MAJOR QUESTIONS ABOUT PRESIDENTIALISM: UNTANGLING THE "CHAIN OF DEPENDENCE" ACROSS ADMINISTRATIVE LAW

JODI L. SHORT
JED H. SHUGERMAN

INTRODUCTION 513
I. PRESIDENTIALISM IN APPOINTMENT AND REMOVAL CASES 522
II. THE "CHAIN OF DEPENDENCE" AND PRESIDENTIALISM IN MQD POLICIES 533
A. Biden v. Nebraska*: Student Debt Forgiveness* 535
B. West Virginia v. EPA*: The Clean Power Plan* 539
C. NFIB v. OSHA*: COVID Emergency Temporary Workplace Safety Standard* 546
D. Alabama Association of Realtors v. United States Department of Health and Human Services*: The Eviction Moratorium* 548
E. King v. Burwell*: IRS Affordable Care Act Tax Credits* 551
F. Gonzales v. Oregon*: Attorney General's Assisted Suicide Guidance* 555
G. FDA v. Brown & Williamson Tobacco Corp.*: FDA Tobacco Regulation* 559
III. "UNACCOUNTABLE AGENCIES" AND ERASED PRESIDENTS IN THE MQD DECISIONS 564
A. Blaming Unruly and Unaccountable Agencies 565
B. Erasing Presidents 568
IV. ADDRESSING ALTERNATIVE EXPLANATIONS OF APPARENT CONTRADICTIONS 574
A. Presidential Erasure as Normal Administrative Law or Depoliticization? 575
B. Consistent Separation of Powers Formalism? 576
C. Structural Containment of the "Fourth Branch"? 580
V. RESOLVING THE CONTRADICTION IN FIVE DOCTRINAL AREAS 582
A. Reconsider Roberts Court Presidentialism in SEC v. Jarkesy*, etc.* 582
B. Major Questions and Presidential Answers 588
C. Does the MQD Apply to Presidential Delegations? 592
D. Preserve Chevron *Deference in* Loper Bright *and* Relentless 594
E. Continued Restraint on Non-Delegation 596
CONCLUSION 598

MAJOR QUESTIONS ABOUT PRESIDENTIALISM: UNTANGLING THE "CHAIN OF DEPENDENCE" ACROSS ADMINISTRATIVE LAW

JODI L. SHORT*
JED H. SHUGERMAN**

Abstract: A contradiction about the role of the President has emerged between the Roberts Court's Article II jurisprudence and its major questions doctrine (MQD) jurisprudence. In its appointment and removal decisions, the Roberts Court claims that the President is the "most democratic and politically accountable official in Government" because the President is "directly accountable to the people through regular elections," an audacious new interpretation of Article II of the U.S. Constitution. Tight presidential control of agency officials, the Roberts Court argues, lends democratic legitimacy to the administrative state. We identify these twin arguments about the "directly accountable president" and the "chain of dependence" as the foundation of "Roberts Court presidentialism."

Meanwhile, each of the major questions policies over the past three decades is the product of the "directly accountable president" and the "chain of dependence" in action: presidents campaigning on the policy, directing agencies to adopt the policy, and then publicly taking credit and responsibility for the policy. Nevertheless, the Roberts Court has almost always ignored the President's role in major questions policies and instead blamed the agency for overstepping its delegated power. The erasure of presidential involvement serves the Court's narrative of blaming "unaccountable bureaucrats," rather than either granting the policy more democratic legitimacy for its presidential backing or holding the President accountable for overstepping the separation of powers. The erasure suggests that the Court has an underlying ambivalence or anxiety about the problems of presidential power, which Roberts Court presidentialism has exacerbated. Ironies abound: the Court relies on a theory of presidential accountability, but then retreats from holding presidents accountable; it expands the power of unaccountable judges based on a narrative of "unaccountable bureaucrats."

The rule of law requires consistent reasoning. We suggest doctrinal opportunities to resolve the contradictions between the Roberts Court's Article II presiden-

* Mary Kay Kane Professor of Law, UC Law, San Francisco.
** Professor and Joseph Lipsitt Scholar, Boston University School of Law.
The authors are grateful for insightful comments on drafts by Beau Baumann, Jack Beermann, Anya Bernstein, Blake Emerson, Chris Havasy, Keith Hylton, Gary Lawson, Ron Levin, Joshua Macey, Zach Price, Mike Ramsey, Dorit Reiss, Ed Rubin, Bijal Shah, Mila Sohoni, Glen Staszewski, and Adam White. Many thanks to Claire Baker and Amin Labbate for excellent research assistance.

tialism and its major questions' erasures of presidents, including: appointment and removal doctrine; the contours of the MQD and its potential extension to statutory delegations of authority to the President; the future of *Chevron* deference; and the application of the non-delegation doctrine. The Roberts Court can untangle the "chain of dependence" with more consistency in either direction, but perhaps the most important lessons from these contradictions are recognizing the value of judicial restraint and acknowledging the costs of direct presidential power over agencies, not just the benefits.

INTRODUCTION

A contradiction has emerged from the Supreme Court's jurisprudence on executive power. On the one hand, in a series of rulings expanding the presidential power of appointment and removal, the Roberts Court builds a unitary executive theory positing that presidents have a special national democratic legitimacy (relative to a locally-elected Congress and appointed agency officials), and thus presidential control is necessary to bring order, accountability, and constitutional legitimacy to the administrative state.[1] For example, in *Seila Law LLC v. Consumer Financial Protection Bureau*, invalidating statutory protections from presidential removal at will, Chief Justice Roberts described the Framers' "constitutional strategy" as "divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections."[2] He wrote:

> [T]he Framers made the President the most democratic and politically accountable official in Government. Only the President (along with the Vice President) is elected by the entire Nation. And the President's political accountability is enhanced by the solitary nature of the Executive Branch, which provides "a single object for the jealousy and watchfulness of the people."[3]

Chief Justice Roberts went on to explain that, for this reason, executive branch officials must be connected to the President through a "chain of dependence" binding them to the President, who is ultimately accountable to the

---

[1] *See infra* notes 40–102 and accompanying text (discussing the appointment and removal decisions). Scholars have documented that the Roberts Court's account of presidential power is more a matter of political theory than of solid textual or originalist historical evidence. *See, e.g.*, Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83, 115 (2021); *infra* notes 385–409 and accompanying text (further discussing this point).

[2] Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2203 (2020).

[3] *Id.* (quoting THE FEDERALIST NO. 70, at 479 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

people.[4] These twin arguments (as a shorthand, "the directly accountable president" and the "chain of dependence") are the foundation for what we identify as "Roberts Court presidentialism" or "presidential superiority": a new audacious claim that the President is "directly accountable" through "regular elections" and is the "most democratic and politically accountable officer in Government," plus a more recurring argument that direct presidential control is necessary to lend democratic legitimacy to the administrative state.[5]

On the other hand, in the decisions that form the basis of the major questions doctrine (MQD), the Roberts Court has repeatedly struck down policies that are the product of the "national presidency" and a highly visible "chain of dependence" in action.[6] The doomed MQD policies were promulgated by agencies linked to presidents with formal supervisory power who directed, actively supported, and took public responsibility for those agencies' key policy decisions. The various presidents involved were, in turn, linked to an attentive public that was engaged in vigorous political debate about these high-profile policies. Mysteriously, despite the special national democratic character of presidential involvement in policies that have been struck down in MQD cases, the President is virtually invisible in these opinions. For example, in 2023, in *Biden v. Nebraska*, the Court did not discuss President Biden's extensive involvement and pivotal decision-making role in the student debt relief policy struck down in that case.[7] In 2015, in *King v. Burwell*, the Court did not even mention President Obama in its consideration of a challenge to the Affordable Care Act (ACA)—his signature policy achievement, more commonly known

[4] *Id.* (quoting 1 ANNALS OF CONG. 499 (1789)); *see also* United States v. Arthrex, Inc., 141 S. Ct. 1970, 1979 (2021) (citing 1 ANNALS OF CONG. 499) (describing Madison's "chain of dependence").

[5] *Seila Law*, 140 S. Ct. at 2203 (referring to the Framers' intent when designing the office of the President). Whereas "judicial supremacy" refers to the Supreme Court as final interpreter of the Constitution, we use the term "presidential superiority" to refer to granting the President powers beyond checks and balances based on a theory that the presidency is more democratic. "Presidentialism" has been used as a historical label in the literature on the Decision of 1789, but only in reference to whether Article II implied any removal power, not whether it implied an indefeasible power, and not with any implied presidential superiority or more democratic representativeness. *See, e.g.*, Jed H. Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. PA. L. REV. 753, 776 (2023); *cf. Seila Law*, 140 S. Ct. at 2230 (Kagan, J., concurring in part, dissenting in part) (discussing the removal power in a presidentialist context). David Driesen explained Chief Justice Roberts's opinion in *Seila Law* as a theory of "the plebiscitary presidency model," a similar account of the representative presidency. *See* David M. Driesen, *Political Removal and the Plebiscitary President: An Essay on* Seila Law, LLC v. Consumer Financial Protection Bureau, 76 N.Y.U. ANN. SURV. AM. L. 707, 728–33 (2021) (explaining that the Court "reimagin[ed] the past as confirming the plebiscitary presidency"). For a discussion of the ahistorical basis for Justice Roberts's claims of the representative presidency, see *infra* notes 371–379 and accompanying text.

[6] *See infra* notes 103–289 and accompanying text (discussing some of these decisions).

[7] *See generally* Biden v. Nebraska, 143 S. Ct. 2355 (2023) (failing to mention President Biden in connection to federal government efforts around debt relief).

as "Obamacare."[8] In 2006, a mix of conservative and liberal Justices similarly erased President George W. Bush from *Gonzales v. Oregon*, a case challenging regulatory action to curb physician-assisted suicide, despite the fact that the regulatory action had been personally directed and publicly supported by President Bush.[9] Despite the Court's insistence in appointment and removal cases that presidential control legitimates the actions of administrative agencies, the Court closes its eyes in MQD cases to the President's prominent role.

Instead, the Court blames major questions indiscretions on unruly and unaccountable agencies: "[H]undreds of [them] poking into every nook and cranny of daily life";[10] agencies "laying claim to extravagant statutory power over the national economy";[11] agencies lying in wait, seeking "to exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond its initial assignment."[12] According to the concurring Justices in *National Federation of Independent Business v. Department of Labor* (*NFIB v. OSHA*), "[t]he major questions doctrine guards against this possibility" of unaccountable bureaucrats overreaching beyond democratic control.[13]

What seems to have escaped the Court's notice is that its solution to the problem of agency accountability in appointment and removal cases—presidential control—has become the nub of its problem in MQD cases. The policies felled by the MQD are paragons of presidential control, but that does not seem to have reined in the agencies that promulgated them. To the contrary, the President's influence in each instance arguably emboldened the agencies to take the ill-fated policy positions that they did. The fact that the Court applies the MQD through review of statutory interpretations by *executive* agencies with limited autonomy rather than *independent* agencies with greater autonomy deepens the tension with its presidentialist theories.[14]

This seeming paradox might be reconciled if the Court had taken the opportunity in MQD cases to reflect on the soundness of its unitarian theory of agency accountability through presidential control. But the Court has done no such thing. Indeed, despite presidents taking the lead and taking responsibility for each of the MQD policies promulgated this century, the Court continually

---

[8] *See generally* 576 U.S. 473 (2015) (making no mention of President Obama).

[9] *See generally* 546 U.S 243 (2006) (failing to mention the President).

[10] City of Arlington v. FCC, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

[11] Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014).

[12] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab. (*NFIB v. OSHA*), 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring).

[13] *Id.* (Gorsuch, J., joined by Thomas & Alito, JJ., concurring).

[14] *See generally* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769 (2013) (demonstrating that the agencies involved in major questions cases—EPA, IRS, CDC, OSHA, and DOJ—have not only formal independence from the President, but limited autonomy based on a range of institutional features).

ignores the President's role and scapegoats the agencies that did the President's bidding. This is an odd way for unitarians to write and think about the executive branch, unless they believe that these agencies were working in secret or somehow slipped the President's grasp. But there is no evidence that the agencies defied presidential directives or that the Court believes they did.[15] In fact, as we document below, the historical record indicates the opposite: the President drove each of these policies.[16]

If the agencies that burst the bonds of their statutory authority were, indeed, under firm presidential control, then the MQD cases raise serious questions about presidentialism and accountability that the Court has not acknowledged, much less resolved. Many scholars have debated whether the President actually represents the nation, whether the Founders intended for the President to represent the nation, and whether this would be a normatively a good idea.[17]

---

[15] Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court's Political Theory*, 73 HASTINGS L.J. 371, 415 (2022) ("If we take seriously these Justices' democratic understanding of the President and unitary and hierarchical understanding of the executive branch, then legislative delegation to principal officers like the attorney general whom the president appoints and can remove at will poses little, if any, problem for democratic legitimacy.").

[16] *See infra* notes 103–289 and accompanying text (analyzing the role of the president in MQD cases and the promulgation of these policies).

[17] *See, e.g.*, JEREMY D. BAILEY, THE IDEA OF PRESIDENTIAL REPRESENTATION 1–41 (2019) (presenting a historical account of presidential representation); JAMES W. CEASER, PRESIDENTIAL SELECTION: THEORY AND DEVELOPMENT 41–86 (1979) (considering the functions of the presidential selection system); JOHN A. DEARBORN, POWER SHIFTS: CONGRESS AND PRESIDENTIAL REPRESENTATION 16 (2021) (arguing that "the best way to understand presidential representation is through the institutional reforms" throughout history); WILLIAM G. HOWELL & TERRY M. MOE, RELIC: HOW OUR CONSTITUTION UNDERMINES EFFECTIVE GOVERNMENT AND WHY WE NEED A MORE POWERFUL PRESIDENCY 99–107 (2016) (contrasting the goals and viewpoints of Congress and the President); JOHN HUDAK, PRESIDENTIAL PORK: WHITE HOUSE INFLUENCE OVER THE DISTRIBUTION OF FEDERAL GRANTS 8–9 (2014) (criticizing presidential discretion in the context of federal fund distribution); DOUGLAS L. KRINER & ANDREW REEVES, THE PARTICULARISTIC PRESIDENT: EXECUTIVE BRANCH POLITICS AND POLITICAL INEQUALITY 3 (2015) (arguing that presidents "pursue policies that target public benefits disproportionately toward some political constituencies at the expense of others"); ERIC NELSON, THE ROYALIST REVOLUTION: MONARCHY AND THE AMERICAN FOUNDING 1–28, 184–232 (2014) (offering a flawed and often mistaken interpretation that the Founders patterned the presidency after the British monarchy and the royal prerogative); NANCY L. ROSENBLUM, ON THE SIDE OF THE ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP 41 (2008) (presenting a historical analysis of elections); NADIA URBINATI, DEMOCRACY DISFIGURED: OPINION, TRUTH, AND THE PEOPLE 4–8, 174 (2014) (presenting a historical view of "representative democracy"); B. DAN WOOD, THE MYTH OF PRESIDENTIAL REPRESENTATION, at ix (2009) (analyzing the "nature of modern presidential representation"); Robert A. Dahl, *Myth of the Presidential Mandate*, 105 POL. SCI. Q. 355, 361–66 (1990) (considering the existence of a presidential mandate to enact policies campaigned on, based on election by a plurality of the people); Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1231–42 (2006) (arguing that presidents "have an incentive to cater to a narrower geographic and population constituency"). *See generally* Jane Mansbridge, *Rethinking Representation*, 97 AM. POL. SCI. REV. 515 (2003) (analyzing and comparing traditional and more recent theories of presidential representation). For parallel debates in administrative

This Article does not address those questions in depth, but instead, joins a small handful of scholars critiquing Chief Justice Roberts's specific claims about presidential superiority and representativeness.[18] Against his claim that the presidency is the "most democratic" office, we note a valid argument that the presidency is structurally and functionally the least representative elected office, as its unitary all-or-nothing design leaves roughly half of the electorate entirely unrepresented. We summarize the historical consensus against the claim that the Founders intended "presidential representation" of the nation, and we point out additional contradictions (namely, within days of *Seila Law*'s claim of the President's "direct" popular election, the Court confirmed the Electoral College's indirectness and states' rights to appoint electors).[19] We show that his claims are more extreme and dubious leaps from Justices' earlier presidentialist arguments. Further, we extend these critiques by showing how the Roberts Court's presidentialism in appointment and removal cases contradicts its MQD jurisprudence.

Juxtaposing the Court's recent appointment and removal decisions with its MQD decisions illuminates three particularly glaring contradictions of Roberts Court presidentialism. First, it reveals that the Court is playing an accountability shell game. In the appointment and removal cases, Congress is the problem, enacting unconstitutional laws that overreach the separation of powers, and the solution is the President, who is "directly accountable to the people through regular elections."[20] Meanwhile, in the MQD decisions, the Court holds Congress up as the solution (as the democratic branch[21] to which the

law, see Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) and the enormous literature debating it.

[18] *See* Andrea Scoseria Katz & Noah A. Rosenblum, *Removal Rehashed*, 136 HARV. L. REV. F. 404, 405 (2023) [hereinafter Katz & Rosenblum, *Removal Rehashed*] (critiquing scholarly arguments that support the unitary executive theory); Andrea Scoseria Katz & Noah A. Rosenblum, *Becoming the Administrator-in-Chief:* Myers *and the Progressive Presidency*, 123 COLUM. L. REV. 2153, 2166–77 (2023) (reviewing decisions by the Roberts Court and analyzing their historical basis); Joshua J. Schroeder, *We Will All Be Free or None Will Be: Why Federal Power Is Not Plenary, but Limited and Supreme*, 27 TEX. HISP. J.L. & POL'Y 1, 17 (2021) (considering the Court's opinion in *Seila Law* and arguing that "[t]he idea that the founders supported a powerful unitary executive theory is belied by history and precedent"); Bijal Shah, *The President's Fourth Branch?*, 92 FORDHAM L. REV. 499, 501–02 (2023) (arguing that "the expansion of presidential power has encouraged administrative agencies to become increasingly unaccountable to Congress").

[19] *See* Chiafalo v. Washington, 140 S. Ct. 2316, 2320 (2020) (holding that an elector has a duty to vote for the candidate determined by their state and may be penalized for violating that duty).

[20] Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2203 (2020).

[21] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab. (*NFIB v. OSHA*), 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring) (articulating that by protecting Congress's Article I power, the non-delegation doctrine and the MQD "[b]oth serve to prevent 'government by bureaucracy supplanting government by the people'" (quoting Antonin Scalia, *A Note on the Benzene Case*, REGUL.: AEI J. ON GOV'T & SOC'Y, July–Aug. 1980, at 27)).

"Constitution gives . . . the reins" to make "the Nation's policy") and "unaccountable" agencies are the problem.[22] Presidents are rendered invisible, and their democratic mandate from national elections and the legitimating "chain of dependence" are suddenly irrelevant.

Second, the Court's erasure of presidents from the recitation of facts in MQD cases where presidents played prominent roles suggests that the Justices wish to avoid two potentially awkward confrontations: one with presidents who have potentially violated the separation of powers, and the other with the dangers of the Court's own long-term presidentialist project. Presidential power has been expanding for decades, and the Roberts Court's appointment and removal jurisprudence both validates and accelerates that expansion. The MQD decisions generally find that the executive branch overstepped, but the Roberts Court's insistence on hiding the role of presidents in its narrative of executive overreach suggests a hidden ambivalence about presidential power and an unwillingness to acknowledge that its own presidentialist jurisprudence has increased the dangers of direct presidential control over administrative agencies. Ironically, although the Roberts Court repeatedly relies on the President's accountability to expand presidential control in appointment and removal cases, its presidential erasure shields presidents from legal accountability, obscuring their role and avoiding an important mechanism for democratic accountability.

Third, the Roberts Court's shifting use of presidentialism produces the ultimate contradiction: a jurisprudence fixated on the problems of "unaccountable bureaucrats" and the importance of "democratic accountability" has created new legal doctrines that increase the power of the judiciary—the most unaccountable, least democratic branch.[23]

These contradictions demand resolution, and the Court's current docket offers abundant opportunities to address them. *Securities and Exchange Commission v. Jarkesy* invites the Court to extend presidential control to adminis-

---

[22] Biden v. Nebraska, 143 S. Ct. 2355, 2381 (2023) (Barrett, J., concurring).

[23] Blake Emerson argues that with the latest iteration of the MQD, "the Justices are taking a share of executive power for themselves and acting collectively as the President's cochief of the federal government." Blake Emerson, *The Binary Executive*, 132 YALE L.J.F. 756, 764 (2022), https://www.yalelawjournal.org/forum/the-binary-executive [https://perma.cc/6VFL-6N3E]; *see* Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 97 (2022), https://harvardlawreview.org/forum/vol-136/the-imperial-supreme-court/ [https://perma.cc/2TVD-ALNK] ("[T]he Court has begun to implement the policy preferences of its conservative majority in a new and troubling way: by simultaneously stripping power from every political entity *except* the Supreme Court itself."); *see also Biden*, 143 S. Ct. at 2384 (Kagan, J., dissenting) ("In every respect, the Court today exceeds its proper, limited role in our Nation's governance.").

trative law judges performing adjudicative functions.[24] *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. United States Department of Commerce* ask the Court to overturn its 1984 decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council* and its rule of deference to agency interpretations of ambiguous statutes, or alternatively to expand the MQD exception to *Chevron* deference.[25] Undoubtedly, many litigants will ask the Court to further clarify the MQD to guide lower courts that are at a loss for how to coherently apply it. The Court should take these opportunities to reconcile its shifting theories of the President's role in agency accountability across its administrative law jurisprudence. Some have asked whether our invitation to the Roberts Court to resolve such contradictions is naïve, and that is a fair question.[26] To that audience, we welcome a reading of this Article as a critique of the Roberts Court's contradictory ideological assumptions and its inconsistent methodologies.

Although there is a substantial literature on the MQD and its precursors, this scholarship (much like the Court) has paid little attention to the President. The bulk of MQD scholarship assesses the coherence of the doctrine on its own terms,[27] evaluates the MQD's compatibility with various theories of statutory interpretation,[28] contemplates the MQD's implications for *Chevron* defer-

[24] *See* Jarkesy v. SEC, 34 F.4th 446, 464 (5th Cir. 2022) (holding that the insulation of SEC administrative law judges from removal is unconstitutional), *cert. granted*, 143 S. Ct. 2688 (U.S. June 30, 2023) (No. 22-859).

[25] *See* Loper Bright Enters. v. Raimondo, 45 F.4th 359, 365 (D.C. Cir. 2022) (applying the *Chevron* framework to questions of statutory interpretation), *cert. granted*, 143 S. Ct. 2429 (U.S. May 1, 2023) (No. 22-451); Relentless, Inc. v. U.S. Dep't of Com., 62 F.4th 621 (1st Cir.) (same), *cert. granted in part*, 144 S.Ct. 325 (U.S. Oct. 13, 2023) (No. 22-1219).

[26] Edward Rubin, *Major Contradictions at the Roberts Court*, JOTWELL (Nov. 30, 2023), https://adlaw.jotwell.com/major-contradictions-at-the-roberts-court/ [https://perma.cc/KF6Y-ZKA8] (reviewing Jodi L. Short & Jed. H. Shugerman, *Major Questions About Presidentialism: Untangling the "Chain of Dependence" Across Administrative Law*, 65 B.C. L. REV. 511 (2024)).

[27] *See generally* Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L.J. 465 (2023); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009 (2023); Ronald M. Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, CALIF. L. REV. (forthcoming 2024); Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022).

[28] *See* Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967, 1011–12 (2021) (examining the similarities between the MQD and the mischief rule); Kevin Tobia, *We're Not All Textualists Now*, 78 N.Y.U. ANN. SURV. AM. L. 243, 253–59 (2023) (considering textualism and the MQD); Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1938 (2017) (critiquing the legal support for the Courts' recently developed power canons). *See generally* Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515 (2023); Kevin O. Leske, *Major Questions About the "Major Questions" Doctrine*, 5 MICH. J. ENV'T & ADMIN. L. 479 (2016); Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL'Y 463 (2021); Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 IOWA L. REV. 465 (2024); Ilan Wurman, *Importance and Interpretive Questions*, 109 VA. L. REV. (forthcoming 2024).

ence,[29] analyzes the MQD's relationship to the non-delegation doctrine,[30] and suggests how Congress could respond to the MQD.[31]

The contribution of this Article is to center the President, and the Court's unitary theory of presidentialism, in the conversation about the MQD. Although a handful of articles have noted the MQD's relationship to executive power—characterizing it either as an encroachment on executive power[32] or as a potentially useful check on executive power[33]—only one provides a thorough

[29] *See generally* Kent Barnett & Christopher J. Walker, Chevron *Step Two's Domain*, 93 NOTRE DAME L. REV. 1441 (2018); William W. Buzbee, *Jazz Improvisation and the Law: Constrained Choice, Sequence, and Strategic Movement Within Rules*, 2023 U. ILL. L. REV. 151; Thomas W. Merrill, *The Major Questions Doctrine: Right Diagnosis, Wrong Remedy*, STAN. UNIV., HOOVER INSTITUTION (2003), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=5215&context=faculty_scholarship [https://perma.cc/S3S3-G8T6]; Keith W. Rizzardi, *From Four Horsemen to the Rule of Six: The Deconstruction of Judicial Deference*, 12 MICH. J. ENV'T & ADMIN. L. 63 (2022); Jonathan Skinner-Thompson, *Administrative Law's Extraordinary Cases*, 30 DUKE ENV'T L. & POL'Y F. 293 (2020); Christopher J. Walker, *Toward a Context-Specific* Chevron *Deference*, 81 MO. L. REV. 1095 (2016).

[30] *See generally* Baumann, *supra* note 27; Brian Chen & Samuel Estreicher, *The New Nondelegation Regime*, 102 TEX. L. REV. (forthcoming 2024); Deacon & Litman, *supra* note 27; Alison Gocke, Chevron*'s Next Chapter: A Fig Leaf for the Nondelegation Doctrine*, 55 U.C. DAVIS L. REV. 955 (2021); Levin, *supra* note 27; Randolph J. May & Andrew K. Magloughlin, NFIB v. OSHA*: A Unified Separation of Powers Doctrine and* Chevron*'s No Show*, 74 S.C. L. REV. 265 (2022); Sohoni, *supra* note 27; Ilya Somin, *Nondelegation Limits on COVID Emergency Powers: Lessons from the Eviction Moratorium and Title 42 Cases*, 15 N.Y.U. J.L. & LIBERTY 658 (2022); Cass R. Sunstein, *The American Nondelegation Doctrine*, 86 GEO. WASH. L. REV. 1181 (2018); Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475 (2021) [hereinafter Sunstein, *There Are Two "Major Questions" Doctrines*]; Marla D. Tortorice, *Nondelegation and the Major Questions Doctrine: Displacing Interpretive Power*, 67 BUFF. L. REV. 1075 (2019); Ilan Wurman, *As-Applied Nondelegation*, 96 TEX. L. REV. 975 (2018).

[31] *See* Christopher J. Walker, *Responding to the New Major Questions Doctrine*, 46 REGUL. 26, 26–27 (2023) (suggesting that Congress "enact legislation similar to the 1996 Congressional Review Act that would enable it to quickly address agency rules that have been invalidated on major questions doctrine grounds").

[32] *See* Baumann, *supra* note 27, at 465 (placing courts within "separation-of-powers conflicts"); Deacon & Litman, *supra* note 27, at 1085 (commenting that the MQD "limits the executive branch's power relative to the federal legislature's and the federal courts'"); Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2081 (2018) ("[I]n the major questions cases, the Court narrows its focus to legislative control alone, while ignoring the possibility that administrative agencies might draw deliberative democratic authority from presidential input."); Timothy A. Roth, *Major Questions Doctrine: Implications for Separation of Powers and the Clean Power Plan*, 29 GEO. ENV'T L. REV. 555, 565 (2017) ("In short, the major questions doctrine impedes the executive in the fulfillment of its constitutional obligations."); *cf.* Sohoni, *supra* note 27, at 276 ("The old major questions exception was a check on executive power . . . .").

[33] *See* Bijal Shah, *Statute-Focused Presidential Administration*, 90 GEO. WASH. L. REV. 1165, 1250 (2022) ("[T]he major question doctrine could be complementary to legislative specification, if courts apply the doctrine to maintain the primacy of statutory aims . . . particularly in instances where the policy at issue has been heavily influenced by the President."); Ilya Somin, *A Major Question of Power: The Vaccine Mandate Cases and the Limits of Executive Authority*, 2021–2022 CATO SUP. CT.

analysis of the executive branch separation of powers issues presented by the MQD.[34] This Article extends the emerging body of scholarship on the relationship between the MQD and executive power by focusing on the particularly jarring contradiction between the MQD and the theory of presidentialism underlying the Roberts Court's appointment and removal jurisprudence. Additionally, this Article lays out the voluminous evidence documenting that contradiction. Specifically, it catalogues the President's role in directing and supervising the agencies that adopted policies struck down as "major questions," reveals the President's conspicuous absence from MQD cases challenging such policies, and considers the implications of erasing the President for the coherence of the Court's administrative law jurisprudence.

The Article proceeds as follows. Part I surveys the Court's appointment and removal jurisprudence and describes the theory of presidential accountability that underlies it: the "chain of dependence." The Court has theorized this chain as binding agencies in a direct line of accountability to the President, who is said to be "the most democratic and politically accountable official in Government" because he is "directly accountable to the people through regular elections."[35] Even if these claims of presidential superiority are dubious in terms of original public meaning and structure, they are the core of the Roberts Court's unitary executive theory to solve the problem of agency accountability. Part II presents detailed case studies of presidents' involvement in the policies challenged (and mostly struck down) in MQD cases decided by the Court this century.[36] These case studies show that each of these policies is a product of the Court's "chain of dependence" ideal: agency officials dependent on the President, and the President responsible to the electorate. Part III turns its focus to the Court's MQD decisions, demonstrating that these cases, like the appointment and removal cases, are driven by the Court's concerns about a lack of agency accountability, but mysteriously erase the President from the story.[37] They contain no mention of the President's close supervision of major questions policies, and they fail to consider whether this might be a basis for legitimizing the agency's actions (or tell us why it shouldn't be). Part IV considers and rejects alternative explanations for the contradictions we identify, including that the Court is simply doing normal, de-politicized administrative law, that the two lines of cases reflect consistent separation of powers formalism, and that both lines of cases represent a structural constitutional commitment to

REV. 69, 71 (arguing that "Americans across the political spectrum have much to gain from judicial enforcement of limits on executive power").

[34] *See generally* Emerson, *supra* note 23.

[35] Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2203 (2020); *see infra* Part I.

[36] *See infra* Part II.

[37] *See infra* Part III.

containing the "Fourth Branch."[38] Part V suggests ways for the Court to more coherently resolve these contradictions and untangle the "chain of dependence" in upcoming cases across a range of administrative law issues, including: appointment and removal; the contours of the MQD and its potential extension to statutory delegations of authority to the President; the future of *Chevron* deference; and the application of the non-delegation doctrine.[39]

I. PRESIDENTIALISM IN APPOINTMENT AND REMOVAL CASES

In two lines of cases on the presidential powers of appointment and removal, the Roberts Court has emphasized the special role of the President at the top of the "chain of dependence," an executive hierarchy under the only American official who has a national democratic mandate and, purportedly, "direct" electoral accountability to the American people.[40] Setting aside (for now) the historical accuracy of these originalist claims, this Part traces their genealogy in the Court's jurisprudence, showing that the Roberts Court has escalated the rhetoric and theoretical claims beyond earlier Justices' arguments. Chief Justice Taft,[41] Justice Jackson,[42] and Justice Scalia,[43] focused on the President's unique role in representing "the entire nation," a model we call "the nation's president." We contrast that model with the Roberts Court's "most accountable president" based on new claims about direct election and being the "most democratic . . . official," period.[44]

Some of the Founders wanted to create a presidency as representative of the nation, but Article II was the result of compromises with those who did not share these goals.[45] The Court's theory of the President's unique national democratic legitimacy emerged a century ago,[46] went into exile for several dec-

---

[38] *See infra* Part IV.

[39] *See infra* Part V.

[40] *Seila Law*, 140 S. Ct. at 2203; *see* Howard Schweber, *The Roberts Court's Theory of Agency Accountability: A Step in the Wrong Direction*, 8 BELMONT L. REV. 460, 464–65 (2021) (describing the "chain of dependence").

[41] *See* Myers v. United States, 272 U.S. 52, 123 (1926) ("The President is a representative of the people . . . elected by all the people . . . .").

[42] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 653 (1952) (Jackson, J., concurring) ("Executive power has the advantage of concentration in a single head in whose choice the whole Nation has a part . . . .").

[43] *See* Edmond v. United States, 520 U.S. 651, 659 (1997) (citing THE FEDERALIST NO. 76, at 387 (Alexander Hamilton) (M. Beloff ed., 1987)) (describing the role of the President in relation to all people); Morrison v. Olson, 487 U.S. 654, 729 (1988) (Scalia, J., dissenting) ("The President is directly dependent on the people, and since there is only *one* President, *he* is responsible.").

[44] *Seila Law*, 140 S. Ct. at 2203.

[45] BAILEY, *supra* note 17, at 4, 10, 40–41.

[46] *See Myers*, 272 U.S. at 131 (citing 1 ANNALS OF CONG. 499 (1789)) (describing Madison's "chain of dependence").

ades, and then returned in the form of unitary executive theory[47] and "presidential administration."[48] The Court's first reference to the "chain of dependence" (a term coined by James Madison) was Chief Justice Taft's 1926 decision in *Myers v. United States*, the key precedent establishing a presidential removal power as implied by Article II.[49] Chief Justice Taft—the only former president to sit on the Supreme Court—is well known as the architect of a theory of expansive presidential power based on the President's status as the sole national representative officer in the federal government.[50] Taft recounted Madison's argument during the debate over the first departments and the removal power, known as the "Decision of 1789":[51]

> As Mr. Madison said in the debate in the First Congress: "Vest this power [of removal] in the Senate jointly with the President, and you abolish at once that great principle of unity and responsibility in the Executive department, which was intended for the security of liberty and the public good. If the President should possess alone the power of removal from office, those who are employed in the execution of the law will be in their proper situation, and *the chain of dependence* be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community."[52]

Madison's "chain of dependence" was a hierarchy with the President at the pinnacle of the federal government, and only "the people" above the President. In this framework, the President's unique "responsibility" and accountability to the American people preserves democratic "security of liberty and the public good."[53]

---

[47] *See* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165 (1992) (explaining the unitary executive theory).

[48] *See generally* Kagan, *supra* note 17 (explaining how presidential influence over executive agencies has developed over time, resulting in "presidential administration").

[49] *See Myers*, 272 U.S. at 131 (making reference to Madison's "chain of dependence") (citing 1 ANNALS OF CONG. 499).

[50] The perception of the President as the nation's singular representative has been shaped during the last century, by the rise of the modern administrative state and the "imperial presidency." *See* BAILEY, *supra* note 17, at 1–10 (reviewing the development of the modern presidency and presidential representation); Katz & Rosenblum, *Removal Rehashed*, *supra* note 18, at 405 (analyzing the development of the Progressive Presidency).

[51] For evidence that the "Decision of 1789" was indecisive and that the First Congress rejected the unitary theory of Article II on removal, see *infra* notes 350–379 and accompanying text; *see also* Shugerman, *supra* note 5, at 759–61 (describing the Decision of 1789).

[52] *Myers*, 272 U.S. at 131 (emphasis added) (quoting 1 ANNALS OF CONG. 499); 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 925 (1972) (documenting events of June 17, 1789).

[53] *Myers*, 272 U.S. at 131.

Taft further elaborated on these points in *Myers*, expanding the locus of accountability to include not only the discipline imposed by upcoming elections, but also the President's democratic "mandate" from the previous election to exercise power:[54]

> The President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President *elected by all the people* is *rather more representative of them all* than are the members of either body of the Legislature whose constituencies are local and not countrywide; and, as the President is elected for four years, *with the mandate of the people* to exercise his executive power under the Constitution, there would seem to be no reason for construing that instrument in such a way as to limit and hamper that power beyond the limitations of it, expressed or fairly implied.[55]

Taft's pivotal move in *Myers* was elevating the President above Congress as the political branch most representative of the people as a whole, validating the President's actions because of the President's unique and sustained connection to the American people through past and future national elections.[56] Taft highlighted the President's "elect[ion] by all the people," consistent with the "nation's president" model.[57] Legal scholars have recently characterized Taft's argument as a novel framing of the "Progressive President" and "the Administrator-in-Chief."[58] Although Taft was emphasizing the President's unique national role, he did not make claims about the President being "directly accountable" via elections or the "most accountable"—those would be the Roberts Court's dubious additions.

Just nine years later, in 1935, the Court severely limited the extent of Taft's removal rule in *Humphrey's Executor v. United States*, the precedent allowing Congress to protect some officers from presidential removal at will.[59] In *Humphrey's*, the Court did not focus on *Myers*'s conception of presidential power over executive offices, but instead recognized a separate category of offices as "quasi-legislative" and "quasi-judicial," with more congressional

---

[54] *Id.* at 123.

[55] *Id.* (emphasis added).

[56] The Court does not address the empirical or normative validity of this model of presidential accountability—ignoring, for instance, the indirectness of the Electoral College and the potential accountability problems of second-term "lame duck" presidents who do not face another election.

[57] *Id.*

[58] *See* Katz & Rosenblum, *supra* note 18, at 2153, 2232–37 (arguing that the *Myers* decision was an expression of "Taft's Progressive Presidentialism").

[59] *See* 295 U.S. 602, 629 (1935) (holding that the Constitution does not grant the President limitless removal power).

power over such offices.[60] *Humphrey's* has applied primarily to allow Congress to statutorily insulate the heads of independent commissions and adjudicatory officers from presidential removal at will.

Humphrey's may have limited *Myers* and presidential removal power, but presidential power expanded in many other ways throughout the twentieth century, and another generation of Justices relied on the "nation's president" reasoning. In his famous *Youngstown Sheet & Tube Co. v. Sawyer* concurrence in 1952, Justice Jackson wrote: "Executive power has the advantage of concentration in a single head in whose choice the whole Nation has a part."[61] Jackson may have voted against President Truman's invocation of war powers, but overall, from World War II through the Cold War, the Commander-in-Chief's power continued to grow, based on another "chain of command"—to represent and defend "the nation."

Meanwhile, in domestic affairs, unitary executive theory was revived as a check against the growth of the administrative state and the power of independent agencies. Critics identified the separation of powers, presidential appointment, and presidential removal as checks on what they saw as an unelected "Fourth Branch" of questionable constitutional legitimacy.[62] The clarion call for unitarians came in Justice Scalia's lone dissent in 1988 in *Morrison v. Olson*, where he referred to a "chain of command" under the President's "direct control," echoing Chief Justice Taft's reference to a "chain of dependence," to argue against the non-presidential appointment and the for-cause removal protections of the independent counsel.[63] The Office of Independent Counsel was created by the Ethics in Government Act, which was enacted in 1978 after Watergate to provide a means of investigating misconduct in the executive branch.[64] Under this statutory scheme, when the attorney general deemed the appointment of an independent counsel appropriate, a three-judge panel from the D.C. Circuit would appoint the counsel, who could only be removed by the attorney general for good cause or impairment.[65] For the 7-1 ma-

[60] *Id.* at 627–30.

[61] 343 U.S. 579, 653 (1952) (Jackson, J., concurring).

[62] *See, e.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1244 (1994); Calabresi & Rhodes, *supra* note 47, at 1165–71; Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 559–99 (1994). For a later collection of unitary executive historical arguments, see STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008); MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION (2020).

[63] 487 U.S. 654, 721 (1988) (Scalia, J., dissenting).

[64] *See id.* at 660 (majority opinion) (describing the reason for enacting the Ethics in Government Act).

[65] *Id.* at 663 ("An independent counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and

jority, Chief Justice Rehnquist explained that such a good-cause requirement would not interfere with a president's duty to "take care that the laws be faithfully executed," and that the "independent counsel [was] an inferior officer," and thus did not require presidential appointment with the advice and consent of the Senate.[66]

Justice Scalia disagreed on both questions, grounding presidential appointment and removal powers squarely in the President's accountability to the people. He criticized the Court's categorization of the independent counsel as an inferior officer based on his understanding of the structure and history of an Appointments Clause, which contemplates that inferior officers "would, of course, *by chain of command still be under the direct control of the President*" even if they had been appointed by others.[67] In a long passage, Justice Scalia envisioned a chain of command through which public opinion checks the President and the President, in turn, checks prosecutors.[68] He concluded that the essential element of the chain of command was the public's ability to place blame:

> As Hamilton put it, "[t]he ingredients which constitute safety in the republican sense *are a due dependence on the people, and a due responsibility*." The President is directly dependent on the people, and since there is only *one* President, *he* is responsible. The people know whom to blame, whereas "one of the weightiest objections to a plurality in the executive . . . is that it tends to conceal faults and destroy responsibility."[69]

Independent prosecutors, however, operate outside these checks. If such an individual were unfairly chosen or acted unjustly, "there would be no one accountable to the public to whom the blame could be assigned. . . . [T]he Founders envisioned when they established a single Chief Executive accountable to the people: the blame can be assigned to someone who can be punished."[70] Notably, Justice Scalia never claimed the President was the *most* accountable or *most* democratic official. He made one reference to the President as "directly dependent on the people," apparently a half-step in the direction of

---

only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties." (quoting 28 U.S.C. § 596(a)(1))).

[66] *Id.* at 690–92.

[67] *Id.* at 721 (Scalia, J., dissenting) (emphasis added) (citing Madison in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 627 (Max Farrand rev. ed., 1966)).

[68] *Id.* at 728–29 (explaining that "the people" are the primary source of discipline and accountability for the President's execution of prosecutorial functions, even in extreme cases of misconduct and abuse of power in the executive branch).

[69] *Id.* at 729 (first emphasis added) (internal citations omitted) (quoting THE FEDERALIST NO. 70, at 427 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

[70] *Id.* at 731 (emphasis removed).

Chief Justice Roberts claiming there is direct accountability through elections.[71] It seems fair, however, to interpret Justice Scalia as putting the phrase "directly dependent" more in the context of the singularity of the President clarifying "responsibility," so "[t]he people know whom to blame"—which is not the same as a claim of direct election.[72] Moreover, Justice Scalia's use of the term "direct" seems to be a comparison to the independent official, to the judges who selected the independent prosecutor, or other administration officials, and in that comparison, the President is more direct. As we will see, the Roberts Court would take a much bigger and untenable leap, with the context of directness being a claim that the President is more democratic and directly accountable relative to Congress. Moreover, Justice Scalia should get more latitude for some imprecision in a dissent, whereas Chief Justice Roberts's majority opinions have the burden of greater clarity about the law and its reasoning.

After Justice Scalia's *Morrison* dissent in 1988, he continued to emphasize the President's special democratic imprimatur in interpreting the Appointments Clause, now joined by other Justices. Even though the Appointments Clause, as applied to principal officers, empowers both the President and the Senate, these Justices put extra emphasis on the President's connection to "the people." In 1991, the majority in *Freytag v. Commissioner* highlighted the special role of the President's "accountability to the people."[73] In concurring, Justice Scalia even more strongly emphasized that the President is "responsible to *his* constituency for their appointments and has the motive and means to assure faithful actions by his direct lieutenants."[74] In 1997, Justice Scalia's majority opinion in *Edmond v. United States* similarly focused on the President's responsiveness to national "reputation" and public opinion, which the Framers expected would produce better nominees than plural bodies.[75] Justice Scalia noted that because of this, presidents "would be less vulnerable to interest-group pressure."[76] He also acknowledged the Senate's role would "curb" the President, but the point of emphasis was on the President and on the President's responsiveness to the public: "If [the President] should . . . surrender the public patronage into the hands of profligate men, or low adventurers,

---

[71] *See id.* at 729 ("The President is directly dependent on the people, and since there is only *one* President, *he* is responsible.").

[72] *See id.* (discussing the President's dependency on "the people").

[73] 501 U.S. 868, 886 (1991) ("Their heads are subject to the exercise of political oversight and share the President's accountability to the people.").

[74] *Id.* at 907 (Scalia, J., concurring in part).

[75] 520 U.S. 651, 659 (1997) (quoting THE FEDERALIST NO. 76, at 376 (Alexander Hamilton) (M. Beloff ed., 1987)).

[76] *Id.*

it will be impossible for him long to retain public favour."[77] Again, this theory of the presidency suggests that its unity, its national character, and its public democratic accountability make the President's choices better, more reliable, and more in line with the national public interest.

In the major appointment and removal decisions over the last two decades, conservative Justices have built on Justice Scalia's national-representative theory of presidential accountability, and they have done so to curb what they see as the problem of unaccountable administrative agencies. The first turning point was in 2010 in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, a challenge to the double-layer of protection from presidential removal provided by statute to members of the Public Company Accounting Oversight Board.[78] They were subject to removal only for good cause by the Securities and Exchange Commissioners, who in turn were implicitly protected from the President's power of removal-at-will.[79] When the D.C. Circuit rejected a challenge to this double-layer of protection from presidential removal, then-Judge Brett Kavanaugh dissented, relying on presidentialism, quoting Madison's "chain of dependence" from executive officers to the president to the people, and invoking "that great principle of unity and responsibility in the Executive department."[80]

On appeal, Chief Justice Roberts, writing for a 5-4 majority, adopted the same arguments and the same sources. Chief Justice Roberts rejected multiple layers as not only immunity from the president, but irresponsibility to the people:

> Indeed, if allowed to stand, this dispersion of responsibility could be multiplied. If Congress can shelter the bureaucracy behind two layers of good-cause tenure, why not a third? . . . The officers of such an agency—safely encased within a Matryoshka doll of tenure protections—would be immune from Presidential oversight, even as they exercised power in the people's name.[81]

Then Chief Justice Roberts offered an extended account of the President's accountability, starting with the "chain of command" and the "chain of dependence" back to the people, moving to the public's democratic scrutiny of the

---

[77] *Id*. at 659–60 (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 375 (1833)). For a similar acknowledgment, see Justice Scalia's opinion later that year in *Printz v. United States*: "The insistence of the Framers upon unity in the Federal Executive—to ensure both vigor and accountability" to the people. 521 U.S. 898, 922 (1997).

[78] 561 U.S. 477, 483–84 (2010).

[79] *Id.* at 486–87.

[80] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 537 F.3d 667, 691 (D.C. Cir. 2008) (citing Myers v. United States, 272 U.S. 52, 131 (1926)), *rev'd*, 561 U.S. 477.

[81] *Free Enter. Fund*, 561 U.S. at 497.

President, and ending with the Framers' vision of a President "chosen by the entire nation":

> Without a clear and effective chain of command, the public cannot "determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.' That is why the Framers sought to ensure that 'those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community."
>
> By granting the Board executive power without the Executive's oversight, this Act subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts. The Act's restrictions are incompatible with the Constitution's separation of powers.
>
> . . . .
>
> No one doubts Congress's power to create a vast and varied federal bureaucracy. But where, in all this, is the role for oversight by an elected President? The Constitution requires that a President chosen by the entire Nation oversee the execution of the laws.[82]

Roberts maintained that the "chain of dependence," as tight presidential control of executive branch officials, is essential to maintain the unity of the executive:

> One can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts. Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people. This concern is largely absent from the dissent's paean to the administrative state.[83]

With heightened anti-bureaucracy rhetoric, Chief Justice Roberts asserted that the President's democratic *bona fides* and top-down control would rescue "the people" from undemocratic government by "functionaries" and "experts."[84]

---

[82] *Id*. at 498–99 (citations omitted).
[83] *Id*.
[84] *Id*.

The Roberts Court advanced its theory of presidential accountability in 2020, in *Seila Law LLC v. Consumer Financial Protection Bureau*, to a stronger claim of presidential superiority, including a puzzling new claim about the Framers' design of "direct" electoral accountability for the President. In ruling that the Director of the Consumer Finance Protection Bureau—the single head of an agency with significant executive power—could not be insulated from presidential removal at will, Chief Justice Roberts relied on the same sources and the same "chain of dependence" theory, but he added a surprising new claim: that the Framers "render[ed] the President *directly* accountable to the people through regular elections" and this "made the President the *most* democratic and politically accountable official in Government. Only the President (along with the Vice President) is elected by the entire Nation."[85] This passage exhibits the clearest turning point from Justice Taft's and Justice Scalia's more grounded framing of "the nation's president" to the Roberts Court's bolder reliance on the president as "the most democratic and politically accountable official."[86] Although Justice Scalia—in his lone *Morrison* dissent—had referred to the President as directly "accountable," he was not talking about accountability in the context of an election.[87] Instead, he was describing the more clear and direct lines of responsibility afforded by the unitary executive—because "The people know whom to blame."[88] The Roberts Court went a step further: putting "direct accountability" in terms of presidential elections.

Chief Justice Roberts overlooked substantial evidence undermining this claim of "direct" presidential accountability to the people, such as the design of the Electoral College, the Framers' reasons for indirect presidential selection, and the historical practice of states opting against direct voting for electors.[89] He also overlooked features of congressional elections that arguably give Congress a more democratic pedigree than the President, all in the service of turbo-charging presidentialism.[90]

---

[85] Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2203 (2020) (emphasis added).

[86] *See id.* (stating that "the Framers made the President the most democratic and politically accountable official in Government").

[87] Morrison v. Olson, 487 U.S. 654, 731 (1988) (Scalia, J., dissenting).

[88] *Id.* at 729.

[89] See infra notes 385–409 and accompanying text, especially on the "independent electors" case, Chiafalo v. Washington, 140 S. Ct. 2316 (2020), decided just two days before *Seila Law*. Scholars have referred to accountability relationships that entail an intermediary as examples of "indirect democratic accountability." *See* Christopher S. Havasy, *Radical Administrative Law*, 77 VAND. L. REV. (forthcoming 2024) (describing the theory of "indirect democratic accountability over agencies" as allocating agency powers to the President and Congress).

[90] Members of the House have always been directly elected by the people, and are elected every two years, arguably making them more directly democratic and politically accountable. After the Sixteenth Amendment, senators are also more directly elected. Moreover, a larger election in terms of

Chief Justice Roberts may have expanded the presidentialist theory in *Seila Law* with these dubious claims of "the most accountable" official because the Roberts Court's unitary executive cases were a leap beyond *Myers*. The question in *Myers* was simpler and more formalistic: Could Congress require the President to have the Senate's consent to remove an executive official? Did Article II imply a presidential removal power?[91] *Myers*'s holding was more limited as a structural matter, even if its dicta had a greater range. The questions in *Free Enterprise* and *Seila Law* went beyond *Myers*: even if Article II implied a presidential removal power exclusive of the Senate, and even if the President had the sole power to remove, could Congress set conditions on the removal, such as requiring "inefficiency, neglect of duty, or malfeasance," or "good cause"? In other words, was the President's implied Article II removal power indefeasible?[92] The Roberts Court concluded that, at least in the context of removal schemes containing "double layers" of protection or single-headed agencies wielding significant executive power, the President's removal power was indefeasible.[93] *Myers*'s interpretation that Article II implies removal was already a leap from the text and the historical record, but the Roberts Court's new indefeasibility rule was another leap that required more expansive justification. *Free Enterprise* did not have these presidentialist claims of "directness" and being "the most accountable." In the wake of new historical research questioning the originalist basis for unitary executive theory, Roberts bolstered this rule in *Seila Law* with a new presidentialist argument from structure and political theory.

The latest Roberts Court decisions on appointment and removal more fully elaborate the role of the "directly accountable president" and the "chain of dependence" in constitutional structure, portraying it as essential to the protection of republican government and individual liberty. In 2021, in *Collins v. Yellen*, Justice Gorsuch's concurrence charged that statutory removal restrictions protecting agency officials are constitutionally suspect because "[t]he chain of dependence between those who govern and those who endow them with power is broken."[94] This break in the chain jeopardizes the foundations of the constitutional structure because those links in the chain—"'a due depend-

the number of voters and a bigger geographic area may produce less directness and accountability. *See infra* notes 380–445 and accompanying text (critiquing the claim that the President is the "most accountable" official).

[91] Myers v. United States, 272 U.S. 52, 106 (1926).

[92] Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2192–93 (2020) (quoting 12 U.S.C. § 5491(c)(1), (3)); Free Enter. Fund. v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 483–84 (2010).

[93] *Free Enter. Fund*, 561 U.S. at 484; *Seila Law*, 140 S. Ct. at 2192.

[94] 141 S. Ct. 1761, 1797 (2021) (Gorsuch, J., concurring in part).

ence on the people' and 'a due responsibility' to them'"[95]— are the "key 'ingredients which constitute safety in the republican sense.'"[96]

In 2021, in *United States v. Arthrex, Inc.*, Chief Justice Roberts's majority opinion quoted Madison's "chain of dependence" once, and Justice Gorsuch quoted it five different times in his concurrence.[97] Chief Justice Roberts concluded his majority opinion requiring presidential supervision of officers with final, binding decision-making authority by highlighting the President's direct accountability to the people: "In this way, the President remains responsible for the exercise of executive power—and through him, the exercise of executive power remains accountable to the people."[98] Justice Gorsuch added, "as Madison put it, 'no principle is more clearly laid down in the Constitution than that of responsibility.' Without presidential responsibility there can be no democratic accountability for executive action."[99] Justice Gorsuch continued by emphasizing how the "chain of dependence" protects individual liberty: "But by breaking the chain of dependence, the statutory scheme denies individuals the right to be subjected only to *lawful* exercises of executive power that can ultimately be controlled by a President accountable to 'the supreme body, namely, . . . the people.'"[100] Like Chief Justice Roberts, he concluded with the "the directly accountable president" model: "Our decision today represents a very small step back in the right direction by ensuring that the people at least know who's responsible for supervising this process—the elected President and his designees."[101] Strikingly, the Court used this theory of presidential accountability to enhance the President's ability to dictate policy outcomes in administrative agencies, irrespective of appointment and removal procedures: "[F]orget who can be hired and fired; the question is whether the President's politics can be realized in the executive branch, and the goal is to overhaul agencies to ensure that the President and his political appointees can directly control decisions made by bureaucrats."[102] The Court effectually expanded the President's power in this regard, allowing further control over agency policy making.

Regardless of whether Justice Scalia and the Roberts Court are right as a matter of historical record of the Founding or as a matter of political science, their bottom line is that the President is fundamentally and constitutionally

---

[95] *Id.* (quoting THE FEDERALIST NO. 70, *supra* note 69, at 424).

[96] *Id.* (quoting THE FEDERALIST NO. 70, *supra* note 69, at 424).

[97] 141 S. Ct. 1970, 1979 (2021); *id.* at. 1989–90 (Gorsuch, J., concurring on presidential power, dissenting in favor of a more robust remedy).

[98] *Id.* at 1988 (majority opinion).

[99] *Id.* (Gorsuch, J., concurring in part) (citation omitted).

[100] *Id.* at 1990.

[101] *Id.* at 1994.

[102] Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 YALE L.J. 1769, 1780 (2023).

different as a policy actor, and this difference matters for purposes of structuring the executive branch. Unlike other federal government officials, the President is "directly accountable" to the people through elections, chosen nationally, with the democratic legitimacy and the popular prerogative to direct the executive branch—at least when the question is about the President's authority to appoint, remove, and direct executive branch officials. In the next two Parts, we examine whether the Presidency has a similarly special status when it comes to administrative law and statutory interpretation.

II. THE "CHAIN OF DEPENDENCE" AND PRESIDENTIALISM IN MQD POLICIES

It is conceivable that the concerns the Court expresses about agency accountability in appointment and removal cases come home to roost in the MQD cases. Plausibly, the agency may have pursued its own ambitious agenda and "slip[ped] from the Executive's control, and thus from that of the people."[103] Perhaps the MQD policies are the work "of unelected officials barely responsive to" the President.[104] Or maybe, even if the agency was subject to formal presidential control through presidential removal power, "the president may not have the time or willingness to review [agency] decisions."[105]

To the contrary, even a cursory review of the policies felled by the MQD this century reveals that this could not be further from the truth.[106] Indeed, ma-

---

[103] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 499 (2010).

[104] West Virginia v. EPA, 142 S. Ct. 2587, 2618 (2022) (Gorsuch, J., concurring) (citing STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 110 (2010)).

[105] *Id.* (quoting BREYER, *supra* note 104, at 110).

[106] Our analysis includes both the most recent cases, decided after the Court's explicit articulation of the MQD in *West Virginia*, as well as older cases commonly included by scholars and judges in the MQD canon. Specifically, we examine presidential involvement in the policies challenged in: *Biden v. Nebraska*,143 S. Ct. 2355 (2023); *West Virginia v. EPA*, 142 S. Ct. 2587 (2022); *National Federation of Businesses v. Department of Labor*, 142 S. Ct. 661 (2022); *Alabama Ass'n of Realtors v. Department of Health and Human Services*, 141 S. Ct. 2485 (2021); *King v. Burwell*, 576 U.S. 473 (2015); *Gonzales v. Oregon*, 546 U.S. 243 (2006); and *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). We find strikingly similar patterns of presidential involvement across these cases. Our study omits *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014), because the facts of President Obama's involvement in the adoption of the greenhouse gas emissions standards struck down in that case so closely mirror the facts of President Obama's involvement in the Clean Power Plan struck down in *West Virginia v. EPA*. Our study also omits *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994), an early precursor to the MQD that is sometimes cited as part of the canon. *MCI Telecommunications Corp.* is the only significant Supreme Court case in the broad line of cases developing major questions jurisprudence that arguably bucks the presidentialist trends we identify here, not least because the policy challenged in that case was adopted by an independent agency not directly subject to presidential control. That aberration should not undermine the force of our findings in this section given the case's early vintage and the fact that the Court's current approach to the MQD departs significantly from the pure statutory interpretation approach taken in that case.

jor questions policies epitomize the "chain of dependence" theory of agency accountability vaunted by the Court in appointment and removal cases.

Below, we document the "chain of dependence," linking the agencies that promulgated these major questions policies to the President and the President, in turn, to the electorate. Specifically, we show that each of these policies exhibited three key accountability links. First, the President had formal supervisory authority over the promulgating agency, with the unfettered ability to remove its head. Second, the President actively directed and advocated for each challenged policy and, in some cases, engaged in ongoing supervision of the policy's implementation. Finally, the President made himself accountable to the electorate for these policies: they were widely publicized and actively debated, and the President took public responsibility for them—enabling the electorate to hold him accountable.

We describe the President's role in the MQD cases in reverse chronological order. Section A analyzes the proposed student debt relief policy under President Biden.[107] Section B describes the history and implementation of the Clean Power Plan across multiple presidencies.[108] Section C discusses the Occupational Safety and Health Administration's (OSHA) emergency temporary standard in response to COVID-19 in the workplace under President Biden.[109] Section D analyzes the nationwide eviction moratoria in response to COVID-19 under both President Trump and President Biden.[110] Section E reviews the ACA's premium tax credit under President Obama.[111] Section F examines the Attorney General's physician assisted suicide policy under President Bush.[112] Section G examines the Food and Drug Administration's (FDA's) assertion of authority to regulate tobacco under President Clinton.[113]

We begin with the most recent cases because they present especially salient examples of presidential involvement in administrative policymaking and because they are roughly contemporaneous with the Court's acceleration of its presidentialist project. Although the Court's omission of facts about presidential involvement from these cases is particularly notable and telling, these cases are only the latest examples in a long and unbroken pattern—presidents have been controlling agency policies treated by the Court as "major questions" since the debut of the MQD in 2000.

---

[107] *See infra* Part II.A.
[108] *See infra* Part II.B.
[109] *See infra* Part II.C.
[110] *See infra* Part II.D.
[111] *See infra* Part II.E.
[112] *See infra* Part II.F.
[113] *See infra* Part II.G.

A. Biden v. Nebraska*: Student Debt Forgiveness*

In 2023, in *Biden v. Nebraska*, the Court considered a challenge to a student loan forgiveness program adopted by the Department of Education during President Biden's administration.[114] This program represented the culmination of a series of student loan relief policies implemented over the course of two presidential administrations in response to the COVID-19 pandemic. The Department of Education promulgated these policies under a statutory grant of authority to the Secretary of Education to "waive or modify any statutory or regulatory provision applicable to [certain federal] student financial assistance programs . . . as the Secretary deems necessary in connection with a . . . national emergency" such as COVID-19.[115] The President appoints the Secretary of Education with the advice and consent of the Senate and the President may remove the Secretary at will. In addition to this formal control, President Trump and President Biden both made key decisions relating to the student debt relief policy and actively supervised the adopting agency.[116] Starting during the Democratic primaries of March 2020 and continuing through the general election in Fall 2020, President Biden campaigned on student debt relief.[117] In January 2021, President Biden "directed the Department of Educa-

[114] *See* 143 S. Ct. 2355, 2362 (2023) ("Six States sued, arguing that the HEROES Act does not authorize the loan cancellation plan. We agree.").

[115] 20 U.S.C. § 1098bb(a)(1).

[116] The Court, in its summary, acknowledged President Trump's role in the initial suspension and extensions. *See Biden*, 143 S. Ct. at 2364 ("On March 13, 2020, the President declared the pandemic a national emergency. One week later, then-Secretary of Education Betsy DeVos announced that she was suspending loan repayments and interest accrual for all federally held student loans.") (citations omitted).

[117] *See, e.g.*, Trevor Hunnicutt & Sharon Bernstein, *Democrat Biden Tacks Left, Backs Warren Bankruptcy Plan with Student Loan Relief*, REUTERS (Mar. 14, 2020), https://www.reuters.com/article/usa-election-bankruptcy-idUKL1N2B70BS [https://perma.cc/DX46-AHCD]; *Biden Campaign Press Release—The Biden Plan to Build Back Better by Advancing Racial Equity Across the American*, AM. PRESIDENCY PROJECT (July 28, 2020), https://www.presidency.ucsb.edu/documents/biden-campaign-press-release-the-biden-plan-build-back-better-advancing-racial-equity [https://perma.cc/D5HY-YPL4] ("As President, Biden will make significant investments into educational institutions and programs that are designed to elevate Black and Brown students. He will: Provide relief from student debt."); *Biden Campaign Press Release—The Biden Agenda for the Latino Community*, AM. PRESIDENCY PROJECT (Aug. 4, 2020), https://www.presidency.ucsb.edu/documents/biden-campaign-press-release-the-biden-agenda-for-the-latino-community [https://perma.cc/5ZH4-6B5C] (laying out plans to "alleviate student debt burdens"); *Biden Campaign Press Release—ICYMI: Young Americans for Biden, Student Debt Crisis and Rise Host Student Loan Voter Townhall and Phone Bank with Alyssa Milano and Anjelika Washington*, AM. PRESIDENCY PROJECT (Oct. 29, 2020), https://www.presidency.ucsb.edu/documents/biden-campaign-press-release-icymi-young-americans-for-biden-student-debt-crisis-and-0 [https://perma.cc/ER22-NWRB] (reporting support for the Biden campaign from Student Debt Crisis, an organization dedicated to reforming student debt and higher education policies in the United States).

tion to pause federal student loan repayments through September of that year"; he subsequently ordered the Department to extend the pause three times.[118]

As the end of the final extension drew near, and as the midterm elections approached, President Biden prominently called for a broad student debt waiver. On August 24, 2022, the White House announced that the Department of Education would implement "targeted debt relief to address the financial harms of the pandemic, fulfilling the President's campaign commitment."[119] The announcement was featured in a variety of White House communications that day, including a background press call by senior administration officials,[120] an official Presidential Fact Sheet,[121] a press briefing by the White House press secretary,[122] and, notably, in highly personal remarks delivered by the President himself, recounting his father's shame at having failed to secure a bank loan for the President's college education.[123]

Importantly, President Biden signaled his own ongoing, hands-on partnership with the Department of Education in crafting student debt relief: "Working closely with the Secretary of Education—he's got the hard job—you know, Secretary Cardona, here's what my administration is going to do: provide more breathing room for people so they have less burden by student debt."[124] As soon as the Department of Education promulgated the student debt relief pro-

---

[118] *Press Briefing by Press Secretary Jen Psaki*, THE WHITE HOUSE (Apr. 6, 2022), https://www.whitehouse.gov/briefing-room/press-briefings/2022/04/06/press-briefing-by-press-secretary-jen-psaki-april-6-2022/ [https://perma.cc/5WCK-M6KL].

[119] *Fact Sheet: President Biden Announces Student Loan Relief for Borrowers Who Need It Most*, THE WHITE HOUSE (Aug. 24, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/ [https://perma.cc/5PHR-PWWR].

[120] *See Background Press Call by Senior Administration Officials on Student Loan Relief*, THE WHITE HOUSE (Aug. 24, 2022), https://www.whitehouse.gov/briefing-room/press-briefings/2022/08/24/background-press-call-by-senior-administration-officials-on-student-loan-relief/ [https://perma.cc/C6JK-JGPY] ("And today, the Biden administration is following through on that promise with a plan that will benefit tens of millions of middle-class Americans, their families, and the economy as a whole.").

[121] *See Fact Sheet*, *supra* note 119 (stating that the Biden administration will "[p]rovide targeted debt relief to address the financial harms of the pandemic, fulfilling the President's campaign commitment").

[122] *See Press Briefing by Press Secretary Karine Jean-Pierre, Domestic Policy Advisor Susan Rice, and NEC Deputy Director Bharat Ramamurti*, THE WHITE HOUSE (Aug. 24, 2022), https://www.whitehouse.gov/briefing-room/press-briefings/2022/08/24/press-briefing-by-press-secretary-karine-jean-pierre-domestic-policy-advisor-susan-rice-and-nec-deputy-director-bharat-ramamurti/ [https://perma.cc/SZ4M-VN2P] (mentioning "the announcement that [President Biden made] to provide breathing room to student loan borrowers").

[123] *See* President Joseph R. Biden, Jr., Remarks on Student Loan Debt Relief and an Exchange with Reporters, 2022 DAILY COMP. PRES. DOC. 725 (Aug. 24, 2022), https://www.govinfo.gov/app/collection/cpd/2022/01 [https://perma.cc/6V8Q-CTMW] (describing a conversation between President Biden and his father discussing his father's failure to secure a bank loan).

[124] *Id.*

gram, it was subject to immediate legal attack by the President's political adversaries, and its implementation was stayed.[125] In the face of these legal challenges, President Biden continued to publicly express strong support for the program and confidence in his administration's legal authority to enact it.[126]

The press widely covered the student debt relief plan—and President Biden's responsibility for it. From the expiration of the final student loan repayment pause to the Court's decision in *Biden v. Nebraska*, which struck down the student loan forgiveness plan, there were 1,018 articles in major U.S. newspapers discussing student debt relief, with 924 articles (more than ninety percent) mentioning President Biden by name.[127] President Biden's name appears in the headline of more than a quarter of these articles.[128] Articles appearing prior to the announcement of the plan signaled that President Biden would soon make a decision about the student debt policy.[129] Once the plan was announced, headlines screamed, "Biden to Cancel $10,000 in Student Debt; Low-Income Students Are Eligible for More";[130] "Boon to borrowers: Biden announces student loan debt forgiveness plan";[131] and "Biden to forgive

---

[125] *See* Nebraska v. Biden, 52 F.4th 1044, 1045–46 (8th Cir. 2022) (considering a motion for a preliminary injunction against the HEROES Act), *rev'd*, 143 S. Ct. 2355 (2023).

[126] *See* Remarks on the Federal Student Loan Debt Relief Program in Albuquerque, New Mexico, 2022 DAILY COMP. PRES. DOC. 997 (Nov. 3, 2022), https://www.govinfo.gov/content/pkg/DCPD-202200997/pdf/DCPD-202200997.pdf [https://perma.cc/MEB3-37VV] ("That's 16 million people who will be hearing from the Department of Education that they've been approved and who should be seeing relief in the coming days. But it's temporarily on hold. Why? Well, because Republican Members of the Congress and Republican Governors are doing everything they can, including taking us to court, to deny the relief and even to their own constituents. And every lawyer tells me we're—there's—we've knocked two of them out of the way. There's only one thing left in the way, and that it's going to happen.").

[127] Lexis Search in Major U.S. Newspapers, LEXIS, https://www.lexisnexis.com/en-us/gateway.page (follow Major U.S. Newspapers hyperlink; then search for "student debt relief" or "student loan forgiveness" or "student loan cancellation" or "student loan forgiveness"; and then filter the timeline to Aug. 1, 2022–June 30, 2023).

[128] Lexis Search in Major U.S. Newspapers, LEXIS, https://www.lexisnexis.com/en-us/gateway.page (follow Major U.S. Newspapers hyperlink; then search for "student debt relief" or "student loan forgiveness" or "student loan cancellation" or "student loan forgiveness"; then filter the timeline to Aug. 1, 2022–June 30, 2023; and then filter to results including "Biden" or "President").

[129] *See* Chris Quintana, *ITT Tech Students to Get $4 Billion in Federal Loan Forgiveness: What Borrowers Should Know*, USA TODAY (Aug. 16, 2022), https://www.usatoday.com/story/news/education/2022/08/16/itt-technical-institute-student-debt-relief-forgiveness/10335860002/# [https://perma.cc/2EHS-WYXY] ("President Joe Biden has said he'll announce a decision on wider student debt relief at the end of the month."); Shant Shahrigian, *New Student-Debt Relief Is on Way, Says Ed. Secretary*, N.Y. DAILY NEWS, Aug. 22, 2022, at 24CS ("The Biden administration will reveal new plans for student debt relief by the end of this month, Education Secretary Miguel Cardona said Sunday.").

[130] Zolan Kanno-Youngs, Stacy Cowley & Jim Tankersley, *Biden to Cancel $10,000 in Student Debt; Low-Income Students Are Eligible for More*, N.Y. TIMES (Aug. 24, 2022), https://www.nytimes.com/2022/08/24/us/politics/student-loan-forgiveness-biden.html [https://perma.cc/KY75-ENM9].

[131] Seung Min Kim, Chris Megerian, Collin Binkley & Zeke Miller, *Boon to Borrowers: Biden Announces Student Loan Debt Forgiveness Plan*, CHRISTIAN SCI. MONITOR (Aug. 24, 2022), https://

up to $20,000 on student loans, affecting millions of Floridians."[132] Articles across a range of publications explained the program and provided information about how beneficiaries could access its benefits.[133] Notably, student debt relief was routinely mentioned in articles discussing President Biden's political prospects generally—as one of several issues for which voters would hold him responsible.[134] It was also covered as a central issue in the November 2022 congressional midterm elections.[135]

Members of Congress put a spotlight on the student debt plan and associated it directly with President Biden.[136] In the spring of 2023, it became a focal

---

www.csmonitor.com/USA/Education/2022/0824/Boon-to-borrowers-Biden-announces-student-loan-debt-forgiveness-plan [https://perma.cc/RXE2-84UJ].

[132] Ian Hodgson, *Biden to Forgive Up to $20,000 on Student Loans, Affecting Millions of Floridians*, TAMPA BAY TIMES (Aug. 24, 2022), https://www.tampabay.com/news/education/2022/08/24/biden-to-forgive-up-to-10000-on-student-loans-affecting-millions-of-floridians/ [https://perma.cc/5EEM-LHTD].

[133] *See, e.g.*, Julia Carpenter & Gabriel T. Rubin, *U.S. News*: *How Loan-Forgiveness Plan Would Work*, WALL ST. J., Aug. 25, 2022, at A4; Medora Lee, *We Dig into Student Debt Forgiveness Plan; What Is the President's Student Loan Forgiveness Plan?*, USA TODAY, Aug. 25, 2022, at A8; Ron Lieber & Tara Siegel Bernard, *What You Need to Know About Biden's Student Loan Forgiveness Plan*, N.Y. TIMES (Mar. 1, 2023), https://www.nytimes.com/article/biden-student-loan-forgiveness.html [https://perma.cc/PT33-HFSK]; Kathleen Pender, *Californians Could Get Up to $20,000 in Student Loan Forgiveness. Do You Qualify?*, S.F. CHRON. (Aug. 24, 2022), https://www.sfchronicle.com/us-world/article/Do-you-qualify-for-student-loan-forgiveness-What-17396344.php [https://perma.cc/R76C-T9CM]; Lynn Sweet, *12 Things to Know About Biden's New Student Debt Cancellation Plan*, CHI. SUN-TIMES (Aug. 24, 2022), https://chicago.suntimes.com/education/2022/8/24/23320104/student-loan-debt-things-to-know-president-biden-forgiveness-cancellation-borrower-pell-grant [https://perma.cc/EA9H-KQNS].

[134] *See, e.g.*, Will Bunch, *Suddenly, Joe Is Becoming Mr. Right; Biden Could Lose Young Voters with His Recent Turns on Oil, the Border, and Crime*, PHILA. DAILY NEWS, Mar. 17, 2023, at X14 (including specific reference to "the president's student-debt relief plan"); Linda Feldmann, *Why Biden's Tack to Center Should Come as No Shock*, CHRISTIAN SCI. MONITOR (Mar. 17, 2023), https://www.csmonitor.com/USA/Politics/2023/0317/Why-Biden-s-tack-to-center-should-come-as-no-shock [https://perma.cc/MXB3-96P4] (suggesting that Biden "is attempting a massive student debt relief initiative").

[135] *See* Maggie Astor, *Republican Defeats 2-Term Democrat to Win Iowa House Seat*, N.Y. TIMES (Nov. 9, 2022), https://www.nytimes.com/2022/11/09/us/politics/zach-nunn-cindy-axne-iowa-house.html [https://perma.cc/6H7H-Y7KR] (reporting that the winning republican candidate campaigned against "President Biden's student debt forgiveness plan"); Dan Petrella, Jeremy Gorner & Rick Pearson, *Vice President Kamala Harris Rallies to Energize Black Vote While Darren Bailey Touts Christian Conservatism*, CHI. TRIB. (Nov. 6, 2022), https://www.chicagotribune.com/politics/elections/ct-pritzker-bailey-black-vote-20221107-zeuj4gym2ze4nhfoxx7obmfeva-story.html [https://perma.cc/WV9P-PND2] (reporting on a candidate "[t]icking off a list of Democratic accomplishments, including student loan forgiveness").

[136] *See* Arit John, *'Student Debt Is a Crisis': Activists Rally Outside Supreme Court for Loan Forgiveness*, L.A. TIMES (Feb. 28, 2023), https://www.latimes.com/politics/story/2023-02-28/student-debt-activists-rally-outside-supreme-court-for-loan-forgiveness [https://perma.cc/VL8P-UG7U] ("Several speakers, including some members of Congress, defended the president's decision to cancel the debt . . . ."); Morgan Watkins, *'Student Loan Socialism': McConnell Slams Biden for Forgiving $10k of Student Loan Debt*, LOUISVILLE COURIER J. (Aug. 24, 2022), https://www.courier-journal.com/

point of negotiations between Congress and the President over raising the debt ceiling, and Republicans insisted on "reversing Biden's student debt forgiveness and repayment plan."[137] Just a few weeks before the Court struck down the plan, President Biden embraced the spotlight by vetoing a bill that Congress had passed to overturn it.[138] At a campaign event one day before the Court's decision in *Biden v. Nebraska*, the President again took credit for the plan and embraced it as part of his re-election campaign theme.[139]

In sum, the student debt relief plan struck down in *Biden v. Nebraska* exhibited the hallmarks of the "chain of dependence." An agency under the President's formal supervisory control promulgated the policy, and the policy was the product of active presidential supervision. Both the policy as well as President Biden's association with it had extraordinarily high public visibility and political salience. Indeed, the political branches actively leveraged the tools at their disposal to advance their constituents' interests with respect to the policy. The Court, however, ignores this accountability context entirely in *Biden v. Nebraska*.

B. West Virginia v. EPA*: The Clean Power Plan*

The Clean Power Plan (CPP), promulgated by the Environmental Protection Agency (EPA) and challenged in 2022, in *West Virginia v. EPA*, set national carbon pollution standards for power plants at a level designed to cut carbon pollution significantly and advance clean energy innovation development and deployment to effectuate "the long-term strategy needed to tackle the threat of climate change."[140] President Obama's EPA adopted the CPP in

---

story/news/politics/mitch-mcconnell/2022/08/24/ky-politics-mcconnell-slams-biden-student-loan-forgiveness/65418181007/ [https://perma.cc/R3M6-2VN6] (describing a comment made by Senator Mitch McConnell in which he referred to loan forgiveness as "President Biden's student loan socialism").

[137] Kevin Freking, *Debt Limit Deadline Looms as Democrats, GOP Spar on Spending*, ST. LOUIS POST-DISPATCH (May 4, 2023), https://www.stltoday.com/news/national/govt-and-politics/debt-limit-deadline-looms-as-democrats-gop-spar-on-spending/article_e2e2b7c9-889f-55a5-977d-90ba7f7abe9c.html [https://perma.cc/9VY6-58N8].

[138] *See* Nirvi Shah, *Biden Vetoes Bill Gutting Student Loan Forgiveness; Plan's Fate Now Rests with Supreme Court*, USA TODAY (June 7, 2023), https://www.usatoday.com/story/news/education/2023/06/07/biden-veto-bill-student-loan/70280944007/ [https://perma.cc/V6LB-UGNM] (noting that President Biden vetoed "a bill that would repeal his signature plan to forgive student loan debt").

[139] *See* Michael D. Shear & Jim Tankersley, *Biden Says He Is 'Turning Things Around' on the Economy*, N.Y. TIMES (June 28, 2023), https://www.nytimes.com/2023/06/28/us/politics/biden-speech-economy-chicago.html?unlocked_article_code=1.5Uw.cw-l.DXC7aocoPZGt&smid=nytcore-ios-share…1/5 [https://perma.cc/DWL4-6PS9] (embracing a campaign theme surrounding economic revival).

[140] *Fact Sheet: Overview of the Clean Power Plan: Cutting Carbon Pollution from Power Plants*, EPA (Jan. 19, 2017), https://19january2017snapshot.epa.gov/cleanpowerplan/fact-sheet-overview-clean-power-plan_.html [https://perma.cc/3FFT-KUE9].

2015,[141] and President Trump's EPA rescinded it in 2019.[142] President Biden took office shortly after the D.C. Circuit invalidated the 2019 rescission and ordered the 2015 CPP's reinstatement; at the request of the Biden administration; reinstatement was delayed to allow the Biden EPA to craft a new policy based on changed circumstances.[143] Before any new rule was proposed, the Court decided *West Virginia*, which struck down the 2015 CPP under the MQD.[144]

To begin, the President appoints the EPA Administrator with the advice and consent of the Senate, and the President may remove the Administrator at will. Beyond this formal source of presidential control over the agency, presidents actively promoted the CPP on its long policy path, which was highly visible in the public sphere. President Obama kicked off the CPP in 2013 with a speech at Georgetown University, where he announced: "[T]oday, for the sake of our children and the health and safety of all Americans, I'm directing the Environmental Protection Agency to put an end to the limitless dumping of carbon pollution from our power plants and complete new pollution standards for both new and existing power plants."[145] This speech was a staged public event designed to rally political support for the President's climate agenda and rally young voters. President Obama told the Georgetown students that day: "It was important for me to speak directly to your generation, because the decisions that we make now and in the years ahead will have a profound impact on the world that all of you inherit."[146] In delivering this speech, President Obama emphasized his involvement in this policy and his personal interest in its promulgation.

President Obama continued to advocate for the CPP throughout his second term. On the day EPA proposed the CPP, the President mobilized the political support of leading public health organizations, emphasizing his personal and political investment in the policy.[147] On the day EPA promulgated the final

---

[141] Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64510 (Oct. 23, 2015).

[142] Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32520 (July 8, 2019) (codified at 40 CFR pt. 60).

[143] *See* Am. Lung Ass'n v. EPA, 985 F.3d 914, 930 (D.C. Cir. 2021) (holding that the 2019 recission of the CPP was not lawful), *rev'd*, 142 S. Ct. 2587 (2022).

[144] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2615–16 (2022) (holding that the EPA was not authorized to enact the CPP).

[145] President Barack Obama, Remarks at Georgetown University, 2013 DAILY COMP. PRES. DOC. 452 (June 25, 2013), https://www.govinfo.gov/content/pkg/DCPD-201300452/pdf/DCPD-201300452.pdf [https://perma.cc/5QKY-RZNZ].

[146] *Id.*

[147] *See* President Barack Obama, Teleconference Remarks to Public Health Organizations on the Environmental Protection Agency's Clean Power Plan, 2014 DAILY COMP. PRES. DOC. 421 (June 2, 2014), https://www.govinfo.gov/content/pkg/DCPD-201300452/pdf/DCPD-201300452.pdf [https://perma.cc/5QKY-RZNZ] ("I wanted to call you directly so you guys hear from me directly . . . .").

rule adopting the CPP, President Obama gave public remarks to an audience of stakeholders and politicians in the East Room of the White House, reminding them of his role in initiating the policy,[148] and he continued to take personal responsibility for the plan at clean energy summits and in other fora.[149]

The CPP was a high-profile policy, widely covered in the media. During President Obama's administration, there were 1,543 articles that discussed it in major U.S. newspapers, including articles explaining the plan, letters submitted by readers opining on the plan, and op-eds by newspaper editorial boards and high profile political figures.[150] The articles reflected a deeply partisan divide on the policy.[151] On one side, for instance, *The Wall Street Journal* editorial board accused President Obama of abusing his power by directing EPA to adopt the CPP, describing the President's "raw willfulness" in implementing the plan as "regulation without representation."[152] On the other side, the editorial board of *The New York Times* lauded the CPP and emphasized the leverage it would give the President in global climate negotiations by increasing his credibility on the issue.[153]

Whatever position different media outlets took on the CPP, they uniformly made one point crystal clear: President Obama's connection to the policy. Over seventy-seven percent of the articles about the policy appearing in major U.S. papers mentioned President Obama.[154] Some articles characterized the

[148] *See* President Barack Obama, Remarks Announcing the Clean Power Plan (Aug. 3, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/08/03/remarks-president-announcing-clean-power-plan#:~:text=With%20this%20Clean%20Power%20Plan,(Applause.) [https://perma.cc/ZPR2-3BW4] ("[T]wo years ago, I directed Gina and the Environmental Protection Agency to take on this challenge.").

[149] *See* President Barack Obama, Remarks at National Clean Energy Summit (Aug. 25, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/08/25/remarks-president-national-clean-energy-summit [https://perma.cc/9SDT-WKJA] (discussing the CPP with the audience members of the National Clean Energy Summit).

[150] Lexis Search in Major U.S. Newspapers, LEXIS, https://www.lexisnexis.com/en-us/gateway.page (follow Major U.S. Newspapers hyperlink; then search for "clean power plan"; then filter the timeline to Jan. 20, 2009–Jan. 20, 2017).

[151] *See, e.g.*, Editorial, *Minnesota Leads in Cutting Emissions*, STAR TRIB. (Minneapolis), June 6, 2014, at 8A (describing the CPP as "something that large majorities of Americans support"); David Jackson, *Climate Plan Becomes Torch in '16 Race; 'This Is Our Moment to Get This Right,' Obama Says as Presidential Hopefuls Take Sides*, USA TODAY, Aug. 4, 2015, at 2A; Daniel Malloy & Dan Chapman, *Ga. Needs to Slash Emissions by 25%*, ATLANTA J.-CONST., Aug. 4, 2015, at 1A (suggesting that "[the President] dismissed 'scaremongering' by the fossil fuel industry, business groups and Republicans").

[152] Editorial, *Climate-Change Putsch*, WALL ST. J. (Aug. 3, 2015), https://www.wsj.com/articles/climate-change-putsch-1438642218 [https://perma.cc/6WJF-6CYB].

[153] Editorial, *A Tough, Achievable Climate Plan*, N.Y. TIMES, Aug. 4, 2015, at A22.

[154] Lexis Search in Major U.S. Newspapers, LEXIS, https://www.lexisnexis.com/en-us/gateway.page (follow Major U.S. Newspapers hyperlink; then search for "clean power plan" and ("Obama" or "president"); then filter the timeline to Jan. 20, 2014–Jan. 20, 2017).

CPP as one of President Obama's hallmark political achievements.[155] Op-eds and reported commentary either praised[156] or blamed President Obama by name for the policy.[157] One in ten articles written about the CPP included "Obama" or "President" in the headline.[158]

In addition, political leaders at all levels of government actively debated the CPP. Media articles frequently quoted comments from state and local government officials about the policy.[159] State and local officials also authored op-

---

[155] *See* Henry Gass, *Supreme Court Blocks Clean Power Plan, but Perhaps Not Its Goals*, CHRISTIAN SCI. MONITOR (Feb. 10, 2016), https://www.csmonitor.com/USA/Justice/2016/0210/Supreme-Court-blocks-Clean-Power-Plan-but-perhaps-not-its-goals [https://perma.cc/VY85-QE8K] ("But the plan is not only a centerpiece of Obama's domestic climate policy, but also his efforts to position the US as a global climate leader."); Paul Monies, *U.S. Supreme Court Grants Stay on Implementing Clean Power Plan*, THE OKLAHOMAN (Feb. 9, 2016), https://www.oklahoman.com/story/news/state/2016/02/09/us-supreme-court-grants-stay-on-implementing-clean-power-plan/60693256007/ [https://perma.cc/75FW-NRJA] (quoting Republican Senator Jim Inhofe's opinion that "the stay" was a "major blow to President Obama's legacy on climate change").

[156] *See, e.g.*, Coral Davenport, *Obama Policy Could Force Robust Climate Discussion from 2016 Candidates*, N.Y. TIMES (Aug. 2, 2015), https://www.nytimes.com/2015/08/03/us/politics/obama-policy-could-force-robust-climate-discussion-from-2016-candidates.html [https://perma.cc/FH69-LFSP] ("On Monday, Mr. Obama is expected to unveil his signature climate change policy . . . to sharply reduce greenhouse gas emissions from the nation's power plants."); Richard L. Revesz & Jack Lienke, Op-Ed, *Obama Takes a Crucial Step on Climate Change*, N.Y. TIMES (Aug. 3, 2015), https://www.nytimes.com/2015/08/04/opinion/obama-takes-a-crucial-step-on-climate-change.html [https://perma.cc/6JGS-8GAM] ("President Obama's Clean Power Plan has rightly been hailed as the most important action any president has taken to address the climate crisis.").

[157] *See*, *e.g.*, Richard L. Revesz, Opinion, *An Obama Friend Turns Foe on Coal*, N.Y. TIMES (Mar. 26, 2015), https://www.nytimes.com/2015/03/26/opinion/an-obama-friend-turns-foe-on-coal.html [https://perma.cc/V9E3-GSFQ] (reporting on commentary that "Mr. Obama's plan is unconstitutional"); Robert Robb, Opinion, *Arizona Should Boycott Obama's Clean Power Plan*, ARIZ. REPUBLIC (Aug. 7, 2015), https://www.azcentral.com/story/opinion/op-ed/robertrobb/2015/08/07/arizona-should-boycott-obamas-clean-power-plan/31308643/ [https://perma.cc/8768-9UCQ] ("President Barack Obama is looking for the states to do the dirty work on *his* Clean Power Plan . . . .") (emphasis added); Editorial, *supra* note 152 (referring to President Obama's announcement of the CPP as "*his* plan to reorganize the economy in the name of climate change") (emphasis added).

[158] Lexis Search in Major U.S. Newspapers, *supra* note 154.

[159] *See, e.g.*, Tony Barboza, *California Is Ahead of the Game as Obama Releases Clean Power Plan*, L.A. TIMES (Aug. 4, 2015), https://www.latimes.com/science/la-me-climate-change-20150804-story.html [https://perma.cc/N5M8-TSZ6] (describing California leadership supporting the CPP: "Gov. Jerry Brown welcomed the president's 'bold and absolutely necessary carbon reduction plan'"); James Bruggers, *Climate Rule Headed for Court Challenge*, COURIER J. (Louisville) (Aug. 5, 2015), https://www.courier-journal.com/story/news/local/indiana/2015/08/05/clean-power-plan-now-final-means-legal-challenges-come-next/31181413/ [https://perma.cc/GJ2Q-9C43] (describing attorneys general supporting EPA's legal basis for CPP: "Attorneys general from nine states signed a letter this week supporting the Clean Power Plan . . ."); Davenport, *supra* note 156; Adam Wilmoth, *Oklahoma Officials Voice Sharp Criticism for Obama's Emission Rules*, THE OKLAHOMAN (Aug. 3, 2015), https://www.oklahoman.com/story/business/energy-resource/2015/08/03/oklahoma-officials-voice-sharp-criticism-for-obamas-emissions-rules/60731664007/ [https://perma.cc/5B77-LYC2] ("Oklahoma political and business leaders on Monday challenged President Barak Obama's plan to reduce carbon emissions . . . .").

eds.[160] Headlines announced high-profile legal challenges to the policy from attorneys general and boycotts from governors.[161] Members of Congress drafted op-eds on the policy.[162] Congress passed a joint resolution of disapproval that would have nullified EPA's CPP rule.[163] President Obama vetoed that resolution with an accompanying memorandum explaining the policy's urgency and his continued support.[164]

Despite all the attention it received, the CPP never went into effect. The Court stayed the rule pending review by the D.C. Circuit of a challenge brought by numerous parties, including twenty-seven state plaintiffs.[165] In response, President Obama continued to express his support for the policy and to

---

[160] *See* Jerry Sonnenberg, Opinion, *Wasting Colorado Money on EPA Plan*, DENVER POST, Apr. 2, 2016, at 19A (writing as a state senator to protest the enactment of the Clean Power Plan); Max Tyler & Anna McDevitt, Opinion, *A Call to Climate Action in This Legislative Session*, DENVER POST (Apr. 25, 2016), https://www.denverpost.com/2015/01/15/a-call-to-climate-action-in-colorado-legislative-session/ [https://perma.cc/7T3H-G3CR] (writing as a state representative and campaign organizer in support of the Clean Power Plan).

[161] *See* James Bruggers, *Ind., Ky. Join Call for Clean Power Plan Elimination*, COURIER J. (Louisville), Dec. 18, 2016, at A16 (describing the protest of attorneys general from Indiana and Kentucky against the Clean Power Plan); Coral Davenport, *Republican Governors Signal Their Intent to Thwart Obama's Climate Rules*, N.Y. TIMES (July 2, 2015), https://www.nytimes.com/2015/07/03/us/republican-governors-signal-their-intent-to-thwart-obamas-climate-rules.html [https://perma.cc/6BPR-LEM8] ("As President Obama prepares to complete sweeping regulations aimed at tackling climate change, at least five Republican governors . . . say they may refuse to carry out the rules in their states."); Coral Davenport, *Fighting Obama's Climate Plan, but Quietly Preparing to Comply*, N.Y. TIMES (July 19, 2016), https://www.nytimes.com/2016/07/20/us/obama-clean-power-plan.html [https://perma.cc/G6S6-24G2] (discussing the opposition to the CPP by some states); Bruce Finley, *Colorado AG Coffman May Fight Obama's Clean Power Plan*, DENVER POST (Apr. 22, 2016), https://www.denverpost.com/2015/08/03/colorado-ag-coffman-may-fight-obamas-clean-power-plan/ [https://perma.cc/FK9L-NVF7] (discussing opposition to the CPP by the Colorado Attorney General); Paul Monies, *Pruitt Sues Again Over EPA's Plan*, THE OKLAHOMAN (July 2, 2015), https://www.oklahoman.com/story/business/energy-resource/2015/07/02/pruitt-sues-again-over-epas-plan/60737271007/ [https://perma.cc/2JTB-9MYB] (discussing the lawsuit filed by the Oklahoma Attorney General in opposition to the CPP).

[162] *See* Mike Kelly, Opinion, *Pushing Back Against Obama's War on Coal*, WALL ST. J., Aug. 4, 2014, at A13 (authoring an opposition to the CPP as a congressional representative); Lamar Smith, Letter to the Editor, *What Is the EPA Hiding from the Public?*, WALL ST. J., June 24, 2014, at A15 (authoring an op-ed as "chairman of the House Committee on Science, Space, and Technology"); Ed Whitfield, Opinion, *Rep. Ed Whitfield: America's Pain Is China's Gain*, USA TODAY (Aug. 3, 2014), https://www.usatoday.com/story/opinion/2014/08/03/climate-change-china-india-rep-ed-whitfield-editorials-debates/13552623/ [https://perma.cc/4GRY-CJ9W] (authoring an op-ed as "chairman of the House Energy and Power Subcommittee").

[163] *See* S.J. Res. 23, 114th Cong. (2015) (resolving that "Congress disapproves the rule submitted by the [EPA]" and resolving that "such rule shall have no force or effect") (passed by House and Senate but vetoed by President).

[164] Memorandum of Disapproval Concerning Legislation Regarding Congressional Disapproval of an Environmental Protection Agency Rule on Carbon Pollution Emission Guidelines, 2015 DAILY COMP. PRES. DOC. 897 (Dec. 18, 2015), https://www.govinfo.gov/content/pkg/DCPD-201500897/pdf/DCPD-201500897.pdf [https://perma.cc/6VPG-9D6C].

[165] West Virginia v. EPA, 577 U.S. 1126 (2016) (No. 15A773).

identify himself with it, telling supporters "*[W]e* are very firm in terms of our legal position here. . . . [T]his Supreme Court has said the Environmental Protection Agency is required to regulate carbon emissions if it's a threat to the public health. And *we* clearly can show that that's the case."[166] President Obama would not have the opportunity to make that case. Before the D.C. Circuit could issue a decision, there was a change in presidential administrations, and the EPA repealed the CPP rule in 2019.[167]

President Trump made the CPP a campaign issue, explicitly pledging to repeal it.[168] Shortly after taking office, President Trump issued Executive Order 13783, rescinding President Obama's climate-related Executive Orders and Memoranda and directing the EPA to "immediately" review the CPP.[169] The EPA complied and repealed the rule that had enacted the CPP in 2019.[170] In the lead-up to and the aftermath of the repeal, President Trump repeatedly claimed credit for canceling the Obama administration's "job-killing Clean Power Plan."[171]

As with the initial promulgation of the CPP, its demise was widely covered in the media, vigorously debated, and explicitly attributed to President Trump.[172] President Biden took office shortly after the D.C. Circuit declared

---

[166] President Barack Obama, Remarks at a Democratic National Committee Reception in Atherton, California (Feb. 11, 2016), https://www.presidency.ucsb.edu/documents/remarks-democratic-national-committee-reception-atherton-california [https://perma.cc/Z4DU-QLTU] (emphasis added).

[167] Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32520 (July 8, 2019) (codified at 40 CFR pt. 60).

[168] *See* Donald J. Trump, Presidential Candidate, Remarks to the Economic Club of New York at the Waldorf Astoria in New York City (Sept. 11, 2016), https://www.presidency.ucsb.edu/documents/remarks-the-economic-club-new-york-the-waldorf-astoria-new-york-city [https://perma.cc/JK5L-5Y86] (promising to "eliminat[e] some of our most intrusive regulations" including the CPP); David R. Baker, *Clinton and Trump Polar Opposites on Global Warming and Energy*, S.F. CHRON. (Sept. 10, 2016), https://www.sfchronicle.com/politics/article/Clinton-and-Trump-polar-opposites-on-global-9214954.php [https://perma.cc/QN2L-ARXH] (campaigning on a promise to "expand drilling for oil and natural gas"); Coral Davenport, *Donald Trump, in Pittsburgh, Pledges to Boost Both Coal and Gas*, N.Y. TIMES (Sept. 22, 2016), https://www.nytimes.com/2016/09/23/us/politics/donald-trump-fracking.html [https://perma.cc/5XM3-VFNW] (indicating that presidential candidate Trump promised to both grow the natural gas industry and "end the war on coal and the war on miners"); Amy Harder, Timothy Puko & John W. Miller, *Election 2016: Nominee Pledges to Roll Back Energy Regulations*, WALL ST. J., Aug. 9, 2016, at A4 (campaigning on a promise to repeal regulation).

[169] Exec. Order No. 13783, 82 Fed. Reg. 16093 (Mar. 28, 2017).

[170] Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32520.

[171] President Donald J. Trump, Remarks in Hackberry, Louisiana, 2019 DAILY COMP. PRES. DOC. 308 (May 14, 2019), https://www.govinfo.gov/content/pkg/DCPD-201900308/pdf/DCPD-201900308.pdf [https://perma.cc/E5ZY-UD3Z].

[172] *See, e.g.*, Tracie Mauriello, *Trump EPA Boosts Coal by Scrapping Clean Power Plan*, PITTSBURGH POST-GAZETTE, June 20, 2019, at A4 (quoting U.S. Representative Ron Johnson, R-Wisc.);

the 2019 rescission of the CPP unlawful.[173] On the day he took office, President Biden directed the EPA to reconsider a list of prior agency actions, including the 2019 CPP repeal.[174] Although President Biden did not direct EPA to reinstate the CPP, he embraced it as his own. For instance, Biden campaign materials referred to the policy as the "Obama-Biden Clean Power Plan,"[175] and once in office, the Biden administration publicly lauded "the Obama-Biden Administration's groundbreaking Clean Power Plan."[176] As part of that policy ownership, Biden's EPA sought to move beyond the CPP and promulgate a new, more ambitious climate policy.[177]

In sum, the Clean Power Plan exhibited the hallmarks of the "chain of dependence." An agency under the President's formal supervisory control promulgated the policy. Three different presidents actively engaged with and directed EPA policy relating to the CPP, and each publicly associated himself with the resulting policies. Finally, both the policy and the various presidents' association with it had high public visibility and political salience. Arguably, the shift in policy across different presidential administrations reflected the democratic process at work, holding presidents to account for their policies. The Court, however, ignores this accountability context entirely in *West Virginia*.

Tatiana Schlossberg, *What to Know About Trump's Order to Dismantle the Clean Power Plan*, N.Y. TIMES (Mar. 27, 2017), https://www.nytimes.com/2017/03/27/science/what-to-know-about-trumps-order-to-dismantle-the-clean-power-plan.html [https://perma.cc/RBN6-28M8]; Editorial, *The EPA's Stunning Gift to Polluters in Chicago and Across the Midwest*, CHI. SUN-TIMES (Nov. 22, 2019), https://chicago.suntimes.com/2019/11/22/20970669/epa-environmental-protection-agency-bga-brett-chase-veolia-sauget-pollution-midwest-scott-pruitt [https://perma.cc/4S82-7GAN]; Editorial, *Trump Fired Up to Save Big Coal Instead of Earth*, USA TODAY (Aug. 21, 2018), https://www.usatoday.com/story/opinion/2018/08/21/trump-fired-up-save-big-coal-instead-earth-editorials-debates/1044764002/ [https://perma.cc/3NL3-F9MC].

[173] *See* Am. Lung Ass'n v. EPA, 985 F.3d 914, 930 (D.C. Cir. 2021) (holding that the 2019 recision of the CPP was not lawful), *rev'd*, 142 S. Ct. 2587 (2022).

[174] *Fact Sheet: List of Agency Actions for Review*, AM. PRESIDENCY PROJECT (Jan. 20, 2021), https://www.presidency.ucsb.edu/documents/fact-sheet-list-agency-actions-for-review [https://perma.cc/74Z5-WCJB] (containing list of agency actions to be reviewed by agency heads in accordance with recently-issued President Biden executive order).

[175] Joseph R. Biden, Presidential Candidate, *Biden Campaign Press Release—Biden-Harris: Ready to Lead*, AM. PRESIDENCY PROJECT (Aug. 11, 2020), https://www.presidency.ucsb.edu/documents/biden-campaign-press-release-biden-harris-ready-lead [https://perma.cc/W2BX-KTPG].

[176] Joseph Biden, President-Elect, *Press Release—President-elect Biden Announces Key Members of His Climate Team*, AM. PRESIDENCY PROJECT (Dec. 17, 2020), https://www.presidency.ucsb.edu/documents/press-release-president-elect-biden-announces-key-members-his-climate-team [https://perma.cc/L8ZS-PXHD].

[177] West Virginia v. EPA, 142 S. Ct. 2587, 2628 (2022) (Kagan, J., dissenting).

C. NFIB v. OSHA*: COVID Emergency Temporary Workplace Safety Standard*

In 2022, in *NFIB v. OSHA*, the Court considered a challenge to an emergency temporary standard (ETS) adopted by OSHA to stanch the spread of COVID-19 in workplaces across the country.[178] The standard required covered employers to enforce a workplace COVID-19 vaccination policy mandating that their employees either be vaccinated or undergo weekly COVID-19 testing and wear protective face covering at work.[179] OSHA is an agency within the Department of Labor and under the supervision of its Secretary, who is appointed by the President with the advice and consent of the Senate and removable at will by the President.

In September 2021, President Biden announced that he had instructed the Department of Labor to issue emergency rules requiring large employers to mandate the COVID-19 vaccine or require weekly testing and masking.[180] White House Press Secretary Jen Psaki explained that this was a piece of the President's broader efforts, since taking office, to protect workers:

> Well, first, the President signed an executive order . . . maybe the third day he was in office, because he wants to ensure that workers are, of course, safe. He's asked the American people to do their part to help quickly beat the virus, and he's directed OSHA to determine if . . . an emergency temporary standard was necessary to protect workers from COVID. So his objective is actually to protect workers and members of the workforce.[181]

The White House consistently discussed the ETS in the context of broader efforts to vaccinate American workers[182] and explained why these policies were

---

[178] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab. (*NFIB v. OSHA*), 142 S. Ct. 661, 663 (2022).

[179] *Id.*

[180] *Press Briefing by Press Secretary Jen Psaki*, THE WHITE HOUSE (Sept. 9, 2021), https://www.whitehouse.gov/briefing-room/press-briefings/2021/09/09/press-briefing-by-press-secretary-jen-psaki-september-9-2021/ [https://perma.cc/59NT-KBNB]; *see Remarks by President Biden on the COVID-19 Response and the Vaccination Program*, THE WHITE HOUSE (Sept. 24, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/24/remarks-by-president-biden-on-the-covid-19-response-and-the-vaccination-program-8/ [https://perma.cc/E2WF-SGTC] (referring to workplace vaccination efforts).

[181] *Press Briefing by Press Secretary Jen Psaki*, THE WHITE HOUSE (Mar. 15, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/15/press-briefing-by-press-secretary-jen-psaki-march-15-2021/ [https://perma.cc/R24P-5G9X].

[182] *See Press Briefing by White House COVID-19 Response Team and Public Health Officials*, THE WHITE HOUSE (Sept. 10, 2021), https://www.whitehouse.gov/briefing-room/press-briefings/2021/09/10/press-briefing-by-white-house-covid-19-response-team-and-public-health-officials-55/ [https://perma.cc/LMP4-3NBY] (describing Biden's efforts to "help make employees, workplaces, and communities safer, and help accelerate our path out of the pandemic").

so important for advancing the interests of workers and employers: "They're good for the economy. They bring people back into the labor force."[183] Psaki cited examples of successful private workplace vaccination policies as inspiration for the OSHA policy:

> [W]e've seen a great deal of success across the board on this front, where companies have been able to—United Airlines, for example—ensure there was greater certainty, employees knew they were working with people who were vaccinated. There are fewer people who are, of course, out sick with COVID; fewer people who have even worse impacts than that. So, one of the big steps we've taken and announced is to—is to put in place these requirements for businesses. Hopefully, that will create more certainty. And we—there's no question, to your point, that a fear of COVID, a fear of work environments—that people are not sure if they're safe or not—is a contributor as we look at the number of open jobs out there.[184]

President Biden publicly supported the ETS by visiting companies that had successfully implemented workplace vaccine requirements,[185] and Psaki indicated that the White House would be in ongoing partnership with OSHA in implementing the ETS.[186]

President Biden's workplace vaccine mandates and, specifically, the OSHA policy, were widely covered in the media. In the five short months between Biden's announcement of the ETS and the Court decision striking it down, major U.S. newspapers carried 713 articles specifically about the OSHA policy (amidst extensive reporting on other state and federal vaccine mandates).[187] Coverage explicitly tied President Biden to the policy—eighty-five

---

[183] *Press Briefing by White House COVID-19 Response Team and Public Health Officials*, THE WHITE HOUSE (Oct. 6, 2021), https://www.whitehouse.gov/briefing-room/press-briefings/2021/10/06/press-briefing-by-white-house-covid-19-response-team-and-public-health-officials-60/ [https://perma.cc/238R-82YB].

[184] *Press Briefing by Press Secretary Jen Psaki*, THE WHITE HOUSE (Oct. 8, 2021), https://www.whitehouse.gov/briefing-room/press-briefings/2021/10/08/press-briefing-by-press-secretary-jen-psaki-october-8-2021/ [https://perma.cc/2AFA-R7F8].

[185] *See Press Briefing by Press Secretary Jen Psaki*, THE WHITE HOUSE (Oct. 6, 2021), https://www.whitehouse.gov/briefing-room/press-briefings/2021/10/06/press-briefing-by-press-secretary-jen-psaki-october-6-2021/ [https://perma.cc/KG5T-FRXM] ("The President will visit with a company local to the Chicago area that is imposing its own vaccine requirement ahead of the OSHA rule.").

[186] *See Press Briefing by Press Secretary Jen Psaki*, *supra* note 181 (explaining that after OSHA promulgates guidelines, "of course, we will work to ensure that people understand why, and that they support workers being safe, which I think even many owners of businesses would support").

[187] Lexis Search in Major U.S. Newspapers, LEXIS, https://www.lexisnexis.com/en-us/gateway.page (follow Major U.S. Newspapers hyperlink; then search: OSHA or "Department of Labor" and vaccin!; then filter to 09/01/2021–01/31/2022).

percent (607) mentioned President Biden by name, including in headlines such as "Biden Asks OSHA to Order Vaccine Mandates at Large Employers."[188]

In sum, the ETS exhibited the hallmarks of the "chain of dependence." An agency under the President's formal supervisory control promulgated the policy. The President actively directed and supported the policy. Both the policy, as well as President Biden's association with it, had high public visibility and political salience. The Court, however, ignores this accountability context entirely in *NFIB*.

Unlike the other cases discussed in this Part, the Court in *NFIB* did not completely ignore President Biden. It selectively included broad statements made by President Biden about the importance of increasing COVID vaccination rates generally.[189] The Court isolated those statements to imply that OSHA acted outside its statutorily prescribed role as a regulator of the *workplace*, and that "occupational safety" was only a pretext for increasing the national vaccination rate.[190] In the comments cited by the Court, President Biden had been describing a six-step national pandemic plan, of which the workplace mandate was one step.[191] The Court omitted the facts we recount here, which clearly indicate that President Biden focused separately and explicitly on the importance of vaccination in the workplace, specified that it was necessary to protect workers and employers from the distinctive safety and economic harms of COVID-19 transmission in the workplace, and directed OSHA to adopt specific policies (including the ETS) to address these concerns.

D. Alabama Association of Realtors v. United States Department of Health and Human Services*: The Eviction Moratorium*

In 2021, in *Alabama Ass'n of Realtors v. United States Department of Health and Human Services*, the Court considered a challenge to the Centers

---

[188] Lexis Search in Major U.S. Newspapers, LEXIS, https://www.lexisnexis.com/en-us/gateway.page (follow Major U.S. Newspapers hyperlink; then search: OSHA or "Department of Labor" and vaccin!; filter to "Biden"; then filter to 09/01/2021–01/31/2022); Lauren Hirsch, *Biden Asks OSHA to Order Vaccine Mandates at Large Employers*, N.Y. TIMES (Nov. 4, 2021), https://www.nytimes.com/2021/09/09/business/osha-vaccine-biden-mandate.html [https://perma.cc/G2XR-FYW3].

[189] *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab. (*NFIB v. OSHA*), 142 S. Ct. 661, 663 (2022) ("On September 9, 2021, President Biden announced 'a new plan to require more Americans to be vaccinated.' . . . In tandem with other planned regulations, the administration's goal was to impose 'vaccine requirements' on 'about 100 million Americans, two-thirds of all workers.'").

[190] *Id.*; *see infra* notes 290–348 and accompanying text (analyzing the Court's failure to mention Presidents in the MQD cases).

[191] *See* President Joseph R. Biden, Jr., *Remarks by President Biden on the COVID-19 Response and the Vaccination Program*, THE WHITE HOUSE (Sept. 24, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/24/remarks-by-president-biden-on-the-covid-19-response-and-the-vaccination-program-8/ [https://perma.cc/E2WF-SGTC] (describing President Biden's six-step plan).

for Disease Control's (CDC) reinstatement of a nationwide moratorium on evictions of tenants suffering COVID-related economic hardship.[192] This policy spanned the administrations of two different presidents, both of whom directed and actively supported its adoption and implementation. As a formal matter, the President appoints the Director of the CDC and has the unfettered authority to remove this official. Indeed, a congressional report documents that high-level CDC officials serving during the Trump administration feared that they would be fired if they did not follow White House directives.[193]

Both President Trump and President Biden used their authority over the CDC to actively supervise the agency and push it to adopt a succession of eviction moratoria. Shortly after the expiration of a statutory moratorium, President Trump issued Executive Order 13945, declaring it to be "the policy of the United States to minimize, to the greatest extent possible, residential evictions and foreclosures during the ongoing COVID-19 national emergency."[194] The Order went on to direct: "Accordingly, my Administration, to the extent reasonably necessary to prevent the further spread of COVID-19, will take all lawful measures to prevent residential evictions and foreclosures resulting from financial hardships caused by COVID-19."[195] Specifically, it ordered the Director of the CDC to consider a moratorium,[196] and the CDC followed this lead, imposing a new moratorium covering all residential properties nationwide through the end of 2020.[197] President Trump proudly touted this policy as his own accomplishment in a Presidential Fact Sheet, where he stated: "I want to make it unmistakably clear that I'm protecting people from evictions."[198]

---

[192] Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2488 (2021) (per curiam); *see* Temporary Halt in Residential Evictions in Communities with Substantial or High Transmission of COVID-19 To Prevent the Further Spread of COVID-19, 86 Fed. Reg. 43244 (Aug. 6, 2021).

[193] HOUSE SELECT SUBCOMMITTEE ON THE CORONAVIRUS CRISIS, PREPARING FOR AND PREVENTING THE NEXT PUBLIC HEALTH EMERGENCY: LESSONS LEARNED FROM THE CORONAVIRUS CRISIS 37 (Dec. 2022), https://coronavirus-democrats-oversight.house.gov/sites/democrats.coronavirus.house.gov/files/2022.12.09%20Preparing%20for%20and%20Preventing%20the%20Next%20Public%20Health%20Emergency.pdf [https://perma.cc/M6LV-93VG] (describing the push for "CDC officials to be fired").

[194] Exec. Order No. 13945, 85 Fed. Reg. 49935 (Aug. 14, 2020).

[195] *Id.*

[196] *Id.* The authority to do so was delegated by regulation to the CDC. Measures in the Event of Inadequate Local Control, 42 C.F.R. § 70.2 (2020).

[197] Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55292 (Sept. 4, 2020) (issuing initial eviction moratorium).

[198] *President Donald J. Trump Is Working to Stop Evictions and Protect Americans' Homes During the COVID-19 Pandemic*, THE WHITE HOUSE (Sept. 1, 2020), https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-working-stop-evictions-protect-americans-homes-covid-19-pandemic/ [https://perma.cc/448C-Y5D3].

The CDC carried the eviction moratorium policy into the Biden administration, extending it on four separate occasions,[199] following President Biden's Executive Order 14002, to address the "economic crisis resulting from the pandemic" with "the full resources of the Federal Government."[200] President Biden was actively engaged in eviction prevention policy, issuing additional orders coordinating a multi-agency effort to build extensive scaffolding within the executive branch to support the implementation and enforcement of the CDC's eviction moratorium involving the Treasury Department, the Department of Housing and Urban Development, the CDC, the Consumer Financial Protection Bureau, and the Federal Trade Commission.[201]

President Biden remained out in front of the eviction moratorium policy up through its adoption by the CDC on August 3, 2021. He told reporters at a press conference the day the new moratorium was announced: "[T]he CDC will have something to announce to you in the next hour to 2 hours."[202] Sure enough, the agency announced a new moratorium later that day.[203]

In addition to the two presidents' formal control over the CDC and their active involvement in the promulgation and implementation of multiple eviction moratoria by that agency, these policies were highly politically salient. Major U.S. newspapers contained extensive coverage of the eviction moratoria, with 1,605 articles appearing during the Trump administration and 2,029 during the Biden administration.[204] The articles reflected a vigorous debate about the policy, including the President's legal authority to order it and the relative merits of imposing it administratively versus legislatively.[205] The arti-

---

[199] *See* Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 8020 (Feb. 3, 2021) (extending previously-issued eviction moratorium); 86 Fed. Reg.16731 (Mar. 31, 2021); 86 Fed. Reg. 34010 (June 28, 2021) (same); 86 Fed. Reg. 43244 (Aug. 6, 2021) (same).

[200] Exec. Order No. 14002, 86 Fed. Reg. 7229 (Jan. 27, 2021).

[201] *Fact Sheet: The Biden-Harris Administration's Multi-Agency Effort to Support Renters and Landlords*, THE WHITE HOUSE (Mar. 29, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/29/fact-sheet-the-biden-harris-administrations-multi-agency-effort-to-support-renters-and-landlords/ [https://perma.cc/LP68-YDVZ].

[202] Remarks on the COVID-19 Response and National Vaccination Efforts and an Exchange with Reporters, 2021 DAILY COMP. PRES. DOC. 635 (Aug. 3, 2021), https://www.govinfo.gov/content/pkg/DCPD-202100635/pdf/DCPD-202100635.pdf [https://perma.cc/Y7C3-HBDM].

[203] *See* Temporary Halt in Residential Evictions in Communities with Substantial or High Transmission of COVID-19 to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 43244 (extending the eviction moratorium on Aug. 6, 2021).

[204] Lexis Search in Major U.S. Newspapers, LEXIS, https://www.lexisnexis.com/en-us/gateway.page (follow Major U.S. Newspapers hyperlink; then search "Eviction Moratorium"; then filter to 01/01/2020–01/31/21; then filter by "President and Trump"); *id.* (follow Major U.S. Newspapers hyperlink; then search "Eviction Moratorium"; then filter to 01/01/2020–01/31/21; then filter "President and Biden").

[205] *See* Emily Cochrane & Jim Tankersley, *Trump Threatens to Bypass Congress as Stimulus Talks Fail Again*, N.Y. TIMES (Aug. 9, 2020), https://www.nytimes.com/2020/08/07/us/politics/trump-

cles also evidenced active engagement on the issue by Congress.[206] In addition to covering the policy itself, major American papers thoroughly documented the President's connection to it: 25.5% of articles during the Trump administration mentioned President Trump[207] and 32.9% of articles during the Biden administration mentioned President Biden.[208] For example, the *Tampa Bay Times* announced the CDC's first extension of the moratorium during the Biden administration with the headline: "CDC officially extends eviction moratorium through March: President Joe Biden had requested the extension on his first day in office."[209]

In sum, the eviction moratorium exhibited the hallmarks of the "chain of dependence." An agency under the President's formal supervisory control promulgated the policy. It was the product of directives by two different presidents, and President Biden actively supported its implementation. Both President Trump and President Biden publicly associated themselves with the policy. Finally, both the policy and the presidents' association with it had high public visibility and political salience. The Court, however, ignores this accountability context entirely in *Alabama Ass'n of Realtors*.

E. King v. Burwell*: IRS Affordable Care Act Tax Credits*

In *King v. Burwell*, the Court considered a challenge to a rule promulgated by the Internal Revenue Service (IRS) implementing the premium tax credit

congress-stimulus.html [https://perma.cc/5RES-7EFP]; Erica Werner, Jeff Stein & Paul Kane, *No Agreement Reached on Stimulus Package; Pelosi Has Harsh Words for Republicans*, BOS. GLOBE, Aug. 7, 2020, at A8 (emphasizing how Trump considered using executive orders to address these issues, but Democrats expressed concerns about the legality and potential court challenges).

[206] *See* Cochrane & Tankersley, *supra* note 205 (describing "days of marathon talks on Capitol Hill to reach a bipartisan compromise"); Maggie Haberman, Emily Cochrane & Jim Tankersley, *With Jobless Aid Expired, Trump Sidelines Himself in Stimulus Talks*, N.Y. TIMES (Aug. 3, 2020), https://www.nytimes.com/2020/08/03/us/politics/congress-jobless-aid-talks-trump.html [https://perma.cc/Z3LJ-NXXH] (describing talks regarding the "federal moratorium on tenant evictions"); Paul Kiernan, *Mnuchin Urges Congress to Pass More Stimulus Funding*, WALL ST. J. (Sept. 1, 2020), https://www.wsj.com/articles/mnuchin-urges-congress-to-passmore-stimulus-funding-11598988384 [https://perma.cc/V3VL-NABZ] (describing negotiations regarding pandemic relief measures).

[207] Lexis Search in Major U.S. Newspapers, LEXIS, https://www.lexisnexis.com/en-us/gateway.page (follow Major U.S. Newspapers hyperlink; then search "Eviction Moratorium"; then filter to 01/01/2020–01/31/21; then filter "President and Trump").

[208] Lexis Search in Major U.S. Newspapers, LEXIS, https://www.lexisnexis.com/en-us/gateway.page (follow Major U.S. Newspapers hyperlink; then search "Eviction Moratorium"; then filter to 01/01/2020–01/31/21; then filter "President and Biden").

[209] Emily L. Mahoney, *CDC Officially Extends Eviction Moratorium Through March: President Joe Biden Had Requested the Extension on His First Day in Office.*, TAMPA BAY TIMES (Feb. 2, 2021), https://www.tampabay.com/news/business/2021/02/02/cdc-officially-extends-eviction-moratorium-through-march/ [https://perma.cc/W3WG-2VVG].

provision of the ACA.[210] The ACA—more commonly known as "Obamacare"—was President Obama's signature policy achievement. It changed the way health care was delivered in the United States, transforming an industry that accounts for nearly twenty percent of the American economy.[211] The availability of tax credits for insurance purchases was the cornerstone of these reforms. As the Court explained in *King*:

> The [ACA] adopts a series of interlocking reforms designed to expand coverage in the individual health insurance market. First, the Act bars insurers from taking a person's health into account when deciding whether to sell health insurance or how much to charge. Second, the Act generally requires each person to maintain insurance coverage or make a payment to the Internal Revenue Service. And third, the Act gives tax credits to certain people to make insurance more affordable.[212]

It was this last piece that was at issue in *King*. Although tax credits were central to the ACA's design, the statutory provisions authorizing them were confusingly drafted, leaving questions about whether they authorized the IRS to provide tax credits for purchases on *all* health insurance exchanges (marketplaces where people can purchase health insurance) or only a limited subset of exchanges.[213] The ACA provides for two different types of exchanges—exchanges established and operated by states and a federal exchange established and operated by the Department of Health and Human Services.[214] The federal exchange markets insurance in states that elect not to establish their own exchanges.[215] The precise issue in *King* was whether ACA tax credits are available in states that utilize the federal exchange or only in states that operate their own exchanges. Although the ACA provides that tax credits "shall be allowed" for any "applicable taxpayer,"[216] it goes on to state that the amount of the tax credit depends in part on whether the taxpayer has enrolled in an insur-

---

[210] *See* 576 U.S. 473, 479 (2015).

[211] *National Health Expenditure Data*, CMS.GOV, https://www.cms.gov/data-research/statistics-trends-and-reports/national-health-expenditure-data/historical [https://perma.cc/9UDH-QXR5] (citing that the healthcare industry accounts for 18.3% of the country's GDP).

[212] *King*, 576 U.S. at 478–79.

[213] *See id.* at 480–82 (recounting the history of health policy reform in the states and demonstrating the failure of reforms adopted in the absence of tax credits).

[214] The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), https://www.govinfo.gov/content/pkg/PLAW-111publ148/pdf/PLAW-111publ148.pdf [https://perma.cc/K2JP-4DKZ].

[215] *Id.*

[216] 26 U.S.C. § 36B(a).

ance plan "through an Exchange *established by the State* under 1311 of the Patient Protection and Affordable Care Act."[217]

This thorny issue of statutory interpretation is outside the scope of this Article. For our purposes, the key point is that this interpretive question was understood at the time to be existential for the ACA—because thirty-three states declined to establish their own exchanges and elected, instead, to utilize the federal exchange, disallowing tax credits in these states would have undermined the entire structure of the Act and the functioning of its principal reforms.[218] As the Court explained in *King*, the coverage requirements at the heart of the ACA "would not work without the tax credits."[219] Thus, the legal challenge to the tax credits was, in reality, an attempt by President Obama's opponents to take down the entire ACA.

It would be hard to overstate the political salience of the ACA and the connection between President Obama and this legislation. President Obama campaigned on expanding Americans' access to health care and expended significant political capital to get the ACA enacted. As a candidate in the Democratic primaries, President Obama campaigned vigorously for national health care reform, including the reliance on tax credits and exchanges.[220] He personally invested much of the first two years of his administration in passing the ACA (and putting into place the administrative policies implementing it). His political opponents zealously bound him to the ACA when they thought it would hurt his political prospects, dubbing it "Obamacare" in order to taint him, but his supporters often appropriated this label to promote the ACA and credit President Obama for it.[221] The signing ceremony was famous for Vice President Biden saying to President Obama that enacting the ACA was a "BFD," a private comment audible to the media, which became the national

[217] *Id.* § 36B(b)(2)(A) (emphasis added).

[218] Sarah Dash, Christine Monahan & Kevin W. Lucia, *Health Policy Brief: Health Insurance Exchanges and State Decisions. Exchanges Must Be Ready to Begin Enrolling People by October 2013. How Is Each State Preparing?*, HEALTH AFFS. (July 18, 2013), https://www.healthaffairs.org/do/10.1377/hpb20130718.132696/full/healthpolicybrief_96-1554750103345.pdf (discussing the status of state-based and federal-based Exchanges).

[219] King v. Burwell, 576 U.S. 473, 482 (2015).

[220] *See* Andrew Cline, *How Obama Broke His Promise on Individual Mandates*, THE ATLANTIC (June 29, 2012), https://www.theatlantic.com/politics/archive/2012/06/how-obama-broke-his-promise-on-individual-mandates/259183/ [https://perma.cc/AZV5-MBLY] (describing President Obama's campaign promise).

[221] *See* Lucy Madison, *On Bus Tour, Obama Embraces "Obamacare," Says "I Do Care*,*"* CBS NEWS (Aug. 15, 2011), https://www.cbsnews.com/news/on-bus-tour-obama-embraces-obamacare-says-i-do-care/ [https://perma.cc/C98N-WV4V] (suggesting that President Obama's reclaimed the term Obamacare).

tagline reflecting President Obama's (and Vice President Biden's) public ownership of the ACA.[222]

To be sure, President Obama's involvement in the drafting of technical tax policy supporting the ACA was less significant than his public support of the legislation as a whole. Nevertheless, there is evidence that the President was specifically attentive to the ACA tax credits and took measures to ensure their effective operation. Even as President Obama trumpeted the ACA's big picture reforms at the signing ceremony,[223] he indicated that he would remain focused on the details of implementation.[224] Moreover, he stated: "And when this exchange is up and running, millions of people will get tax breaks to help them afford coverage, which represents the largest middle-class tax cut for health care in history. *That's what this reform is about*," characterizing the ACA's tax credits as the beating heart of health insurance reform.[225]

The President appoints the Commissioner of Internal Revenue (the head of the IRS) with the advice and consent of the Senate and the President may remove the Commissioner at will. In addition to having formal control over the agency, President Obama personally acted on several occasions to protect the ACA tax credits from hostile legislation introduced in Congress and ensure that the IRS could effectively implement them. Specifically, he addressed the issue of IRS implementation authority in a series of policy statements in 2011,[226] 2012,[227] and 2014.[228] These statements indicate that the President saw the tax credits as inextricable from the broader ACA reforms and that he was actively involved in supporting IRS implementation of the tax credits. This

---

[222] *See* David Jackson, *Biden: 'Assume Every Microphone Is On,'* USA TODAY (May 27, 2014), https://www.usatoday.com/story/theoval/2014/05/27/obama-biden-bfd-big-deal-health-care-memorlal-day-remarks/9618121/ [https://perma.cc/GQ9L-36Y4] (describing Biden's reflection on this moment).

[223] President Barack Obama, *Remarks by the President and Vice President at Signing of the Health Insurance Reform Bill*, THE WHITE HOUSE (Mar. 23, 2010), https://obamawhitehouse.archives.gov/the-press-office/remarks-president-and-vice-president-signing-health-insurance-reform-bill [https://perma.cc/Y3DX-X6BC] ("History is made when you all assembled here today . . . .").

[224] *See id.* (explaining the need to "implement [the reforms] responsibly").

[225] *Id.* (emphasis added).

[226] *Statement of Administration Policy: H.R. 2354—Energy and Water Development and Related Agencies*, AM. PRESIDENCY PROJECT (Nov. 10, 2011), https://www.presidency.ucsb.edu/documents/statement-administration-policy-hr-2354-energy-and-water-development-and-related-agencies [https://perma.cc/HNR2-4PZQ].

[227] *Statement of Administration Policy: H.R. 6020—Financial Services and General Government Appropriations Act, 2013*, AM. PRESIDENCY PROJECT (June 28, 2012), https://www.presidency.ucsb.edu/documents/statement-administration-policy-hr-6020-financial-services-and-general-government [https://perma.cc/27YV-TYZU].

[228] *Statement of Administration Policy: H.R. 5016—Financial Services and General Government Appropriations Act, 2015*, AM. PRESIDENCY PROJECT (July 14, 2014), https://www.presidency.ucsb.edu/documents/statement-administration-policy-hr-5016-financial-services-and-general-government [https://perma.cc/A435-CFVF].

specific policy was highly visible and politically salient. Discussion of the ACA tax credits appeared in 1,151 articles in major U.S. newspapers between March 2010 (the month the legislation was enacted) and June 2015 (when *King* was decided).[229] Articles explained how the tax credits operate,[230] made their significance clear by reporting on the number of affected individuals,[231] and conveyed personal stories of individuals who benefitted from the tax credits.[232] In addition, there was vigorous political debate about these policies. As President Obama staked his presidency on supporting the ACA, a generation of politicians built their careers trying to tear down "Obamacare."[233]

In sum, the ACA tax credit policy challenged in *King* exhibited the hallmarks of the "chain of dependence." An agency under the President's formal supervisory control promulgated the policy. The President actively directed and supported its implementation. Both the policy, as well as President Obama's association with it, had high public visibility and political salience. Although the Court ultimately upheld this policy, this accountability context plays no role in its analysis.

F. Gonzales v. Oregon*: Attorney General's Assisted Suicide Guidance*

In *Gonzalez v. Oregon*, the Court considered a challenge to an interpretive rule issued by the U.S. Attorney General indicating that physicians who assist the suicide of terminally ill patients, pursuant to an Oregon statute authorizing them to do so, would be violating the federal Controlled Substances Act (CSA).[234] This Department of Justice (DOJ) interpretation would place physicians at risk of criminal prosecution and the loss of their federal registration to

---

[229] Lexis Search in Major U.S. Newspapers, LEXIS, https://www.lexisnexis.com/en-us/gateway.page (follow Major U.S. Newspapers hyperlink; then search ("Obamacare" or "Affordable Care Act") and "tax credit"; then filter to 03/01/2010–06/30/2015).

[230] *See* Erin Arvedlund, *How Health Law Affects Tax Law*, PHILA. INQUIRER, Oct. 1, 2013, at A12 (describing tax credits under the Affordable Care Act).

[231] *See* Jaclyn Cosgrove, *377,000 Oklahomans Will Be Eligible for 'Obamacare' Tax Credits in 2014*, THE OKLAHOMAN (Apr. 18, 2013), https://www.oklahoman.com/story/news/politics/2013/04/18/337000-oklahomans-will-be-eligible-for-obamacare-tax-credits-in-2014/62916958007/ [https://perma.cc/2FC3-3W94] ("Nearly 337,000 Oklahomans will be eligible for tax credits next year that will help them pay for health insurance premiums . . . ."); Jerome R. Stockfisch, *1.3M in Florida Keep Coverage: Nationally, 6.4M People Would Have Been Affected*, TAMPA TRIB., June 26, 2015, at 1 (describing the "roughly 1.3 million Floridians" receiving tax credits under the ACA).

[232] *See* Misty Williams, *Obamacare Stands*, ATLANTA J.-CONST., June 26, 2015, at 1A (describing stories of those who would be uninsured without the ACA tax credits).

[233] *Id.*

[234] The Oregon Death with Dignity Act, OR. REV. STAT. §§ 127.800–.990 (2003); *see* Gonzales v. Oregon, 546 U.S. 243, 243 (2006) (exempting "from civil or criminal liability state-licensed physicians who, in compliance with ODWDA's specific safeguards, dispense or prescribe a lethal dose of drugs upon the request of a terminally ill patient").

lawfully prescribe drugs regulated by the CSA.[235] Although a seemingly narrow, technical issue, this policy was a key piece of President Bush's larger prolife agenda, and his administration—his Attorney General, John Ashcroft, in particular—pursued it with gusto.

The attorney general, at least for most of the last century, fits the model of presidential control—subject to presidential appointment with the advice and consent of the Senate, removable at will by the President, and in charge of performing functions at the core of executive power.[236] Although presidential removal authority is an abstract threat for many department heads, presidents have asserted it throughout history to pressure attorneys general.[237]

Not only did President Bush enjoy formal control over his Attorney General, but he also endorsed the Attorney General's efforts to oppose the Oregon law that had authorized physician-assisted suicide in that state, and he publicly associated himself with these efforts. The White House press corps and the President himself publicly discussed his opposition to physician-assisted suicide and his commitment to mobilize the resources of the DOJ to oppose the Oregon law. For instance, in a press gaggle, White House Press Secretary Ari Fleischer was asked by a reporter, "[o]n physician-assisted suicide, the President did step in and have [Attorney General] John Ashcroft prosecute – I forget if it was Washington state or Oregon."[238] Fleischer responded that he did not recall specifically, but allowed that "there are a host of other issues where the President has a different position than states."[239] A few months later, Fleischer's successor, White House Press Secretary Scott McClellan, affirmed President Bush's continued opposition to physician-assisted suicide in a similar back-and-forth with a reporter in a press briefing.[240]

---

[235] *Gonzales*, 546 U.S. at 249.

[236] *See* Morrison v. Olson, 487 U.S. 654, 663 (1988) (considering the function of the attorney general). For the mixed history of the attorney general as independent and accountable, see Jed Handelsman Shugerman, *Professionals, Politicos, and Crony Attorneys General: A Historical Sketch of the U.S. Attorney General as a Case for Structural Independence*, 87 FORDHAM L. REV. 1965 (2019) and Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121 (2014) [hereinafter Shugerman, *The Creation of the Department of Justice*].

[237] Alberto Gonzales himself resigned under pressure from the Bush administration in 2007 amid controversy over the alleged political firing of U.S. attorneys. Scott Bomboy, *Attorney General Removals Rare, but Not Unprecedented*, NAT'L CONST. CTR. (July 26, 2017), https://constitutioncenter.org/blog/attorney-general-removals-rare-but-not-unprecedented [https://perma.cc/EP4L-AR6X]. For five other examples, see *id.*

[238] *Press Gaggle by Ari Fleischer*, THE WHITE HOUSE (Sept. 23, 2002), https://georgewbush-whitehouse.archives.gov/news/releases/2002/09/20020923-8.html [https://perma.cc/888Z-EG2B].

[239] *Id.*

[240] *Press Briefing by Scott McClellan*, THE WHITE HOUSE (Nov. 18, 2002), https://georgewbush-whitehouse.archives.gov/news/releases/2002/11/20021118-2.html [https://perma.cc/S6J8-RSG9].

In telephone remarks delivered to the March for Life, an annual gathering on the national mall organized by pro-life organizations, President Bush explicitly discussed his personal ethics and policy commitments on physician-assisted suicide and situated it in the context of his broader support for the pro-life agenda:

> I want to thank you very much for including me in the celebration of life. . . . In our time, respect for the right to life calls us to defend the sick and the dying, persons with disabilities and birth defects, and all who are weak and vulnerable. . . . My administration is challenging the Oregon law that permits physician-assisted suicide.[241]

At another press event, White House Press Secretary McClellan made clear that the DOJ was acting on President Bush's personal beliefs about physician-assisted suicide.[242]

These presidential statements were made against the backdrop of a broader public conversation about physician-assisted suicide. As the Court recognized in *Gonzales*, "Americans [were] engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide."[243] Major U.S. newspapers carried 475 articles about physician-assisted suicide from the month the interpretive rule was adopted through the month it was struck down.[244] More than half of these (253) mentioned President Bush by name or referred to the "President."[245]

Attorney General John Ashcroft announced the interpretive rule with much fanfare.[246] There was vigorous public debate about the ethics of physi-

---

[241] *President Calls Participants of the 30th Annual March for Life on the National Mall*, THE WHITE HOUSE (Jan. 22, 2003), https://georgewbush-whitehouse.archives.gov/news/releases/2003/01/20030122-3.html [https://perma.cc/D929-UVBV].

[242] *Press Gaggle by Scott McClellan*, THE WHITE HOUSE (Mar. 21, 2005), https://georgewbush-whitehouse.archives.gov/news/releases/2005/03/20050321-2.html [https://perma.cc/GA7M-93ER] ("The legislation he signed is consistent with his views.").

[243] Gonzales v. Oregon, 546 U.S. 243, 249 (2006) (quoting Washington v. Glucksberg, 521 U.S. 702, 735 (1997)).

[244] Lexis Search in Major U.S. Newspapers, LEXIS, https://www.lexisnexis.com/en-us/gateway.page (follow Major U.S. Newspapers hyperlink; then search: "physician assisted suicide" and NOT "bishops" (to eliminate irrelevant articles about the election of a Catholic Bishop to be president of the United States Conference of Catholic Bishops); then filter to 10/01/2001–01/30/2006).

[245] Lexis Search in Major U.S. Newspapers, LEXIS, https://www.lexisnexis.com/en-us/gateway.page (follow Major U.S. Newspapers hyperlink; then search: "physician assisted suicide" and NOT "bishops" (to eliminate irrelevant articles about the election of a Catholic Bishop to be president of the United States Conference of Catholic Bishops); then filter to 10/01/2001–01/30/2006; and then filter ("President" or "Bush")).

[246] *See* Jill Carroll, *Physicians Who Assist in Suicides Will Face Charges, Ashcroft Says*, WALL ST. J. (Nov. 7, 2001), https://www.wsj.com/articles/SB1005078917622534000?mod=Searchresults_pos1&page=1 [https://perma.cc/WL48-JAWV] ("Attorney General John Ashcroft said doctors who

cian-assisted suicide[247] as well as the propriety of the Attorney General's interpretive rule, with editorials supporting[248] and opposing it.[249] Controversy over physician-assisted suicide fueled national political contestation in the years following the Attorney General's adoption of the interpretive rule. The national parties poured money into Oregon's Senate race in 2002, which featured attacks on one of the candidates for "opposing abortion and Oregon's voter-approved physician-assisted suicide law."[250] Physician-assisted suicide became a hot-button issue in John Roberts's nomination to the Court in 2005, following the retirement of Justice O'Connor. Articles highlighted the Oregon case on the Court's docket and speculated about how Roberts might rule.[251] When

participate in assisted suicides will face criminal charges, targeting Oregon's physician-assisted suicide law."); Sam Howe Verhovek, *Federal Agents Are Directed to Stop Physicians Who Assist Suicides*, N.Y. TIMES (Nov. 7, 2001), https://www.nytimes.com/2001/11/07/us/federal-agents-are-directed-to-stop-physicians-who-assist-suicides.html [https://perma.cc/XN7R-MPR3] (indicating that "Attorney General John Ashcroft yesterday authorized federal agents to take action against doctors who prescribe lethal drugs for terminally ill patients").

[247] *See* Kristin E. Holmes, *Jewish Guidebook on Dying Offers Broad Perspectives on Values*, PHILA. INQUIRER, May 26, 2002, at B05 (considering the religious view on physician-assisted suicide); Alicia Kerstyn & John T. Sinnott, *Local Physician Offers Tips for Facing Death*, TAMPA TRIB., Oct. 7, 2001 (providing commentary on "ethical and moral dilemmas" surrounding physician-assisted suicide); Editorial, *Life-and-Death Decisions*, ST. LOUIS POST-DISPATCH, Nov. 8, 2001, at C18 (considering the perspective of the patient and their autonomy).

[248] *See* Editorial, *Ashcroft: For Life Decision Reflects Sensible Judgment*, THE OKLAHOMAN (Nov. 11, 2001), https://www.oklahoman.com/story/news/2001/11/11/ashcroft-for-life-decision-reflects-sensible-judgment/62123472007/ [https://perma.cc/R3KL-Y8SU] ("Attorney General John Ashcroft has moved to slow the descent of American culture down the slippery slope of assisted suicide and euthanasia."); Asa Hutchinson, *Drugs Are to Help, Not Harm*, USA TODAY, Nov. 14, 2001 (writing that the "American public must be confident that these drugs are used for legitimate medical purposes and will cause no undue harm to patients"); Letters to the Editor, *Ashcroft Is Not Alone on This One*, COLUMBUS DISPATCH, Dec. 29, 2001, at 11A (describing opposition to physician-assisted suicide).

[249] *See* Editorial, *Ashcroft's Meddling*, BOS. GLOBE, Nov. 10, 2001, A.14 (describing opposition to Ashcroft's interpretive rule); Editorial, *Ashcroft's Moral Stand Out of Line*, TAMPA BAY TIMES, Nov. 13, 2001, at 12A (suggesting that "Ashcroft has decided to squander resources threatening doctors and second-guessing the way medicine is practiced"); Editorial, *Emergency Matters Must Take Priority*, INDIANAPOLIS STAR, Nov. 12, 2001, at A10 (arguing that Ashcroft's rule was not timely and that he "should concentrate on the challenges at hand"); Editorial, *Washington Shouldn't Be Tinkering with Oregon Law*, NEWSDAY, Nov. 12, 2001 (stating that "Attorney General John Ashcroft shouldn't take it upon himself to criminalize [physician-assisted suicide] in Oregon"); Bill McClellan, *When Ashcroft Turns Into an Activist, He Hurts His Credibility*, ST. LOUIS POST-DISPATCH, Nov. 12, 2001, at B1 (describing letters submitted by readers on the topic); Clarence Page, *The Right to Choose the Quality of One's Death*, CHI. TRIB., Nov. 11, 2001, at 1.21 (arguing that Ashcroft used the law "to enforce his personal faith and moral convictions").

[250] V. Dion Haynes, *National Parties Pour Money into Oregon's Senate Race*, CHI. TRIB., Oct. 2, 2002, at 1.10.

[251] *See* Jess Bravin & Jeanne Cummings, *Divided Ranks: In High Court Battle, First Phase Plays Out Among Conservatives; Business Saw O'Connor as Ally but Religious Right Wants a Different Kind of Justice; Weighing the Gonzales Option*, WALL ST. J., July 5, 2005, at A1 (mentioning then-Judge Roberts "limited paper trail"); John Aloysius Farrell, *First Cases to Quickly Clear Air on Roberts; Assisted Suicide, Abortion on Agenda*, DENVER POST, Oct. 2, 2005, at A-01 (indicating that

the Court ruled against the Attorney General in *Gonzales* (with Roberts in dissent), one headline brought it all together, capturing the ongoing political salience of the issue and the Bush administration's connection to it: "Oregon assisted-suicide law upheld; The Supreme Court rejected the Bush administration's challenge to the right-to-die law, removing a major obstacle to state initiatives."[252]

In sum, the Attorney General's interpretive rule challenged in *Gonzales* exhibited the hallmarks of the "chain of dependence." An agency under the President's formal supervisory control promulgated the policy. The President actively directed and supported the policy. Both the policy, as well as President Bush's association with it, had high public visibility and political salience. Arguably, it catalyzed political debate about the issue of physician-assisted suicide. Indeed, the political debate outlasted the rule itself. This accountability context, however, plays no role in the Court's analysis in *Gonzales*.

G. FDA v. Brown & Williamson Tobacco Corp.*:* *FDA Tobacco Regulation*

In 2000, in *FDA v. Brown & Williamson Tobacco Corp.*, the Court considered a challenge to the FDA rule regulating tobacco products to reduce youth consumption.[253] President Clinton was involved in the policymaking process from its earliest stages, made (and took public responsibility for) key policy decisions, and vigorously advocated for the FDA rule, expending significant political capital. Tobacco regulation fit squarely within President Clinton's core political agenda of improving health outcomes and supporting families. In remarks at a swearing-in ceremony for members of the newly created President's Council on Physical Fitness and Sports, President Clinton discussed the FDA's early consideration of its authority to regulate tobacco products: "An enormous amount of what we do involves the health of our people. . . . Our FDA is taking on a pretty tough fight with the tobacco industry

---

"[o]n Wednesday morning . . . the Roberts court will hear oral arguments in its first marquee case of the 2005 term"); Gina Holland, Associated Press, *With Court Change, Rulings Become Even Less Predictable; Appointee Will Face Hot-Button Cases*, ST. LOUIS POST-DISPATCH, July 3, 2005, at B7 (mentioning that the Court would "take up the administration's challenge to Oregon's law allowing physician-assisted suicide"); Sheryl Gay Stolberg, *Nominee Is Pressed on End-of-Life Care*, N.Y. TIMES, Aug. 10, 2005, at A18 (considering, prior to his confirmation, Chief Justice Roberts's approach to physician-assisted suicide).

[252] David Whitney, *Oregon Assisted-Suicide Law Upheld; The Supreme Court Rejected the Bush Administration's Challenge to the Right-to-Die Law, Removing a Major Obstacle to State Initiatives.*, MINNEAPOLIS STAR TRIB., Jan. 18, 2006, at 1A.

[253] *See* 529 U.S. 120, 125 (2000) (analyzing the FDA's authority to regulate tobacco as a drug).

and now looking into the whole issue of the narcotic or addictive effects and whether they can be varied based on certain production techniques."[254]

There was heightened media interest in the President's position on tobacco regulation following reports that the agency had found it had jurisdiction to regulate tobacco, with reporters pressing the President and White House Press Secretary Mike McCurry on how the President would respond.[255] Both indicated that there was an ongoing, deliberative process in which the President was personally involved and stressed that the President would make a final decision on the policy. When first asked about FDA action on tobacco, President Clinton underscored the identity of interest between him and the agency but cautioned that a final policy decision would require his supervisory input.[256]

In deliberating about the policy decision, the President and his staff met with FDA officials[257] and members of Congress[258] and solicited input from the tobacco industry.[259] Throughout the process, White House Press Secretary McCurry stressed the President's role as the "decider"[260] in the policy-making process:

---

[254] President William J. Clinton*, Remarks by the President at Swearing-in Ceremony for the President's Council on Physical Fitness and Sports*, THE WHITE HOUSE (May 31, 1994), https://clintonwhitehouse6.archives.gov/1994/05/1994-05-31-remarks-by-president-at-fitness-council-swearing-in.html [https://perma.cc/2LRR-2RZD].

[255] *See* President William J. Clinton, *Remarks by the President Following Welfare Reform Meeting*, THE WHITE HOUSE (July 13, 1995), https://clintonwhitehouse6.archives.gov/1995/07/1995-07-13-president-remarks-after-welfare-reform-meeting.html [https://perma.cc/PQ8X-JP36] (exhibiting that reporters began questioning the President on the FDA's tobacco regulation); *Press Briefing by Mike McCurry*, THE WHITE HOUSE (July 26, 1995), https://clintonwhitehouse6.archives.gov/1995/07/1995-07-26-press-briefing-by-mike-mccurry.html [https://perma.cc/AB54-FJEE] (exhibiting that reporters began questioning Mike McCurry on the review of the FDA tobacco regulation).

[256] *See Remarks by the President Following Welfare Reform Meeting*, *supra* note 255 (stating that President Clinton would receive a request for guidance on the regulation prior to its enactment).

[257] *See Interview with Bob Edwards and Mara Liasson of National Public Radio*, AM. PRESIDENCY PROJECT (Aug. 7, 1995), https://www.presidency.ucsb.edu/documents/interview-with-bob-edwards-and-mara-liasson-national-public-radio [https://perma.cc/TAL6-PUPZ]. In an interview with NPR reporters, President Clinton said, "We're working through what our options are, and I've talked with Dr. Kessler at the FDA. He has asked me to do that, and we've been involved with him and discussed that." *Id.*

[258] *See Press Briefing by Mike McCurry*, THE WHITE HOUSE (July 26, 1995), https://clintonwhitehouse6.archives.gov/1995/07/1995-07-26-press-briefing-by-mike-mccurry.html [https://perma.cc/AB54-FJEE] ("I did note that two members of Congress, Congressman Wyden and Congressman Rose, mentioned that they had come in, too. . . . They . . . had a good discussion with the Chief of Staff to pass on their views.").

[259] *See Press Briefing by Mike McCurry*, THE WHITE HOUSE (July 13, 1995), https://clintonwhitehouse6.archives.gov/1995/07/1995-07-13-press-briefing-by-mike-mccurry.html [https://perma.cc/F4FZ-9RQW] ("I'm sure the President and the administration would be interested in any suggestions from the industry of that nature. But, again, I don't want to suggest that that has been decided.").

[260] *See* Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 704–05 (2007) (arguing that "the President's role—like that of the Congress and the courts—is that of overseer and not decider" concerning agency decisions).

> [T]here are some complex legal, regulatory and policy issues at play here. I wouldn't rule out that it could be sooner rather than later, but I don't want to set artificially a timetable for the President either. I think *he* wants to make the right decision, make sure that *he's* got the information that *he* needs, make sure that *he* constructs a policy—regardless of some of the regulatory and legal decisions—there are some policy decisions here that *he* feels are very important as they relate to tobacco use by young people.[261]

Asked by reporters about the delay in announcing the rule, McCurry explained that the President had "been working [on]" the "complicated issue," which "involv[ed] both regulation and then *policymaking on the President's part*" and noted that the President is "very keen on making sure *he's* got the right policy to make good on a commitment *he* feels strongly about. *That's his responsibility as President*, to protect the nation's children from tobacco use."[262]

One reporter explicitly asked McCurry "why is this a presidential issue?" and McCurry responded, "Well, that goes to the heart of FDA's determination or their interest in the issue itself."[263] The reporter followed up, "Of all the issues that the President is dealing with lately, why did he agree to make this an issue on his plate right now?"[264] McCurry situated FDA tobacco regulation in President Clinton's broader political agenda of "protecting future generations of taxpayers" from spiraling Medicare costs and protecting "the current generation of children" from the dangers of tobacco addiction. [265]

The President personally announced FDA's proposed rule in a news conference, where he explicitly invoked his executive authority and indicated his responsibility for the policy. [266]

---

[261] *Press Briefing by Mike McCurry*, *supra* note 258 (emphasis added); *see also Press Briefing by Mike McCurry*, *supra* note 259 (explaining that the President had not yet made a decision on tobacco regulation).

[262] *Press Briefing by Mike McCurry*, THE WHITE HOUSE (Aug. 8, 1995), https://clintonwhitehouse6.archives.gov/1995/08/1995-08-08-press-briefing-by-mike-mccurry.html [https://perma.cc/PW3D-AK6T] (emphasis added).

[263] *Id.*

[264] *Id.*

[265] *Id.* ("Well, you've seen in recent weeks one after another scientific study coming forward that confirms some of the documented evidence that addiction to tobacco especially among young people is on the rise. It's a source of very real concern to him. And you remember the context for the discussion of this issue is a very real debate going on now about Medicare expenditures. And that speaks to the long-term health costs in America of what happens if we're paying 20, 30, 40 years down the road from the health damage done to today's children by tobacco use. So in a very real sense he's protecting future generations of taxpayers, in addition of protecting the current generation of children.").

[266] President William J. Clinton, *Press Conference by the President*, THE WHITE HOUSE (Aug. 10, 1995), https://clintonwhitehouse6.archives.gov/1995/08/1995-08-10-press-conference-by-the-president.html [https://perma.cc/FG32-KP92] ("Today I am announcing broad executive action to

President Clinton followed up the policy announcement with a media blitz in support of the FDA's regulations, including an interview with MTV (a cable TV channel with a large youth viewership),[267] a national radio address delivered from the Oval Office,[268] and an interview with Larry King on his then-highly-rated CNN talk show.[269] He continued to build political support for the initiative in remarks delivered in a wide variety of forums, including a Roundtable Discussion on Tobacco Use Prevention,[270] the Anticancer Initiative,[271] a proclamation marking Cancer Control Month,[272] an anti-smoking event on Kick Butts Day,[273] and to the Saxophone Club.[274] The President also shielded Dr. Kessler, the FDA Administrator, from personal attacks by the tobacco industry and calls for his resignation.[275]

The White House had a keen sense of the political salience of the issue. As McCurry told reporters, "clearly there are many members of Congress that

protect the young people of the United States from the awful dangers of tobacco. . . . Today and every day this year, 3,000 young people will begin to smoke. One thousand of them ultimately will die of cancer, emphysema, heart disease, and other diseases caused by smoking. That's more than a one million vulnerable young people a year being hooked on nicotine that ultimately could kill them. *Therefore, by executive authority, I will restrict sharply the advertising, promotion, distribution, and marketing of cigarettes to teenagers*.") (emphasis added).

[267] President William J. Clinton, *Interview of the President by MTV*, THE WHITE HOUSE (Aug. 11, 1995), https://clintonwhitehouse6.archives.gov/1995/08/1995-08-11-mtv-interview-of-the-president.html [https://perma.cc/83NK-LTSQ].

[268] President William J. Clinton, *Radio Address of the President to the Nation*, THE WHITE HOUSE (Aug. 12, 1995), https://clintonwhitehouse6.archives.gov/1995/08/1995-08-12-radio-address-of-the-president-to-the-nation.html [https://perma.cc/LVT8-ZDYM].

[269] President William J. Clinton, *Remarks by the President at Larry King Radio Town Meeting*, THE WHITE HOUSE (Sept. 21, 1995), https://clintonwhitehouse6.archives.gov/1995/09/1995-09-21-president-remarks-on-larry-king-radio-town-meeting.html [https://perma.cc/WZ85-BTFY].

[270] President William J. Clinton, Remarks in a Roundtable Discussion on Tobacco Use Prevention and an Exchange with Reporters, AM. PRESIDENCY PROJECT (Feb. 12, 1996), https://www.presidency.ucsb.edu/documents/remarks-roundtable-discussion-tobacco-use-prevention-and-exchange-with-reporters [https://perma.cc/3ACP-SM8H].

[271] President William J. Clinton, *Remarks by the President at Ceremony for Anti-Cancer Initiative*, THE WHITE HOUSE (Mar. 29, 1996), https://clintonwhitehouse6.archives.gov/1996/03/1996-03-29-president-remarks-at-anti-cancer-initiative-ceremony.html [https://perma.cc/BU5M-X63R].

[272] Proclamation No. 6875, 61 Fed. Reg. 14603 (Apr. 2, 1996), https://www.presidency.ucsb.edu/documents/proclamation-6875-cancer-control-month-1996 [https://perma.cc/8Q4B-C68G].

[273] President William J. Clinton, Remarks by the President in Telephone Conference with Kick Butts Day Student Participants (May 7, 1996), https://clintonwhitehouse6.archives.gov/1996/05/1996-05-07-president-remarks-in-kick-butts-telephone-conference.html [https://perma.cc/PUF7-2SGD].

[274] President William J. Clinton, Remarks by the President at the Saxophone Club Fundraiser (Sept. 26, 1995), https://clintonwhitehouse6.archives.gov/1995/09/1995-09-26-president-remarks-at-saxophone-club-fundraiser.html [https://perma.cc/39AE-P4YB].

[275] *Press Briefing by Mike McCurry*, THE WHITE HOUSE (Aug. 11, 1995), https://clintonwhitehouse6.archives.gov/1995/08/1995-08-11-press-briefing-by-mike-mccurry.html [https://perma.cc/QL5M-C5YK] (stating that the calls for Dr. Kessler's resignation were "utterly without merit").

have a very active interest in the issue."[276] Reporters routinely highlighted the political stakes of the decision to regulate tobacco, noting the opposition of tobacco state lawmakers[277] and asking the President himself, "Mr. President, with your decision on tobacco you're taking on one of the biggest cash crops in a region where you've already got major political problems. Are you writing off the South for next year's elections?"[278]

Despite the political risks, President Clinton personally announced the issuance of the final FDA rule to protect youth from tobacco, framing it as a joint effort between him and the agency: "*We* have carefully considered the evidence. It is clear that the action being taken today is the right thing to do, scientifically, legally, and morally. So today *we* are acting."[279] Following the promulgation of the rule, President Clinton continued to advocate for it publicly.[280] Further, he attempted to build on the rule by proposing comprehensive tobacco legislation in Congress.[281]

The topic of tobacco regulation—and President Clinton's connection to it—was the subject of public discussion and debate throughout his tenure in office. In major U.S. newspapers, 357 articles addressed tobacco regulation, and more than seventy percent of them (253) mentioned the President.[282] Articles covered legislative and regulatory developments relating to tobacco regu-

---

[276] *Briefing by Mike McCurry*, *supra* note 258.

[277] *Briefing by Mike McCurry*, *supra* note 259.

[278] *Press Conference by the President*, *supra* note 266.

[279] President William J. Clinton, *Remarks by the President During the Announcement of Food and Drug Administration Rule on Children and Tobacco*, THE WHITE HOUSE (Aug. 23, 1996), https://clintonwhitehouse6.archives.gov/1996/08/1996-08-23-president-on-fda-rule-on-children-and-tobacco.html [https://perma.cc/6NMK-2UP6] (emphasis added).

[280] *See* President William J. Clinton, *Press Conference by the President*, THE WHITE HOUSE (Aug. 6, 1997), https://clintonwhitehouse6.archives.gov/1997/08/1997-08-06-press-conference-by-the-president.html [https://perma.cc/ZN2A-CBSS] (stating his goal of "protecting the jurisdiction of the FDA and the victories we've already won"); President William J. Clinton, *Statement of the President*, THE WHITE HOUSE (May 2, 1997), https://clintonwhitehouse6.archives.gov/1997/05/1997-05-02-president-on-appeal-in-tobacco-advertising-ruling.html [https://perma.cc/2P3F-B7ZE] ("We will continue to work to protect our children from tobacco, and we will not stop until we succeed."); President William J. Clinton, *Remarks by the President to the American Medical Association Leadership Conference*, THE WHITE HOUSE (Mar. 9, 1998), https://clintonwhitehouse6.archives.gov/1998/03/1998-03-09-remarks-by-the-president-to-ama.html [https://perma.cc/GGN2-T7LK] ("If we do this, we can cut teen smoking by almost half in five years.").

[281] *See* President William J. Clinton, *Remarks by the President on Tobacco Settlement Review*, THE WHITE HOUSE (Sept. 17, 1997), https://clintonwhitehouse6.archives.gov/1997/09/1997-09-17-president-remarks-on-the-tobacco-settlement-review.html [https://perma.cc/G7GD-5TJC] ("I want to challenge Congress to build on this historic opportunity by passing sweeping tobacco legislation . . . .").

[282] Lexis Search in Major U.S. Newspapers, LEXIS, https://www.lexisnexis.com/en-us/gateway.page (follow Major U.S. Newspapers hyperlink; then search: "tobacco regulation"; then filter to 01/01/1993–03/30/2000; and then filter "Clinton or President").

lation[283] and conveyed a range of viewpoints supporting[284] and opposing[285] regulation or simply reporting on the "[h]ot debate over regulating teen smoking."[286] Press coverage clearly conveyed the President's decisive role in the policymaking process with headlines such as "FDA Dubs Nicotine a Drug, Backs Off on Regulating It; Bounces Recommendations, Issue to Clinton"[287] and "FDA urges nicotine curbs; But agency sidesteps issue, urges Clinton to draft regulations."[288] Furthermore, President Clinton's support for tobacco regulation (and his opponent Bob Dole's opposition to it) was a significant issue in the 1996 presidential campaign.[289]

In sum, the FDA's tobacco regulation exhibited the hallmarks of the "chain of dependence." An agency under the President's formal supervisory control promulgated the policy. It was the product of active presidential supervision and support, with President Clinton making key policy decisions and expending political capital to advocate for the policy. Both the policy, as well as President Clinton's association with it, had high public visibility and political salience. Although the dissent in *Brown & Williamson* encouraged the Court to consider this accountability context, it played no role in the majority opinion.

III. "UNACCOUNTABLE AGENCIES" AND ERASED PRESIDENTS IN THE MQD DECISIONS

It is jarring to read the MQD cases against the background of how the challenged policies were actually enacted. In each of these cases, despite the

---

[283] *See* Marlene Cimons & Jeff Leeds, *Quick House Vote Sought on Regulation of Tobacco*, L.A. TIMES, June 14, 1994, at A21 (describing a House vote "on legislation that would require the Food and Drug Administration to regulate tobacco but would forbid the agency to ban cigarettes").

[284] *See* Anita Manning, *AMA Calls for Tobacco Regulation*, USA TODAY, June 8, 1994, at 1A (describing the American Medical Association's decision to support the FDA regulation); Philip J. Hilts, *Majority Backs Cigarette Rules*, *Poll by Tobacco Industry Finds*, N.Y. TIMES, Jan. 11, 1995, at A14 (noting a report that "a majority of Americans think increased Government regulation of cigarettes is important").

[285] *See* Carol Jouzaitis, *High Stakes, Deep Worries of More Tobacco Regulation: Firms Fight Hard to Avert Worst Scenario*, CHI. TRIB., June 24, 1994, at SW1 (expressing opposition to the FDA regulation); Laurie D. Craw, *What About Smokers' Rights?*, CHRISTIAN SCI. MONITOR, Oct. 28, 1994, at 20 (expressing concern for smokers as a result of the FDA regulation).

[286] Doug Levy, *Hot Debate Over Regulating Teen Smoking*, USA TODAY, July 14, 1995, at 10D.

[287] *FDA Dubs Nicotine a Drug, Backs Off on Regulating It; Bounces Recommendations, Issue to Clinton*, ST. LOUIS POST-DISPATCH, July 13, 1995, at 3A.

[288] Philip J. Hilts, *FDA Urges Nicotine Curbs; But Agency Sidesteps Issue, Urges Clinton to Draft Regulations*, PITTSBURGH POST-GAZETTE, July 13, 1995, at A3.

[289] *See* Judy Keen, *Dole Still 'Not Certain' if Tobacco Is Addictive; Supporters Are Baffled by His Stance*, USA TODAY, July 3, 1996 (reporting that the Clinton campaign "has long planned to use a strong anti-tobacco stance as a major re-election theme"); Judy Keen & Judi Hasson, *Dole Tries to Regain the GOP's Southern Ground*, USA TODAY, June 17, 1996 (noting that "in tobacco growing states, [Bob Dole] suddenly opened attack on tobacco regulation").

overwhelming evidence that these policies were the product of direct (and often highly personal) presidential control and supervision, the Court inexplicably lets the President off the hook and goes after the agency instead. Chief Justice Roberts sums it up nicely in *West Virginia v. EPA*, where he explains that the MQD is a response to "a particular and recurring problem: *agencies* asserting highly consequential power beyond what Congress could reasonably be understood to have granted," despite the highly public role of the President in promulgating these policies. [290]

A close reading of major questions cases confirms that the doctrine rests in no small part on what might be characterized as a theory of "agencies gone wild": agencies doing big, "aggressive" things; agencies doing things they have never done before; agencies using sleight of hand to pull these policy elephants out of the modest statutory mouseholes delegated to them by Congress.[291] Although the sins of bigness, novelty, and statutory sorcery have been widely remarked upon in case law and commentary on the MQD, what has largely escaped notice is the identity of the accused sinner: the agency. This assignment of blame is puzzling given the Court's theory of a unitary executive branch, its insistence on operationalizing that theory by expanding presidential power over appointment and removal, and a succession of presidents' hands-on involvement in major questions policies.[292] Indeed, the President—so prominent in the Court's theory of accountability in appointment and removal cases—is virtually nowhere to be found in its MQD jurisprudence. This Part documents the Court's rhetoric of unruly and unaccountable agencies in MQD cases and its conspicuous silence about the presidents who control them.

A. Blaming Unruly and Unaccountable Agencies

In identifying which policy decisions constitute major questions warranting distinctive treatment, the Court has focused on three key attributes: (1) policies with great "economic and political significance";[293] (2) novel policies that differ, in the Court's view, from the agency's historic use of its authority;[294]

---

[290] 142 S. Ct. 2587, 2609 (2022) (emphasis added). This particular gripe about agencies is, itself, recurring—quoted verbatim in Justice Gorsuch's concurrence. *Id.* at 2620 (Gorsuch, J., concurring).

[291] *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab. (*NFIB v. OSHA*), 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring) (describing the agency action at issue as "aggressive assertions of executive authority").

[292] *See supra* notes 103–289 and accompanying text (providing an account of presidential involvement in the promulgation of MQD policies).

[293] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000).

[294] Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) ("When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' we typically greet its announcement with a measure of skepticism.") (citation omitted) (quoting *Brown & Williamson*, 529 U.S. at 159).

and, (3) the manipulation of ambiguous statutory text to pull policy "elephants" out of statutory "mouseholes."[295] Notably, the Court consistently faults the agency that promulgated the policy for these transgressions rather than the President who ordered the agency to adopt it.

First, major questions cases portray agencies as free agents, untethered from democratic control and attempting to make big policy moves. For instance, in *Biden v. Nebraska*, the Court accuses the Secretary of Education of a power grab with large economic impacts: "[*T*]*he Secretary* would enjoy virtually unlimited power to rewrite the Education Act. . . . in which *the Secretary* may unilaterally define every aspect of federal student financial aid . . . The 'economic and political significance' of *the Secretary's* action is staggering by any measure."[296] Similarly, in *Alabama Ass'n of Realtors v. Department of Health and Human Services*, the Court found that "the kind of power that *the CDC* claims here"[297]—over "[a]t least 80% of the country, including between 6 and 17 million tenants at risk or eviction"[298]—is of "vast economic and political significance."[299] Further, in *West Virginia v. EPA*, the Court not only expressed its general concern, about "*agencies* asserting highly consequential power beyond what Congress could reasonably be understood to have granted",[300] it also registered more targeted criticism of the "*EPA* dictating the optimal mix of energy sources nationwide."[301] The Court portrays the agencies sitting in the driver's seat rather than following presidential directives ordering them to reach a specific policy destination.

Second, MQD cases not only stress the significance of challenged agency policies, but they also highlight the perceived novelty of these policies and explicitly attribute responsibility for the shift in policy direction to the promulgating agency. As the Court began to stake out the contours of major questions in *FDA v. Brown & Williamson Tobacco Corp.*, it declared that the Clinton administration's attempt to regulate tobacco products was "hardly an ordinary case. Contrary to its representations to Congress since 1914, *the FDA* has now asserted jurisdiction to regulate an industry constituting a significant portion of

---

[295] Gonzales v. Oregon, 546 U.S. 243, 267 (2006) (quoting Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001)).

[296] 143 S. Ct. 2355, 2373 (2023) (emphasis added) (quoting West Virginia v. EPA, 142 S. Ct. 2587, 2608) (2022)).

[297] 141 S. Ct. 2485, 2489 (2021) (per curiam) (emphasis added).

[298] *Id.* at 2489.

[299] *Id.* (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)) (internal quotation marks omitted).

[300] *West Virginia*, 142 S. Ct. at 2609 (emphasis added).

[301] *Id.* at 2613 (emphasis added); *see also Util. Air Regul. Grp.*, 573 U.S. at 324 (emphasis added) (arguing that the EPA's proposed policy to "require permits for the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide" was an example of "an *agency* laying claim to extravagant statutory power over the national economy").

the American economy."[302] This ignores the substantial (and public) evidence that the agency looked to President Clinton to make the final policy decision on whether and how to regulate tobacco.[303] Similarly, in striking down the workplace vaccine or test emergency standard in *NFIB*, the Court found it "telling that *OSHA*, in its half century of existence, has never before adopted a broad public health regulation of this kind—addressing a threat that is untethered, in any causal sense, from the workplace."[304] And in *West Virginia*, the Court highlighted what it characterized as a marked change in the EPA's approach to Clean Air Act policy design: "Prior to 2015, *EPA* had always set emissions limits under Section 111 based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly. *It* had never devised a cap by looking to a 'system' that would reduce pollution simply by 'shifting' polluting activity 'from dirtier to cleaner sources.'"[305] The Court leveled these charges despite the substantial record documenting that these policy changes were ordered (and publicly owned) by the President.[306]

Third, several of the major questions cases suggest that agencies use statutory sleight-of-hand to identify legal authority for their bold, novel policies. For instance, in *Biden v. Nebraska*, the Court denounced the Secretary of Education for promulgating a novel policy through statutory subterfuge: "What *the Secretary* has actually done is draft a new section of the Education Act from scratch by 'waiving' provisions root and branch and then filling the empty space with radically new text."[307] Similarly, in 2014, in *Utility Air Regulatory Group v. EPA*, the Court found it suspicious that "*an agency* claims to discover in a long-extant statute an unheralded power to regulate."[308] Concurring Justices in *NFIB* warned generally that "*the agency* may seek to exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond its initial assignment."[309] The concurrence in *West Virginia* cautioned that in a world without the MQD, "*agencies* could churn out new

---

[302] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) (emphasis added).

[303] *See supra* notes 253–289 and accompanying text (providing an account of President Clinton's involvement in promulgating the FDA tobacco regulation considered in *FDA v. Brown & Williamson*).

[304] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab. (*NFIB v. OSHA*), 142 S. Ct. 661, 666 (2022) (emphasis added).

[305] *West Virginia*, 142 S. Ct. at 2610 (emphasis added) (citation omitted) (quoting Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662, 64726 (Oct. 23, 2015) (codified at 40 C.F.R. pt. 60)).

[306] *See supra* notes 103–289 and accompanying text (providing an account of the President's involvement in promulgating MQD policies).

[307] 143 S. Ct. 2355, 2371 (2023) (emphasis added).

[308] 573 U.S. 302, 324 (2014) (emphasis added).

[309] *NFIB v. OSHA*, 142 S. Ct. at 669 (Gorsuch, J., concurring) (emphasis added).

laws more or less at whim."[310] Again, the Court made these charges despite the fact that these agencies interpreted their statutory authority in consultation with the President to advance the President's agenda, often with media scrutiny about the scope of the President's authority.[311]

The Court's pique with agencies is perhaps best explained by the strong anti-administrative strand threading through the arguments in these cases.[312] Justices have framed the MQD as an essential tool to prevent "government by bureaucracy"[313] and protect the democratic republic from "a regime administered by a ruling class of largely unaccountable 'ministers.'"[314] Notably, lower federal courts have embraced and amplified this anti-administrative rhetoric, lamenting, for instance, "the impenetrable halls of an administrative agency"[315] and "the deep recesses of the federal bureaucracy."[316] In *Biden v. Nebraska*, the Court assures us that the MQD clear statement rule protects us from a bureaucratic nightmare in which "*a Department Secretary* can *unilaterally* alter large sections of the American economy."[317] Of course, the Court never acknowledges that the policy promulgated by the Department of Education was not the brainchild of some rogue secretary, but rather was President Biden's own policy, a quintessential example of "presidential administration."[318]

B. Erasing Presidents

In stark contrast to the drubbing the Court administers to agencies and their leaders in MQD cases, the presidents who ordered these policies get a

---

[310] *West Virginia*, 142 S. Ct. at 2618 (Gorsuch, J., concurring) (emphasis added).

[311] *See supra* notes 103–289 and accompanying text (providing an account of the President's involvement in promulgating MQD policies).

[312] The Roberts Court's broad anti-administrative orientation is summarized in Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017). Commentators have noted the "anti-adminsitrativist[]" character of the MQD. *See* Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174, 204 (2022), https://virginialawreview.org/articles/antideference-covid-climate-and-the-rise-of-the-major-questions-canon [https://perma.cc/WBR7-3DK4] ("If the anti-administrativists want to constrain or roll back agency power, they should propose doing so openly and contest elections on that basis, not give courts a veto over policy."). They have also noted the "antibureaucratic philosophy of the modern state" that underlies it. Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2024 (2018).

[313] *NFIB v. OSHA*, 142 S. Ct. at 669 (Gorsuch, J., concurring).

[314] *West Virginia*, 142 S. Ct. at 2617 (quoting THE FEDERALIST NO. 11, at 85 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

[315] Am. Lung Ass'n v. EPA, 985 F.3d 914, 1003 (D.C. Cir. 2021), *rev'd*, 142 S. Ct. 2587 (2022).

[316] BST Holdings, L.L.C. v. Occupational Safety & Health Admin., 17 F.4th 604, 611 (5th Cir. 2021).

[317] 143 S. Ct. 2355, 2375 (2023) (emphasis added).

[318] *See* Kagan, *supra* note 17, at 2246 (defining presidential administration as a reflection of executive branch control over the "outcome of administrative process").

pass. Many of the core MQD cases do not even mention the President.[319] A few allude to the President as part of the factual background and procedural posture of the case, but they draw no analytical significance from these facts.[320] This absence borders on the absurd in recent cases. Even though Presidents Obama and Biden played vocal and public roles in announcing health care reform, climate policy, the eviction moratorium policy, and student debt relief, the Roberts Court majorities never mentioned either president by name in the cases challenging these policies.[321] Remarkably, even in *King v. Burwell*, a challenge to the ACA (known publicly as "Obamacare"), the majority never mentioned "Obama" or the "president."[322]

There are two notable exceptions, where the Court strategically inserted the President into its narrative to bolster the claim that the promulgating agency had acted inappropriately. In *Biden v. Nebraska*, the Court noted that President Biden had publicly declared the COVID-19 pandemic over, a statement that was in tension with his Department of Education's assertion of emergency authority to authorize student debt relief.[323] The Court included this isolated fact to imply that the Department of Education had strayed from President Biden, without acknowledging the prominent and personal role that President Biden himself had taken in ordering, announcing, and supporting the student debt relief policy. Similarly, in *NFIB*, the Court recited several broad statements by President Biden describing a strategy to promote vaccines for "more Americans" (which, among five policies, included the workplace mandate) to suggest that OSHA was using its authority to promulgate workplace standards as a pretext to increase vaccination rates generally.[324] The Court ignored Presi-

[319] *See* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485 (2021) (per curiam) (failing to mention the President); King v. Burwell, 576 U.S. 473 (2015) (same); Gonzales v. Oregon, 546 U.S. 243 (2006) (same); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) (failing to mention the President in the majority opinion); MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218 (1994) (making no mention of the President).

[320] *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab. (*NFIB v. OSHA*), 142 S. Ct. 661, 663 (2022) (recounting President Biden's announcement of OSHA's emergency vaccine or test rule but drawing no doctrinal significance from such facts); West Virginia v. EPA, 142 S. Ct. 2587, 2604, 2606 (2022) (noting without comment or analysis that there had been a change in presidential administrations).

[321] *See* Biden v. Nebraska, 143 S. Ct. 2355, 2364 (2023) (mentioning President Biden announcing the end to the COVID-19 pandemic but not in connection to student debt relief); *West Virginia*,142 S. Ct. 2587 (failing to mention the President); *Ala. Ass'n of Realtors*, 141 S. Ct. 2485 (same); *King*, 576 U.S. 473 (same).

[322] *See* 576 U.S. 473 (making no mention of President Obama).

[323] *Biden*, 143 S. Ct. at 2364 ("But in August 2022, a few weeks before President Biden stated that 'the pandemic is over,' the Department of Education announced that it was once again issuing 'waivers and modifications' under the Act—this time to reduce and eliminate student debts directly.").

[324] *NFIB v. OSHA*, 142 S. Ct. at 663 ("On September 9, 2021, President Biden announced 'a new plan to require more Americans to be vaccinated.' . . . In tandem with other planned regulations, the administration's goal was to impose 'vaccine requirements' on 'about 100 million Americans, two-

dent Biden's more specific statements about the importance of vaccines to protect workplace safety.[325]

Like presidents themselves, discussion of the President's constitutional role and separation of powers principles are largely absent from the Court's MQD cases. The only majority opinion in a MQD case to allude to the President's constitutional role in executing the laws is *Utility Air Regulatory Group*. There, the Court provided a basic primer on the separation of legislative and executive power: "Under our system of government, Congress makes laws and the President, acting at times through agencies like EPA, 'faithfully execute[s]' them."[326] The Court went on to explain that although "[t]he power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration," "it does not include a power to revise clear statutory terms that turn out not to work in practice."[327] The Court stated these truisms without joining the issues they raise about whether the President faithfully executed the law in that case and how presidential control relates to major questions more broadly. Indeed, no major questions case addresses these issues.

Similarly missing from major questions cases is the "take care" clause. Despite the significant work this clause does in supporting (or, as some might say, demanding) presidential control in the Court's appointment and removal jurisprudence, it makes not a peep in MQD jurisprudence.[328] Perhaps tellingly, the phrase "take care" appears in only two MQD cases—where it refers not to the President's constitutional duty to faithfully execute the law, but to the *Court's* duty to faithfully interpret Congress's statutory purpose. In *Brown & Williamson*, the Court cautioned that "'[i]n our anxiety to effectuate the congressional purpose of protecting the public, *we* [the Court] must *take care* not to extend the scope of the statute beyond the point where Congress indicated it would stop.'"[329] And in *King*, the Court stated that "in every case *we* [the Court] must respect the role of the Legislature, and *take care* not to undo what

thirds of all workers.'" (citation omitted) (quoting Remarks on the COVID-19 Response and National Vaccination Efforts, 2021 DAILY COMP. PRES. DOC. 775 (Sept. 9, 2021), https://www.govinfo.gov/content/pkg/DCPD-202100725/pdf/DCPD-202100725.pdf [https://perma.cc/QL4N-WT9X])).

[325] *See supra* notes 178–188 and accompanying text (discussing President Biden's involvement in promulgating the policy in question in *NFIB*).

[326] Util. Air Regul. Grp. V. EPA, 573 U.S. 302, 327 (2014) (citing U.S. CONST. art. II, § 3).

[327] *Id.*

[328] *See* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485 (2021) (per curiam) (making no mention of the take care clause); Gonzales v. Oregon, 546 U.S. 243 (2006) (same); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) (same); MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218 (1994) (same).

[329] *Brown & Williamson*, 529 U.S. at 161 (emphasis added) (quoting United States v. Article of Drug . . . Bacto-Unidisk, 394 U.S. 784, 800 (1969)).

it has done."[330] In both instances, the duty of the Court is the focus, rather than the duty of the President.

The most sustained discussion of presidentialism and its implications for major questions jurisprudence is in Justice Breyer's dissent in *Brown & Williamson*, where he quoted at length then-Justice Rehnquist's concurrence in *Motor Vehicle Manufacturers Ass'n of United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, defending an agency change in policy direction based on the change in presidential administrations:

> The agency's changed view . . . seems to be related to the election of a new President of a different political party. It is readily apparent that the responsible members of one administration may consider public resistance and uncertainties to be more important than do their counterparts in a previous administration. A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.[331]

As in *State Farm*, Justice Breyer observed that "administration policy [with respect to tobacco regulation] changed."[332] He went on to explain that the administration's policy change accounted for the FDA's changed position on its jurisdiction over tobacco (which the majority cited as evidence that the agency lacked statutory authority): "Earlier administrations may have hesitated to assert jurisdiction for the reasons prior Commissioners expressed. Commissioners of the current administration simply took a different regulatory attitude."[333] Justice Breyer further argued that the President's support justified the agency's shift in policy:

> Insofar as the decision to regulate tobacco reflects the policy of an administration, it is a decision for which that administration, and those politically elected officials who support it, must (and will) take responsibility. And the very importance of the decision taken here, as well as its attendant publicity, means that the public is likely

[330] King v. Burwell, 576 U.S 473, 498 (2015) (emphasis added).

[331] *Brown & Williamson*, 529 U.S. at 189 (Breyer, J., dissenting) (internal quotations omitted) (quoting Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part)).

[332] *Id.* at 188.

[333] *Id.* (citation omitted).

> to be aware of it and to hold those officials politically accountable. Presidents, just like Members of Congress, are elected by the public. Indeed, the President and Vice President are the *only* public officials whom the entire Nation elects. I do not believe that an administrative agency decision of this magnitude—one that is important, conspicuous, and controversial—can escape the kind of public scrutiny that is essential in any democracy. And such a review will take place whether it is the Congress or the Executive Branch that makes the relevant decision.[334]

The majority responded to this argument with the truism that an administrative agency's authority to regulate must always be rooted in valid statutory authority—"no matter how 'important, conspicuous, and controversial' the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable."[335] Notwithstanding, that merely raises rather than answers the question of what constitutes a valid grant of statutory authority—and who decides. The Court answered that "*we* [the Court] must *take care* not to extend the scope of the statute beyond the point where Congress indicated it would stop."[336] The Court's appropriation of this Article II terminology lends credence to one scholar's charge that "[w]hile pumping up the presidency, the Justices are taking a share of executive power for themselves and acting collectively as the President's cochief of the federal government."[337]

Justice Breyer reprised presidential accountability themes in his dissent in *NFIB*, where he argued that OSHA's temporary emergency vaccine or test standard "has the virtue of political accountability, for OSHA is responsible to the President, and the President is responsible to—and can be held to account by—the American public."[338] Breyer further suggested that the Court's relative lack of political accountability raises broader separation of powers concerns:

> Underlying everything else in this dispute is a single, simple question: Who decides how much protection, and of what kind, American workers need from COVID-19? An agency with expertise in workplace health and safety, acting as Congress and the President author-

[334] *Id*. at 190–91.

[335] *Id*. at 161 (majority opinion).

[336] *Id*. (emphasis added) (quoting United States v. Article of Drug . . . Bacto-Unidisk, 394 U.S. 784, 800 (1969)).

[337] Emerson, *supra* note 23, at 764.

[338] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab. (*NFIB v. OSHA*), 142 S. Ct. 661, 676 (2022) (Breyer, J., dissenting).

ized? Or a court, lacking any knowledge of how to safeguard workplaces, and insulated from responsibility for any damage it causes?[339]

Justice Kagan picked up the presidential accountability theme in her dissent in *Biden v. Nebraska*. Like Justice Breyer in *NFIB*, she highlighted the agency's ties to the democratic accountability of *both* Congress and the President, particularly relative to the Court. She chided the majority for its "concerns over the exercise of administrative power" when that power was exercised pursuant to "the statute Congress passed and the President signed, in their representation of many millions of citizens."[340] She noted, consistent with Roberts Court presidentialism, that "agency officials, though not themselves elected, serve a President with the broadest of all political constituencies."[341] She reminded the Court that if the executive gets it wrong, the "chain of dependence" will correct the error: "there are political remedies—accountability for all the actors, up to the President, who the public thinks have made mistakes."[342] And she concluded that the answer to the ultimate question in all MQD cases—who is authorized to determine whether significant regulatory actions should be taken—must be "the political branches: Congress in broadly authorizing loan relief, the Secretary and the President in using that authority to implement the forgiveness plan."[343]

It is worth noting that explicit discussion of separation of powers considerations has surfaced only recently in MQD cases, and to date it remains rare. The debut appearance of the phrase "separation of powers" in a MQD case comes in *Utility Air Regulatory Group*, where the Court argued that "recogniz[ing] the authority claimed by EPA" to promulgate the challenged rule "would deal a severe blow to the Constitution's separation of powers."[344] As discussed above, the Court's concern was encroachment on legislative power by the Executive. The only other majority opinion to mention separation of powers is *West Virginia*. There, the Court explained that "in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text'

---

[339] *Id.*

[340] Biden v. Nebraska, 143 S. Ct. 2355, 2396 (2023) (Kagan, J., dissenting).

[341] *Id.* at 2397.

[342] *Id.* at 2399.

[343] *Id.* at 2400.

[344] Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 327 (2014). Arguably, this invocation of the separation of powers did not even apply to the portion of the opinion that rested on the MQD; the Court raised this argument solely with respect to the EPA's "'tailoring' rule," which was struck down as contrary to statutory authority without application of the MQD. Levin, *supra* note 27, at 14.

the delegation claimed to be lurking there."[345] The Court, however, did not indicate the nature of separation of powers principles at stake.

Justice Gorsuch's concurrences in *NFIB* and *West Virginia* provide a more sustained elaboration of the separation of powers concerns he and some of his colleagues share. In *NFIB*, he detailed the relationship between the MQD and the non-delegation doctrine, explaining that "[b]oth are designed to protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands."[346] In *West Virginia*, he explicitly grounded the MQD in "Article I's Vesting Clause,"[347] raising the stakes in major questions cases to include "basic questions about self-government, equality, fair notice, federalism, and the separation of powers."[348] These cases contain no acknowledgement of the tension this creates with the Court's interpretation of Article II's Vesting Clause, as interpreted in appointment and removal cases.

Perhaps this is precisely the clash the Court hopes to avoid. Many, including some Justices, have suggested that the Court's latest version of the MQD functions as a type of constitutional avoidance canon to ensure that Congress does not unwittingly violate the non-delegation doctrine.[349] Yet the Court's strenuous efforts to hide the actions of the President in ordering agency policies that the Court believes violate the law suggest a different type of constitutional avoidance. The Court strains to avoid the constitutional issues that might be raised by confronting the President for failing to faithfully execute the law. This position is untenable if the Court insists on advancing presidentialism as the lodestar of administrative accountability.

IV. ADDRESSING ALTERNATIVE EXPLANATIONS OF APPARENT CONTRADICTIONS

One potentially powerful rejoinder to our account is that there are no contradictions in the Court's jurisprudence. We identify and respond to three particularly salient versions of this critique. Section A of this Part considers the argument that the Justices are not erasing presidents but are simply following the conventions of normal administrative law cases by focusing on agency action and avoiding the appearance of partisan bias.[350] Section B considers if the

---

[345] West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324).

[346] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab. (*NFIB v. OSHA*), 142 S. Ct. 661, 668–69 (2022) (Gorsuch, J., concurring).

[347] *West Virginia*, 142 S. Ct. at 2619 (Gorsuch, J., concurring).

[348] *Id.* at 2620.

[349] *See infra* notes 357–370 and accompanying text (offering further discussion on this point).

[350] *See infra* Part IV.A.

different treatment of presidents in MQD and appointment and removal cases reflects a consistent formalist approach to the separation of powers.[351] Section C discusses the plausibility of the argument that both lines of cases effectuate a constitutionally grounded structural commitment to limit the "Fourth Branch."[352] In our view, none of these explanations sufficiently resolve the inconsistencies we identify across these cases.

A. Presidential Erasure as Normal Administrative Law or Depoliticization?

One might wonder if the Roberts Court is not erasing presidents as much as it is following the normal conventions of administrative law: formally, the legal question in these cases is about agency action, and judicial review focuses on the agency record. The EPA acted in *West Virginia v. EPA*, for example, and the Court focused on the legal actor, not the political actor.[353] The problem is that this approach is in tension with Roberts Court presidentialism and the "chain of dependence." Politics is fair game for the Court in appointment and removal cases—indeed, the Court's stylized understanding of the President's political accountability is the primary justification for expanding presidential control of the bureaucracy. Politics has long served as the justification for judicial deference to agencies under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[354] Politics are not entirely absent from MQD cases—these decisions are steeped in rhetoric about the political accountability of Congress relative to agencies. We simply point out the inconsistency of erasing *presidential* politics from the equation in this context. Perhaps litigants are a step ahead of the Court in recognizing the President's role in administration, as suggested by the many high-profile administrative law cases brought directly against the President.[355]

One might also imagine that the Justices omit explicit discussion of presidents to avoid the appearance of partisan attack or bias. The Justices understand that these cases are highly politicized, and so perhaps they avoid mentioning a specific president to signal that they are above the political fray. This interpretation is particularly appealing considering the unmistakable political

---

[351] *See infra* Part IV.B.

[352] *See infra* Part IV.C.

[353] *See* 142 S. Ct. 2587 (2022) (considering the EPA's promulgation of the Clean Power Plan).

[354] *See* 467 U.S. 837, 865 (1984) (explaining the need to evaluate "competing political interests").

[355] *See, e.g.*, Biden v. Nebraska, 143 S. Ct. 2355 (2023) (bringing suit in connection to federal student debt relief policies); Biden v. Texas, 142 S. Ct. 2528 (2022) (bringing suit in connection to the termination of Texas's Migrant Protection Protocols); Clinton v. New York, 524 U.S. 417 (1998) (bringing suit against President Clinton for his termination of the Balanced Budget Act); Trump v. Hawaii, 138 S. Ct. 2392 (2018) (bringing suit in connection with Proclamation No. 9645).

valence of MQD cases: all but one struck down agency policies promulgated by democratic administrations and the four most recent cases struck down policies of the Biden or Obama administrations (with no intervening challenges to Trump administration policies).[356]

Although this explanation might provide a plausible legal realist account of what the Court is doing, it only heightens our concerns. Indeed, it suggests that the Court is trying to mask rather than resolve the contradictions we identify. Such masking creates significant problems from the standpoint of political accountability because it distorts the political feedback loop of the vaunted "chain of dependence." When the Court strikes down a high-profile policy in a MQD case without discussing the President's role in enacting it, what the public sees is a president who has failed to enact a policy with broad public support. This might lead the public to blame and discipline that president for failing to enact popular policies even though the president did, in fact, successfully enact them. This is not how accountability is supposed to work. Moreover, the Court's failure to discuss more explicitly how statutes constrain presidents' policy goals disables democratic accountability for Congress. It is difficult to mobilize political support for ambitious new legislation (even when that support exists) if the public does not understand that existing legislation is the barrier to their policy preferences. The Court's effort to de-politicize administrative law to protect its own perceived legitimacy has the perverse effect of disabling the political accountability structures envisioned by the "chain of dependence."

Finally, we suggest that the Roberts Court's reluctance to hold the President accountable indicates some doubt about how accountability works or some implicit acknowledgement about the difficulty of operationalizing accountability in practice. Holding parties accountable is a core part of the judicial function. If the Roberts Court believes its ability to hold presidents accountable is constrained by partisan politics, its reticence suggests that, on some level, the Court recognizes the limits of democratic accountability in the reality of modern American polarized politics.

B. Consistent Separation of Powers Formalism?

The formalist view of the separation of powers holds that the Constitution creates three co-equal branches and provides each branch with distinct, substantive authorities.[357] The Constitution vests legislative power in Congress

---

[356] *See supra* notes 103–289 and accompanying text (providing an overview of the MQD cases and the President's involvement in promulgating such policies).

[357] *See generally* Robert L. Glicksman & Richard E. Levy, *The New Separation of Powers Formalism and Administrative Adjudication*, 90 GEO. WASH. L. REV. 1088 (2022) (describing separation of powers formalism in administrative law). The legal scholarship questioning the originalist or textu-

and executive power in the President.[358] It follows that: (1) any executive authority to alter domestic legal relations must be conferred by Congress by statute, but (2) any such authority, once conferred, must be subject to supervisory control by the President, including through the power of nomination of principal officers (with Senate confirmation), and the power of removal of executive branch officials (unfettered by Congress).[359] From this perspective, a formalist might deny any contradiction if the MQD cases are addressing the first point—whether Congress has conferred authority on the executive—and if the appointment and removal cases are addressing the second point—presidential supervision of that authority, once conferred.

Even viewed through this lens, the tension between these two bodies of doctrine remains. The unitary perspective underlying the appointment and removal decisions takes the formalist position that subordinating agencies to the President makes them consistent with the separation of powers because it places all agency action within the President's law execution power. If the President has the requisite control, all agency actions taken pursuant to a legislative enactment—rulemaking, adjudication, enforcement—are part of the law execution function.[360] In theory, the Court could use the MQD to complement this line of cases by simply ensuring that there is a valid statutory delegation of authority to the executive. But this is not how the MQD functions. Particularly in recent cases, the Court has used the MQD as a substantive canon and has not offered definitive statutory interpretations that foreclose the executive's

---

al basis for separation-of-powers formalism is voluminous. *See, e.g.*, GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 151–52, 604 (1969) (examining the emergence of the separation of powers in American government); M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (1967) (examining the history of the separation of powers); W.B. GWYN, THE MEANING OF THE SEPARATION OF POWERS (1965) (evaluating the separation of powers doctrine based on "seventeenth and eighteenth century connotation"); Joshua C. Macey & Brian M. Richardson, *Checks, Not Balances*, 101 TEX. L. REV. 89, 113–34 (2022) (analyzing "Founding Era separation-of-powers debates to argue that the Founding generation made a deliberate choice *not* to enumerate a clear separation of powers"); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1944 (2011) (arguing that "the Constitution adopts *no freestanding principle of separation of powers*"); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984) (arguing that "the rigid separation-of-powers compartmentalization of governmental functions should be abandoned in favor of analysis in terms of separation of functions and checks and balances"); Malcom P. Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U. CHI. L. REV. 385 (1935) (analyzing the historical development of the separation of powers).

[358] U.S. CONST. art. I, § 1; *id.* art. II, § 1, cl. 1.

[359] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2609 (noting that "[t]he agency instead must point to 'clear congressional authorization' for the power it claims" (quoting Util. Air. Regul. Grp. V. EPA, 573 U.S. 302, 324 (2014))); Emerson, *supra* note 15, at 379 (describing removal as a form of "managerial control").

[360] *See* Macey & Richardson, *supra* note 357, at 158 (explaining that agencies "help to execute duly enacted laws when they perform any function pursuant to statutory authority").

policy discretion. A formalist would consider such discretion, exercised under the President's supervision, to be within the execution power; but the MQD decisions suggest that the challenged agency actions are quasi-legislative—big, discretionary policy moves that usurp Congress's law-making power.[361] That understanding of the type of power exercised by agencies advancing major questions policies is incompatible with the unitary conception of the executive branch theorized and operationalized in appointment and removal cases.

Moreover, a serious commitment to separation of powers formalism in policing the boundaries of Article I and Article II would demand a deeper commitment to textualism in interpreting statutory delegations to ensure that the Court remains within its own Article III lane. If the challenged statute is a valid exercise of legislative power, formalism requires that the Court apply the text as passed by Congress, including even broad delegations of power to the executive branch. In recent cases, however, the Court has strayed from any recognizable version of textualism, invoking the MQD even when the agency policy fits squarely within the four corners of the text.[362] This has led some Justices and commentators to suggest that the MQD is a substantive canon: constitutional avoidance of violating the non-delegation doctrine.[363] It has led one Justice, apparently concerned about the tension between substantive canons and separation of powers formalism, to strenuously deny that the MQD is a substantive canon. Justice Barrett's twenty-page concurrence in *Biden v. Nebraska*, in which she tied herself in knots to try to make the MQD appear textualist, is as good an indication as any that the MQD cases are not textualist, and it does not appear to have persuaded many.[364] Until the Court clarifies its interpretive approach in MQD cases, it cannot claim to be upholding any coherent version of separation of powers formalism.

The way the criteria for determining what constitutes "majorness" have been articulated sharpens the implausibility of the formalist resolution.[365] Alt-

---

[361] That view was expressed explicitly by Justice Thomas in concurrence in *Michigan v. Environmental Protection Agency*. 576 U.S. 743, 761 (2015) (Thomas, J., concurring) (arguing that *Chevron* deference gives agencies lawmaking power constitutionally reserved to Congress).

[362] *See generally* Jed Handelsman Shugerman, Biden v. Nebraska*: The New State Standing and the (Old) Purposive Major Questions Doctrine*, 2022–2023 CATO SUP. CT. REV. 209.

[363] *See supra* note 361. This view has also been elaborated upon by Shugerman. *See supra* note 362 and accompanying text (offering further discussion on this topic).

[364] *See* Biden v. Nebraska,143 S. Ct. 2355, 2377 (2023) (Barrett, J., concurring) ("But a strong-form canon 'load[s] the dice for or against a particular result' in order to serve a value that the judiciary has chosen to specially protect." (quoting ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 27 (1997))); *see also* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 117, 124, 168–69 (2010) (analyzing constitutionally inspired canons); Shugerman, *supra* note 362, at 22–27 (analyzing Justice Barrett's concurrence in *Biden v. Nebraska*).

[365] Deacon & Litman, *supra* note 27, at 1013 (describing what the Court has considered to be in the scope of the MQD).

hough the Court has not been entirely clear on the specific indicia of "majorness" beyond the economic costs imposed by a policy, the MQD cases have been read to say that a policy is more likely to be "major" if it departs from the agency's past practices and if it is politically controversial.[366] It is difficult to justify administrative policymaking on the ground that it is subordinated to the President if the Court prevents presidents from overseeing policy changes. This diminishes the law-execution power and subjugates it to largely uncabined *judicial* discretion, compounding separation of powers problems.[367] Similarly, it does not make sense to justify presidential control of administrative agencies on majoritarian grounds, while preventing presidents from directing agencies to implement policies consistent with their electoral mandate whenever a vocal minority strongly objects.[368] The Court's account of the "directly accountable" President demands that elections have consequences in the realm of agency policy.

Although it might be possible to conceive of presidentialism and the MQD in a way that is formally consistent, the Court has made no effort to do so. The appointment and removal decisions baldly rely on the normative description of governmental accountability embedded in Roberts Court presidentialism. As one scholar puts it, the Roberts majority in 2020, in *Seila Law LLC v. Consumer Financial Protection Bureau* is "all but frankly Dworkinian," relying on "political morality," and making a leap from "structure" to "[contestable] broad principles," and "political philosophy."[369] With respect to the MQD, the Court has provided no explicit separation of powers justification for it (despite the invocation of the non-delegation doctrine by some concurring justices and commentators). MQD cases do not even answer the key formalist question of whether Congress delegated to the executive branch the authority it claims. Rather, they propose a default presumption that Congress would not have delegated such authority to address major questions, resting on policy concerns about the democratic deficit of agencies relative to Congress. Moreover, the vague parameters the Court has laid out for application of the MQD would make any self-respecting formalist blanch. As Justice Scalia famously said of the removal test announced in *Morrison v. Olson*, "[e]vidently, the governing stand-

---

[366] *Id.*

[367] Emerson, *supra* note 23, at 779.

[368] Deacon and Litman have identified other separation of powers concerns raised by the "political significance" prong of the MQD, such as "allow[ing] ideological opponents of particular policies to, whether deliberately or not, effectively unmake portions of a statute delegating authority to an agency" outside the legislative process. Deacon & Litman, *supra* note 27, at 1056.

[369] ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM: RECOVERING THE CLASSICAL LEGAL TRADITION 101 (2022).

ard is to be what might be called the unfettered wisdom of a majority of this Court, revealed to an obedient people on a case-by-case basis."[370]

C. Structural Containment of the "Fourth Branch"?

A related, potentially consistent way of articulating the through-line across these bodies of case law is that they both effectuate a constitutionally-grounded structural commitment to limit the federal bureaucracy, which many conservative jurists and scholars see as an unconstitutional "Fourth Branch." This project is at odds with separation of powers formalism because it expands Article III judicial power at the expense of textually- and historically-grounded Article I and Article II powers. When the Court invalidates a statute for an appointment clause violation,[371] the Court curtails Congress's Article I power under the Necessary and Proper Clause, "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[372] The Court likewise infringes on Congress's legislative powers when it rewrites statutes protecting the independence of individuals occupying executive branch offices created by Congress to command that they must be removable at will by the President.[373]

---

[370] 487 U.S. 654, 712 (1988) (Scalia, J., dissenting).

[371] On appointment, the Court has been interpreting laconic and open-ended texts (the Article II, Section 2 distinctions between principal officers, inferior officers, and employees) against Congress's legislative power, even though originalists concede that the term "principal officer" is not grounded in original public meaning (e.g., Blackstone never used it), and they warn that this mid-twentieth century "terminology is a mistake that has the potential badly to mislead." *See* Steven G. Calabresi & Gary Lawson, *Why Robert Mueller's Appointment as Special Counsel Was Unlawful*, 95 NOTRE DAME L. REV. 87, 135–36 (2019) (noting that the term "principal officer," in the context of presidential appointment, appears to have been a twentieth-century inference from the Opinions clause); *see also* Brief for Separation of Powers Scholars as Amici Curiae in Support of Petitioner at 26, Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020) (No. 19-7) ("As for the distinction between 'principal officers' and other 'heads of departments,' the Framers used these terms interchangeably—there is no evidence at all that the Framers ever thought of them differently." (citing Steven G. Calabresi & Saikrishna Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 629 (1994))).

[372] U.S. CONST. art. I, § 8, cl. 18.

[373] The Removal cases are even more dubious: there is no removal clause and there is no evidence from the Convention or Ratification that Article II's Executive Vesting Clause or Take Care Clause implied removal. Recent scholarship has debunked the originalist argument for indefeasible removal. *See* JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 125–62 (2018) (explaining the history of the removal power); Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, 96 NOTRE DAME L. REV. 1, 35, 39–40 (2020) [hereinafter Chabot, *Is the Federal Reserve Constitutional?*] (arguing that the Framers created certain independent agencies); Christine Kexel Chabot, *Interring the Unitary Executive*, 98 NOTRE DAME L. REV. 129, 172–73 (2022) [hereinafter Chabot, *Interring the Unitary Executive*] (same); Katz & Rosenblum, *Removal Rehashed*, *supra* note 18, at 406 (critiquing

Similarly, the MQD cases directly empower the judiciary over the executive branch by circumscribing the President's law-execution function.[374]

Furthermore, there is growing evidence that a consistency grounded in animosity toward the "Fourth Branch" is not justified by originalism. Although a full account of originalist support for administrative government is beyond the scope of this Article, we provide a summary here. The Constitution itself in the Opinions Clause contemplates a decisionally-independent administration, rather than direct presidential control or removal.[375] Further, recent historical

---

other scholarly articles that failed to "prove that at the time of the Constitution's ratification, a consensus existed around the idea that the executive power included the power of removal"); Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2189–90 (2019) (considering the potential limits on the removal power in connection to Article II); Jane Manners & Lev Menand*, The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 20–21 (2021) ("To Madison, the duration and terms of ministerial offices . . . were up to the legislature . . . ."); Jed Handelsman Shugerman, *Freehold Offices vs. 'Despotic Displacement': Why Article II 'Executive Power' Did Not Include Removal* (forthcoming 2024) [hereinafter Shugerman, *Freehold Offices*], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4521119 [https://perma.cc/CCF8-QMDB] (analyzing the lack of removal power explicit in Article II); Jed Handelsman Shugerman, "*The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity" Appendix II*, (Feb. 28, 2023) (unpublished manuscript) (on file with SSRN), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4359596 [https://perma.cc/KP43-X4L6] (same); Jed H. Shugerman, *Movement on Removal: An Emerging Consensus About the First Congress and Presidential Power*, 63 AM. J. LEGAL HIST. 258 (2024) [hereinafter Shugerman, *Movement on Removal*] (same); Jed Handelsman Shugerman, *Vesting*, 74 STAN. L. REV. 1479, 1479 (2022) (providing "a close textual reading of the word 'vesting'" in the context of executive powers). *See generally* Shugerman, *supra* note 5 (considering the removal power in the context of the Decision of 1789); Jed Handelsman Shugerman, *Presidential Removal: The* Marbury *Problem and the Madison Solutions*, 89 FORDHAM L. REV. 2085 (2021) [hereinafter Shugerman, *Presidential Removal*] (considering the removal power in the context of *Marbury v. Madison* and its historical development); Jed Handelsman Shugerman, *Removal of Context: Blackstone, Limited Monarchy, and the Limits of Unitary Originalism*, 33 YALE J.L. & HUMANITIES 125 (2022) [hereinafter Shugerman, *Removal of Context*] (considering the issues with the unitary executive theory).

[374] Emerson, *supra* note 23, at 764; Havasy, *supra* note 89.

[375] U.S. CONST. art. II, § 2, cl. 1 (indicating that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices"); *see* MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 244–45 (2020) (offering explanations which militate against an indefeasible removal power); Shugerman, *Freehold Offices*, *supra* note 373 (arguing that an indefeasible removal power is unsupported); Brief of Amicus Curiae Professor Jed H. Shugerman in Support of Petitioner, at 1–16, SEC v. Jarkesy, No. 22-859 (U.S. filed Sept. 5, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4562616 [https://perma.cc/QL4R-HPX6] ("[P]resent[ing] new research showing that the Executive Vesting Clause did not imply a removal power, because 'executive power' did not imply removal in the eighteenth century."). The Opinions Clause has always been a problem for those who claim an indefeasible removal power. If Article II already gave the President an absolute removal power, why would it need to specify a lesser power merely to ask for opinions? Refusal to give an opinion surely would be sufficient cause for removal. The Opinions Clause, in explicitly granting the president only a lesser power to ask for opinions, seems to imply that the president does not have any greater power to control department heads, and it seems to imply that department heads would have interpretive independence.

work demonstrates a relatively independent administration in areas ranging from prosecution,[376] to Hamilton's 1790 "sinking fund" commission on national debt,[377] to situating a national capitol,[378] to tax assessment.[379]

Lacking originalist support, anti-administrativism becomes a political rather than a constitutional project. It is tempting to identify the consistency reconciling these lines of case law as unbridled political hostility toward social and economic regulation. Nevertheless, that hardly supports the formalist critique of our account, and we doubt that the Court would (explicitly) endorse such a reconciliation. The next Part of this Article suggests how the Court can address these contradictions through more legal consistency and coherent reasoning.

V. RESOLVING THE CONTRADICTION IN FIVE DOCTRINAL AREAS

This Part presents potential solutions to resolve the contradiction between presidentialism and the MQD. Section A asks the Court to avoid deepening the contradiction in *SEC v. Jarkesy*.[380] Section B explores how presidentialism might be incorporated into MQD analysis.[381] Section C considers largely unexplored complexities raised by cases applying the MQD to statutory delegations of authority directly to the president.[382] Section D suggests the Court maintain *Chevron* deference in *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. United States Department of Commerce* if it remains committed to presidentialism.[383] Section E urges caution before pursuing the nondelegation doctrine any further.[384]

A. Reconsider Roberts Court Presidentialism in SEC v. Jarkesy*, etc.*

The clearest path to reconciling the contradictions we identify is to abandon Roberts Court presidentialism or, at least, stop using this dubious theory to

---

[376] *See* Shugerman, *The Creation of the Department of Justice*, *supra* note 236, at 121 (arguing that "the Department of Justice (DOJ) [was founded] in 1870 as an effort to shrink and professionalize the federal government").

[377] *See* Chabot, *Is the Federal Reserve Constitutional?*, *supra* note 373, at 39–40 (considering the Framers' intent to create independent agencies).

[378] *See* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 337–38 (2021) (describing the "power to define the 'proper metes and bounds' of the capital district, with little more guidance than it had to be put somewhere along a nearly 100-mile stretch of the Potomac").

[379] *See* Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1327–32 (2021) (describing the Valuation and Enumeration Act of 1798).

[380] *See infra* Part V.A.

[381] *See infra* Part V.B.

[382] *See infra* Part V.C.

[383] *See infra* Part V.D.

[384] *See infra* Part V.E.

extend presidential control over appointment and removal based on the fiction that this will lead to greater agency accountability.

We suspect that this fiction grew from the perceived need to bolster the Roberts Court's theory of presidential control in the face of concerns that scholars across the ideological spectrum have raised about *Seila Law LLC v. Consumer Financial Protection Bureau's* presidentialist assumptions.[385] Many scholars have identified problems with the unitary executive theory on appointment and removal as a matter of text, original public meaning, practice, and precedent.[386] In trying to make up for those shortcomings, Chief Justice Roberts has cobbled together a mix of dubious claims and exaggerations about the presidency in *Seila Law* to support his contention that the President is "the most democratic and politically accountable official in Government."[387] For instance, the specific claim that the Framers "render[ed] the President directly accountable to the people through regular elections" is structurally, doctrinally, and formally incorrect.[388] In making this claim, Chief Justice Roberts overlooked both the design of the Electoral College, attenuating the President's "direct" ac-

[385] For examples of conservative and originalist critiques or concerns, see VERMEULE, *supra* note 369, at 101 and Gary Lawson, *Command and Control*, 92 FORDHAM L. REV. 441 (2023). For examples of presidentialists' concessions and recognition of evidentiary problems, see Shugerman, *Movement on Removal*, *supra* note 373.

[386] *See* GIENAPP, *supra* note 373, at 125–62 (providing a historical account of the removal debate); Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 STAN. L. REV. 175, 182 (2021) (arguing the Framers did not believe in a limitless removal power because "a general removal power was [not] an inherent attribute of the 'executive power' as it was understood in England"); Chabot, *Interring the Unitary Executive*, *supra* note 373, at 129, 172–73 (providing an example of the Framers' intent to establish an independent agency); Chabot, *Is the Federal Reserve Constitutional?*, *supra* note 373, at 39–40 (arguing that the Framers considered and proposed the existence of independent agencies); Jonathan Gienapp, *Removal and the Changing Debate Over Executive Power at the Founding*, 63 AM. J. LEGAL HIST. 229 (2023) (considering the removal power in light of its historical debate); Katz & Rosenblum, *Removal Rehashed*, *supra* note 18, at 406 (commenting on the shortcomings of arguments supporting the unitary executive theory); Kent et al., *supra* note 373, at 2187–89 (considering the potential limits on the removal power in connection to Article II); Manners & Menand, *supra* note 373, at 5 (arguing that term limits indicate that the Framers did not intend a limitless removal power); Shah, *supra* note 18, at 5 ("Unitary executive theory takes the view that Article II of the U.S. Constitution is expansive. However, unitarians overlook the fact that the Chief Executive exists, as a constitutional matter, to enforce the legislature's mandates."); Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CONST. L. 323, 324 (2016) (arguing that presidential removal power should be limited by congressional review). *See also generally* Shugerman, *Freehold Offices*, *supra* note 373 (analyzing the lack of removal power explicit in Article II); Shugerman, *Presidential Removal*, *supra* note 373 (considering the removal power in the context of *Marbury v. Madison* and its historical development); Shugerman, *Removal of Context*, *supra* note 373 (considering the issues with a unitary executive theory); Shugerman, *The Indecisions of 1789*, *supra* note 5 (considering the removal power in the context of the decision of 1789); Shugerman, *Vesting*, *supra* note 373 (examining the eighteenth-century use and meaning of the term "vesting").

[387] *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2203 (2020) (describing the Framers' intent for the President).

[388] *See id*. (describing the Framers' intent for the President).

countability to the people, and the arguably more "direct" democratic design of Congress. Legal scholars, political scientists, and historians have debated the reasons for the Electoral College for years, and they disagree about whether, on balance, it was a more democratic compromise or a more elite-oriented check on democracy—but no one would claim that it is a *direct* election.[389]

In fact, just a week after the Roberts Court decided *Seila Law*, the Court acknowledged the Electoral College's democratic deficit in *Chiafalo v. Washington*—and even confirmed the states' discretion to deepen it.[390] Namely, there is no requirement that states appoint their electors based on the voters' preferences. Article II gives states wide discretion on how to appoint electors "in such Manner as the Legislature thereof may direct."[391] Writing for a unanimous Court, Justice Kagan reviewed the complicated history of the Electoral College's indirectness. Some of the Framers indicated the indirectness was by design to allow independent judgment. Justice Kagan cited Hamilton defending the Electoral College as empowering "men most capable of analyzing the qualities" to choose among the candidates "under circumstances favorable to

---

[389] *See* BAILEY, *supra* note 17, at 40–41 (highlighting the issues of bicameralism for presidential elections that the Framers considered at the founding); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 265–68 (1997) (suggesting that "the electoral college extended 'the great compromise' over representation"); NEAL R. PEIRCE, THE PEOPLE'S PRESIDENT: THE ELECTORAL COLLEGE IN AMERICAN HISTORY AND THE DIRECT-VOTE ALTERNATIVE 28–50 (1968) (explaining the debate over presidential election); CEASER, *supra* note 17, at 83–84 (explaining the "five functions of the selection system" the Framers had in mind); James P. Pfiffner & Jason Hartke, *The Electoral College and the Framers' Distrust of Democracy*, 3 WHITE HOUSE STUD. 261, 262 (2003) (arguing that the electoral college was a compromise based on "uneven distribution of population among the states"); Martin H. Redish, *Constitutional Remedies as Constitutional Law*, 62 B.C. L. REV 1865, 1869 (2021) ("The Framers sought to temper the worst impulses of democracy by making ours a democratic republic in which people elect representatives rather than participate in democracy directly.").

[390] 140 S. Ct. 2316 (2020). This case is otherwise known as the "independent electors," the "faithless electors," or the "Hamilton electors" case. *See generally* Adam Liptak, *States May Curb 'Faithless Electors,' Supreme Court Rules*, N.Y. TIMES (Nov. 3, 2020), https://www.nytimes.com/2020/07/06/us/politics/electoral-college-supreme-court.html [https://perma.cc/B29J-HLCS]; Jeffrey Abramson, *Faithless or Faithful Electors? An Analogy to Disobedient but Conscientious Jurors*, 69 EMORY L.J. 2039 (2020); Jacob D. Shelley, CONG. RSCH. SERV., LSB10515, SUPREME COURT CLARIFIES RULES FOR ELECTORAL COLLEGE: STATES MAY RESTRICT FAITHLESS ELECTORS (2020); Keith E. Whittington, *Originalism, Constitutional Construction, and the Problem of Faithless Electors*, 59 ARIZ. L. REV. 903 (2017); Lilly O'Donnell, *Meet the 'Hamilton Electors' Hoping for an Electoral College Revolt*, THE ATLANTIC (Nov. 21, 2016), https://www.theatlantic.com/politics/archive/2016/11/meet-the-hamilton-electors-hoping-for-an-electoral-college-revolt/508433/ [https://perma.cc/76FY-ZGCK]; HAMILTON ELECTORS, https://web.archive.org/web/20161122235026/http://www.hamiltonelectors.com/ [https://perma.cc/RD65-8KDD] (providing background on "Hamilton Electors"—members of the Electoral College pledging not to cast their votes for candidates "lacking requisite qualifications, ability, and virtue").

[391] U.S. CONST. art. II, § 1, cl. 2.

deliberation."[392] Justice Kagan also quoted John Jay's Federalist essay inviting the Electors' "discretion and discernment."[393] Justice Kagan also recognized that states have the choice of whether to appoint electors or to hold a popular vote: "In the Nation's earliest elections, state legislatures mostly picked the electors, with the majority party sending a delegation of its choice to the Electoral College."[394] Over the course of the early nineteenth century, states shifted to popular votes for electors, but states retained discretion about the bindingness of the popular vote, as the Court merely held that states *may* "penalize an elector for breaking his pledge and voting for someone other than the presidential candidate who won his State's popular vote."[395] States may choose not to make the popular vote binding, and some states do not. Further, states remain free to abandon the popular vote entirely. It is odd that the majority in *Seila Law* would compartmentalize this entire discussion in *Chiafalo* regarding the Founders' intent to design an *indirect* system for presidential selection.

To be clear, the scholarly consensus is that the Founders generally did *not* favor or design a presidency that would represent the nation, but instead, Article II reflected mixes and compromises of different designs and goals.[396] One prominent interpretation is that the Founders rejected a representative presidency in favor of a president "'independent' from popular pressure."[397] Even

---

[392] *Chiafalo*, 140 S. Ct. at 2326 (quoting THE FEDERALIST NO. 68, at 410 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

[393] *Id.* (quoting THE FEDERALIST NO. 64, at 389 (John Jay) (Clinton Rossiter ed., 1961)).

[394] *Id*. at 2321.

[395] *Id*. at 2320.

[396] BAILEY, *supra* note 17, at 22, 33–34; JEREMY D. BAILEY, THOMAS JEFFERSON AND EXECUTIVE POWER 9–10 (2007); DEARBORN, *supra* note 17, at 16–20. Dearborn's thesis is that the idea of presidential representation emerged later and recurringly, as part of a movement seeking national legitimacy for a reform agenda each time—mostly starting with Andrew Jackson. DEARBORN, *supra* note 17, at 16 (citing Richard J. Ellis & Stephen Kirk, *Presidential Mandates in the Nineteenth Century: Conceptual Change and Institutional Development*, 9 STUD. AM. POL. DEV. 117, 117–86 (1995)). For the idea that the representation was a way to limit and check executive power, rather than enhance it, see JOHN PHILLIP REID, THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION 28–30, 82–85, 129–36 (1989). For the idea that a "chief Magistrate" would be an independent officer for executing the laws, serving as a check on legislature, see ANTHONY KING, THE FOUNDING FATHERS V. THE PEOPLE: PARADOXES OF AMERICAN DEMOCRACY 49–50 (2012).

[397] BAILEY, *supra* note 17, at 14–15 (citing JAMES CEASER, PRESIDENTIAL SELECTION: THEORY AND DEVELOPMENT 51–55 (1979)); *see id.* at 33–34, 40–41 (describing the Convention of 1787 and the idea of the independent executive); CEASER, *supra* note 17, at 42–55 ("One such attribute—and a crucial one—was the ability of the president to withstand popular pressure when it conflicted with the public good."); JEFFREY K. TULIS, THE RHETORICAL PRESIDENCY 39–40 (1987) ("In order to 'withstand the temporary delusions' of popular opinion, the executive was made independent."); DAVID BRIAN ROBERTSON, THE ORIGINAL COMPROMISE: WHAT THE CONSTITUTION'S FRAMERS WERE REALLY THINKING 127–31, 144–45 (2013) (describing how the Electoral College removed the "danger of cabal and corruption"); KAREN ORREN & STEPHEN SKOWRONEK, THE POLICY STATE: AN AMERICAN PREDICAMENT 123–25 (2017) (mentioning the "institutional independence" of the President); WOOD, *supra* note 357, at 139 (comparing representative elections from direct elections); Mi-

the scholars who find a representative strand among the Founders still concede that there was no consensus.[398] The representative president model arose long after the Founding.[399]

Furthermore, the assumption of presidential superiority does not stand up structurally. Although Chief Justice Roberts asserts that the presidency is the "most democratic" office in terms of breadth of representation, the presidency is arguably less representative of the broad electorate than any of the other branches, possibly even including the "Fourth Branch." The unitary all-or-nothing design of the presidential office leaves roughly half of the electorate entirely unrepresented.[400] Although many presidents use rhetoric about representing the entire nation, others talk about serving their own voters and their base.[401]

By contrast, the House, Senate, and Supreme Court are multi-member bodies that reflect a broader mix of "the people" and the electorate over time—with opportunities for shifting coalitions and compromises, the House, Senate, and Supreme Court arguably represent more of the entire electorate than the single President does.[402] Congress could make its own claim to being the "most" democratically accountable branch. Members of the House of Representatives are elected directly (without the Electoral College filter) and must stand for election every two years, plausibly making them more politically accountable.[403] After the Seventeenth Amendment, ratified in 1913, senators are also, literally, directly elected.[404] Although the Roberts Court has made much of the size and scale of presidential elections, these features do not obviously produce more accountability to the electorate. Of course, a presidential election is the only formally national election, but in terms of accountability, local and state-wide elections potentially provide for more scrutiny of a candidate

---

chael Lind, *The Out-of-Control Presidency*, NEW REPUBLIC, Aug 14, 1995, at 20 ("The idea of the chief executive as chief representative is French, not American.").

[398] BAILEY, *supra* note 17, at 15–16; NELSON, *supra* note 17, at 107.

[399] BAILEY, *supra* note 17, at 31–32; DEARBORN, *supra* note 17, at 16–22; Dahl, *supra* note 17, at 355–61 (considering the origins of the theory). *See generally* WOOD, *supra* note 17 (discussing the representative president model).

[400] We thank Glen Staszewski for emphasizing this point.

[401] DEARBORN, *supra* note 17, at xi–xii.

[402] Nzelibe, *supra* note 17, at 1217–24 (questioning the "deeply ingrained assumption" of the national presidency, relative to Congress); *cf.* VERMEULE, *supra* note 369, at 48 ("[T]he classical tradition identifies good reasons to respect, within a broad range of determination, the law produced by legislatures, because that law takes into account a broader range of central cases, resting on a broader base of information and a more impartial basis, than does the judgment of any fallible individual in particular cases."). *But see* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 552 (1954) (focusing on the president's "full national constituency" and national accountability, relative to Congress's "localism").

[403] *See* U.S. CONST. art. I, § 2, cl. 2 (describing the election of representatives and term limits).

[404] *See id.* amend. XVII (describing the election of senators and term limits).

and their policy choices. Many scholars have argued that presidential elections are still driven by special interests, particular swing states ("purple" states rather than reliably "blue" or "red"), and swing voting groups, and that national elections are "noisier" and create information problems.[405] Even the "Fourth Branch" has a claim of broader representativeness, although more indirect, because the department heads, other major administration officials, and commissioners must be confirmed by the Senate, thus building in a more broadly democratic and representative structure and practice. The merits of the debate over which institution is "most democratic" are beyond the scope of this Article. We merely point out that the question of whether national presidential elections are more "democratic" or "representative" is unclear and actively contested, and Chief Justice Roberts provides no support for his remarkable assertions about the President as "the most democratic" official in Government.

In addition to such critiques from constitutional history and structure, we argue that the Court's own MQD jurisprudence signals the Court's ambivalence about its myth of a "directly accountable president" tethered to the people through a "chain of dependence." In the MQD cases, the Court recoils from the fruits of presidential control (even as it refuses to name them as such). Therefore, the Court should refrain from expanding the reach of its incoherent "presidentialist" political theory as it is invited to do in upcoming cases. The Court will be ruling this term on the constitutionality of administrative law judges' tenure protections in *SEC v. Jarkesy*.[406] It will be asked to extend *Myers*, *Free Enterprise Fund v. Public Company Accounting Oversight Board*, and *Seila Law* and to overturn *Humphrey's Executor v. United States*. Around the corner are challenges to the Federal Trade Commission and the Securities and Exchange Commission after deciding *Axon Enterprise v. Federal Trade Commission* and *SEC v.*

---

[405] *See, e.g.*, BAILEY, *supra* note 17, at 1–10 (presenting a compilation of critiques of the presidential election process); WOOD, *supra* note17, at xi ("Modern presidents typically behave as partisan rather than centrist representatives. . . . [P]residents are likely to remain partisan representatives due to self-interest and the nature of the two party electoral system."); KRINER & REEVES, *supra* note 17, at 4 ("At other times, the president will engage in decidedly particularistic behaviors that disproportionately benefit some voters more than others."); HUDAK, *supra* note 17, at 3–4 (arguing that distribution of federal grants has special motives); ROSENBLUM, *supra* note 17, at 41 (discussing "holist" and "antiparty partisans"); URBINATI, *supra* note 17, at 4–8, 174 ("The issue is instead how the public forum of ideas can succeed in remaining a public good and play its cognitive, dissenting, and monitoring role if the information industry that affects politics so radically 'in many different parts of the world belongs to a relative small number of private individuals.'"); Dahl, *supra* note 17, at 361–66 (considering the existence of a presidential mandate to enact policies campaigned on, based on election by a plurality of the people). *See generally* Mansbridge, *supra* note 17 (analyzing the cause of presidential action in light of theories of representation).

[406] *See* Jarkesy v. SEC, 34 F.4th 446, 464 (5th Cir. 2022) (holding that the insulation of SEC administrative law judges from removal is unconstitutional), *cert. granted*, 143 S. Ct. 2688 (June 30, 2023) (No. 22-859).

Cochran last term,[407] as well as challenges to other administrative appointments and to private rights of action as impermissible delegations of executive power, as invited by Justice Thomas in the past term and by the 11th Circuit.[408] These cases will provide the Roberts Court with an opportunity to consider the limits of presidentialism and to contemplate alternative sources of bureaucratic accountability.[409] The cautionary tale of presidential control in the MQD cases counsels careful and thoughtful consideration of the implications of further extending the President's power over agency officials in these cases.

B. Major Questions and Presidential Answers

Alternatively, if the Court remains committed to the "directly accountable president" and the "chain of dependence" in appointment and removal cases, then presidentialism should inform the Court's understanding of the MQD.[410] The MQD, by design, applies to big, high-profile policies of the type most likely to draw presidential involvement, and the Court must grapple with the implications of this collision of its various commitments. First, a commitment to presidentialism should force the Court to clarify that the "novelty" and "political controversy" of an agency's policy should play no role in the MQD analysis. A president whose legitimacy hinges on "direct" majoritarian election must be allowed latitude (within statutory bounds) to change policies consistent with their electoral mandate. Second, in determining the validity of an

---

[407] Axon Enter., Inc. v. FTC, 598 U.S. 175, 180 (2023) (consolidating *SEC v. Cochran*).

[408] *See* U.S. *ex rel.* Polansky v. Exec. Health Res., Inc., 599 U.S. 419, 442–52 (2023) (Thomas, J., dissenting) (noting certain "complex questions" to be addressed); Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1136–37 (11th Cir. 2021) (Newsom, J., concurring) (arguing that standing should be denied when Congress attempts to vest executive power in private plaintiffs by providing a "right to sue on behalf of the community and seek a remedy that accrues to the public").

[409] *See, e.g.*, Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600, 1600 (2023) (arguing that "agency officials work within structures that promote the very values [of] accountability"); Christopher J. Walker, *Administrative Law Without Courts*, 65 UCLA L. REV. 1620, 1620 (2018) (arguing "it is a mistake to fixate on courts as the core safeguard in the modern administrative state"); Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1239 (2017) (describing internal administrative law as the "internal directives, guidance, and organizational form" relevant to agency action).

[410] We note that the co-authors have differing normative views of the MQD. One of us (Shugerman) has partially endorsed the MQD, or at least most of its applications pre-2021. *See* Shugerman, *supra* note 362 (noting that "[t]he majority opinion falls short in explaining its methodological basis of statutory interpretation in this case and in the major question doctrine generally"); *see also* Brief of Jed Handelsman Shugerman as Amicus Curiae in Support of Respondents at 2, Biden v. Nebraska, 143 S. Ct. 2355 (2023) (No. 22-506) (writing that *Biden v. Nebraska* offered an opportunity for the Court to "clarify[] and limit[] the scope of the major question doctrine"). Although the other author (Short) has not endorsed the MQD in these or other applications, we both agree that the Roberts Court has avoided acknowledging that it is engaged in the expansion of Article III judicial power in its new application of the MQD, and that it has avoided resolving inconsistencies between the MQD and presidentialism in ways that distort administrative law and the separation of powers.

agency's assertion of statutory authority, the Court should either give credit to policies that are the product of direct presidential supervision, or it should confront the President directly if the Court believes that the President has commanded an agency to act outside the bounds of statutory law.

If the Court maintains a commitment to the theory that the President represents "the people" and democratically legitimates the actions of administrative agencies through the "chain of dependence," then the Court should accord more legitimacy to those agency actions the President has initiated. Of course, presidential involvement would not automatically rescue the policy because the core issue remains whether it is authorized by statute. If the agency action is within the band of policy discretion allowed by statute, however, presidential involvement should inform the Court's analysis. Such considerations are not unknown to administrative law. For instance, scholars have argued that legitimate presidential influence should bolster agency policies challenged under "arbitrary and capricious review,"[411] and courts have shielded certain policies from judicial review altogether when the promulgating agency acted under the President's direction.[412] Moreover, unitary executive theory has traditionally presumed an identity between the President and executive branch agencies that the Roberts Court's appointment and removal cases have strengthened: "Because agency decisionmaking occurs under the direction of the Chief Executive, it is no longer constitutionally suspect."[413] Thus, in appointment and removal cases, the Court has emphasized the importance of the President's direction over agency action.

Such considerations of the President's democratic legitimacy are absent from the Roberts Court's MQD jurisprudence. Instead, the Court grounds the MQD on the inferences drawn from claims about the democratic legitimacy of *Congress* relative to *agencies*. The Court's argument is that because *agencies* are less democratically legitimate than Congress, we can infer that Congress would "not leave [major policy] decisions to *agencies*,"[414] and we should worry about "*agencies* asserting highly consequential power beyond what Con-

---

[411] Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 2 (2009) (arguing for the "expan[sion] [of]current conceptions of arbitrary and capricious review beyond a singular technocratic focus so that credit would also be awarded to certain political influences").

[412] Shah, *supra* note 18, at 3; Adam J. White, *Executive Orders as Lawful Limits on Agency Policymaking Discretion*, 93 NOTRE DAME L. REV. 1569, 1569 (2018).

[413] Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1764 (2007).

[414] Biden v. Nebraska, 143 S. Ct. 2355, 2380 (Barrett, J., concurring) (emphasis added); *see also* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam) ("We expect Congress to speak clearly when authorizing an agency to exercise powers of 'vast "economic and political significance."'" (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014))).

gress could reasonably be understood to have granted."[415] If, however, the President at the top of the chain takes responsibility for the policy, and if the "chain of dependence" applies even-handedly, then the Court should abandon its reasoning about the democratic deficit of agencies in its MQD decisions. The Court cannot base its analysis on the preference for an accountable Congress over an unaccountable agency as the policy decision-maker; it must contend with the relative scope of policymaking authority granted by the Constitution to two democratically accountable branches: Congress and the President.

Although the President's control of the agency policy does not answer the ultimate statutory interpretation question about the scope of the agency's authority, it changes the MQD analysis. The Court has been unwilling to flatly state in MQD cases that Congress *did not* delegate to the agency the statutory authority it claims. Instead, the Court argues that it must be especially wary of accepting an agency's assertion of statutory authority in cases involving major questions because Congress has democratic legitimacy and agencies do not. The democratic deficit argument falls flat, however, when the agency has acted at the direction of the President. One way to avoid the awkwardness of deciding which branch is more "democratic" would be to return to earlier iterations of the MQD, which focused on the tools of statutory interpretation. Nevertheless, this would not resolve the larger tensions created by the Court's commitment to presidentialism in other areas.

In appointment and removal cases, the Roberts Court has interpreted checks and balances with a thumb on the scale in favor of presidential power. Indeed, some have argued that the "balance" struck by the Roberts Court in this domain goes well beyond the more modest "checks" on Congress that the Constitution provides to the President.[416] It would bring some coherence across administrative law doctrines to put a similarly weighted thumb on the scale in favor of a major questions policy that the President has commanded. Alternatively, coherence could be achieved by taking the presidentialist thumb off the scale across administrative law, treating both Congress and the President as similarly democratically legitimate, even if their electoral designs differ. In fact, those differences are a feature, not a bug, of the Framers' mixed democratic representation systems.

At the same time, the Court must begin to acknowledge the broader array of consequences that flow from placing a thumb on the scale in favor of presidential power. In appointment and removal cases, the Roberts Court justifies the expansion of presidential power to protect the separation of powers and democracy but fails to recognize that each expansion of one branch's power

---

[415] West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (emphasis added).
[416] Macey & Richardson, *supra* note 357, at 158.

comes at the cost of the others, with concomitant risks to democracy. Presidents sometimes use their increased power to protect checks and balances, but now always—presidents sometimes use that increased power to overrun checks and balances. MQD cases invite the Court to reflect with candor and caution about the risks of presidential power and emergency powers.[417] It is revealing that the Roberts Court has declined these invitations, instead contorting the facts to conceal presidents' association with the executive branch overreach it decries in these cases.

This dodge is not just from the six current conservatives. Liberal Justices, present and past, have also avoided calling out presidential abuses. For example, the liberal Justices did not identify President Bush's role in *Gonzales v. Oregon*.[418] Liberal Justices in other areas have been more critical of specific presidents' abuses, but not in the domain of statutory interpretation and the MQD.[419] Even though they criticize and dissent from the Roberts Court's unitary executive theory decisions, liberal Justices have endorsed a parallel accountability argument for expanding presidential power, notably Justice Kagan,[420] Justice Breyer,[421] and Justice Stevens.[422] Despite their polarization on many legal questions, the left and right of the Court are both surprisingly quiet about the risks of presidentialism—which sustains the Court's continued silence.

It is imperative that Justices from across the political spectrum candidly acknowledge the President's role in misusing executive power where such abuses have occurred—whether they are in the majority or in dissent. Although some commentators have suggested that the MQD is an important tool for reining in abuses of power by the President, the doctrine cannot serve that

---

[417] Jed Handelsman Shugerman, Major Questions and an Emergency Question Doctrine: The Biden Student Debt Case Study in the Pretextual Abuse of Emergency Powers (Feb. 2, 2023) (unpublished manuscript) (on file with SSRN), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4345019 [https://perma.cc/LAJ5-D8SS].

[418] *See supra* notes 234–252 and accompanying text (describing the President's opposition to physician-assisted suicide); *supra* notes 290–348 and accompanying text (describing the Court's failure to mention presidents in MQD cases).

[419] *Compare* Biden v. Nebraska, 143 S. Ct. 2355, 2384–2400 (2023) (Kagan, J., dissenting) (dissenting from the majority's holding that student loan relief was improper under the MQD), Trump v. Hawaii, 138 S. Ct. 2392, 2429–33 (2018) (Breyer, J., dissenting) (considering Proclamation No. 9645), *and Hawaii*, 138 S. Ct. at 2433–48 (Sotomayor, J., dissenting) (same), *with* Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1901 (2020) (majority opinion) (holding that "the Acting Secretary did violate the APA, and that the recission must be vacated"), *and Dep't of Homeland Sec.*, 140 S. Ct. at 1916–18 (Sotomayor, J., concurring) (suggesting that the plaintiffs sufficiently pleaded that the recission of DACA was motivated by racial animus in violation of the 14th Amendment).

[420] Kagan, *supra* note 17.

[421] *See supra* notes 331–339 and accompanying text (discussing Justice Breyer's dissents).

[422] *See infra* notes 434–439 and accompanying text (discussing *Chevron v. NRDC*).

function if the Court is unwilling to candidly confront presidents for breaches of statutory authority.[423] Rather than use MQD cases as an occasion to check presidential power, the Court's erasure of the President from the MQD cases serves to protect a myth of the President as the nation's protector of democracy and the rule of law. Instead of promoting presidential accountability, the Court's erasure of presidents undermines a key tool of accountability: the judiciary's deliberation, fact-finding, and reason-giving to foster public debate. At the very least, both the majority's and the dissenters' recitation of the facts of each case should provide a more accurate and complete record of what actually happened.

Advocates have an important role to play in encouraging judges to address presidential influence. Scholars have observed in other contexts that one explanation for courts' omission of political facts from their decisions is that parties often do not brief them.[424] Parties could advance the conversation by integrating presidential influence into their arguments.

More candor about the President's role in major questions policies—whether for good or for ill—might lead the Roberts Court to be less compartmentalized and more balanced in its review of presidential power generally. Recognizing the presidential role in these cases may not change their outcome, but the Court that has given presidents more and more control over administrative agencies in service of its theory of democratic accountability has a responsibility to call out presidents when they fail to faithfully execute the law. If such failures happen frequently, this suggests the need to reconsider the wisdom of a system of accountability based on the "chain of dependence" and presidentialism.

C. Does the MQD Apply to Presidential Delegations?

Should the MQD apply to statutory delegations of authority to the President? This is an open question precisely because the Roberts Court so clearly focuses on *agencies*, not presidents, as the problematic actors in its MQD reasoning.[425] Thus, there is a valid question about whether the doctrine should apply when Congress delegates authority explicitly to the *President*.

---

[423] Shah, *supra* note 33, at 1250 (arguing that the major questions doctrine, applied in a way that "narrow[s] the scope of agenc[y] authority" "could serve to constrain presidential administration that is inconsistent with [the] statute." (quoting Deacon & Litman, *supra* note 27, at 6)); Somin, *supra* note 33, at 71 ("Americans across the political spectrum have much to gain from judicial enforcement of limits on executive power. The kind of sweeping unilateral authority the Biden administration claimed in *NFIB* could easily have been misused by a future Republican administration.").

[424] Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 967 (1997) (distinguishing the materials reviewed by the Court and public perception); Watts, *supra* note 411, at 24 (same) (citing *id.*).

[425] *See supra* notes 290–348 and accompanying text (evaluating the Court's failure to discuss the President in MQD cases).

The Court has held that "the President is not an agency within the meaning" of the Administrative Procedure Act.[426] More specifically, the "Supreme Court has declared that when the President is directing an agency in her own capacity, her exercise of presidential discretion is not reviewable under the agency's enabling statute."[427] Although the wisdom of presidential non-reviewability has long been the subject of debate, scholars tend to agree that congressional delegations to the President differ in kind from delegations to agencies in that they demonstrate a deliberate preference that certain decisions be made by an executive branch actor with heightened political accountability.[428]

The Roberts Court's reasoning in the MQD cases (calling out unaccountable agencies), and its failure to integrate its theories of presidentialism into these decisions, point toward treating presidential delegations differently for MQD purposes. Indeed, some legal commentators have pointed to the Roberts Court's reasoning in *Seila Law* about the President's special "most democratic" role to distinguish presidents from "unaccountable agencies" and to argue that the MQD should not apply to presidents:[429] "Applying the major questions doctrine to the President as if the President were an agency ignores the President's heightened political accountability and Congress's intent to delegate to the President in light of that accountability."[430]

Nevertheless, three Circuit Courts have concluded that the MQD does apply to congressional delegations to the President.[431] These decisions are conclusory and contain no justification for extending the MQD to presidential delegations.[432] The only Circuit Court to explicitly analyze the application of

---

[426] Franklin v. Massachusetts, 505 U.S. 788, 796 (1992).

[427] Shah, *supra* note 18, at 520–21.

[428] *See, e.g.*, Kagan, *supra* note 17, at 2329 (indicating that "a delegation to the President gives notice that Congress will hold him specially accountable for decisions made within its scope"); Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 308–09 (2006) (arguing that "when Congress . . . delegate[s] authority [directly] to the President, basic political values of accountability and coordination counsel in favor of applying (or presuming a congressional intent to apply) *Chevron* deference").

[429] Case Comment, Georgia v. President of the United States*: Eleventh Circuit Applies the Major Questions Doctrine to a Delegation to the President*, 136 HARV. L. REV. 2020, 2026 (2023).

[430] *Id.*

[431] *See* Louisiana v. Biden, 55 F.4th 1017, 1029 (5th Cir. 2022) ("This so-called 'Major Questions Doctrine' . . . serves as a bound on Presidential authority."); Kentucky v. Biden, 57 F.4th 545, 555 (6th Cir. 2023) (holding that "the President exceeded his authority"); Georgia v. President of the United States, 46 F.4th 1283, 1295–96 (11th Cir. 2022) ("That doctrine has been applied in 'all corners of the administrative state,' and this case presents no exception.").

[432] *Louisiana*, 55 F.4th at 1029 (stating without support that the "so-called 'Major Questions Doctrine' . . . serves as a bound on Presidential authority"); *Kentucky*, 57 F.4th at 550, 555 (citing *Louisiana* and the District Court's argument that "the major-questions doctrine counseled against the federal government's broad reading of the Property Act" without mentioning the issue of its application to presidential delegations); *Georgia*, 46 F.4th at 1295–96 (noting that the major questions "doctrine has been applied in 'all corners of the administrative state,' and this case presents no exception" without

MQD to presidential delegations reached the opposite conclusion.[433] Nevertheless, no court has considered the complexities raised by this issue, especially if one takes seriously Roberts Court presidentialism in the MQD context.

Arguably, the "chain of dependence" model breaks through the President versus agency divide that counsels for different treatment of these executive branch actors when they decide major questions. If the Court is committed to the "chain of dependence" account of the executive branch, then there should be a uniform application of the MQD, because the President and the agencies directed by the President would be interlocked in an Article II chain of supervision and control. According to the unitary logic of the "chain of dependence," once the Court applies the MQD to agencies, it formally would apply to presidents too.

If the Court backs away from its account of presidentialism, however, the question becomes more complicated. The answer might depend on which components of Roberts Court presidentialism inform the MQD. On the one hand, if the MQD applies to agencies because they are acting outside the "chain of dependence," there is less reason to apply the same rules to presidents and agencies. Thus, there would be good reason to give presidents more latitude than agencies to make policy under broad statutory delegations, and not to require "clear statements" for a president to make major policy. On the other hand, if the MQD applies in cases where the President has overreached and betrayed their accountability to the national electorate, the President would lose some of their special democratic legitimacy relative to agencies. This would counsel for applying the same strict "clear statement" rules of the MQD to presidential delegations.

The bottom line in this doctrinal area is that if the Roberts Court chooses the path of more presidentialism, the "chain of dependence" upon the powerful President ironically would lead to an application of the MQD that would constrain presidents directly. The alternative path—less presidentialism—does not lead to a clear result. What is clear, however, is that the issue demands much closer analysis than any court has given it to date.

D. Preserve Chevron *Deference in* Loper Bright *and* Relentless

This term, in *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. United States Department of Commerce*, the Court revisits *Chevron* deference,

addressing the distinct status of the President in administrative law and constitutional structure (quoting West Virginia v. EPA, 142 S .Ct. 2587, 2608 (2022))).

[433] Mayes v. Biden, 67 F.4th 921, 934 (9th Cir. 2023).

and may be poised to overturn this foundational administrative law doctrine.[434] If the Roberts Court is committed to presidentialism, it must acknowledge that presidentialism was one of the original justifications for deference to agency statutory interpretations in *Chevron* and grapple with the fact that the Roberts Court has only fortified this foundation.

In *Chevron*, Justice Stevens invoked a presidentialist theory of accountability to explain why judges should defer to agencies' interpretations of ambiguous statutes:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[435]

Thus, the Court founded *Chevron* on the premises that presidents are "directly accountable to the people,"[436] that this legitimacy extends to agencies (via a "chain of dependence"), and that it makes agencies comparatively more legitimate interpreters of statutory ambiguities than the unelected judiciary.

Drawing on this reasoning, scholars have characterized *Chevron* as an example of a broader turn to a model of administrative law that legitimizes agency action based principally on presidential control: "*Chevron*, more than any other case, is responsible for anchoring the presidential control model. It recognized that politics is a permissible basis for agency policymaking."[437] Moreover, scholars have suggested that the constitutional imperative of *Chevron*'s default deference rule is based on the President's completion power: "execu-

---

[434] *See* Loper Bright Enters. v. Raimondo, 45 F.4th 359, 365 (D.C. Cir. 2022) (applying the *Chevron* framework to questions of statutory interpretation), *cert. granted*, 143 S. Ct. 2429 (U.S. May 1, 2023) (No. 22-451); Relentless, Inc. v. U.S. Dep't of Com., 62 F.4th 621 (1st Cir.) (same), *cert. granted in part*, 144 S.Ct. 325 (U.S. Oct 13, 2023) (No. 22-1219).

[435] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984).

[436] *Id.* at 865.

[437] Bressman, *supra* note 413, at 1765; *see also* Watts, *supra* note 411, at 37–38 (suggesting that "presidential influences can validly impact an agency's interpretive decisions where Congress has chosen to delegate interpretive powers to executive agencies").

tive branch officials are endowed with presumptive constitutional authority, grounded in Article II, to complete an ambiguous statutory scheme unless Congress specified otherwise."[438] Justice Scalia went so far as to argue that this power encompasses the discretion of an agency to change the law "in light of new information or even new social attitudes impressed upon it through the political process."[439]

The Roberts Court has only strengthened presidentialism, both normatively and descriptively, both de jure and de facto. The Roberts Court has thus strengthened a core justification for *Chevron* deference. If the Roberts Court is considering overturning or further scaling back *Chevron*, it must explain why its stronger theory of presidentialism and its strengthening of the bonds in the "chain of dependence" have not also bolstered the case for *Chevron.* If the Roberts Court overturns *Chevron*, it is hard to see how its presidentialist theories would support continued expansion of presidential control over administrative agencies. After all, nominal control is hollow if the President has little discretion to execute the law (or if that discretion can be unpredictably circumscribed or appropriated by the Court). Alternatively, if the Roberts Court is committed to its version of presidentialism, it should exercise judicial restraint and preserve a workable and meaningful version of *Chevron*. To do otherwise would lay bare a politically motivated anti-administrativist project that applies presidentialism conveniently and selectively, only when it cuts against regulatory policies adopted by agencies.

E. Continued Restraint on Non-Delegation

Finally, a revival of the non-delegation doctrine is looming, after its endorsement by five justices, and with three justices offering a non-delegation doctrine rationale of constitutional avoidance in the MQD cases.[440] The proponents of a more muscular application of the non-delegation doctrine rely on

---

[438] Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2301 (2006).

[439] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 519; *see also* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 897 (1983) (endorsing the executive's interpretive and enforcement discretion—its "ability to lose or misdirect laws"—as "one of the prime engines of social change").

[440] Chief Justice Roberts and Justice Thomas joined Justice Gorsuch's dissent in *Gundy v. United States*. 139 S. Ct. 2116, 2131–48 (2019) (Gorsuch, J., joined by Thomas & Alito, JJ., dissenting). Justice Alito wrote separately of his "willing[ness] to reconsider the approach we have taken for the past 84 years." *Id.* at 2131 (Alito, J., concurring in the judgment). Justice Kavanaugh stated his own interest a few months later. *See* Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari) (suggesting that "Justice Gorsuch's thoughtful *Gundy* opinion raised important points that may warrant further consideration in future cases").

arguments about democracy and structural design, but instead of the President, it is Congress that they celebrate. Justice Gorsuch's dissent in *Gundy v. United States*, joined by Chief Justice Roberts and Justice Thomas, hailed Congress's representative design, its open deliberation, and its accountability. As Gorsuch summed up, "by directing that legislating be done only by elected representatives in a public process, the Constitution sought to ensure that the lines of accountability would be clear: The sovereign people would know, without ambiguity, whom to hold accountable for the laws they would have to follow."[441] In a recent MQD case, Justices Gorsuch, Thomas, and Alito emphasized the same points about Congress's democratic accountability—"[w]hichever the doctrine, [MQD or Non-Delegation,] the point is the same. Both serve to prevent 'government by bureaucracy supplanting government by the people'"[442]—placing the MQD squarely in the context of the non-delegation doctrine.

The Court could revive the non-delegation doctrine solely based on separation of powers and the meaning of "all legislative power" in the Legislative Vesting Clause, but the passages quoted above indicate that some Justices would ground it outside pure constitutional structure in a theory of democratic accountability—this time Congress's. It is a cliché that it takes a theory to beat a theory. Perhaps Gorsuch's congressionalist theory of the non-delegation doctrine will compete with the Roberts Court's presidentialist theories, provoking a resolution between the two. For now, we offer two alternative paths to resolving this tension.

On the one hand, if the Court continues in its appointment and removal jurisprudence to theorize the legitimacy and accountability of an administrative state controlled by the President, and to fortify the "chain of dependence" through tightened presidential control, these arrangements should also lend democratic legitimacy to statutory delegations to the executive branch. As one scholar argued, allocating to the executive the authority to interpret broad statutory delegations "reduce[s] the nondelegation concern, precisely because the executive, far more than the courts, has a measure of accountability."[443] For this reason, Justice Scalia observed in the last two non-delegation cases in which he participated that the Court has "almost never felt qualified to second-

---

[441] *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., joined by Thomas & Alito, JJ., dissenting).

[442] Nat'l Fed'n of Indep. Bus. v. Dep't of Lab. (*NFIB v. OSHA*), 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring) (quoting Scalia, *supra* note 21, at 27); *see also* Sunstein, *There Are Two "Major Questions" Doctrines*, *supra* note 30, at 483–84 (comparing the relationship of the major questions doctrine and non-delegation doctrine by courts). Justice Barrett's concurrence in *Biden v. Nebraska* disclaims the non-delegation background for MQD, but in doing so, she acknowledges the common interpretation that it is a substantive canon, the constitutional avoidance of non-delegation. 143 S. Ct. 2355, 2376 (2023) (Barrett, J., concurring).

[443] Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2608 (2006).

guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."[444] The Roberts Court should continue to apply the non-delegation doctrine with restraint if it wants to maintain judicial consistency.

On the other hand, if the Court begins to utilize the non-delegation doctrine to strike down expansive statutory delegations of authority to the executive, it must explain how this squares with its theory of democratic presidentialism. It must also explain how expanding the judiciary's power to interpret, and potentially to erase, broad grants of statutory authority to the executive would reduce concerns about the delegation of legislative power to another branch.[445]

CONCLUSION

Regardless of which direction the Court chooses—more or less emphasis on the President as "most accountable officer" and on the "chain of dependence"—perhaps the most important lessons from these contradictions are for judicial restraint, interpretive modesty, and judicial candor and balance.[446] The shell game of which branch is the "most democratic" fails the consistency test that the rule of law demands. It is a shell game where the winner, either way, is judicial supremacy over Congress, the President, and the administrative state. The Roberts Court's critique of "unaccountable bureaucrats" ignores how the resulting doctrines empower unaccountable judges.

The Roberts Court should offer more candor: acknowledge the costs of direct presidential power, not just the benefits; and acknowledge the benefits of meaningful presidential accountability even when the results of democracy do not suit the Court's conservative majority. Presidents of both parties have been expanding their own power for over a century, enabled by many Congresses and many Supreme Courts, long before Chief Justice Roberts's tenure. Nevertheless, Chief Justice Roberts's theories about presidents' "direct" elections and presidents being "the most democratic and accountable" officials are more implausible and extreme than earlier presidentialist theories. They contribute to presidential superiority and perhaps long-term to presidential supremacy. They have thrown checks and balances off-balance. If the Roberts Court finds executive branch overreach in the MQD cases, its silence about the role of presidents in those overreaches speaks volumes. Indeed, there is no "right" answer

---

[444] Mistretta v. United States, 488 U.S. 361, 416 (1989); Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 474–75 (2001) (quoting *id.*).

[445] Sunstein, *supra* note 443, at 2608 (arguing that "[i]f the executive is denied interpretive authority, that authority is given to the judiciary instead, and that step would hardly reduce the nondelegation concern; it would merely grant courts the power to make judgments of policy and principle").

[446] Heidi Kitrosser, *Interpretive Modesty*, 104 GEO. L.J. 459, 504–13 (2016).

about how to resolve these contradictions, except to be more balanced about Congress, presidential power, agency power, and judicial power.