SOME THOUGHTS ABOUT THE FUTURE OF ADMINISTRATIVE LAW

By: Richard E. Levy[*]

I. INTRODUCTION

I have been teaching administrative law at the University of Kansas for nearly forty years. This fall (2024), as the semester began, something unprecedented happened. Students approached me of their own free will to ask about what was happening in the field of administrative law.

These students typically referenced *Loper Bright*[1] or *Jarkesy*[2] and followed up with some variation of the question: "Is administrative law dead?" I usually agreed that those decisions were dramatic while emphasizing that they were part of a much broader pattern of decisions limiting agency authority over the last ten years or so. I also reassured students that administrative agencies would continue to play a critical role in the implementation of government programs, even if administrative law was in a period of profound change.

Some students asked me to do a talk on the subject over the lunch hour, and the student division of the Federal Bar Association offered to sponsor it. To my surprise, the session was very well attended even at a busy time of the year (although the free food likely had something to do with it). Nonetheless, I have been teaching long enough to recognize the rare case in which students actually have a keen interest in administrative law. So I asked the Journal of Law and Public Policy if it was interested in publishing the talk in adapted form,[3] and the Journal graciously agreed to publish this Essay.[4]

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[1] Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024) (overruling Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)).

[2] SEC v. Jarkesy, 603 U.S. 109 (2024) (holding that administrative adjudication of securities fraud enforcement actions brought by agency against brokers violated the Seventh Amendment).

[3] Both the talk and the essay draw on some of the work I did in connection with the forthcoming fourth edition of the administrative law textbook I coauthor, Robert L. Glicksman, Richard E. Levy & David E. Adelman, ADMINISTRATIVE LAW: AGENCY ACTION IN LEGAL CONTEXT (4th ed.) (forthcoming 2025).

[4] Insofar as administrative agencies are an essential tool for implementing public policy through law, it is fitting to publish the essay in a journal focused on the intersection of law and public policy. In view of the essay format, I have written this in a more casual style and will not comprehensively research and document the issues addressed. In many cases, I have followed the easiest course and cited to my own prior work, which has the added benefit of increasing my citation counts.

Of course, the Supreme Court's decisions from last term faded from our attention as the presidential election approached and thoughts about the future now are naturally focused on the new Trump Administration. Nonetheless, insofar as many of the trends shaping administrative law began or gained momentum during the first Trump Administration, the prospect of a second Trump Administration provides a useful context for considering the practical impact of the new administrative law.

Accordingly, in this Essay I will consider the implications of recent Supreme Court decisions for administrative agencies and administrative law. To make a long story short, I think the death of administrative law is greatly exaggerated, but I also think that the new administrative law will look different than the old administrative law in important ways. Under the new administrative law, Presidents will have a greater ability to direct agencies to implement their policy agendas, but those agencies will have less power and authority to carry out that agenda. Nonetheless, many questions remain unanswered and the judicial response to the incoming Trump Administration's use of agencies to implement policy is likely to tell us a great deal about the new administrative law.

II. THE NEW ADMINISTRATIVE LAW

There can be little doubt that we have entered a new era of administrative law. To understand the new administrative law, however, we must begin with an understanding of the old administrative law, which was, by and large, "pro-agency." The old administrative law used a functional approach to separation of powers that accommodated agency discretion and authority and adopted deference principles and other doctrines that limited judicial interference with agency decisions. These elements reflected a broader judicial perspective under which the courts' role was to facilitate the implementation of statutory programs by agencies. After summarizing these features of the old administrative law, I will then explore three contrasting features of the new administrative law: formalistic separation of powers, judicial activism, and regulatory skepticism.

A. The Old Administrative Law

While administrative law has existed since the time of the founding,[5] it remained largely inchoate throughout most of the nineteenth century.[6] Thus,

[5] The first Congress created essential executive offices, including the Departments of State, War, and the Treasury. Indeed, the Supreme Court's famous decision in *Marbury v. Madison*, has been called "the first great administrative law decision." *See* Thomas W. Merrill, Marbury v. Madison *as the First Great Administrative Law Decision*, 37 J. MARSHALL L. REV. 481 (2004).

[6] One foundational principle established in *Marbury* and other cases is that executive officers are bound by statutes. *See* Kendall v. United States *ex rel.* Stokes, 37 U.S. 524, 610 (1838) (requiring postmaster to obey act of Congress rather than directive from President Jackson). The Court also

most of what we understand to be administrative law evolved over the course of the twentieth century. Key landmarks of this evolution included the collapse of judicial resistance to federal programs and agencies, the emergence of deference and other doctrines that limited judicial interference with agencies, and judicial support for agency implementation of regulatory and benefit programs.

From the 1890s through the New Deal period (the "*Lochner* era"[7]), the Supreme Court relied on doctrines such as federalism, separation of powers, and substantive due process to invalidate a number of regulatory programs.[8] In 1937, however, Justice Roberts famously switched sides, casting the deciding fifth vote to uphold regulatory programs.[9] In the aftermath of this New Deal switch, the Supreme Court upheld expansive federal regulatory and benefit programs administered by agencies, including independent agencies.[10]

The growth of regulatory and benefit programs necessitated the adoption of a comprehensive federal statute to govern the agencies that implement them: The Administrative Procedure Act (APA).[11] The APA was compromise legislation that resolved a long and difficult political battle between

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addressed other fundamental administrative law questions in early decisions, including the delegation of statutory authority to agencies, the relationship between agencies and courts, and the appointment and removal of officers. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272 (1855) (discussing agency adjudication and the judicial power); Wayman v. Southard, 23 U.S. 1 (1825) (acknowledging nondelegation doctrine but upholding delegation of authority to the judicial branch); Brig Aurora v. United States, 11 U.S. 382 (1813) (acknowledging nondelegation doctrine but upholding delegation of authority to the judicial branch); Marbury v. Madison, 5 U.S. 137 (1803) (discussing presidential power to appoint and remove officers); Hayburn's Case, 2 U.S. 409 (1792) (discussing relationship between judicial power and agency adjudication).

[7] The era is commonly identified by reference to the Court's infamous decision in *Lochner v. New York*. *See* Lochner v. New York, 198 U.S. 45 (1905) (invalidating state statute limiting the maximum number of hours per week for bakery workers as an interference with liberty of contract).

[8] *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (relying on separation of powers to invalidate the National Industrial Recovery Act); *see generally* Richard E. Levy, *Escaping* Lochner's *Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 342–45 (1995) (describing the Court's *Lochner* era jurisprudence).

[9] In *NLRB*, Justice Roberts joined a 5-4 majority in upholding the National Labor Relations Act. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). Just one year earlier, Justice Roberts was part of a 5-4 majority invalidating the Bituminous Coal Conservation Act. *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936). This change is sometimes referred to as the "switch in time that saved nine," which references President Roosevelt's infamous "Court Packing Plan."

[10] *See, e.g.*, Am. Power & Light Co. v. SEC, 329 U.S. 90 (1946) (discussing the SEC's power to regulate holding companies); Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–226 (1943) (discussing the FCC's power to regulate airwaves); New York Cent. Sec. Corp. v. United States, 287 U.S. 12, 24–25 (1932) (discussing the Interstate Commerce Commission's power to approve railroad consolidations).

[11] Pub. L. No. 79-404, 60 Stat. 237 (1946), (codified as amended at 5 U.S.C. §§ 551–559, 701–706, and scattered additional provisions of 5 U.S.C.); *see generally* DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947) (reviewing the statute and discussing the operation of its provisions).

proponents and opponents of administrative agencies.[12] It by recognized and protected the authority of agencies but imposed baseline procedural constraints and facilitated judicial review of agency action. With the adoption of the APA, it became possible to speak of administrative law as a body of generally applicable rules for agencies, even if the application of those rules was colored by the specifics of the statute that creates and empowers an agency (its "organic statute").[13]

These developments, moreover, laid the foundations for the rise of the administrative state, as the second half of the twentieth century saw tremendous growth in the size and scope of government programs and the powers of agencies that administer them.[14] Thus, for example, a wave of new programs and agencies emerged during the 1960s and 1970s. Under President Johnson's "Great Society" initiatives, Congress created, federalized, or expanded a number of benefit programs, such as Medicare and Medicaid, enlarging agencies or creating new ones to implement these programs. This period also saw the birth of modern environmental law, with the creation of the Environmental Protection Agency (EPA) by a presidential Reorganization Plan, in which Congress later vested authority to administer the Clean Air and Clean Water Acts, as well as other environmental laws. Congress also established other programs and agencies during the 1960s and 1970s to protect workers and consumers.

The administrative law that emerged during this period accepted the premise that the delegation of broad authority to agencies was a necessary and desirable feature of modern government. Building on this premise, the courts read agencies' powers broadly so as to facilitate the effective implementation of their statutory mandates. In *National Petroleum Refiners Ass'n v. Federal Trade Commission*,[15] for example, the U.S. Court of Appeals for the D.C. Circuit upheld the Federal Trade Commission's authority to promulgate legally binding rules to define "unfair trade practices" that violated the statute. Ten years later, in the now famous *Chevron* case,[16] the Supreme Court held that courts must defer to an agency's reasonable construction of an ambiguous provision in its organic statute. The administrative law of the period also protected agency processes from judicial interference in other ways.[17]

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[12] *See, e.g.*, Wong Yang Sung v. McGrath, 339 U.S. 33 (1950) (discussing history and purposes of the APA).

[13] *See generally* Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 566–71 (2011).

[14] *See, e.g.*, Robert L. Glicksman & Richard E. Levy, ADMINISTRATIVE LAW: AGENCY ACTION IN LEGAL CONTEXT 5–6 (3d ed. 2020).

[15] Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973). Because the D.C. Circuit handles an especially high volume of administrative law cases, its administrative law decisions are often considered especially influential.

[16] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

[17] *See, e.g.*, Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994) (holding that the statutory provisions for judicial review in the federal courts of appeals after agency action implicitly precluded pre-enforcement suit in district court to challenge agency authority); Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519 (1978) (holding that courts may not require agencies to follow rulemaking procedures beyond those required by statute or due process).

Thus, at the close of the twentieth century, administrative law reflected three essential characteristics. First, courts followed a functional approach to separation of powers under which agencies, including independent agencies, could wield broad power and authority, including the authority to promulgate legally binding rules and to decide cases involving important rights and interests. Second, because Congress delegated policy discretion to agencies with expertise, courts should respect agency authority by deferring to their policy judgments and refusing to interfere with agency processes. Finally, these principles rested on the broader premise that the courts' responsibility was to facilitate the successful implementation of regulatory and benefit programs enacted by Congress, subject only to (limited) constitutional constraints.

B. The New Administrative Law

A number of factors combined to erode the foundations of the old administrative law and set the stage for fundamental change. That change is now upon us, as reflected in the emergence of three critical trends in administrative law—separation of powers formalism, judicial activism, and opposition to regulatory programs. While these trends are already well-established, their full implications are still unfolding and there are many unanswered questions for the new administrative law.

1. The Winds of Change

Even before the close of the twentieth century, there was renewed political, academic, and judicial criticism of agencies and the programs they implement. On the political front, the "Reagan revolution" popularized the view that agencies and regulatory programs are ineffective, wasteful, and excessively burdensome. Likewise, support for many benefit programs eroded, as a result of both rising costs and political attacks that characterized recipients as lazy and undeserving. Academically, the law and economics movement and the rise of public choice theory offered a powerful critique of regulation that lent support to political and legal arguments. Critics of the modern administrative state also renewed separation of powers arguments against administrative agencies, challenging their constitutional legitimacy.[18]

The attacks on the administrative state fundamentally altered the political and legal climate for administrative agencies. Deregulation, regulatory reform, and privatization gained popularity, while any effort to strengthen regulation faced new procedural and structural hurdles such as regulatory impact analysis requirements imposed by statute or executive order. At the same time,

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[18] *See, e.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994) ("The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution.").

growing congressional dysfunction encouraged Presidents to implement policies by regulation and ideological polarization led to increasingly aggressive and partisan agency actions following each change in presidential administration.[19]

Meanwhile, a series of presidential appointments moved the Supreme Court in a conservative direction. By the end of the twentieth century, it was clear that we were entering a new era of administrative law. These changes gained momentum as the Supreme Court moved further rightward with the appointment of additional conservative Justices, first by President George W. Bush and then by President Trump, whose three appointments cemented a solid 6-3 conservative majority. One salient feature of this conservative majority is its evident desire to remake administrative law.

2. Separation of Powers Formalism

The core doctrinal development fueling the new administrative law is the Supreme Court's use of separation of powers formalism to sharply constrain agency power.[20] Under this approach, the legislative power—the power to determine the ends and means of public policy through the enactment of laws—is vested exclusively in Congress, which must act by means of bicameralism and presentment. The execution of those laws by agencies must be under the direct control of the President, in whom the Constitution vests the executive power and the duty to take care that the laws are faithfully executed. Finally, the judicial power to "say what the law is" to resolve cases and controversies is exercised exclusively by the Article III courts, whose judges have life tenure and salary protections and who can conduct jury trials as needed.

First, the Court has emphasized that the legislative power belongs to Congress by limiting the delegation of lawmaking authority to agencies. Under the "nondelegation doctrine," although Congress can and must delegate executive power to agencies to implement the law, it may not delegate the legislative power itself. In the old administrative law, the "intelligible principle" test was a loose functionalist approach to the nondelegation doctrine that tolerated the delegation of rulemaking authority under broad standards.[21] Although the Supreme Court has to this point stopped short of invalidating a statute on nondelegation grounds, a number of Justices have openly called for a reinvigoration of the doctrine.[22] The United States Court of Appeals for the Fifth

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[19] *See* Richard E. Levy, *Presidential Power in the Obama and Trump Administrations*, 87 J. KAN. B. ASS'N 46 (2018) (comparing the expansive use of presidential power in the Obama Administration and the first Trump Administration).

[20] *See generally* Robert L. Glicksman & Richard E. Levy, *The New Separation of Powers Formalism and Administrative Adjudication*, 90 GEO. WASH. L. REV. 1088 (2022).

[21] *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474–76 (2001) (discussing cases upholding broad delegations of authority and rejecting nondelegation challenge to EPA's authority to set national air quality standards).

[22] *See* Gundy v. United States, 588 U.S. 128, 149–79 (2019) (Gorsuch, J., joined by Roberts, C.J., and Thomas, J., dissenting) (arguing that statutory provision at issue violated Article I by delegating the legislative power to an official in the executive branch); *see also id.* at 149 (Alito, J., concurring)

Circuit, which in recent years has twice held that statutes violate the nondelegation doctrine,[23] appears to be heeding these calls.

To this point, however, the more significant development in regard to the delegation of policy authority to agencies is the rise of the "major questions doctrine" as a tool to limit the scope of agencies' statutory power.[24] The major questions doctrine is essentially an interpretive "clear statement rule" driven by the nondelegation doctrine: because the delegation of authority to resolve "major" questions of "vast (or deep) economic and political significance" would potentially violate the nondelegation doctrine, courts will not construe a statute as granting such authority unless it does so explicitly. This doctrine has emerged as a potent tool for the invalidation of agency policies because courts can use it to rewrite statutes in ways that limit agency authority.[25]

Second, the Court has invoked a strong version of the unitary executive theory to enhance the President's control over administrative agencies, especially in relation to the removal of officers.[26] Under the old administrative

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("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment.").

[23] Consumers' Rsch. v. FCC, 109 F.4th 743 (5th Cir. 2024) (en banc) (holding that the FCC's administration of the Universal Service Fund was an improper delegation of the taxing power); Jarkesy v. SEC, 34 F.4th 446 (5th Cir. 2022), aff'd on other grounds sub nom., SEC v. Jarkesy, 603 U.S. 109 (2024) (holding that the SEC's standardless discretion to choose between enforcement through administrative adjudication and or a proceeding before an Article III court violated the nondelegation doctrine).

[24] *See* Biden v. Nebraska, 600 U.S. 477 (2023) (relying on major questions doctrine to reject student loan forgiveness program); West Virginia v. EPA, 597 U.S. 697 (2022) (relying on major questions doctrine to reject EPA requirements to shift generation of electricity away from fossil fuels); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 595 U.S. 109 (2022) (relying on major questions doctrine to invalidate OSHA regulation mandating that large scale employers require workers to either be vaccinated against COVID or wear a mask and have weekly tests).

[25] In *West Virginia v. EPA*, for example, the Court held that a statute directing EPA to set performance standards based on the best "system" for reducing emissions, 42 U.S.C. § 7411(a)(1), did not authorize EPA to require power companies to base its standards on a shift in how electricity is generated from fossil fuels to renewable sources. *See* 597 U.S. at 735 ("A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."). This sort of "generation shifting," however, fits easily within the ordinary meaning of the term "system." *See id.* at 759–60 (Kagan, J., dissenting) (discussing dictionary definitions of "system").

[26] *See* Collins v. Yellen, 594 U.S. 220 (2021) (holding that the good-cause restrictions on the President's removal of the single Director of the Consumer Financial Protection Bureau violated Article II). The Court has also shored up the President's control over executive officers in other ways. *See* United States v. Arthrex, Inc., 594 U.S. 1 (2021) (holding that Administrative Patent Judges (APJs) could not be responsible for final decisions concerning patent validity unless they were principal officers appointed by the President with the consent of the Senate); Lucia v. SEC, 585 U.S. 237 (2018) (holding that SEC ALJs are "Officers of the United States" whose appointment by subordinate officers within the SEC violated the Appointments Clause). In addition, of course, the President's power to control the executive branch was also greatly enhanced by the Court's

law, cases like *Humphrey's Executor v. United States*[27] and *Morrison v. Olson*[28] accepted the use of "good-cause" removal requirements to insulate executive officers from presidential control and foster policy independence and decisions based on agency expertise. *Humphrey's Executor*, in particular, accepted the creation of so-called "independent agencies" that are insulated from presidential control.

More recent decisions, by way of contrast, indicate that the authority to remove officers is a core presidential power subject only to narrow exceptions.[29] First, in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,[30] the Court invalidated provisions that added a second level of good-cause protection for inferior officers in independent agencies. More recently, the Court invalidated good-cause provisions that limit the removal of a single officer who is the head of an agency in *Seila Law, L.L.C. v. Consumer Financial Protection Bureau*[31] and *Collins v. Yellen*.[32] These cases rely on the majority's historical understanding of executive power and the premise that only at-will removal ensures political accountability for agency officials.[33]

The Court's removal power cases raise a number of complex issues that are still unfolding.[34] As a practical matter, they make it easier to replace some officials, as reflected in President Biden's removal of Andrew Saul from his position as Commissioner of Social Security in July of 2021 notwithstanding a

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recent presidential immunity decision in *Trump v. United States*, which gives the President substantial legal protection even when ordering administrative officials to violate the law. 603 U.S. 593 (2024).

[27] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (upholding good-cause removal restriction for FTC Commissioners).

[28] Morrison v. Olson, 487 U.S. 654 (1988) (upholding good-cause requirement to remove independent counsel).

[29] *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 218 (2020) ("These two exceptions—one for multimember expert agencies that do not wield substantial executive power, and one for inferior officers with limited duties and no policymaking or administrative authority—represent what up to now have been the outermost constitutional limits of permissible congressional restrictions on the President's removal power.") (internal quotation marks and citation omitted).

[30] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010) (holding that two layers of good-cause removal protections for members of the Public Company Accounting Oversight Board violated Article II).

[31] *Seila Law*, 591 U.S. 197 (holding that the good-cause restrictions on the President's removal of the single Director of the Consumer Financial Protection Bureau violated Article II).

[32] Collins v. Yellen, 594 U.S. 220 (2021) (holding that good-cause restrictions on the President's authority to remove the Director of the Federal Housing Finance Agency (FHFA) violated Article II).

[33] *Seila Law*, 591 U.S. at 213–15 (advancing historical and accountability rationales for presidential removal power); *see also Free Enter. Fund*, 561 U.S. at 492 (discussing historical basis for removal power); *id.* at 496–97 (advancing political accountability rationale for invalidating two layers of good-cause protection for members of the Public Company Accounting Oversight Board).

[34] *See* Space Expl. Technolo-Gies Corp. v. NLRB, 741 F. Supp. 3d 630 (W.D. Tex. 2024) (concluding that the independence of the NLRB and its ALJs improperly infringes on the President's removal power); Energy Transfer, LP v. NLRB, 742 F. Supp. 3d 755 (S.D. Tex. 2024) (applying Free Enterprise Fund to invalidate dual good-cause restrictions on NLRB ALJs).

statutory good-cause removal provision.[35] Meanwhile, lower courts struggle to unpack the full implications of these decisions in three principal areas:

- ***Implied Good-Cause Removal Protections.*** In some cases, the Court has treated statutes providing for an appointment for a term of years as creating an implicit right to continue in office, thus creating implied good-cause removal protections.[36] The courts of appeal have unanimously declined to infer such a restriction on the removal of the General Counsel of the NLRB, emphasizing the Court's recent decisions invoking a strong presidential removal power.[37] This sort of reasoning may mean that the President in fact has power to remove at will the members of some traditional independent agencies, like the SEC and the FCC, whose statutes do not include explicit good-cause protections.[38]
- ***Dual Good-Cause Protections for ALJs.*** Strict application of the rule from *Free Enterprise Fund* would mean that two layers of good-cause protections for Administrative Law Judges (ALJs) are constitutionally invalid. The Court, however, suggested in a footnote that ALJs might be different from the officials at issue in that case.[39] The lower courts

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[35] President Biden relied on advice from the Office of Legal Counsel that the provision in question, 42 U.S.C. § 902(a)(3), was unconstitutional. *See* Constitutionality of the Comm'r of Soc. Sec.'s Tenure Prot., 2021 WL 2981542 (July 8, 2021). Lower courts have generally agreed with this conclusion, but they have also concluded that the removal provision can be severed and does not affect the validity of SSA benefit decisions absent proof that the denial of benefits was the result of the President's inability to remove the commissioner. *See, e.g.*, Kaufmann v. Kijakazi, 32 F.4th 843 (9th Cir. 2022).

[36] *See* Marbury v. Madison, 5 U.S. 137, 155–57 (1803) (concluding that Marbury had a right to his commission as Justice of the Peace because once his appointment was complete, he served for a term of years and was therefore not removable at will); *see also* Wiener v. United States, 357 U.S. 349 (1958) (reading silent statute to impose for cause restriction on President's power to remove members of war claims tribunal acting in a quasi-judicial capacity because presidential control might violate due process).

[37] *See* Rieth-Riley Constr. Co. v. NLRB, 114 F.4th 519 (6th Cir. 2024); United Nat. Foods, Inc. v. NLRB, 66 F.4th 536 (5th Cir. 2023); NLRB v. Aakash, Inc., 58 F.4th 1099 (9th Cir. 2023); Exela Enter. Sols., Inc. v. NLRB, 32 F.4th 436 (5th Cir. 2022). This is also another practical example of President Biden using the expanded removal power. *See supra* note 35 and accompanying text (discussing removal of SSA Commissioner Saul).

[38] *See* 15 U.S.C. § 78d (providing for the appointment of SEC commissioners for staggered 5-year terms but saying nothing about removal before their terms expire); 47 U.S.C. § 154 (providing for appointment of FCC Commissioners for staggered 5-year terms but saying nothing about removal of commissioners before their terms expire). In *Free Enter. Fund*, the Court assumed that SEC Commissioners could be removed only for good cause. *See* 561 U.S. at 487 ("The parties agree that the Commissioners cannot themselves be removed by the President except under the *Humphreys Executor* standard…and we decide the case with that understanding.").

[39] *See Free Enter. Fund*, 561 U.S. at 507 n.10 (stating that "our holding also does not address that subset of independent agency employees who serve as administrative law judges"). The Court

are currently divided on whether dual good-cause removal protections for ALJs are constitutionally permissible.[40]

- ***The Constitutionality of Traditional Independent Agencies.*** Although the Court's recent decisions took care to distinguish *Humphrey's Executor*, which upheld good-cause removal protections for traditional multimember independent agencies, the Court's disdain for *Humphrey's Executor* was evident.[41] Indeed, *Humphrey's Executor* is flatly inconsistent with the Court's historical and accountability rationales for an at will presidential removal power.[42] Although some lower courts have gone to great lengths to distinguish *Humphrey's Executor*,[43] it appears that lower courts will nonetheless treat the decision as "good law" until the Supreme Court overrules it.[44]

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offered two rationales for this limitation. First, it observed that "whether administrative law judges are necessarily 'Officers of the United States' is disputed." *Id*. Second, it noted that "many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions. *Id.* The first rationale is no longer valid, as the Court itself has held that ALJs are officers of the United States. *See* Lucia v. SEC, 585 U.S. 237 (2018) (holding that SEC ALJs are "Officers of the United States"). Thus, any exception for ALJs must depend on the nature of their adjudicatory functions.

[40] *Compare* Jarkesy v. SEC, 34 F.4th 446, 463–64 (5th Cir. 2022), *aff'd on other grounds*, 603 U.S. 109 (2024) (holding that statutory removal restrictions for SEC ALJs were unconstitutional under *Free Enter. Fund* because they involve at least two layers of protection against removal), *with* Decker Coal Co. v. Pehringer, 8 F.4th 1123, 1133–34 (9th Cir. 2021) (relying on footnote in *Free Enter. Fund* to reject claim that good-cause removal for ALJs on the Department of Labor's Benefits Review Board was invalid because Merit System Review Board members, who review removals of ALJs for good-cause, are also protected by good-cause removal restrictions).

[41] *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 215 (2020) ("Rightly or wrongly, the Court viewed the FTC (as it existed in 1935) as exercising 'no part of the executive power.'"); *id.* at 215 n. 2 ("The Court's conclusion that the FTC did not exercise executive power has not withstood the test of time."); id. at 216 (describing *Humphrey's Executor* as "permitt[ing] Congress to give for-cause removal protections to a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise any executive power"); *see also Collins v. Yellen*, 594 U.S. 220, 256 (2021) (referring to *Humphrey's Executor* for the only time in the majority opinion and only for the purpose of describing the removal provision at issue in the case).

[42] Indeed, this issue appears to be headed to the Supreme Court, as President Trump has attempted to remove a member of the NLRB in violation of an explicit good-cause removal requirement. *See infra* note 88 (discussing President Trump's exercise of the removal power since taking office).

[43] *See* Space Expl. Technolo-Gies Corp. v. NLRB, 741 F. Supp. 3d 630 (W.D. Tex. 2024) (distinguishing *Humphries Executor* in part on the basis of differences in the language of their removal provisions and ruling that the good-cause removal provision for the NLRB is invalid).

[44] *See* Leachco, Inc. v. Consumer Prod. Safety Comm'n, 103 F.4th 748, 760 (10th Cir. 2024); Consumers' Rsch. v. Consumer Prod. Safety Comm'n, 91 F.4th 342, 353, 356 (5th Cir. 2024), on denial of rehearing en banc. 98 F.4th 646 (5th Cir. 2024). The Fifth Circuit decision is especially striking for several reasons. First, that circuit has been especially aggressive in applying separation of powers principles in cases like *Consumers' Research* and *Jarkesy*. Consumers' Rsch. v. FCC, 109 F.4th 743 (5th Cir. 2024) (en banc) (holding that the FCC's administration of the Universal Service Fund was an improper delegation of the taxing power); Jarkesy v. SEC, 34 F.4th 446 (5th Cir. 2022), *aff'd on other grounds sub nom.*, SEC v. Jarkesy, 603 U.S. 109 (2024) (holding that the SEC's standardless discretion to choose between enforcement through administrative adjudication

Third, the Court has also begun to reassert the judicial power as a separation of powers constraint on agency authority, although separation of powers formalism in this area is less fully developed than in respect to legislative or executive power.[45] In one of last summer's high-profile administrative law decisions, *SEC v. Jarkesy*,[46] the Court held that administrative adjudication in an SEC enforcement proceeding violated the defendant's Seventh Amendment right to a jury trial. The statutory cause of action was analogous to a common law fraud action that would have been tried to a jury, so the Seventh Amendment applied even though the statutory fraud provision fundamentally altered the applicable legal standards and provided for public enforcement rather than a private fraud claim.[47] These characteristics, moreover, were also insufficient to justify the treatment of these adjudications as public rights claims, because there were no historical analogs for treating the claim as a matter of public right.[48]

This holding casts doubt on many traditional forms of regulatory enforcement if a regulatory adjudication resembles a common law cause of action. Because of the close relationship between the Seventh Amendment and Article III judicial power, moreover, *Jarkesy* may also signal a reinvigoration of Article III as a limit on agency adjudication of private rights—a position that Justice Gorsuch has espoused in some recent decisions.[49] Another sign of the potential reinvigoration of Article III was *Loper Bright*, which relied in part on the judicial power to "say what the law is" to reject deference to agencies' interpretations of the ambiguous statutes they administer.[50]

Although the use of formalistic analysis to limit agency adjudication is not as far along as the Court's use of formalism to restrict agency policy authority and enhance presidential control over agencies, it seems reasonably

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and or a proceeding before an Article III court violated the nondelegation doctrine); *see also* Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB, 51 F.4th 616 (5th Cir. 2022) (holding that the CFPB's ability to self-fund violated the Appropriations Clause), *rev'd*, 601 U.S. 416 (2024). Second, the decision reversed a district court decision in which the court had attempted to distinguish *Humphrey's Executor* on the basis that the CPSC exercised executive powers not exercised by the FTC. *See* Consumers' Rsch. v. Consumer Prod. Safety Comm'n, 592 F. Supp. 3d 568 (E.D. Tex. 2022). Third, eight judges—just one short of a majority of judges in the circuit—would have granted en banc review, endorsing the district court's effort to distinguish the CPSC from the FTC. *See* Consumers' Rsch. v. Consumer Prod. Safety Comm'n, 98 F. 4th 646, 650–57 (Oldham, J., joined by seven other judges, dissenting from the denial of rehearing en banc).

[45] *See generally* Glicksman & Levy, *supra* note 20 (exploring the implications of separation of powers formalism for administrative adjudication).

[46] *Jarkesy*, 603 U.S. 109 .

[47] *See id.* at 120–26 (concluding that the Seventh Amendment applied).

[48] *See id.* at 127–40 (concluding that agency enforcement of civil fraud penalties did implicate public rights).

[49] *See* Thryv, Inc. v. Click-To-Call Techs., LP, 590 U.S. 45, 61–82 (2020) (Gorsuch, J., joined by Sotomayor, dissenting); Oil States Energy Servs. v. Greene's Energy Grp., 584 U.S. 325, 346–56 (2018) (Gorsuch, J., joined by Roberts, C.J., dissenting).

[50] *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 384–87 (2024) (overruling Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc. 467 U.S. 837 (1984)).

safe to assume that there will be further developments in this area and that the Court will impose additional limits on adjudication by regulatory agencies. The only real question seems to be how far the Court will go.

Taken as a whole, the Court's formalistic separation of powers decisions sharply constrain agency regulatory authority. Agencies cannot make major policy decisions because broad language delegating authority is insufficient to overcome the major questions doctrine, and it seems increasingly likely that an explicit delegation of authority to make major policy decisions would violate the nondelegation doctrine. Agency adjudication is also constrained, as any agency determination of private rights may be invalid or subject to a de novo jury trial in an Article III court. The Court's unitary executive decisions, conversely, enhance the President's control over agencies, casting doubt on the validity of independent agencies, as well as the independence of ALJs and other inferior officers in agencies. Even when agencies do have the authority to act, moreover, the Court's recent decisions also make it much easier for courts to reject or block the agency's discretionary judgments.

3. Judicial Activism

While the full extent of the Supreme Court's separation of powers formalism is still unfolding, the decisions to date have already reshaped the legal context of agency action in profound ways. One common feature of these decisions is that they exhibit an unapologetic judicial activism. This activism is clearest and most direct when the courts invalidate agency actions as unconstitutional or rewrite statutes using the major questions doctrine, but it is also reflected in a lack of deference to the other branches of government and in doctrines that facilitate legal challenges to agency action, thereby expanding the jurisdiction and authority of the courts.

Separation of powers formalism is clearly an activist doctrine, as it allows the courts to substitute their judgement for the decisions of the political branches. Such decisions override the congressional choice to vest discretion in expert agencies, insulate agency officials from political controls, or authorize agencies to adjudicate regulatory enforcement matters.[51] Equally important, the decisions overturn the agency's policy judgments by denying them the authority to act.

The major questions doctrine, for example, is activist because the Court uses it to essentially rewrite statutes for the purpose of denying agencies the power Congress vested in them.[52] In so doing, the Court rejects not only the agency's expert judgment, but also Congress's decision to authorize the agency to make that expert judgment. It is especially ironic that the Supreme Court has justified the major questions doctrine on the theory that it enhances political

[51] *See supra* Part II.B.1 (discussing separation of powers formalism).
[52] *See supra* notes 24–25 (discussing West Virginia v. EPA, 597 U.S. 697 (2022)).

accountability, given that its effect is to transfer power away from Congress and the Executive to the courts, which are the least politically accountable branch.[53]

The Court's refusal to defer to agencies on the construction of ambiguous statutes also transfers power from agencies to the courts.[54] The courts have long recognized that Congress's choice to delegate policy authority to expert agencies implies that judges should defer to the agency's expert policy judgments.[55] The *Chevron* doctrine rested on the premise that when Congress uses vague or open-ended language, the determination of what that language means in practice is a policy judgment rather than an interpretive question.[56] In *Loper Bright v. Raimondo*,[57] however, the Court overruled *Chevron*, concluding that courts should construe statutes de novo and owe no deference to the agency's views, effectively transferring the power to resolve these policy questions from the agencies to the courts. In a similar vein, the Court has also shown a willingness to apply even traditionally deferential standards of review aggressively to block agencies' regulatory actions.[58]

In addition to these aggressive assertions of judicial power, the Court's decisions also enhance the jurisdiction of the courts at the expense of administrative agencies. Most directly, after *Jarkesy*, courts will now conduct many adjudications that would have been conducted by agencies with only deferential judicial review. This means that the judiciary, rather than the expert body chosen by Congress, will determine the meaning and application of regulatory provisions in those cases. Other decisions make it easier to get into court to challenge and potentially block agency action. In *Axon Enterprise, Inc.*

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[53] *See* Lisa Heinzerling, *Nondelegation on Steroids*, 29 N.Y.U ENV'T. L.J. 379, 379 (2021).

[54] For a thoughtful debate among the Justices concerning the relationship between legislative, executive, and judicial power in relation to the standards of judicial review, *see* FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009) (upholding FCC's rescission of its fleeting expletive policy under which it did not prosecute broadcasters for inadvertently airing brief flashes of indecent material).

[55] *See, e.g.*, Nat'l Broad. Co. v. United States, 319 U.S. 190, 224 (1943) (stating that if the contention that challenged rules were arbitrary and capricious "means that the Regulations are unwise, that they are not likely to succeed in accomplishing what the Commission intended, we can say only that the appellants have selected the wrong forum for such a plea").

[56] Chevron U.S.A. Inc. v. Nat. Res. Def. Council Inc., 467 U.S. 837, 843–44 (1984) (observing that agency administration of statutory programs "'necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress'" and that when "the legislative delegation to an agency on a particular question is implicit rather than explicit . . . a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency") (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

[57] Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

[58] In *Ohio v. EPA*, for example, the Court overturned an EPA decision rejecting as inadequate state plans to achieve compliance with the federal air quality standards and promulgating a substitute federal plan. 603 U.S. 279, 292–93 (2024). The Court exhibited little to no deference to EPA, concluding that the agency's explanation was insufficient because it did not respond to an attenuated theory that was barely raised in the comments and to which the agency actually did respond. *See id.* at 306–10 (Barrett, J., dissenting).

v. FTC,[59] for example, the Court held that statutory provisions for review of agency action in a federal court of appeals did not implicitly preclude a regulated entity from going directly to district court to challenge the constitutionality of agency action before the agency process has been completed. This doctrine invites private entities that are the targets of regulatory action to file a preemptive lawsuit to block the action.[60]

In a less famous case from last summer, *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*,[61] the Court held that the statute of limitations for challenges to an agency regulation does not begin to run until the party challenging the agency action has been harmed by it. This holding allows parties such as newly formed companies to challenge a regulation adopted many years earlier if they had not previously been subject to it. Such a challenge could rely on newer decisions like *Loper Bright* or the major questions doctrine, both of which make it easier to win such challenges, perhaps even challenges to regulations previously upheld by the courts.[62]

Consider, for example, *Harner v. SSA, Commissioner*,[63] which upheld a Social Security Administration (SSA) regulation rejecting the so-called "treating physician rule." The treating physician rule was a judge-made doctrine under which courts had required the SSA to give special weight to the opinions of a claimant's treating physician and to articulate specific reasons for rejecting a treating physician's opinion. Although the regulation rejected a judicial construction of the agency's statute, the court relied on *Chevron*, reasoning that the treating physician rule was a judicial construction of an ambiguous statute that the agency could reject.[64] After *Loper Bright*, this sort of reasoning is no longer valid because the courts would owe no deference to the agency construction, so the regulation is vulnerable to a legal challenge under current law. *Corner Post* would permit a claimant in the Eleventh Circuit to challenge the regulation notwithstanding *Harner* and even though it was adopted in 2017.[65]

Another phenomenon that has enhanced the power of the courts is the rise of the nationwide injunction, through which a single district court prevents

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[59] Axon Enter., Inc. v. FTC, 598 U.S. 175 (2023).

[60] *See also* Sackett v. EPA, 566 U.S. 120 (2012) (concluding that EPA compliance order determining that property was subject to the Clean Water Act was final agency action subject to judicial review before any further actions to enforce the compliance order were taken).

[61] Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 603 U.S. 799 (2024).

[62] *Compare* In re MCP No. 185, 124 F.4th 993 (6th Cir. 2025) (relying on *Loper Bright* to hold that the FCC lacked authority to require broadband internet service providers to follow "net neutrality principles") *with* U.S. Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016) (applying *Chevron* deference to uphold previous regulation that was substantially similar).

[63] Harner v. Soc. Sec. Admin., Comm'r, 38 F.4th 892 (11th Cir. 2022).

[64] *See id.* at 898; *see generally* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.").

[65] *See* 20 C.F.R. § 404.1520c (2017).

the enforcement of agency rules anywhere against any party.[66] The propriety of this remedy is hotly debated, with proponents arguing that it is the natural remedy for an invalid rule,[67] and opponents arguing that it encourages forum shopping and is not authorized by the APA.[68] Whatever the merits of this debate, in practice the availability of this remedy has encouraged parties to file in a friendly district court, such as district courts in California during the last Trump Administration or district courts in Texas during the Biden Administration.[69] To this point, the Supreme Court has not definitively ruled on the issuance of nationwide injunctions, but it has tolerated the practice.[70]

These new administrative law doctrines exhibit judicial activism in both an institutional and a policy sense.[71] Institutionally, the cases expand judicial authority vis-à-vis other institutions of government, transferring decisional authority away from Congress and administrative agencies and giving it to the judiciary. From a policy perspective, the cases reflect a consistent pattern of anti-

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[66] *See* Robert L. Glicksman & Emily Hammond, *The Administrative Law of Regulatory Slop and Strategy*, 68 DUKE L.J. 1651, 1695–98 (2019) (describing the importance of this issue in immigration matters under the Obama and Trump Administrations); Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56, 56 (2017) (describing the propriety of nationwide injunctions as "one of the most salient issues of our modern legal system").

[67] *See, e.g.*, O.A. v. Trump, 404 F. Supp. 3d 109, 152–53 (D.D.C. 2019) (describing itself as "at a loss to understand what it would mean to vacate a regulation, but only as applied to the parties before the Court"); E. Bay Sanctuary Covenant v. Trump, 349 F. Supp. 3d 838, 867 (N.D. Cal. 2018); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1090 (2018).

[68] *See, e.g.*, Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 421 (2017) ("Article III gives the federal courts the 'judicial Power,' which is a power to decide cases for parties, not questions for everyone."); Ronald A. Cass, *Nationwide Injunctions' Governance Problems: Forum Shopping, Politicizing Courts, and Eroding Constitutional Structure*, 27 GEORGE MASON L. REV. 29, 30–31 (2019) (arguing that the issuance of a nationwide injunction "undermines rule-of-law values, threatens the operation of courts as impartial arbiters of disputes over legal rights, and erodes the Constitution's careful separation of functions among the branches of government").

[69] *See, e.g.*, Texas v. Cardona, 743 F. Supp. 3d 824, 898 (N.D. Tex. 2024) (Texas district court decision enjoining enforcement of Biden Administration Title IX guidance); *E. Bay Sanctuary Covenant*, 349 F. Supp. 3d at 867 (California district court decision issuing nationwide injunction against Trump Administration immigration policy).

[70] In *United States v. Texas*, the Supreme Court reversed the Texas district court's decision issuing a nationwide injunction against Biden Administration immigration policies. 599 U.S. 670, 686 (2023). Because the majority focused on the plaintiff States' lack of standing, it did not specifically address the propriety of a nationwide injunction. *See id.* at 675–86. Justice Gorsuch, however, wrote a concurring opinion expressing skepticism that the APA authorized courts to issue nationwide injunctions. *See id.* at 694–95 (Gorsuch, J. concurring). Justice Kavanaugh, by way of contrast, expressed his support for nationwide injunctions in a lengthy concurring opinion in *Corner Post*. *See* Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 603 U.S. 799, 826–43 (2024) (Kavanaugh, J., concurring) (arguing that vacatur is the appropriate remedy when a federal court holds a rule unlawful).

[71] *See generally* Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343 (1989) (distinguishing between institutional and policy activism).

agency outcomes, suggesting a broader opposition to agencies and the programs they implement. Although institutional and policy activism do not always align, in the new administrative law, the Court's institutional activism is in furtherance of an ideological agenda that is profoundly anti-agency in character.

4. Anti-Agency Outcomes

Separation of powers formalism and the rejection of judicial deference reflect a more fundamental underlying shift in judicial perspectives. The old administrative law was designed to facilitate agency action, based on the premise that agencies serve essential functions by implementing congressionally created regulatory and benefit programs that further the public interest. The new administrative law is designed to limit agency action, based on the premise that unaccountable agencies are likely to abuse their authority in ways that burden important private interests and deny basic liberties and property rights.

The driving force of the Court's separation of powers formalism is the premise that agencies wield too much power and are insufficiently accountable.[72] Accordingly, agencies cannot be trusted to make important policy choices. Some of the cases reflect the assumption that agencies have inherent incentives to expand their own power and authority that only the courts can check.[73] In other contexts, the courts seem to be more concerned that agencies are prone to capture and that their authority can easily be abused for nefarious purposes.[74] This perspective also goes hand in hand with an unspoken opposition to the regulatory and benefit programs they implement.[75]

Separation of powers formalism responds to these concerns by denying power to agencies. Thus, the nondelegation and major questions doctrines limit the authority delegated to agencies in ways that block significant agency policy

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[72] *See generally* Cass R. Sunstein, Administrative Law's Grand Narrative 1 (Oct. 15, 2024) (unpublished manuscript) (available on SSRN at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4986085#) [https://perma.cc/YD5P-3ML5] (describing Supreme Court's acceptance of a "Grand Narrative" under which the modern administrative state violates separation of powers).

[73] Chief Justice Roberts noted this concern in his dissenting opinion in *City of Arlington v. FCC*, in which he argued that courts should not apply *Chevron* deference to jurisdictional matters. *See* 569 U.S. 290, 327 (2013) (Roberts, C.J, dissenting) (describing Court's "duty to police the boundary between the Legislature and the Executive" and stating that this "concern is heightened, not diminished, by the fact that the administrative agencies, as a practical matter, draw upon a potent brew of executive, legislative, and judicial power"). Chief Justice Roberts' analysis in *City of Arlington* presaged his adoption of the major questions doctrine in *West Virginia v. EPA* and his opinion in *Loper Bright*. *See supra* notes 24–25 (discussing *West Virginia v. EPA*); *supra* notes 1, 50 (discussing *Loper Bright*).

[74] *See, e.g.*, Consumers' Rsch. v. FCC, 109 F.4th 743, 750–52 (5th Cir. 2024) (en banc) (describing Universal Service Fund as bloated and prone to abuse).

[75] The conservative majority is primarily the result of an extended effort by the Federalist Society and others to reshape the judiciary to promote such libertarian conservative values. *See generally* MICHAEL AVERY & DANIELLE MCLAUGHLIN, THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS (2012); AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION (2015).

initiatives on the theory that only Congress can make those choices. The presidential removal power cases rest on the premise that without at-will removal, agencies are insufficiently accountable to elected officials. The Court may also be poised to hold that only Article III courts, with a jury as appropriate, can adjudicate regulatory enforcement matters that are in any way connected to traditional common law rights.

Likewise, the demise of deference to agencies reflects a profound distrust of agencies and agency expertise. To be sure, deferring to agencies on matters of statutory interpretation is hard to square with the responsibility of the judiciary to say what the law is, but it is also clear that many questions of statutory interpretation are, at bottom, policy choices. Traditional tools of statutory interpretation do not provide clear answers to questions that were unanticipated or purposefully left unresolved. This sort of interpretation is therefore a policy judgment that *Loper Bright* removes from the agency and assigns to the courts.

Put simply, in the new administrative law, agency action—especially regulatory action—is inherently suspect. It may be invalid because the agency's structure and authority violates separation of powers. If it is not invalid for that reason, it is likely invalid because the agency lacks statutory authority, has provided an inadequate justification for its action, or has improperly infringed on either state authority or private interests, such as property rights. In addition, the Court has invited regulated entities (and states) with the incentives to challenge agency action to do so, throwing open the courthouse doors and issuing favorable rulings that encourage further challenges to further restrict agency authority.

III. IMPLICATIONS FOR THE TRUMP ADMINISTRATION

As described above, under the new administrative law, agencies will have less power, Presidents will have greater control, and courts will be more willing to override agency action. We can illustrate and explore the implications of these changes by considering their impact on the second Trump Administration. As outlined below, the new administrative law likely means that President Trump will be able to assert greater control over officers in the executive branch, but that those officers will be less able to do his bidding.

A. Presidential Control

One of the hallmarks of the first Trump Administration was his effort to control the executive bureaucracy (the "deep state") so as to ensure that officials would follow his orders. Some of these efforts targeted particular policy

objectives,[76] but the more fundamental goal of many initiatives was simply to assert greater presidential control over all executive officers. There is every indication that President Trump will redouble those efforts during his second term.[77] Some aspects of the new administrative law, particularly the Court's unitary executive cases, will likely facilitate those efforts. On the other hand, the Court's formalist separation of powers analysis might limit President Trump's ability to use some of the tools he relied on during his first term in office.

One strategy President Trump used to assert greater political control over agencies was to remove or limit legal protections for the independence of executive officers. Most prominently, for example, he issued an executive order that created an exception from civil service protections for career positions in the federal service "of a confidential, policy-determining, policy-making, or policy-advocating character."[78] President Biden revoked this order, asserting that it "not only was unnecessary to the conditions of good administration, but also undermined the foundations of the civil service and its merit system principles . . . ."[79]

President Trump also sought to assert greater control over ALJs,[80] issuing an executive order that exempted them from civil service hiring practices[81] and a memorandum from the Solicitor General specifying that the

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[76] The most prominent example of this sort of order is the so-called "2-for-1" order, which required agencies to identify at least two existing regulations for repeal whenever it proposed a new regulation, to offset new costs from a proposed regulation by eliminating existing costs from two prior regulations and imposed an annual cap on the net costs of regulations. Reducing Regulation and Controlling Regulatory Costs, Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017). Although the order arguably contravened statutes and exceeded presidential power, challenges to the order failed because plaintiffs were unable to show that the withdrawal, rescission, or delay of a rule was caused by the order or would be remedied by its invalidation. *See, e.g.*, California v. Trump, 613 F. Supp. 3d 231, 236 (D.D.C. 2020); Pub. Citizen, Inc. v. Trump, 435 F. Supp. 3d 144, 147 (D.D.C. 2019). President Biden revoked the order immediately upon taking office. *See* Revocation of Certain Executive Orders Concerning Federal Regulation, Exec. Order No. 13,992, 86 Fed. Reg. 7049 (Jan. 20, 2021).

[77] *See* Rebecca Jacobs, *Trump has said he Wants to Destroy the "Deep State" 56 times on Truth Social*, CITIZENS FOR RESP. AND ETHICS IN WASH. (Aug. 1, 2024), https://www.citizensforethics.org/reports-investigations/crew-investigations/trump-has-said-he-wants-to-destroy-the-deep-state-56-times-on-truth-social/ [https://perma.cc/Z6E7-F46P] (describing "multi-step plan . . . to 'demolish the deep state' by gutting the civil service, limiting the power of institutions and experts, and replacing career officials with Trump loyalists").

[78] Creating Schedule F in the Excepted Service, Exec. Order No. 13,957, § 1, 85 Fed. Reg. 67631 (Oct. 21, 2020). This exemption applied both to civil service hiring practices and limits on discipline. *Id.*

[79] Protecting the Federal Workforce, Exec. Order No. 14,003, § 2(a), 86 Fed. Reg. 7231 (Jan. 22, 2021). For an empirical analysis of the effects of intra-agency ideological differences between political appointees and career officials, *see* Brian D. Feinstein & Abby K. Wood, *Divided Agencies*, 95 S. CAL. L. REV. 731 (2022) (concluding that civil service employees can serve as "ballast" between the oscillating views of presidential administrations of different parties).

[80] *See generally* Richard E. Levy & Robert L. Glicksman, *Restoring ALJ Independence*, 105 MINN. L. REV. 39 (2020) (describing various threats to the independence of ALJs and arguing for consideration of a federal central panel as a means to protect their independence).

[81] Excepting Administrative Law Judges From the Competitive Service, Exec. Order No. 13,843, 83 Fed. Reg. 32755 (July 10, 2018). According to one commentator, the Order "dramatically

Justice Department would only defend good-cause removal restrictions if they are interpreted so as to "allow for removal of an ALJ who fails to perform adequately or to follow agency policies, procedures, or instructions . . . ."[82] If President Trump's political appointees renew efforts to control ALJs, the Court's presidential removal power cases will help.

A second tactic that President Trump used extensively during his first term was to rely on the Federal Vacancies Reform Act (FVRA)[83] to fill vacancies temporarily without Senate consent through the appointment of acting officers.[84] President Trump's use of FVRA included some high profile and controversial appointments, such as the appointment of Mick Mulvaney as Acting Director of the Consumer Financial Protection Bureau,[85] Matthew Whitaker as Acting Attorney General,[86] or Ken Cuccinelli as Acting Director of the U.S. Citizenship and Immigration Services.[87] Reliance on acting officers enhances presidential control because they are easy to name and replace.

The Court's unitary executive cases will likely facilitate some of President Trump's efforts to control the executive branch, but how much remains to be seen. For example, the Court's removal power cases will make it easier for President Trump to remove agency heads, including perhaps at least some traditional independent agencies, either because the Court rejects implicit

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expand[ed] executive control over administrative adjudicators." Paul R. Verkuil, *Recent Developments: Presidential Administration, the Appointment of ALJs, and the Future of For Cause Protection*, 72 ADMIN. L. REV. 461, 464 (2020). Nonetheless, although President Biden repealed many of President Trump's orders, he did not repeal this order and ALJs are still exempt from civil service hiring.

[82] Memorandum from the Solicitor General to Agency General Counsels on Guidance on Administrative Law Judges After *Lucia v. SEC* (S. Ct.) (July 2018), https://static.reuters.com/resources/media/editorial/20180723/ALJ--SGMEMO.pdf [https://perma.cc/9ZFU-5PGF] (indicating the Department of Justice will only defend good-cause removal requirements for ALJs if those requirements are "properly read").

[83] 5 U.S.C. §§ 3345–3349d.

[84] *See id.* at § 3345(a). It is not necessary to recount the complexity of this statute here. For further discussion, see Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613 (2020).

[85] *See* English v. Trump, 279 F. Supp. 3d 307, 319–320 (D.D.C. 2018) (concluding that Deputy Director of Bureau was unlikely to succeed on the merits of her claim for injunctive relief against President Trump's use of the FVRA to appoint Mulvaney).

[86] A number of lower court cases addressed challenges to this appointment focusing on an alleged conflict between FVRA and the Justice Department succession statute and the constitutionality of appointing an acting Attorney General without Senate consent. *See* United States v. Santos-Caporal, 2019 WL 468795 (E.D. Mo. 2019), report and recommendation adopted, 2019 WL 460563 (E.D. Mo. 2019); United States v. Valencia, 2018 WL 6182755 (W.D. Tex. 2018); United States v. Peters, 2018 WL 6313534 (E.D. Ky. 2018); United States v. Smith, 2018 WL 6834712 (W.D. N.C. 2018). These issues became moot when the Senate confirmed the appointment of William Barr. *See* Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives, 920 F.3d 1 (D.C. Cir. 2019) (concluding that challenge to regulation promulgated by Acting Attorney General Whittaker was moot because it had been ratified by Attorney General Barr).

[87] *See* L.M.-M. v. Cuccinelli, 442 F. Supp. 3d 1, 24–25 (D.D.C. 2020) (concluding that the appointment was invalid because Cuccinelli did not qualify as a first assistant).

good-cause restrictions or because explicit provisions are invalid.[88] Likewise, to the extent that President Trump seeks to control agency policy through executive orders or exercise delegated authority over personnel matters to enhance his control over inferior officers in the executive branch, it is unlikely that the judiciary will intervene.

On the other hand, the Court's formalistic approach to separation of powers may limit President Trump's ability to *replace* the officers he removes. Cabinet officials, traditional independent agency members, and other heads of agencies occupy positions as "principal officers," whose appointment requires Senate consent. To the extent that FVRA permits such positions to be filled by acting officers without Senate consent, it is arguably unconstitutional—unless the temporary nature of the position converts it from a principal to an inferior officer. The answer to this question is important because the need to get Senate consent for a replacement is an important constraint on the removal of officers.[89]

In the final analysis, it is safe to assume that President Trump will wield more direct and extensive control over officers in the executive branch than during his first term, but there will be constitutional, statutory, and political limits to that control. It is also safe to assume that events in the coming years will test the limits of presidential control in various ways.

B. Agency Power and Authority

While President Trump may hold a tighter rein on federal administrative agencies during his second term, he is likely to find their ability to do what he wants is constrained.[90] I think it is safe to assume that Congress will not enact President Trump's agenda and that he will attempt to achieve his goals through executive action. These efforts, however, may be at odds with the new administrative law, as formalist separation of powers, judicial activism, and anti-agency perspectives may impede his ability to do so. Thus, the coming years may tell us something about the ultimate direction of the new administrative law.

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[88] President Trump has already begun to test the limits of his removal powers by acting to remove officials in violation of statutory requirements, including inspectors generals in many executive agencies, a member of the Federal Election Commission, and a member of the National Labor Relations Board. *See, e.g.*, Daniel Barnes & Dareh Gregorian, *Fired inspectors general sue Trump over their 'unlawful' termination*, NBC NEWS (Feb. 12, 2025, 11:28 AM) https://www.nbcnews.com/politics/donald-trump/fired-inspectors-general-sue-trump-unlawful-termination-rcna191869 [https://perma.cc/V6G9-DRR2]; Ashley Lopez, *Federal election commissioner says Trump is trying to improperly remove her*, NPR (Feb. 7, 2025, 2:57 PM) https://www.npr.org/2025/02/07/nx-s1-5290112/trump-federal-election-commissioner-weintraub [https://perma.cc/F4LF-YPLN]; Andrea Hsu, *Trump fires EEOC and labor board officials, setting up legal fight*, NPR (January 28, 2025, 6:07 PM) https://www.npr.org/2025/01/28/nx-s1-5277103/nlrb-trump-wilcox-abruzzo-democrats-labor [https://perma.cc/X8VD-7BHA].

[89] *See* Aaron L. Nielson & Christopher J. Walker, *Congress's Anti-Removal Power*, 76 VAND. L. REV. 1 (2022) (arguing that elimination of good-cause removal restrictions for independent agencies will not undermine their independence because the requirement of Senate consent for replacements imposes significant costs on presidential removal).

[90] This discussion assumes that the Constitution and the rule of law continue to limit the authority and conduct of the President and officers of the Executive Branch.

If there is one thing that almost everyone agrees on during these polarized times, it is that Congress is dysfunctional. The most recent elections did not alter the basic conditions of our current political moment. Any dreams of a grand legislative agenda are unrealistic even if the Republican Party currently controls the House, Senate, and presidency. Those majorities are slim, temporary, and insufficient to sustain a broad legislative agenda. Like the Biden, Obama, and first Trump Administrations, these conditions may produce a few key legislative initiatives, but it will be a major surprise if Congress passes a "big, beautiful bill" or a series of statutes to enact the entire Trump Administration policy agenda. In the absence of legislative action, President Trump will almost certainly try to implement his policies directly through the executive branch—just as other Presidents have done.[91] The new administrative law will enhance President Trump's control over the executive branch, but it will likely limit the authority of executive branch officials to carry out his wishes.

Consider, for example, the implications of the major questions doctrine for President Trump's well-known intent to impose tariffs. If President Trump tries to impose tariffs by executive action, that will certainly be challenged in court. Although Congress has delegated some discretion to impose tariffs by statute, the major questions doctrine would appear to be a major problem. Certainly, the imposition of massive tariffs would seem like a question of deep economic and political significance that the nondelegation and major questions doctrines would reserve for Congress. Other policy objectives, such as mass deportation of undocumented immigrants, are also likely to be difficult to implement without congressional action. This is not to say that tariffs or other measures are necessarily invalid, but rather to suggest that these doctrines would make it easier to challenge these actions in court.

Likewise, judicial activism invites challenges from opponents of President Trump's policies, just as it facilitated challenges to actions by agencies under President Biden. For example, in *Department of Commerce v. New York*,[92] the Supreme Court showed its mistrust of agency officials during the first Trump Administration when invalidating the Department of Commerce's effort to include a citizenship question on the census, describing the agency explanation as "contrived."[93] Likewise, the decisions that make it easier to get into court to

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[91] *See* Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience,* 35 YALE J. ON REG. 549, 550 (2018) (examining "presidential direction of administrative action in the Obama and early Trump Administrations against the backdrop of ongoing debates concerning: (i) the desirability of and appropriate techniques for presidential control of administration and (ii) the relevance of separated powers when American government is under unified political control").

[92] Dep't of Com. v. New York, 588 U.S. 752 (2019).

[93] *Id.* at 784–85; *see also id.* (describing agency's explanation as "incongruent with what the record reveals about the agency's priorities and decisionmaking process" and as exhibiting a "disconnect between the decision made and the explanation given").

challenge agency action will also make it easier to challenge agency action in the Trump Administration. Indeed, we can expect opponents of President Trump's policies to seek friendly district judges from whom they can obtain nationwide injunctions so as to tie President Trump's policies up in court.

The application of the new administrative law to this sort of action during the Trump Administration will tell us more about its underlying purpose. If the primary concern of the new administrative law is the power of agencies, writ large, then we might expect that many Trump Administration initiatives relying on broad assertions of power, such as the refusal to spend funds appropriated by Congress, might be at risk.[94] On the other hand, it appears that the new administrative law is at least to some degree asymmetrical, in that it is primarily focused on agency efforts to regulate private conduct and is less concerned with deregulation or with government benefit programs.

For example, the emphasis in *Jarkesy* (and Article III cases) is increasingly on the protection of traditional common law private rights, with the idea that Article III courts and jury trials are essential protections for the rights of parties burdened by regulatory actions.[95] Government benefits, like those provided under Social Security, Medicare or Medicaid, and other entitlement programs, are public rights, the administrative adjudication of which raises no concerns. In the same way, the rights of regulatory beneficiaries like environmental plaintiffs do not appear to qualify as private rights either and so can be freely resolved by agencies.

The major questions doctrine also appears to operate only when an agency tries to regulate (and not when it fails to do so or rescinds a previously adopted prior regulation). Consider, for example, the FCC's vacillation on whether to require broadband internet service providers (BISPs) to comply with "net neutrality" rules requiring them to treat all internet content, applications, and services equally regardless of their source.[96] In the most recent litigation challenging the net neutrality rule, *In re MCP No. 185*,[97] the U.S. Court of Appeals for the Sixth Circuit held that the FCC lacked the authority to issue the rule. Although the court declined to rule on whether the major questions doctrine applied,[98] a prior unpublished opinion in the case explicitly relied on the doctrine and net neutrality rules would appear to be questions of deep economic and

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[94] *See, e.g.*, Nat'l Council of Nonprofits v. Off. of Mgmt. and Budget, 2025 WL 368852 (D.D.C. Feb. 3, 2025) (granting temporary restraining order against funding freeze); Am. Foreign Serv. Ass'n v. Trump, 2025 WL 435415 (D.D.C. Feb. 7, 2025) (granting temporary restraining order against funding freeze in part); New York v. Trump, 2025 WL 480770 (D.R.I. Feb. 12, 2025) (denying government's motion to dissolve TRO against federal funding freeze).

[95] *See* Glicksman & Levy, *supra* note 20, at 1145 (describing parallel between private rights formalism and the discarded right-privilege distinction).

[96] It is not necessary to detail the convoluted history of these rules here. The key point is that the FCC declined to regulate, then decided to regulate, then rescinded the regulations, and then reissued them, all over a span of about 20 years. *See In re* MCP No. 185, 124 F.4th 993, 997–1001 (6th Cir. 2025) (recounting this history).

[97] In re MCP No. 185, 124 F.4th 993 (6th Cir. 2025).

[98] *See id.* at 1009 ("Given our conclusion that the FCC's reading is inconsistent with the plain language of the Communications Act, we see no need to address whether the major questions doctrine also bars the FCC's action here").

political significance.[99] The point here is that the net neutrality issue has exactly the same economic and political significance whether the FCC adopts a net neutrality rule or declines to adopt (or rescinds) the rule—just in opposite directions. Yet the major questions doctrine only seems to be a problem for the adoption of the rule.

Thus, the courts' reaction to agency decisions during the second Trump Administration will tell us a great deal about the true nature of the new administrative law. If the primary emphasis of the new administrative law is a commitment to restrictions on agency power, then the new administrative law will constrain the Trump Administration in much the same way as it did the Biden Administration. If, however, the new administrative law is about opposition to regulation, then we might expect the Court to tolerate broad assertions of deregulatory power by agencies. And if the Court allows the broad assertion of regulatory authority by the Trump Administration in ways that it denied authority to the Biden Administration, then we might be concerned that the Court is thoroughly politicized.

IV. CONCLUSION

In this Essay, I have come neither to praise administrative law nor to bury it. Instead, my goal has been to illuminate the profound changes that have reshaped the field. Despite these changes, administrative law and administrative agencies will live on and continue to play an essential role in the implementation of public policy.

But the agencies and administrative law we see going forward will be different. The independence of agency officials will be more limited and the President's ability to control agency action will be greater. At the same time, the administrative state will be less powerful. Agencies will wield less policy discretion and have more limited authority to promulgate rules or adjudicate cases.

The full contours of the new administrative law are still unfolding. Much will be revealed by the Court's decisions going forward, especially those that address the validity of agency actions under President Trump. In time, these decisions may tell us whether the primary characteristic of the new administrative law is a general curtailment of agency power, a focused attack on regulation by agencies, or a partisan political tool to block Democratic presidents.

A final note of caution is necessary. This entire Essay is premised on the assumption that administrative law is "law," that it binds agencies and the

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[99] *In re* MCP No. 185, 2024 WL 3650468, at *1, *5 (6th Cir. Aug. 1, 2024) (relying on major questions doctrine to conclude that plaintiffs were likely to succeed on the merits of their challenge to the regulation and granting stay).

President, and that the executive branch will comply with the decisions of the courts. Administrative law only matters if the rule of law still constrains the operation of government institutions through binding legal obligations—either because those officials accept law as binding or because the public and our institutions are willing to hold them to account if they do not.

As of this writing, there are disturbing signs that the Trump administration might ignore or directly defy judicial decisions applying administrative law principles to block its actions.[100] Indeed, the American Bar Association recently took the unusual step of reaffirming its support for the rule of law.[101] That such an entity would find it necessary to issue such a statement is a sad commentary on our times.

I have previously written about my support for the rule of law and my concerns that it is entirely dependent on a widely shared norm of respect for the law.[102] Once that norm has eroded, it is unclear how to get it back. As lawyers, we have a special obligation to uphold the rule of law. I hope that my fellow attorneys in the state will join me in renewing their commitment to supporting and defending the rule of law.

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[100] *See, e.g.* New York v. Trump, 2025 WL 440873 (D.R.I. Feb. 10, 2025) (concluding that plaintiff states had presented evidence that the United States "continued to improperly freeze federal funds and refused to resume disbursement of appropriated federal funds" in violation of the "the plain text of the TRO").

[101] *The ABA supports the Rule of Law*, AMERICAN BAR ASSOCIATION (Feb. 10, 2025), https://www.americanbar.org/news/abanews/aba-news-archives/2025/02/aba-supports-the-rule-of-law/ [https://perma.cc/QU8G-XFMD].

[102] Richard E. Levy, *The Tie That Binds: Some Thoughts About the Rule of Law, Law and Economics, Collective Action Theory, Reciprocity, and Heisenberg's Uncertainty Principle*, 56 KAN. L. REV. 899 (2008).