing Congress to either add greater accountability for these individuals (so that they comply with the Appointments Clause) or, more likely, amend these cooperative federalism programs so that they can embrace the idea of competitive federalism as our founders intended.

1. Department of Justice's Office of Legal Counsel's Opinion

The United States Department of Justice's Office of Legal Counsel (OLC) has long argued that the Appointments Clause cannot be triggered when talking about non-federal actors. ("The Appointments Clause simply is not implicated when significant authority is devolved upon non-federal actors.")[83] OLC claims that some questions are mistakenly brought as Appointments Clause issues, when they are actually separation of powers or delegation issues.[84]

At the outset, it is not a surprise that the Executive Branch would take this position; virtually all major federal policies now require state action under the guise of cooperative federalism to achieve. Requiring Appointments Clause compliance within those programs would make it more difficult for federal administrations to achieve their policy goals.

Nonetheless, as support for its claim, OLC cites to *Germaine* claiming the "founders intended appointment pursuant to the Appointments Clause only for 'persons who can be said to hold an office under the government about to be established under the Constitution.'"[85] OLC also cites to another Appointments Clause case from the decade before *Germaine*, in which the Court stated "[a]n office is a public station, or employment, conferred by the appointment of government . . . . The employment of the defendant was in the public service of the United States."[86]

First, as noted *supra*, "[t]he principle of separation of powers is embedded in the Appointments Clause."[87] While OLC frames Appointments Clause issues and

83. The Const. Separation of Powers Between the President and Cong., 20 Op. O.L.C., 124, 145 (1996).

84. *Id*. at 145 n.60.

85. United States v. Germaine, 99 U.S. 508, 510 (1878).

86. United States v. Hartwell, 73 U.S. 385, 393 (1868).

87. Freytag v. Comm'r, 501 U.S. 868, 882 (1991).

Separation of Powers issues as two unique things, the two cannot be separated. By their nature, an Appointments Clause issue is a Separation of Powers issue.

Second, OLC appears to ignore the fact that only an "Officer of the United States" can do certain (so called) "significant actions" on behalf of the United States. As the Supreme Court noted in *Buckley*, for example, "if Congress insists upon retaining the power to appoint, then the members of the Commission may not discharge those many functions of the Commission which can be performed only by 'Officers of the United States,' as that term must be construed within the doctrine of separation of powers."[88]

That is, the inquiry needs to focus on the *substance* of the powers being exercised. Only an "Officer of the United States" can do certain things. So, if those certain things are being done, and they are *not* being done by an Officer of the United States (say, by a state actor, for example), they necessarily raise Appointments Clause concerns, and those concerns are also likely going implicate separation of powers concerns, because the two are inseparable.

Instead, OLC reads in words to the Appointments Clause that simply do not exist. Their conclusion that devolving federal power onto non-federal officers can *never* implicate the Appointments Clause is simply incorrect. Congress has no ability to empower anyone to exercise the powers of an Officer of the United States without that individual being appointed pursuant to the Appointments Clause. Absent such an appointment, those powers simply *cannot* be exercised. Viewed another way, any time Congress empowers someone to act as an Officer of the United States (no matter who that person is) they are necessarily a de facto federal officer.

The Supreme Court said as much in *Buckley*:

> We think that the term "Officers of the United States" as used in Art. II, defined to include "all persons who can be said to hold an office under the government" in *United States v. Germaine*, supra, is a term intended to have substantive meaning. We think its fair import is that any appointee exercising significant authority pursuant to the laws of the United States is an "Officer of the United States," and must, therefore, be appointed in the manner prescribed by s 2, cl. 2, of that Article.[89]

While it may be *inconvenient* for the federal government to comply with the Appointments Clause, that is not a reason to ignore the Constitution's text, which plainly applies to "all persons *who can be said* to hold an office under the government."

88. Buckley v. Valeo, 424 U.S. 1, 118–19 (1976).
89. *Id.* at 125–26.

2. Contrary to OLC's Position, Some More Recent Appellate Caselaw Suggests that the Appointments Clause May Be Implicated when Significant Authority Has Been Devolved on Other Actors

Further pushing back on the OLC opinion, some courts more recently have gone the other direction and acknowledged that where Congress empowers individuals to act on behalf of the United States, it may well raise Appointments Clause issues if those individuals are not actually appointed in compliance with the Constitution.

One of the places we have seen Courts consider this is within the context of the Indian Gaming Regulatory Act ("IGRA"), and specifically the provision of that law that requires gubernatorial approval in order for the Secretary of the Interior to take land into trust.

In reviewing similar fact situations under IGRA, two separate appellate circuits came to similar conclusions, and in so doing both implicitly acknowledged that it is possible for a non-federal official to be an "Officer of the United States" within the terms of the Appointments Clause.[90]

a. Confederated Tribes

In 1997, the Ninth Circuit considered a challenge to the gubernatorial approval requirement in IGRA.[91] In that case, the Confederated Tribes of Siletz Indians of Oregon had applied to "have land taken in trust for their benefit for the purpose of establishing a gaming facility."[92] The Governor of Oregon, however, refused to approve such a transfer of land, and so the Secretary of the Interior, pursuant to the gubernatorial approval requirement, denied the Confederated Tribes' application.[93]

The District Court found that the Appointments Clause was triggered by the gubernatorial approval requirement "because it allows a state governor to 'veto' findings made by the Secretary of the Interior."[94] In a somewhat bizarre outcome, the District Court determined that it could not just sever the gubernatorial approval from the statute. It instead had to sever the entire section from IGRA—which ended up denying the Confederated Tribes the relief they had sought. And so it was the tribes who appealed.

The Ninth Circuit began its Appointments Clause analysis by quoting the text of the clause, and noting "[p]ersons 'who are not appointed and who therefore can not be considered "Officers of the united States" may not discharge functions

90. Even though, as will be discussed further below, in both instances the Appellate Courts declined to find such a situation, neither court adopted the O.L.C. position that because governors are non-federal actors, power granted to them by federal law could *never* raise Appointments Clause concerns.

91. 25 U.S.C. § 2719(b)(1)(A).

92. Confederated Tribes of Siletz Indians v. U.S., 110 F.3d 688, 691 (9th Cir. 1997).

93. *Id.* at 691–92.

94. *Id.* at 692.

that are properly discharged only by officers.'"[95] The Court also cited *Freytag* noting "[t]he Appointments Clause serves as a guard against one branch aggrandizing its power at the expense of another branch, and preserves constitutional integrity by preventing the diffusion of appointment power."[96]

Since there was "no question that the Governor has not been appointed as a federal officer in accordance with the Appointments Clause or that the Governor is not a federal officer in fact," the court stated that its inquiry was "whether, under [IGRA], the Governor is performing duties reserved for officers of the United States."[97]

The Ninth Circuit looked to *Buckley* and explained further that the test "to assess whether persons are exercising authority that can only properly belong to appointed Officers is whether those persons 'exercis[e] significant authority pursuant to the laws of the United States.'"[98] The Court further noted that in *Buckley* the Supreme Court looked at whether the particular office had "primary responsibility" for exercising that significant authority.[99]

The Ninth Circuit's test was thus twofold: first, whether the individual in question exercises significant authority, and second, whether that individual had primary responsibility for protecting a federal interest.[100]

Applying those tests to the facts in *Confederated Tribes*, the Ninth Circuit concluded that the Governor *did not* act with significant authority under federal law, because "the authority exercised by the Governor under IGRA is also not significant enough to require appointment."[101]

Further, the Ninth Circuit concluded that "when the Governor responds to a Secretary's request for a concurrence, the Governor acts under state law, as a state executive, pursuant to state interests."[102] For the second step, the Court determined that a "Governor who exercises authority pursuant to state law does not have primary responsibility for protecting a federal interest."[103]

* * *

The Ninth Circuit's analysis in *Confederated Tribes* is interesting here because by reviewing the possibility that the Governor of a state could qualify as an "officer" for Appointments Clause purposes, the court implicitly acknowledged that there are circumstances in which a state official could qualify, even though the Court declined to do so in this particular case.

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95. *Id.* at 696 (quoting United States ex rel. Kelly v. Boeing Co., 9 F.3d 743, 757 (9th Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994)).

96. *Confederated Tribes*, 110 F.3d at 696.

97. *Id.* at 697.

98. *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 126 (1976)).

99. *Confederated Tribes*, 110 F.3d at 697.

100. *Id.*

101. *Id.*

102. *Id.* at 698.

103. *Id.*

b. Lac Courte Oreilles

The Ninth Circuit is not alone in its IGRA analysis. In 2004, the Seventh Circuit took up similar fact issues in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. U.S.*[104]

Lac Courte Oreilles also involved an application under IGRA seeking to take property into a trust for purposes of operating a casino gaming facility.[105] Like the Governor of Oregon did in *Confederated Tribes*, the Governor of Wisconsin declined such a transfer of land, and so the Secretary of the Interior denied the Lac Courte Oreille tribe's application on that basis.[106]

The Lac Courte Oreilles then filed an action in district court seeking a declaration that the 25 U.S.C. § 2719(b)(1)(A) gubernatorial approval provision was unconstitutional, amongst other reasons, because it violated the Appointments Clause.[107] The district court rejected Lac Courte Oreilles' argument and upheld the gubernatorial approval requirement. That decision was then appealed to the Seventh Circuit.

The Seventh Circuit likewise began with the language of the Appointments Clause, and cited *Buckley*'s conclusion that "[a]ny person 'exercising significant authority pursuant to the laws of the United States is an 'officer of the United States' and must, therefore, be appointed in a manner prescribed by [the Appointments Clause].'"[108]

The Seventh Circuit, like the Ninth, upheld the gubernatorial approval section of IGRA. The Court concluded that "the Governors of the 50 states do not enjoy power under § 2719(b)(1)(A) to enforce or administer federal law."[109] That is, they are not exercising authority "pursuant to the laws of the United States" as *Buckley* (and the Appointments Clause) required.[110]

Further, the Seventh Circuit went on to find that the Governor's role under IGRA was not "significant enough to merit the title of an Officer of the United States."[111] Citing to *Freytag*, the Court concluded that "a governor's opportunity to participate in the administration of IGRA will arise irregularly, if it materializes at all."[112] Presumably in an attempt to differentiate its argument from that of the *Confederated Tribes* in the Ninth Circuit, the Lac Courte Oreilles argued that Wisconsin law did not authorize the governor to do anything, and so *the only source of authority* was federal law.

The Seventh Circuit, again citing to *Freytag*, concluded that "the requirements of the Appointments Clause are not triggered by the gubernatorial concurrence

104. 367 F.3d 650 (7th Cir. 2004).
105. *Id.* at 653.
106. *Id.*
107. *Id.* at 654.
108. *Id.* at 660 (quoting Buckley v. Valeo, 424 U.S. 1, 126 (1976)).
109. *Id.* at 661.
110. *Buckley*, 424 U.S. at 126.
111. *Lac Courte Oreilles*, 367 F.3d at 661.
112. *Id.*

provision because that provision neither specifies the 'duties, salary, and means of appointment' of any governor, nor does it empower any governor to execute federal law."[113]

Lastly, the Seventh Circuit noted that the gubernatorial approval provision of IGRA did not fall under the separation of powers concerns underlying the Appointments Clause.[114] That is, the Court reasoned, because Congress did not act to thwart Presidential appointment power, rather it acted to aide a Presidential appointee by requiring them to consult with "the chosen representative of the citizens of the States before executing the law."[115]

* * *

The Seventh Circuit's analysis, like the Ninth Circuit, amounts to an implicit acknowledgement of the possibility of non-federal actors could trigger analysis under the Appointments Clause.

B. Separation of Powers Generally

As has been stated throughout this paper, the Appointments Clause is a structural limit on the power of government and is designed to ensure accountability and protect liberty. It helps to enforce the separation of powers. The idea that Congress cannot end-run around the Appointments Clause simply by devolving power into non-federal actors also finds support in basic separation of powers principals embedded in the Appointments Clause itself.[116]

Does the current state of Appointments Clause jurisprudence line up with the plain text of the clause as the founders intended? It would seem that most modern Appointments Clause jurisprudence has become largely untethered from the Constitutional text. While the Supreme Court does occasionally use it to attempt to tie the administrative state back to the law, more often than not, Congress has been allowed to circumvent its limitations to achieve its preferred policy goals.

To protect liberty, we must enforce a strong separation of powers. This requires a robust enforcement of the Appointments Clause, as the founders intended, and this necessarily requires the Court to acknowledge that Congress cannot empower anyone (including non-federal officials) under federal law with the powers of an Officer of the United States without also requiring that individual to be appointed pursuant to the Appointments Clause.

FEDERALISM AND THE APPOINTMENTS CLAUSE

Thus far this paper has covered historic cases in the development of the Appointments Clause, and argued that the Court should acknowledge that the Appointments Clause may be triggered when significant authority has been

113. *Id.* at 661–62.
114. *Id.* at 662.
115. *Id.*
116. *See* Freytag v. Comm'r, 501 U.S. 868, 878 (1991).

delegated to purportedly non-federal actors by Congress. With that foundation, the paper now turns to look at several federal statutes to determine if those statutes could potentially raise Appointments Clause concerns.

Our country was founded with federalism principles woven throughout the Constitution. This was by design, so that states would be free to be unique and compete against each other while also working together for their common good. This good-natured competition between the states is known as competitive federalism—or the idea that states should be empowered to innovate and improve. Over time, as the federal government has continued to grow seemingly unchecked, this competitive federalism evolved into cooperative federalism—or the idea that states should work as "partners" with the federal government to achieve federal policy goals.

As the federal government continues to grow larger and larger there must be a check on its use of cooperative federalism to achieve its policy goals, and a push for a more traditional competitive federalism. This paper suggests one answer is a reinvigorated Appointments Clause—and that requires a recognition that where states act as de-facto federal officers, they do so in violation of the clause.

Enforcing the original separation of powers as our founders intended would not only better protect liberty, but would help hold the federal government accountable for its own policy choices, and give us the government that we were promised centuries ago when the original states first joined together to form a limited federal government.

A. From Competitive Federalism to Cooperative Federalism

Federalism is the basis of our system of government. Fundamental to federalism is dual sovereignty, the idea that multiple levels of government can exist at the same time to better govern in the most efficient and effective ways possible.

Under our system of federalism, while the federal government is supreme, its powers are well defined and its structures are plainly limited by the Constitution.

State governments, on the other hand, have broad powers. "The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite."[117] The Tenth Amendment's plain text lays bare what the founders envisioned: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[118]

So designed, this type of government called for a competitive federalism in which states were empowered to compete against one another, while also supporting each other and working together within the framework of the federal system. A federal solution was never envisioned as an answer to problems the country would face; rather it was the states who would develop those solutions

117. THE FEDERALIST No. 45 (James Madison).
118. U.S. CONST. amend. X.

and learn from one another. "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[119]

This form of competitive federalism is what the founders envisioned when our Constitution was first drawn up. States serving as the laboratories of democracy, competing against each other on a more local level to be the very best they could be. In a sense, the system encourages a bottom-up approach to solving policy questions for the nation.

Over the centuries since the Founding, however, competitive federalism has given way to a different kind of federalism—a top-down cooperative federalism—wherein the states are asked not to innovate but rather to "partner" with the federal government, often in exchange for funding or some other federally provided benefit,[120] and in which the states help achieve federal policy goals. From environmental programs to healthcare to education, most federal programs now have some cooperative component whereby the state actors do the bidding of their federal counterparts. The Supreme Court has largely blessed these schemes as a lawful exercise of Congress' commerce powers:

> [W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation. This arrangement, which has been termed "a program of cooperative federalism," is replicated in numerous federal statutory schemes. These include the Clean Water Act, the Occupational Safety and Health Act of 1970, the Resource Conservation and Recovery Act of 1976, and the Alaska National Interest Lands Conservation Act.[121]

As outlined *supra*, courts have largely failed to grasp a clear and effective test to adequately enforce the Appointments Clause and our Constitution's structural limitations, often leading to the growth of the federal administrative state and to the detriment of individual liberty. "One cumulative effect of these abdications was the rise of 'cooperative federalism': the integration of state and federal governments under an umbrella of federal control."[122]

Our founders never envisioned this type of cooperative federalism, and our Constitution has safeguards in place explicitly to prevent it. Of course, the Supreme Court has not always abdicated its role in enforcing the structural

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119. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

120. The term "benefit" here being used broadly as one of the incentives the federal government uses is the thread of federal preemption, as will be discussed in greater detail herein.

121. New York v. United States, 505 U.S. 144, 167–68 (1992) (internal citations and references omitted).

122. Epstein & Loyola, *supra* note 8, at 2.

limitations on government, but such instances have been too few and too far between, and too inconsistent.[123]

Of course, the government established by the founders included a much more significant role for the states—they were represented in the United States Senate.[124] That role was effectively eliminated by the Seventeenth Amendment, which moved the Senate into popular election.[125]

The bottom line is that our Constitution requires more of our courts. It requires enforcement of the separation of powers, which necessarily requires greater enforcement of the Appointments Clause. Within the context of cooperative federalism, courts should very closely review federal laws which seek to empower state officials to achieve federal policy goals, and should view such laws with significant constitutional concerns.

The paper now reviews several of those laws to discuss some of the issues these cooperative federalism schemes present in practical application on a day-to-day basis amongst the states.

1. Clean Water Act

One of the most well-known of the federal-state "partnership" laws that rely upon "cooperative federalism" is what we now call the federal Clean Water Act. Originally adopted as the Federal Water Pollution Control Act in 1948,[126] it took on its more "modern" form with amendments in 1972, and through additional amendments in subsequent years.

The Clean Water Act as we now know it is codified in Chapter 26 of Title 33 of the United States Code. For purposes of this paper, the relevant section of the act is codified at 33 U.S.C. § 1342, creating the "National Pollutant Discharge Elimination System" ("NPDES"), which is the permitting program designed to limit water pollution nationwide.

At a high level, what the Clean Water Act's NPDES provisions say is that nobody can discharge pollutants to a navigable water without first obtaining an NPDES permit. Those permits govern everything about the discharge from concentrations to locations, and everything in between. These permits can be lengthy and complex documents.

The act itself provides for two ways to issue acceptable permits: (1) either by the EPA itself utilizing federal staff at an EPA regional office; or (2) pursuant to a state-run program that meets all of the same requirements as the EPA operated

123. *See, e.g.*, NFIB v. Sebelius, 567 U.S. 519 (2012) (on one hand striking down the Affordable Care Act as an improper use of the commerce clause, on the other hand upholding it under the taxing power).

124. U.S. CONST. art. I, § 3, cl. 1.

125. U.S. CONST. amend. XVII. While noting that this certainly hastened the rise of cooperative federalism to the detriment of the states, that discussion is largely beyond the scope of this paper and will not be explored further.

126. Pub. L. No. 80-845, 62 Stat. 1155.

program. In order to qualify under the second method, a state must go through an application process that requires a variety of things.

The Wisconsin Supreme Court summarized the process for obtaining approval for a state-run program:

> If a state wishes to administer its own permit program, the governor of that state must submit to the EPA (1) a letter requesting program approval; (2) a complete description of the proposed program; (3) a statement from the Attorney General assuring that the state's laws provide adequate authority to carry out the program; (4) a Memorandum of Agreement with the Regional Administrator of the EPA; and (5) copies of all applicable state statutes and regulations, including those governing state administrative procedures.[127]

A state which obtains an "approved" program is allowed to issue its own Clean Water Act permits, and the EPA cannot issue NPDES permits directly into those states.[128] Nonetheless, those state authorities are still required to send every permit they issue to the EPA for a passive review process. The EPA may, at its discretion, overrule the state permitting authority and refuse to allow a permit to move forward.

States have almost universally agreed to take on the federal government's permitting work. Indeed, all but three states have an approved state-NPDES program.[129] Ordinarily, operating their own environmental permitting programs would on its face appear to be the embodiment of federalism envisioned by our founders (to the extent that the founders could have envisioned the permitting of such activities, of course). However, the cooperative federalism created by the Clean Water Act is something altogether different—states are not free to innovate. They are instead handcuffed to the federal program and may not deviate from its terms.

Indeed, the consequences for a state that wishes to deviate from the federal government's environmental permitting policies are steep—the EPA can simply withdraw its approval of the state permitting program altogether, and if that happens, it takes federal control of all water discharge permitting in the state and issues NPDES permits directly.[130]

What's more is that states' abilities to innovate are additionally significantly limited by other more specific provisions of the law. For example, due to "federal anti-backsliding" regulations, a state which seeks to innovate and try something new (like a more stringent effluent limit for a particular pollutant) is prohibited

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127. Andersen v. Dep't of Nat. Res., 796 N.W.2d 1, 10 (Wis. 2011) (citing 33 U.S.C. § 1342(b)); 40 C.F.R. § 123.21(a). *See also* 33 U.S.C. § 1342(b), (c)(2); 40 C.F.R. § 123.62(a).

128. This is one of the "benefits" discussed earlier, namely the threat of federal pre-emption to get states to do the work on behalf of the federal government.

129. ENV'T PROT. AGENCY, *NPDES State Program Authority*, https://www.epa.gov/npdes/npdes-state-program-authority [https://perma.cc/4Y3H-CXNH].

130. *See* 33 U.S.C. § 1342(c)(3); 40 C.F.R. § 123.63(a).

(with limited exceptions) from ever going back to the way it was before if it turns out the more stringent limit was ineffective or otherwise found to be detrimental to the interests of the state.[131]

Indeed, under the guise of a "state-federal partnership," states are actually required to strictly abide by whatever the federal government desires; they have no bargaining position from which to seek changes. As the Supreme Court has explained: "The Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective. . . ."[132] But this partnership is decidedly one-sided, as the federal government simply imposes its will upon the states:

> The EPA provides States with substantial guidance in the drafting of water quality standards. See generally 40 CFR pt. 131 (1991) (setting forth model water quality standards). Moreover, § 303 of the Act requires, inter alia, that state authorities periodically review water quality standards and secure the EPA's approval of any revisions in the standards. If the EPA recommends changes to the standards and the State fails to comply with that recommendation, the Act authorizes the EPA to promulgate water quality standards for the State. 33 U.S.C. § 1313(c).[133]

Nonetheless, the Court has allowed this type of cooperative federalism scheme because of Congress' power to regulate commerce, so long as those programs do not go so far as to "commandeer" the states to do the work of the federal government.[134] But the line between lawful program and unlawful commandeering is not quite so clear as the Court seems to think.

The simple fact remains that while the Clean Water Act itself appears to "allow" states to issue *their own* permits under *their own* laws, those states are actually *de facto* federal authorities doing little more than following the whims of federal law with significant restrictions in place that do not allow them to innovate, and with every decision they make subject to a broad federal veto power.

While such a system may be allowable under the commerce clause, it ought to be prohibited unless it complies with the requirements under the Appointments Clause.

a. Citizen Suit Provisions

To further illustrate the idea that state actors issuing clean water act permits are actually de facto federal officers, it is helpful to look at the enforcement mechanisms for the federal law.

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131. *See* 13 U.S.C. § 1342(o).

132. Arkansas v. Oklahoma, 503 U.S. 91, 101 (1992).

133. *Id.*

134. *See, e.g.*, New York v. United States, 505 U.S. 144, 167 (1992) ("[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.").

One of the ways in which Clean Water Act permits may ultimately be enforced is through a process called "citizen suits." These civil actions are brought by third parties to enforce the Clean Water Act against the permittee (or someone who is otherwise alleged to be in violation of the act).

Enforcement via citizen suit supports the idea that the permits issued by states are federal in nature, and that the state individuals issuing those permits are doing so pursuant to federal law even though they are simultaneously acting in accordance with state law.

The Clean Water Act's citizen suit provision allows anyone to bring a civil suit against a person or entity (including government entities) alleged to be violating the Clean Water Act.[135] The process is relatively straightforward. An individual is required to give sixty days' notice to the individual or entity alleged to be in violation. After that sixty-day period, they may commence their action in federal court.[136]

An individual may enforce effluent limitations and orders issued by the EPA administrator or a state. That is, any individual can go to *federal* court and enforce a *state's* order issued regarding a *state* permit. This supports the idea that the permits at issue are federal permits being issued by state entities, which raises Appointments Clause concerns that must be addressed.

Although still an open question, some courts have found that enforcement by citizen suit does not violate the Appointments Clause.[137]

* * *

The Clean Water Act creates a regulatory system where state officials administer and enforce federal law. While they do so under a mix of state and federal authority, because their state authority is subject to federal control, they are federal officers, and the Court should recognize that by reinvigorating the Appointments Clause in a way that holds those officials accountable.

2. Every Student Succeeds Act

Congress has also sought to establish and enforce cooperative federalism schemes outside of the environmental permitting context. Another, more recent, example of the federal government's increasing reliance upon cooperative federalism is the 2015 Every Student Succeeds Act ("ESSA"),[138] which replaced the No Child Left Behind Act, which itself was based on cooperative federalism.

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135. 33 U.S.C. 1365(a).

136. 33 U.S.C. 1365(b).

137. *See, e.g.*, Chesapeake Bay Found., Inc. v. Bethlehem Steel Corp., 652 F. Supp. 620, 624 (D. Md. 1987) (referencing *Buckley* and holding "[t]he opinion does not stand for the proposition, as defendant would have this Court believe, that private persons may not enforce any federal laws simply because they are not Officers of the United States appointed in accordance with Article II of the Constitution").

138. Pub. L. No. 114-95, 129 Stat. 1802.

ESSA represents the federal government's current attempt to achieve its education policy goals within the states.[139]

In exchange for receiving federal education dollars (under Titles I–IX), states are required to comply with ESSA's requirements. These title funds are not small dollar amounts. In 2015 when ESSA was enacted, for example, these funds totaled $23.3 billion.[140] Each state takes in hundreds of millions of ESSA dollars each year.

States are required to develop plans to comply with ESSA in order to qualify for those title funds, and those state plans must be heavily guided by federal regulatory guidelines.[141]

ESSA imposes a variety of requirements upon the states. States are required to adopt a "report card" system for their primary and secondary educational institutions.[142] These report cards must include all of the information mandated by the federal government, which includes certain data points and several "academic indicators" and one "non-academic indicator."[143] In addition, states have to identify their lowest performing 5% of schools which receive Title I funds.[144] States must then develop a plan to intervene in those lowest performing schools to improve performance.[145]

The State plans, once submitted to their federal bureaucracy overseers, go through a review process and must be ultimately approved by the federal government, who have complete control over that process.[146] This federal approval requirement ensures that it is ultimately *federal* regulators who are in charge of ESSA implementation at the *state* level. The policies being implemented, while developed nominally by state officials, are done only by following the guidelines and obtaining the approval of an all-powerful federal bureaucracy.

Those state officials, again while operating under their state authority, are doing little more than administering federal policies, and are de facto federal officers.

3. Other Federal Programs

The CWA and the ESSA are not the only federal programs that operate this way, of course. As discussed *supra*, the Supreme Court has listed others,[147] and

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139. *See generally* DEP'T OF EDUC., *Every Student Succeeds Act (ESSA)*, https://www.ed.gov/essa [https://perma.cc/H9CB-XM7Y].

140. DEP'T OF EDUC., *Fiscal Year 2016 Budget Summary and Background Information*, https://www2.ed.gov/about/overview/budget/budget16/summary/16summary.pdf [https://perma.cc/3FW6-U5C6].

141. *See* 34 C.F.R. §§ 200.12–19.

142. 20 U.S.C. § 6311(b)(2)(A).

143. *See* 34 C.F.R. § 200.35; *see also* 34 C.F.R. § 200.14(b).

144. 20 U.S.C. § 6311(c)(4)(D).

145. 20 U.S.C. § 7801(21)(A).

146. 20 U.S.C. § 6311(a)(4).

147. *See* New York v. United States, 505 U.S. 144, 167–68 (1992) (mentioning as cooperative federalism programs the Clean Water Act, the Occupational Safety and Health Act of 1970, the

there are many more beyond that. The Clean Air Act, for example, operates in much the same way as the Clean Water Act does, with states issuing permits on behalf of the federal government subject to extensive federal requirements and regulations.

Another, and perhaps the most well-known example of cooperative federalism programs, is the Affordable Care Act ("ACA").[148] Under the ACA the federal government attempted to work with states to achieve federal healthcare policy goals. One such federal policy goal was the mandated expansion of state-run Medicaid programs. From a legal perspective, the ACA is perhaps best known for the "individual mandate" which the Supreme Court in *NFIB v Sebelius* upheld as a tax, but the Court also declared that states could not be mandated to expand Medicaid programs as the ACA had required. The Court determined this was unconstitutionally coercive upon the states.

B. Analysis

These are examples of some of the different cooperative federalism programs created by Congress to convince the states that they should help achieve federal policy goals. Some programs use the threat of federal preemption to entice states to act in the way the federal government wants, others use federal aid dollars to induce states to act. At the end of the day the result is the same: states are used as pass-through entities to achieve federal policy goals.

While each program is unique to the policy goals which the federal government seeks to attain, the overall structure is somewhat uniform amongst them. They always begin with Congress establishing some federal policy goals (be it a cleaner environment or better educational outcomes for students, increasing the number of people with health insurance, etc.). Congress assigns some federal agency to oversee the policy effort, the agency then puts together some ideas of what they think will achieve the goal under the guidelines laid out by Congress and issues regulations. These regulations are then imposed upon the states, who utilize them to develop their own "state" program to comply with the federal requirements. Those federal agencies are using the states as pass-through entities to accomplish their goals, either under the implicit threat of federal pre-emption (like the Clean Water Act) or by using federal funds (like the ESSA).

As noted briefly earlier, while the Supreme Court has allowed Congress broad powers, the Court has been careful not to allow the federal government to "commandeer" states into acting on their behalf. It has nonetheless explicitly allowed Congress to create cooperative federalism schemes including the Clean Water Act.[149] In doing so, the Court has always recognized the threat these cooperative federalism programs pose, and the need for careful analysis especially when the

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Resource Conservation and Recovery Act of 1976, and the Alaska National Interest Lands Conservation Act).

148. Pub. L. No. 111-148, 124 Stat. 119.

149. *New York*, 505 U.S. at 167 ("Second, where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of

federal government seeks to attach conditions to federal funds to get states to do things that Congress itself could not do.[150] But the Court's recognition of this threat has not prevented it from becoming a reality. Specifically, the Court has acknowledged "[t]his practice of attaching conditions to federal funds greatly increases federal power."[151] In a government system that relies on federalism and utilizes a supreme federal government with limited powers, the idea that Congress can "greatly increase" its own power over virtually any area it wants is certainly troubling.

With regard to the acceptance of federal funds, the Court allows federal coercion so long as pressure does not turn into compulsion.[152] The line is somewhere between the "relatively mild" loss of some federal funds and what the Court has called "a gun to the head."[153] That test is not the easiest to apply, and as a result, pretty much all federal financial inducement programs have been upheld.

The Court is obviously aware of the concerns that cooperative federalism programs raise, noting that "where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished."[154] In *New York* the Court described "permissible" cooperative federalism programs:

> If the citizens of New York, for example, do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view. That view can always be pre-empted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular.[155]

That is, if the people of a state do not want the regulatory program (such as the Clean Water Act) they do not have to administer it, but the federal government still can, and those federal officials will be held accountable.

The contrary, and in the Court's view, unlawful, alternative occurs when the federal government *directs* the states to act:

> [W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the

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regulating that activity according to federal standards or having state law pre-empted by federal regulation.").

150. NFIB v. Sebelius, 567 U.S. 519, 675 (2012) ("This formidable power, if not checked in any way, would present a grave threat to the system of federalism created by our Constitution.").

151. *Id.* at 675.

152. South Dakota v. Dole, 483 U.S. 203, 211 (1987) (upholding a federal requirement to raise the drinking age to twenty-one—and the threat that states who did not comply risked losing five percent of their federal transportation aids).

153. *Sebelius*, 567 U.S. at 581.

154. New York v. United States, 505 U.S. 144, 168 (1992).

155. *Id.*

> electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.[156]

In such cases accountability is diminished because both sides of the federalism equation can point fingers of blame at each other and avoid electoral consequences.

But in practice, it simply does not work that way. States "cannot regulate in accordance with the views of the local electorate" because, as described, the federal programs do not allow state officials any meaningful opportunity to operate these federal programs in a way that works for them. Their only options are: (1) implement a "state" program which mirrors the federal requirements in every way; or (2) have the federal program imposed upon them. The result is the same: states are forced to accept federal policy decisions. In the former case, the federal actors can largely avoid accountability altogether.

This could not be the system of government that the founders intended. An unaccountable, all-powerful federal government using the states as pass-through entities to achieve federal policy goals is abhorrent to our constitutional principles.

The question becomes one of remedy—how do we ensure accountability when states really have no choice but to accept federal policies? How can the text of the Constitution be implemented to restore competitive federalism as the founders intended?

PROPOSED SOLUTION: REINVIGORATE THE APPOINTMENTS CLAUSE

The Appointments Clause's status as a structural limit on government, and a key cog in the enforcement of our constitutional separation-of-powers, like the other structural limitations in our Constitution designed to protect individual liberty, must be respected and vigorously enforced.

While the Court has enforced the Appointments Clause to an extent throughout American history, this paper takes the position that the Court simply has not gone far enough, and courts generally have not been clear enough in their decisions to ensure that the clause has the impact the founders intended it to have.

The result has been, in essence, a federal takeover of state governments under the guise of cooperative federalism that is detrimental to individual liberty, government accountability, and the states' roles as sovereign laboratories of democracy in our federal system. This is not the world the founders envisioned.

Reinvigorating the Appointments Clause can restore the accountability the founders intended by upholding the Constitution's text and bringing back true competitive federalism to the states.

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156. *Id.* at 169.

The question is then what does it take to reinvigorate the Appointments Clause? The simple and most obvious answer is a return to the text of the clause itself, and to the separation of powers principles upon which the clause was originally fashioned.

There were essentially two primary goals of the clause: first, to ensure that the best people were selected to act as officials on behalf of the United States Government; and second, to ensure that those officials are held accountable for the actions they take.[157]

With those principles in mind, a reinvigorated Appointments Clause would simply need to take current caselaw and specify a clear test to identify whether an individual qualifies as an "Officer of the United States," which comports with the text of the clause—something the Court has been asked to do repeatedly, and has so far declined. Only then will the clause be given the full impact that was its original purpose by the founders.

The current state of the caselaw, as recently summed up by the Supreme Court in *Lucia*, conducts a two-step analysis: an "Officer of the United States" is someone who occupies a "continuing" position established by law, and those individuals must exercise "significant" authority.[158]

The test between inferior and principal officers, most recently established by *Edmond v. United States*, is:[159] "that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate."[160]

But what is a continuing role established by law, and what is "significant" such that an individual has enough power to be classified as an Officer of the United States?

A. Continuing Role Established by Law

The text of the Appointments Clause does not include a temporal requirement on individuals named as "Officers of the United States." This requirement came from the Supreme Court in *Germaine*, which looked at an earlier case, *United States v. Hartwell*,[161] for the idea that the role of an "officer" in the Court's view "embraces the ideas of tenure, duration, emolument, and duties, and that the latter were continuing and permanent, not occasional or temporary."[162]

In *Germaine* the Court determined that because the duties were "occasional and intermittent" he could not be an "Officer."[163] So, the fact that someone does some things that officers do every now and then does not make them an officer in the Court's eyes. In *Freytag*, recall the Court held that the opposite is also true:

157. *See generally* THE FEDERALIST No. 76 (Alexander Hamilton).
158. Lucia v. SEC, 138 S. Ct. 2044, 2051 (2018).
159. Edmond v. United States, 520 U.S. 651, 659 (1997).
160. *Id.* at 663.
161. United States v. Hartwell, 73 U.S. 385 (1867).
162. United States v. Germaine, 99 U.S. 508, 511–12 (1878).
163. *Germaine*, 99 U.S. at 512.

"The fact that an inferior officer on occasion performs duties that may be performed by an employee not subject to the Appointments Clause does not transform his status under the Constitution."[164]

This test seems antiquated, and unnecessary—and is unmoored from the text of the Appointments Clause itself. If someone can exercise the authority of an Officer of the United States, no matter for how long or how often they do it—they should be held accountable for their actions and that requires them to be subject to the Appointments Clause. That said, the Appointments Clause's requirement that the activity be "established by law"[165] itself implies some kind of "ongoing" office.

Thus imagined, a reinvigorated Appointments Clause jurisprudence should align closer to Justice Thomas' concurrence in *Lucia*, where he noted "[t]he Founders likely understood the term 'Officers of the United States' to encompass all federal civil officials who perform an ongoing, statutory duty—no matter how important or significant the duty."[166] This would not include all federal employees (as not all employees are charged with performing some statutory duty). But it would apply to significantly more than the Court's current jurisprudence reaches—including, potentially, to state officials who have been empowered to enforce or administer federal laws under the guise of cooperative federalism programs.

B. Significant Authority

The text of the Appointments Clause also does not mention any requirement of what *level* of authority is required. While the clause lists some specific offices that are "principal" offices (Ambassadors, public Ministers and Consuls, Judges of the Supreme Court) it does not do so for "inferior" officers, leaving that job up to Congress itself to determine.[167]

Should the "significance" of the authority of the United States government being engaged in be relevant only to determine if a particular position is an "Officer of the United States" or should there be some powers more significant reserved for principal officers, such that reviewing the actual amount of power to be wielded becomes relevant to the question of whether an individual is an "inferior" or "principal" officer? Principal officers necessarily exercise *more* power than inferior officers, so it would seem the latter would be the necessary way forward. The question becomes how to implement such a system under a reinvigorated Appointments Clause jurisprudence.

First, Congress could simply and clearly specify each position that is an inferior officer, and the principal officer to whom the inferior officer reports. Those inferior officers would be required to be appointed pursuant to the Appointments

164. Freytag v. Comm'r, 501 U.S. 868, 882 (1991).
165. U.S. CONST. art. II, § 2, cl. 2.
166. *Lucia*, 138 S.Ct. at 2056 (Thomas, J., concurring).
167. U.S. CONST. art. II, § 2, cl. 2.

Clause. Those who are not inferior officers would not need to be appointed in such a manner, but also may not exercise the duties available only to officers. Each "inferior" office could only be appointed, pursuant to *Edmonds*, under the supervision of some principal officer—who would have to be named by Congress in the enactment legislation.

This simple change would likewise better align the text of the Appointments Clause with the practical application of it. It would also recognize Congress' role in the process—creating the offices and affirmatively determining who qualifies as an inferior officer. This process essentially creates a paper trail, builds accountability, and enhances our separation of powers—two of the goals of the clause itself.

C. Practical Application

How would these two changes practically be implemented under the current ongoing statutory cooperative federalism schemes? While no crystal ball exists to know for sure, there are a few possibilities, and a few assumptions that could be reasonably made about each one.

Initially, there would be essentially two options for federal lawmakers: (1) they could either modify the already existing programs so that the officials so empowered were appointed in compliance with the Appointments Clause, or (2) they could amend the program in a way that does not empower non-officers to take significant actions.

Were Congress to go with the first option, it would require the President to appoint state officials to federal positions, and then (presumably) take accountability for the actions of those state officials who were also now federal appointees. Because of the practical issues associated with that approach, the second category seems most likely from a standpoint of pure political expediency.

In that instance, those amendments to programs could take one of two paths: The first would be eliminating restrictions on the states in a way that does not subject them to the federal control, which raises Appointments Clause concerns in the first instance; the other possibility for some programs would just be a full federal takeover. While that itself is certainly worse than a competitive federalism-based program, the accountability that would be restored would, presumably, be beneficial.

In the first instance, removing restrictions on the states would amount to a return to competitive federalism, and would be the best outcome, allowing states to serve as the innovative laboratories of democracy they were intended to be by the founders.

The other alternative would require a significant increase in federal expenditures, and a massive growth of the bureaucracy at the federal level to manage all of these programs. This approach would obviously eliminate state involvement in the programs, while also increasing accountability at the federal level for those who administer them.

Here again, pure political expediency would make the latter less likely than the former, and so the most likely outcome here would be an increase in competitive federalism—and an empowerment of state officials to take control of these programs to serve as the laboratories of democracy they were intended to be.

CONCLUSION

The Appointments Clause is one of the Constitution's vital structural limits. For too long courts have allowed it to be read in a way that has allowed the federal government to grow its power in an unchecked and unaccountable manner. Only through a reinvigoration of the appointments clause can we realize the weight and force it was intended to have.