

SEPARATION-OF-POWERS LOCHNERISM

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*One hundred and twenty years ago, in 1905, the U.S. Supreme Court rendered one of the single most notorious opinions in history, striking down a New York labor law for violating the right to contract—a right found nowhere in the text of the Constitution. Though the era of *Lochner v. New York* is well past us, the judicial impulses that gave rise to the case remain. With a new champion in the Roberts Court, *Lochnerism* is alive and well, deployed in a new context to redefine the relationships between the president, Congress, federal agencies, and the courts.*

*Bringing together two lines of case law—on the president and the agencies—this Article shows how the Roberts Court is now doing for the separation of powers what the *Lochner* Court did for rights. In the first line, the Court identifies “core” presidential (super)powers and bars Congress from regulating these by statute. In the second line, the Court crafts unwritten principles that defeat agency action; these include the rule that Congress must give a “clear statement” when it delegates “major” authority and the rule that deference to agencies violates judicial independence. Taken together, the two lines of cases make “the separation of powers” into a collection of judge-made rules no other branch can change, devised by judges who disregard “plain text” for “higher-law” values they alone can see and articulate. One particularly salient consequence has been the aggrandizement of the presidency, now put in full relief by the unprecedented barrage of executive orders issued during President Donald J. Trump’s second term, many of questionable legal grounding.*

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During the 2023 to 2024 term, the Court's landmark rulings on presidential immunity and the federal agencies each garnered significant attention. But viewing them through the lens of this new "separation-of-powers Lochnerism" reveals these decisions to be part of the same judicial project: a judge-led revolution decades in the making. The U.S. Constitution creates three branches of power and gives each tools to mutually check and balance the others. Separation-of-powers Lochnerism distorts this ideal into a judge-made constitutional order requiring interbranch isolation (except on the part of the judiciary), with the Supreme Court increasingly defining the roles of Congress, the president, and the agencies according to higher-law principles of its own making. This Article demonstrates that this scheme is both ahistorical and dangerous, threatening to upend the United States' tripartite system of government.

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There is a tendency to think of judges as if they were independent mouthpieces of the infinite . . . [I]t is that that I have aimed at when I have said that the [Law] is not a brooding omnipresence in the sky and that the U.S. is not subject to some mystic overlaw that it is bound to obey.¹

-Justice Oliver Wendell Holmes Jr. (1926)

1. Letter from Oliver Wendell Holmes Jr., Assoc. Sup. Ct. Just., to Professor Harold Laski (Jan. 29, 1926), in *HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, VOLUME II: 1926–1935*, at 822, 822–23 (Mark DeWolfe Howe ed., 1953).

While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.²

-Justice Robert H. Jackson (1952)

Functionalism of the sort the Court practices today will *systematically* favor the unitary President over the plural Congress It is possible that this approach will make for more effective foreign policy, perhaps as effective as that of a monarchy. It is certain that, in the long run, it will erode the structure of separated powers that the People established.³

-Justice Antonin Scalia (2015)

INTRODUCTION: A LOCHNERIAN SEPARATION OF POWERS

What was so wrong with *Lochner v. New York*,⁴ surely one of the most reviled decisions ever penned by the U.S. Supreme Court?⁵ Scholars disagree; but they do agree on what, from the point of view of judicial method, *Lochner* did.⁶ The 1905 decision, which famously struck down a New York maximum-hours law for violating an unenumerated “right of free contract,”⁷ was typical of an era when the Court invoked unwritten “higher principles” of law discovered in the Fourteenth Amendment to invalidate legislation that, in the eyes of elected representatives, served important social purposes.⁸ It was this tendency that Justice Oliver Wendell Holmes Jr. was thinking of when he famously criticized his colleagues for treating law as though it were some “brooding omnipresence” in the sky that a judge could pick out.⁹ Lochnerism stands for *this* tendency.

2. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

3. *Zivotofsky v. Kerry*, 576 U.S. 1, 80 (2015) (Scalia, J., dissenting).

4. 198 U.S. 45 (1905).

5. See David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 374 (2003).

6. *Id.*

7. *Lochner*, 198 U.S. at 57.

8. See Andrea Scoseria Katz, *The Lost Promise of Progressive Formalism*, 99 TEX. L. REV. 679, 697–99 (2021); see also Howard Gillman, *De-Lochnerizing Lochner*, 85 B.U. L. REV. 859, 859 (2005) (“[C]ritics ‘who claim that the Court stands as an obstacle to “social justice” legislation, if asked to specify where they find the evil of which they complain and for which they propose radical remedies, always take refuge in the single case of *Lochner v. New York*.” (quoting Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294, 294 (1913))).

9. HOLMES-LASKI LETTERS, *supra* note 1, at 822–23.

One hesitates before accusing a court of “Lochnerizing.”¹⁰ It is one of the worst slights a court’s authority can receive.¹¹ But today, there are reasons. It is not just the similarities between Gilded Age America and our own.¹² Replace yesterday’s oil, steel, and sugar “trusts” with today’s tech, banking, and pharmaceutical sectors, and the “collective revulsion against the privileges of great wealth allied with great power” is the same.¹³ Then as now, the Supreme Court is weighed down by perceptions of high-handedness, politicization, and unaccountability.¹⁴ But the parallels between the Courts of *Lochner* and Chief Justice John G. Roberts Jr. go even deeper than that.

“Lochnerizing” has come to stand for the judicial temptation to overenforce rights that lack a basis in the Constitution.¹⁵ Throughout the twentieth century, the Supreme Court has been accused of “Lochnerizing” everything from equal protection to contraception, abortion, same-sex marriage, campaign finance spending, commercial speech, and (again)

10. See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 944 (1973) (using “Lochnering” as a verb to describe the Court’s “indulging in sheer acts of will, ramming its personal preferences down the country’s throat”); Thomas C. Grey, *Do We Have an Unwritten Constitution*, 27 STAN. L. REV. 703, 711 n.35 (1975) (noting that the “ultimate punchline in the criticism of a constitutional decision is to say that it is ‘like *Lochner*’”); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 567 (2d ed. 1990) (“‘Lochnerizing’ has become so much an epithet that the very use of the label may obscure attempts at understanding.”).

11. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 40 (1991) (“For a modern judge, one of the worst insults is that she is reenacting the sin originally committed by the pre-New Deal Court in cases like *Lochner v. New York*.”).

12. See Katz, *supra* note 8, at 681–82.

13. Paul Starr, *How Gilded Ages End*, AM. PROSPECT (Apr. 29, 2015), <https://prospect.org/economy/gilded-ages-end/> [<https://perma.cc/4TEK-8ZCD>]. For other sources comparing the present day with the Gilded Age, see generally LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* (2010); JACOB S. HACKER & PAUL PIERSON, *LET THEM EAT TWEETS: HOW THE RIGHT RULES IN AN AGE OF EXTREME INEQUALITY* (2021); LAWRENCE LESSIG, *AMERICA, COMPROMISED* (2018); THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Arthur Goldhammer trans., 2017); K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* (2016); JANE F. MCALEVEY, *NO SHORTCUTS: ORGANIZING FOR POWER IN THE NEW GILDED AGE* (2018).

14. Public opinion polls show that trust in the Supreme Court is at or near historic lows. Fix the Court, *The Supreme Court’s Lack of Self-Awareness Stretches Across Decades*, MEDIUM (Oct. 26, 2016), <https://fixthecourt.medium.com/the-supreme-courts-lack-of-self-awareness-stretches-across-decades-1fb3e42c670e> [<https://perma.cc/4TKF-ZFJA>]; *Supreme Court*, GALLUP (Sep. 25, 2007), <https://news.gallup.com/poll/4732/Supreme-Court.aspx> [<https://perma.cc/P8XN-M6VU>]; *Views of Supreme Court Remain Near Record Lows*, GALLUP (Sep. 29, 2023), <https://news.gallup.com/poll/511820/views-supreme-court-remain-near-record-lows.aspx> [<https://perma.cc/GJ45-Q6UU>]; Lauren Sforza, *Americans’ Approval of Supreme Court Near Historic Low*: Gallup, THE HILL (July 30, 2024, at 10:04 ET), <https://thehill.com/regulation/court-battles/4799762-supreme-court-approval-rating-historic-low/> [<https://perma.cc/2FS9-GSQR>]; *Fox News Poll: Supreme Court Approval Rating Drops to Record Low*, FOX NEWS (July 16, 2024, at 18:00 ET), <https://www.foxnews.com/official-polls/fox-news-poll-supreme-court-approval-rating-drops-record-low> [<https://perma.cc/L9P U-LFNV>].

15. See Ely, *supra* note 10, at 944.

contract.¹⁶ But, as this Article shows, it is equally possible to *Lochnerize* the *separation of powers*—and under the Roberts Court, this is precisely what is taking place for the first extended period in American history.¹⁷

Over the last two decades, wielding its power “to say what the law is,” the Supreme Court has effectuated a dramatic remaking of our government.¹⁸ It has identified new presidential powers and elevated them to a suprapresidential status.¹⁹ The Court has shrunk Congress’s power to structure our institutions and to check the president.²⁰ It has handcuffed the federal agencies and placed them at the president’s discretion.²¹ It has done so, often in “oracular” fashion,²² calling on the authority of “foundational” rules that cannot be found anywhere in the Constitution’s text.²³ The Roberts Court is doing, then, for the separation of powers what the *Lochner* Court did for rights.

16. For sources finding “*Lochnerizing*” in diverse contexts, see generally Patricia A. Carlson, Adarand Constructors, Inc. v. Peña: *The Lochnerization of Affirmative Action*, 27 ST. MARY’S L.J. 423 (1995); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015); RANDY BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 222–23, 231 (2004); Sherif Girgis, Windsor: *Lochnerizing on Marriage?*, 64 CASE W. RES. L. REV. 971 (2014); Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527 (2015); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016); Genevieve Lakier, *The First Amendment’s Real Lochner Problem*, 87 U. CHI. L. REV. 1241 (2020); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133.

17. Three other periods of American history arguably feature separation-of-powers *Lochnerism* but left behind only a few cases, unlike our time: the post–Civil War period (1866) in which the Court judicialized the presidential veto; the Taft Court’s *Myers v. United States*, 272 U.S. 52 (1926), and *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928), on Congress’s ability to structure removals and delegate power; and the late-1970s/early 1980s, which featured a handful of decisions limiting Congress’s powers of oversight. See generally *Myers*, 272 U.S. 52; *Hampton*, 276 U.S. 394. See also Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2077 n.360 (2021) (discussing *Ex parte Garland*, 71 U.S. 333 (1866), and *United States v. Klein*, 80 U.S. 128 (1871), as examples of what the authors call “juristocracy”); Andrea Scoseria Katz & Noah A. Rosenblum, *Becoming the Administrator-in-Chief: Myers and the Progressive Presidency*, 123 COLUM. L. REV. 2153, 2161 (2023) (explaining that *Myers* constructed a new tradition of presidentialism); Andrea Scoseria Katz, *A Regime of Statutes: Building the Modern President in Gilded Age America (1873–1921)*, 2 J. AM. CONST. HIST. 737, 781–85 (2024) (discussing *Hampton* as the progenitor of a new formalism in the 1970s and 1980s); Josh Chafetz, *The Chadha Presidency* (July 20, 2025) (unpublished manuscript) (on file with the *Fordham Law Review*) (arguing that the Court’s destruction of the legislative veto fatally weakened Congress’s ability to check the president).

18. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2257 (2024) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

19. See *infra* notes 217–25.

20. See *infra* notes 308–13.

21. See *infra* notes 243–64.

22. Jacob Hale Russell, *The Supreme Court Doesn’t Need 9 Justices. It Needs 27*, TIME (July 16, 2018, 08:17 ET), <https://time.com/5338689/supreme-court-packing/> [<https://perma.cc/5WY8-N5WR>] (“We have been lulled into believing that the Supreme Court possesses oracular powers to divine the Constitution’s meaning in a way the rest of us can’t.”).

23. See, e.g., *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2205 (2020) (“It is true that ‘there is no “removal clause” in the Constitution, but neither is there a ‘separation of powers clause’ or a ‘federalism clause.’ These foundational doctrines are instead evident from the Constitution’s vesting of certain powers in certain bodies.” (citation omitted)).

As this Article shows, the Lochnerized separation of powers rests on a mythologized history and a fundamentally unsound constitutional model. In the Court's telling, the framers' "solution to the problem of governmental power and its perils was simple: divide it."²⁴ But this was not how the framers thought about the matter.²⁵ Even President James Madison, the political philosopher most often associated with the idea of separated powers, knew that *total* separation was never desirable or even possible. In fact, Madison wrote that, to maintain the proper "degree of separation" between the three branches, these had to be "connected and blended as to give to each a constitutional control over the others."²⁶ Rather than three boxes on an organizational chart, the framers' constitution was one of "separated institutions *sharing* powers."²⁷ The government's outlines were created and defined by statutes, laid out in arrangements designed to change over time.²⁸ And unlike in our time, the judiciary policing these lines was quite rare.²⁹

This is how the Constitution worked in practice for most of its history. Successive state-building projects saw Congress in the driver's seat, tinkering with institutional relationships as it saw fit to meet situational needs.³⁰ Governance involved enlisting other actors in a cooperative project, whether this meant experimenting with a national bank to stabilize the nation's credit, partnering with private industry to build canals and railroads, nurturing a two-party system to routinize executive-legislative partnerships, deploying northern manufacturing know-how to win a Civil War, or

24. *Id.* at 2202.

25. Bowie & Renan, *supra* note 17, at 2025–27, 2042–44.

26. THE FEDERALIST No. 48 (James Madison), *reprinted in* THE FEDERALIST PAPERS: ALEXANDER HAMILTON, JAMES MADISON, JOHN JAY 251 (Ian Shapiro ed., 2009); *see also* M. J. C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 14 (2d ed. 1998) (characterizing a total separation of the three branches of power as a "pure" or "extreme form" of the doctrine, which has "rarely been put into practice").

27. RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN 29 (1990) ("The Constitutional Convention of 1787 is supposed to have created a government of 'separated powers.' It did nothing of the sort. Rather, it created a government of separated institutions *sharing* powers.").

28. *See* STEPHEN SKOWRONEK, JOHN A. DEARBORN & DESMOND KING, PHANTOMS OF A BELEAGUERED REPUBLIC: THE DEEP STATE AND THE UNITARY EXECUTIVE 32–33 (2021). On the framers' pragmatism and empiricism, *see generally* Tom Ginsburg, *Constitutional Knowledge*, 2 KNOW: J. ON FORMATION KNOWLEDGE 15 (2018) (describing the framers as "committed empiricists"); DAVID A. STRAUSS, THE LIVING CONSTITUTION 112–14 (1st ed. 2010) (describing the Constitution's open-endedness as a delegation to modern interpreters and publics).

29. Bowie & Renan, *supra* note 17, at 2026 ("Even after *Marbury v. Madison*, when the Supreme Court emphatically declared that it would decline to enforce statutes that conflicted with its interpretation of the Constitution, the Court spent the next century deferring to Congress and the President's judgment about what the relationship between the Executive and Congress should legally entail." (footnotes omitted)).

30. STEPHEN SKOWRONEK, THE ADAPTABILITY PARADOX: POLITICAL INCLUSION AND CONSTITUTIONAL RESILIENCE (forthcoming) (manuscript at 6–7) (on file with the *Fordham Law Review*); JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 2–5, 9–44 (2017).

belatedly legislating a national civil rights regime.³¹ Interbranch cooperation also underwrote the building of a modern regulatory state, epitomized by the Administrative Procedure Act³² (APA) of 1946, which created broad new agencies and powers, invited the president to oversee them, and tasked the federal judiciary with ensuring that they acted in accordance with the law.³³

Late in the 1970s, however, distrust of government surged, and cooperation gave way to something different. The fiascos of Vietnam and Watergate led Congress to pass a series of laws tying down the “imperial presidency”³⁴ with greater oversight requirements.³⁵ But soon, there came a sharp backlash. A rising conservative movement, resentful of the presidency’s prostration, hit on the idea that executive power could be used to demolish the administrative state.³⁶ So, too, could the courts.³⁷ Incubated in conservative legal circles, new doctrines of originalism and presidentialism were formulated to justify formal legal controls over a government that had always been managed collectively.³⁸ These ideas spread to universities and think tanks, migrated into the U.S. Department of Justice (DOJ) under President Ronald Reagan, and eventually took root in the federal judiciary.³⁹ Although they could be glimpsed in a handful of cases from the late 1970s and early 1980s, for the most part they lay fallow until 2005 when Chief Justice Roberts took the bench.⁴⁰

The judicial revolution came swiftly and along two fronts: the presidency and the agencies. On the one hand, the Court identified a set of “inherent”

31. On the history of the First and Second Banks of the United States, see generally EDWARD S. KAPLAN, *THE BANK OF THE UNITED STATES AND THE AMERICAN ECONOMY* (1999). On building canals and the railroads, see generally JOHN LAURITZ LARSON, *INTERNAL IMPROVEMENT: NATIONAL PUBLIC WORKS AND THE PROMISE OF POPULAR GOVERNMENT IN THE EARLY UNITED STATES* (2001); RICHARD WHITE, *RAILROADED: THE TRANSCONTINENTALS AND THE MAKING OF MODERN AMERICA* (2011). On how the two-party system revolutionized government, see generally RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780-1840* (1970). On Northern manufacturing and the Civil War, see generally MARK R. WILSON, *THE BUSINESS OF CIVIL WAR: MILITARY MOBILIZATION AND THE STATE, 1861-1865* (2006). On civil rights as a statutory regime, see generally HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960-1972* (1990).

32. Ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

33. See *infra* Part II.BB.

34. See generally ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (2004).

35. See *infra* Part II.BB.

36. William G. Howell & Terry M. Moe, *The Strongman Presidency and the Two Logics of Presidential Power*, 53 *PRESIDENTIAL STUD. Q.*, no. 2, 2023, at 145, 159.

37. See generally STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008).

38. Amanda Hollis-Brusky, *Helping Ideas Have Consequences: Political and Intellectual Investment in the Unitary Executive Theory, 1981-2000*, 89 *DENV. U. L. REV.* 197, 219–28 (2011) (describing the Federalist Society’s enduring effect on constitutional jurisprudence, especially in terms of the rise in formalism).

39. See *infra* Part II.BB.

40. See generally, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976); *INS v. Chadha*, 462 U.S. 919 (1983); *Bowsher v. Synar*, 478 U.S. 714 (1986). On the formalist logic behind these cases, a classic account is provided by Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—a Foolish Inconsistency?*, 72 *CORN. L. REV.* 488 (1987).

Article II powers belonging to the president and admonished Congress for “violating” the separation of powers when it intruded on them.⁴¹ On the other hand, the Court recently overturned, or cut into, years of precedent recognizing independent agencies, broad delegations of power, and judicial deference to agency expertise.⁴² Both lines of cases featured a telltale new approach: the announcement of new rules deduced from the “separation of powers” that shrink the reach of statutes and regulation.⁴³ The new rules have names: the theory of the unitary executive,⁴⁴ the major questions doctrine (MQD),⁴⁵ and anti-*Chevron* deference,⁴⁶ to name a few. They also have a common endgame: the judicialization of the separation of powers.⁴⁷

This Article tells the story of how we arrived at this new and untested Lochnerized separation of powers and what it means for American governance moving forward. Part I defines Lochnerism as a method. Extrapolating from the case law, it identifies it as a perverse kind of

41. *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2234, 2216 n.3 (2020) (Kagan, J., concurring in part) (citing E. Gerhart, *AMERICA’S ADVOCATE: ROBERT H. JACKSON* 99 (1958)); U.S. CONST. art. II, § 1. On the rise of unitary executive theory, see *infra* notes 134–79 and accompanying text. For cases formalizing inherent presidential powers, see generally *Seila L.*, 140 S. Ct. 2183 (further expanding the removal power); *Zivotofsky v. Kerry*, 576 U.S. 1 (2015); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010); *Collins v. Yellen*, 141 S. Ct. 1761 (2021); *Trump v. Mazars*, 140 S. Ct. 2019 (2020) (expanding the scope of presidential privilege by prescribing limits on Congress’s subpoena power); *Trump v. United States*, 144 S. Ct. 2312 (2024) (formalizing absolute presidential immunity for official acts).

42. See generally *Free Enter. Fund*, 561 U.S. 477; *Seila L.*, 140 S. Ct. 2183; *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014); *King v. Burwell*, 576 U.S. 473 (2015); *West Virginia v. EPA*, 142 S. Ct. 2587 (2022); *Chevron U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837 (1984), *overruled by*, *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024).

43. Sometimes these rules are called substantive canons. See generally Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 IOWA L. REV. 465 (2024) (construing the Major Questions Doctrine (MQD) as a substantive canon at odds with the idea of the court as a faithful interpreter of text); see also Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109 (2010) (arguing that substantive canons “pose[] a significant problem of authority, however, for textualists [and purposivists] who [both] understand courts to be the faithful agents of Congress”).

44. The theory of the unitary executive claims a constitutional mandate for the president to control the entire executive branch. See *supra* note 36 (canvassing the cases); see also STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 3* (2008).

45. The MQD demands that Congress give particularly specific authorization for agency actions of “vast ‘economic and political significance,’” and has served to block agency action that would appear legitimate according to a plain textualist mode of statutory interpretation. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).

46. The landmark *Chevron* doctrine counseled that federal courts should defer to agency interpretations of their own statutes when they were ambiguous and said interpretations were reasonable. See *infra* note 324 (canvassing early scholarly responses to whether the MQD continues to exist post-*Loper Bright*).

47. Cf. Bowie & Renan, *supra* note 17, at 2031, 2084, 2093, 2102; Z. Payvand Ahdout, *Separation-of-Powers Avoidance*, 132 YALE L.J. 2360, 2365–68 (2023); see also John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 L. & CONTEMP. PROBS. 41, 43 (2002) (alleging that judicial regulation of the conduct of political life has increased over the past few decades).

formalism, a judicial philosophy defined by the idea that “correct” answers to legal questions can be inferred from rules deduced, in turn, from higher principles.⁴⁸ The problem is, how can we know which rules follow from an idea like the “separation of powers”? Does the fact that the Constitution speaks of “the executive power” require us to believe in a unitary executive or tell us whether the president has the power to initiate diplomacy with a foreign nation?⁴⁹ The Court provides no way to tell the difference between a genuine rule and a false one, which makes separation-of-powers formalism dangerous in same the way *Lochner* was: it is about as opaque as reading tea leaves and equally unaccountable.

Part II shows how separation-of-powers Lochnerism dates to the Reagan era, when an insurgent conservative movement sought to intellectualize a new pro-presidential and anti-administrative separation of powers.⁵⁰ Despite the Roberts Court’s attempts to couch these ideas in old authorities, the history shows that they are new and disruptive, a turn away from decades of cooperative, shared control of government in favor of interbranch isolation.

Part III illustrates the changes wrought on our government by the Roberts Court’s two-track doctrinal revolution. The Court’s work has yielded the following institutional landscape: a go-it-alone president using unilateral tools to make policy, a weakened Congress limited in its sphere of action, and a chastened administrative state caught in the crossfire of an unpredictable review by the president and the courts. This system is the product of a judiciary acting as a separation-of-powers clearinghouse, following a logic of its own making. It is a Lochnerized separation of powers.

Finally, Part IV critiques the Court’s constitutional model as triply unsound. First, by raising the already high collective-action costs of legislating, it pushes the heart of governance further into the executive realm—an ironic result given the justices’ stated concerns with bureaucratic unilateralism, arbitrariness, and unpredictability.⁵¹ Second, by weakening Congress’s control over the executive branch and blessing presidents’ authority to put agencies in the service of their personal agendas, the Court

48. See *infra* note 67 and accompanying text.

49. See *infra* notes 67, 219 and accompanying text.

50. See *infra* note 152 (contesting the history of the unitary executive theory (UET)); *infra* note 265 (arguing that the MQD is novel and cannot be justified on older precedents).

51. For examples of criticisms of the regulatory state on grounds of arbitrariness and perhaps, illegality, see *City of Arlington v. FCC*, 569 U.S. 290, 314–15 (2013) (Roberts, C.J., dissenting) (“By design or default, Congress often fails to speak to the precise question before an agency. In the absence of such an answer, an agency’s interpretation has the full force and effect of law It would be a bit much to describe the result as the very definition of tyranny, but the danger posed by the growing power of the administrative state cannot be dismissed.” (citation and quotation omitted)); *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2212 (2020) (Thomas, J., concurring) (“Because independent agencies wield substantial power with no accountability to either the President or the people, they ‘pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances.’” (quoting *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J., dissenting))); *West Virginia v. EPA*, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring).

aids and abets an aggressive presidentialism that threatens the rule of law itself.⁵² Third and finally, the Court's *Lochner*ism worsens judicial review's countermajoritarian difficulty and makes constitutional law ever more elitist, remote, and unconnected from the lives of ordinary people.⁵³

In its own day, the *Lochner* decision occasioned rebukes that "the judiciary [was] . . . 'step by step destroying government by law and substituting therefore a government by Judges.'"⁵⁴ Judicial overreach is a risk any time courts invoke "higher principles" to strike down duly enacted laws—for when they do, who can check their work? But *Lochner*ism is doubly bad in the separation-of-powers context—for in defining other branches' powers, the Court not only turns itself into a kind of supreme constitutional gatekeeper, but it also weakens countervailing checks that keep the system in equilibrium. With the president's powers ballooning and Congress's own authority dwindling—all on the Court's watch—it is far from clear that judges can be trusted with this massive responsibility.

In several of its recent opinions, the Court has used the language of restoration, promising to reset a constitutional balance that had been upset by an overreaching Congress and a craven judiciary.⁵⁵ But far from a pre-New Deal Arcadia, we are heading for something different entirely: a new, untested form of government where policy is driven by a president in control of our institutions and immune to most checks, save for the few big decisions the Court reserves for itself. With Congress cut off from reversing this power imbalance, we find ourselves in a constitutional impasse, with few options for taming the president and judiciary but politics itself.

The original *Lochner* era ended with a chastened Supreme Court brought to heel by its political masters and an enduring lesson in judicial humility.⁵⁶ Will ours?

52. See Greg Stohr & Zoe Tillman, *Trump Dares Judiciary with Orders Testing His Presidential Power*, BLOOMBERG L. (Jan. 31, 2025, at 15:53 ET), <https://www.bloomberg.com/news/articles/2025-01-31/trump-dares-judiciary-with-orders-testing-his-presidential-power> (on file with the *Fordham Law Review*) (describing President Trump's claim to a "roving presidential power to ignore statutes if they conflict with his policy preferences").

53. See generally AZIZ RANA, *THE CONSTITUTIONAL BIND: HOW AMERICANS CAME TO IDOLIZE A DOCUMENT THAT FAILS THEM* (2024).

54. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1387 (2001) (emphasis omitted) (quoting AM. FED'N OF LAB. EXEC. COUNCIL, ELECTION CIRCULAR (Oct. 12, 1908), *microformed on* Am. Federation of Labor Records: The Samuel Gompers Era, reel 69 (Microfilming Corp. of Am.)).

55. *Seila L.*, 140 S. Ct. at 2198 (restoring "the general rule that the President possesses 'the authority to remove those who assist him in carrying out his duties'" (quoting *Free Enters. Fund. v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 513–14 (2010))); *SEC v. Jarkesy*, 144 S. Ct. 2117, 2139 (2024) ("[L]aw courts have dealt with fraud actions since before the founding."); *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2275 (2024) (Thomas, J., concurring) ("[*Chevron*] improperly strips courts of judicial power by simultaneously increasing the power of executive agencies. By overruling *Chevron*, we restore this aspect of our separation of powers.").

56. See *infra* note 106 (describing the New Deal Supreme Court's so-called "switch in time").

I. LOCHNERISM AS METHOD

Since the mid-1980s, a period spanning the tenures of Chief Justices Warren E. Burger, William H. Rehnquist, and John G. Roberts Jr., two dominant trends in the Supreme Court's separation-of-powers cases can be discerned. One, the Court has drawn more and more constitutional questions into its sphere, *judicializing* disputes once resolved outside the courtroom.⁵⁷ Two, it is applying a framework whereby any government act can be classified under one of three headings of power: legislative, executive, or judicial.⁵⁸ Scholars have captured both tendencies under the heading of *separation-of-powers formalism*.⁵⁹

In this Article, I deliberately construe this jurisprudence as “Lochnerizing” to draw our attention to a characteristic pattern through which the current Court infuses *specific* meaning into the spare phrases of Article II. To show how, let's discuss *Lochner*'s method for a moment.

Lochner never told its readers where the “right of free contract” came from, but *E. Allgeyer & Co. v. Louisiana*,⁶⁰ an earlier case by Justice Rufus W. Peckham, did.⁶¹ Eight years before *Lochner*, the *Allgeyer* Court, striking down a Louisiana law barring out-of-state insurance companies from doing business in the state, explained: “The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase ‘pursuit of happiness’ in the Declaration of Independence.”⁶²

What is the problem with such reasoning? One could give several answers, but I would emphasize that Justice Peckham unselfconsciously *reads preferred content* (a prohibition on commercial bans) into a *vague phrase* (“the pursuit of happiness”) found in a *nonlegal document* (the Declaration of Independence) to *construct a legal tradition* (free labor) and *fashion a*

57. See Bowie & Renan, *supra* note 17, at 2025–27.

58. See generally Shalev Gad Roisman, *President Trump in the Era of Exclusive Powers*, HARV. L. REV. BLOG (Apr. 12, 2025); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939 (2011).

59. See, e.g., Strauss, *supra* note 40; Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 226–27 (1991); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1167 n.62 (1992); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 559 n.63 (1994); CALABRESI & YOO, *supra* note 44, at 304; Manning, *supra* note 58, at 1979–80 (2011); Ronald J. Krotoszynski, Jr., *Transcending Formalism and Functionalism in Separation-of-Powers Analysis: Reframing the Appointments Power After Noel Canning*, 64 DUKE L.J. 1513, 1515–16 (2015); Shalev Gad Roisman, *The Limits of Formalism in the Separation of Powers*, 16 J. LEGAL ANALYSIS 178, 178–79 (2024); Roisman, *supra* note 58. There is some disagreement on how to characterize the Court's separation-of-powers jurisprudence, with many scholars arguing that it toggles between formalism and functionalism in a confusing way. See generally M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1155–82 (2000); Strauss, *supra* note 40. This Article does not dispute that characterization, focusing instead on the development of executive power through what it describes as formalism.

60. 165 U.S. 578 (1897).

61. *Lochner v. New York*, 198 U.S. 45, 57 (1905).

62. *Allgeyer*, 165 U.S. at 589–90 (quoting *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 762 (1884)).

constitutional right (the right to choose a profession) that *defeats a duly enacted statute* (the right is “inalienable,” and cannot be abridged, even in the remotest degree). This is a method that cannot be checked because it is not clearly rule-based (and even if it were, we cannot know *ex ante* what the rules are, or where they come from).⁶³ We must take judges at their word—which makes *Lochnerism* almost a kind of divination, not to mention judicial countermajoritarianism in the worst sense.

This Article argues that, in like fashion, separation-of-powers formalism is a species of *Lochnerism*, an illegitimate form of judicial reasoning that claims to apply legal reasoning to the Constitution’s questions while in fact relying on external sources, including, ostensibly, ideological or even partisan commitments.⁶⁴

Formalism, as a method of legal interpretation, is based on *deduction*: the idea that we can move from “higher” rules of law to an answer in the concrete case.⁶⁵ This Article does not claim that this is never a valid form of legal reasoning.⁶⁶ But whatever its merits in the abstract, formalism is especially ill-suited for resolving interbranch conflicts stemming from debates over the meaning of a constitution like ours.⁶⁷ This is for several reasons.

First, in all but the most obvious cases, our Constitution’s text is too vague and too abstract to yield concrete answers to specific disputes between

63. To expand further on the flaws in the reasoning, legal authority cannot be claimed from extralegal sources. For another, the *Allgeyer* Court never indicates *which* extratextual rights belong in the American “canon” or how to identify and apply them. As to this last point, in both *Allgeyer* and *Lochner*, it would have been possible for the Court to have admitted that the state laws *infringed* on some existing right to contract, but to a *permissible* degree. Instead, the Court applied the right categorically: any infringement on it was intolerable. See JAMAL GREENE, *HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART* 55–56 (2021) (advocating a “rights balancing” approach in the *Lochner* context).

64. See Brian Z. Tamanaha, *The Several Meanings of “Politics” in Judicial Politics Studies: Why “Ideological Influence” Is Not “Partisanship”*, 61 EMORY L.J. 759, 774 (2012) (distinguishing “ideological influence” on judicial reasoning, which he claims is natural and inevitable, given that all people are products of their circumstances, from partisanship, which he defines as “improperly favoring one side over the other in a given action,” which judges must not do).

65. Thomas C. Grey, *Langdell’s Orthodoxy*, 45 U. PITT. L. REV. 1, 11–12 (1983) (defining formalism as comprising two guidelines for decision-making: (1) that rules can be written so as to provide an uncontroversial basis for specific decisions following from them as applied to concrete facts—that is, an “objective test”—and (2) that these rules in turn can be derived analytically from higher principles).

66. Of course, there are myriad classic critiques of formalism in general terms. See generally Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908); Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930); Karl N. Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222 (1931); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); JEROME FRANK, *LAW AND THE MODERN MIND* (2009). For modern classics, see generally Grey, *supra* note 65; Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179 (1986).

67. Thomas Merrill, *Interpreting an Unamendable Text*, 71 VAND. L. REV. 547, 552 (2018); Katz, *supra* note 8, at 730–31.

branches.⁶⁸ Rather, judges must supply additional norms from outside the text. Professor Bijal Shah has shown that, as practiced, formalism relies on originalism and textualism to give specific words meaning; these methods have their own normative baggage, and their distorting effects increase with a text's age.⁶⁹

Moreover, formalism, with its rigid three-branch idea of the Constitution, is a poor fit for a text that never mentions a "separation of powers," let alone establishes a single version of the doctrine.⁷⁰ In most interbranch conflicts, as Professor Shalev Roisman has pointed out, formalism is of little help because (almost by definition) more than one branch has a plausible claim to possess authority to perform an action.⁷¹ In fact, because the Constitution *does* specify certain powers that cannot be shared (initiation of revenue bills, simultaneous legislative and executive officeholding), it stands to reason that formalism's inference of a "freestanding norm of strict separation"⁷² conflicts with the implication that the rest of the text, taken as a whole, permits blending.⁷³ Moreover, as a historical matter, according to the political scientist M. J. C. Vile, our framers may never have intended the "separation of powers" to be enforced as a "freestanding principle" from which subordinate rules could be deduced.⁷⁴ In fact, as Professor Vile maintained, in early state constitutions, the phrase merely conveyed a ban on plural office-holding, not a wider theory of how public power is distributed.⁷⁵

Formalists believe that the phrase "the executive power" contains specific presidential roles, including, for example, the power to decide how a law is applied, and that Congress should not intrude on this power. This was precisely the Court's logic in *Bowsher v. Synar*,⁷⁶ in which Congress had assigned a legislative officer the authority to make binding recommendations

68. See Manning, *supra* note 58, at 1943–44 (contrasting controversies relating to "encroachment" by one branch into another, which are textually indeterminate, with controversies relating to issues for which there is specific textual guidance, such as bicameralism and presentment).

69. Bijal Shah, *A Critical Take on Separation-of-Powers Formalism*, 22 GEO. J.L. & PUB. POL'Y. 441, 441–43 (2024).

70. See generally *id.*

71. Roisman, *supra* note 58, at 180.

72. Manning, *supra* note 58, at 1944–45.

73. U.S. CONST. art. I, §§ 6–7.

74. Manning, *supra* note 58, at 1944–45 ("[T]he Constitution adopts no freestanding principle of separation of powers By invalidating schemes on the ground that they offend a freestanding norm of strict separation, formalists undervalue the *indeterminacy* of the Vesting Clauses relative to Congress's authority to shape government under the Necessary and Proper Clause. In so doing, formalists attribute to parts of the document a specificity of purpose that the text may not support."); Jeremy Waldron, *Separation of Powers in Thought and Practice?*, 54 B.C. L. REV. 433, 437 (2013).

75. VILE, *supra* note 26, at 147 (arguing that the recognition of separation of powers in the early state constitutions "'was verbal merely,' and that in practice it meant little more than a prohibition on plurality of office" (quoting Edward S. Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 AM. HIST. REV. 511, 514 (1925))).

76. 478 U.S. 714 (1986).

to the president regarding budget cuts.⁷⁷ The Court reasoned that “[i]nterpreting a law enacted by Congress to implement the legislative mandate is the *very essence* of ‘execution’ of the law,” and thus Congress had “intruded into the executive function.”⁷⁸ But the Court did not say much about why specific decisions on spending were *executive*, not *legislative* in nature, or why the power could not be shared between the two branches.

A few years ago, a Harvard Law School symposium announced its purpose with a statement that “the rejection of formalism is the beginning of all wisdom.”⁷⁹ But if so, this message has not reached the Supreme Court. In 2010, the Court concluded that “the separation of powers” barred the appointment of an independent director of the Federal Housing Finance Agency, created in 2010 to oversee the servicing of housing mortgages.⁸⁰ In *Zivotofsky v. Kerry*,⁸¹ the Court held that the president had a diplomatic power to recognize other governments, a power Justice Antonin Scalia objected had no “footing in the Constitution.”⁸² In *Trump v. United States*,⁸³ the Court famously found presidential immunity on the grounds that “the executive power” mandated an energetic executive;⁸⁴ Justice Sotomayor fulminated that this conclusion was “atextual, ahistorical, and unjustifiable.”⁸⁵ Today, the Court is practicing in its separation-of-powers cases the same inscrutable judicial alchemy found in *Lochner*—a kind of formalism where rules are unknowable in advance, untraceable, and unpredictably applied.

II. HISTORY: THE SEPARATION OF POWERS FROM COOPERATION TO ISOLATION

Writing in the fabled 1952 case, *Youngstown Sheet & Tube Co. v. Sawyer*,⁸⁶ Justice Robert H. Jackson—a longtime New Dealer and former attorney general who knew the executive branch better, perhaps, than anyone else on the bench⁸⁷—admitted that he was struggling to find useful guidance

77. Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, tit. II, 99 Stat. 1038 (codified as amended in scattered sections of 2, 31, and 42 U.S.C.).

78. *Bowsher*, 478 U.S. at 732–34 (emphasis added).

79. John Goldberg, Henry Smith, Brian Leiter, Anthony Sebok & Catharine Wells, *Who’s Afraid of Christopher Columbus Langdell [or What Is Formalism and Why Must We Hate It]?*, HARV. L. SCH. BICENTENNIAL (Oct. 27, 2017), <https://200.hls.harvard.edu/events/hls-in-the-world/reconsidering-first-year-law-school-classic-cases/> [https://perma.cc/8PXS-FSL9]; see also Katz, *supra* note 8, at 693–94.

80. *Collins v. Yellen*, 141 S. Ct. 1761, 1770 (2020).

81. 576 U.S. 1 (2014).

82. *Id.* at 14 (Scalia, J., dissenting).

83. 144 S. Ct. 2312 (2024).

84. *Id.* at 2329.

85. *Id.* at 2356 (Sotomayor, J., dissenting).

86. 343 U.S. 579 (1952).

87. By this I mean the famed realism that endeared Justice Jackson to scores of readers, not the length of his government service, as several of Justice Jackson’s colleagues on the bench had also served in the administrations of Presidents Harry S. Truman and Franklin D. Roosevelt, including Chief Justice Fred M. Vinson, and Associate Justices Tom C. Clark and Stanley Reed. On Justice Jackson’s realism, see, for example, Richard A. Posner, *Realism*

when it came to the legality of a wartime executive order issued by President Harry S. Truman.⁸⁸ The Constitution said very little.⁸⁹ Judicial decisions, he felt, treated presidential power unrealistically.⁹⁰ Scholars had produced competing evidence that more or less canceled itself out.⁹¹ Ultimately, Justice Jackson decided to sketch out a *realistic* picture of the presidency grounded in the reality he had lived as a civil servant.⁹² “Presidential powers are not fixed,” he wrote, “but fluctuate” depending on the situation and Congress’s collective judgment.⁹³ The powers of the three branches cannot be understood abstractly, outside of context, or in isolation from one another.⁹⁴ “[T]he Constitution diffuses power,” Justice Jackson explained, but “it also contemplates that practice will integrate the dispersed powers into a workable government.”⁹⁵

For most of American history, government has resembled what Justice Jackson described, a sequence of regimes drawn up by Congress in which the branches worked together in different ways to solve new problems as they arose.⁹⁶ With each succeeding era, Congress enlisted new partners in its experiments, finding each time, as the political scientist Stephen Skowronek writes, that the separation of powers behaved less as a “system of mutual restraint” than as “a precondition for inventing new ways to collaborate.”⁹⁷ Inevitably, this meant friction as well as cooperation. Difficult as it is to imagine, however, for the bulk of our history, the courts stayed out of these

About Judges, 105 Nw. U. L. REV. 577, 577, 586 (2011) (arguing that “a significant fraction” of appellate cases “cannot be decided by legalist methods but require . . . moral and political reasoning” and that Justice Jackson is a helpful example of such an approach); Matthew Steilen, *Life and Afterlife in the Steel Seizure Case*, 70 BUFF. L. REV. 875, 876 (2022) (arguing that “Jackson’s concurrence has acquired a kind of democratic authority” in part thanks to its “broad, theoretical language and flexible framework”).

88. *Youngstown*, 343 U.S. at 634 (Jackson, J., concurring) (“A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves.”).

89. *Id.* at 634–35.

90. *Id.* at 634 (stating that judicial decisions on the executive power “seem unduly to accentuate doctrine and legal fiction”).

91. *Id.*

92. *Id.* at 634–35 (reflecting that lessons learned from his time as “legal adviser to a President in time of transition and public anxiety . . . probably are a more realistic influence on my views than the conventional materials of judicial decision”).

93. *Id.* at 635.

94. *Id.* (“The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context.”).

95. *Id.*

96. On Congress’s power to structure the government, and therefore the separation of powers, too, see CHAFETZ, *supra* note 30, at 9–44. For sources providing a regime theory of American constitutional history, see ACKERMAN, *supra* note 11, at 272–90; BRUCE ACKERMAN, *WE THE PEOPLE: VOLUME 2: TRANSFORMATIONS* 3–31 (1998); STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON* 3–31 (2d ed. 1997). See generally JACK M. BALKIN, *THE CYCLES OF CONSTITUTIONAL TIME* (2020). On the rise of the modern presidency as one example, see generally KATZ, *supra* note 17.

97. SKOWRONEK, *supra* note 30 (manuscript at 178).

conflicts, allowing them to be channeled through political checks and balances.

Several decades ago, our constitution's flexibility began to wane with the revival of formalism in the courts and the executive branch during the Reagan era. This part reconstructs the rise of Lochnerism as a method of judicial control of the separation of powers during the 1980s. With the legitimacy of government itself under question today, it is worth recovering a larger history of institutional adaptation—and how it fell into the cross fires of the judiciary as well.

A. *The Old Way: Political Statecraft
and Collaboration*

It would be fair to say that America's greatest policy successes—and many of its failures—were the product of cooperation between the branches. We could consider Alexander Hamilton's plan for American finances; the Louisiana Purchase and westward expansion; the development of the railroads; the Civil War and Reconstruction; removal of Native Americans; the rise of American imperialism; the building of an administrative state; the Civil Rights era, including the rollout of Social Security and Medicare; and so on.

These successive episodes were the product of a specific idea of how the constitution was to work. As Professors Nikolas Bowie and Daphna Renan write, our framers crafted a “system in which each institution of government enforced its own prerogatives through political negotiation and statecraft.”⁹⁸ Constitutional meaning was “distilled” through negotiation between the branches, not “declared” by courts.⁹⁹ This was true even after *Marbury v. Madison*¹⁰⁰ emphatically asserted a judicial power to invalidate statutes that conflicted with judges' interpretation of the Constitution: for most of the next century, the Court deferred to Congress and the president's judgment about what the relationship between them should legally entail.¹⁰¹

The growth of a regulatory state in the late nineteenth century disturbed this *modus vivendi* only slightly. Admittedly, Congress and the states' experiments with new regulatory bodies, like independent regulatory commissions, could provoke a sharp reaction by courts wary of incursions into the free market, especially where administrators could seize property or

98. Bowie & Renan, *supra* note 17, at 2025.

99. SKOWRONEK, DEARBORN & KING, *supra* note 28, at 33.

100. 5 U.S. (1 Cranch) 137 (1803).

101. Bowie & Renan, *supra* note 17, at 2026. During the nineteenth century the Supreme Court struck down a grand total of twenty-two federal laws, out of which only a handful can be classified as involving the “separation of powers” in the present-day sense. See *Table of Laws Held Unconstitutional in Whole or in Part by the Supreme Court*, LIBR. OF CONG., <https://constitution.congress.gov/resources/unconstitutional-laws/> [<https://perma.cc/DBG9-EVTJ>] (last visited Oct. 19, 2025); see also Bowie & Renan, *supra* note 17, at 2025 (“[J]uristocratic separation of powers . . . took control of the American imagination only in 1926, after centuries in which a profoundly different understanding of the separation of powers was dominant.”).

reduce its value with less than full judicial process.¹⁰² Courts could be wary, too, of laws that give a leg up to certain participants in the free market: one famous example is *Lochner*'s disapproval of a maximum work hours law for bakers.¹⁰³

But for the most part, when it came to the actual design and operations of the new regulatory state—which was now doing everything from banning mislabeled butter substitutes, to building bridges, to deciding what lands sheep could graze on—the Court's bark was worse than its bite.¹⁰⁴ The vast majority of agency actions, and nearly all statutory delegations, were left intact. The early New Deal saw the Court make one last stand against a pair of legislative schemes that allowed agencies regulating the coal, meatpacking, and agricultural sectors to issue rules that *seemed* like laws or to exercise other powers felt to be “legislative” in nature.¹⁰⁵ But barely a year later, facing a unified political mass movement, the Court dropped its resistance.¹⁰⁶ Anti-regulatory doctrines like the “non-delegation doctrine” were buried, and institutional experimentation was allowed to continue per Congress's stated intentions.¹⁰⁷

Nor did courts seek to dictate much in the way of how much process was “due” by agencies to citizens. As late as the end of World War II, there was no transsubstantive body of “administrative law” of which to speak, and the existing limits on agency processes consisted mostly of in-house rules written

102. Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1407–12 (2010); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1212–15 (1986).

103. See generally ROBERT C. POST, *THE TAFT COURT: MAKING LAW FOR A DIVIDED NATION, 1921–1930* (2024); HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE & DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993).

104. Mashaw, *supra* note 102, at 1464 (“Given the paucity of appellate review, the basic rule of public administrative law that emerges from the judicial decisions of the nineteenth century is that administrative discretion will not be disturbed by judicial intervention.”); Katz, *supra* note 17, at 778–81 (finding no pre-1930s cases that invalidated agency action for violating the separation of powers).

105. See David P. Currie, *The Constitution in the Supreme Court: The New Deal, 1931–1940*, 54 U. CHI. L. REV. 504, 516–41 (1987) (discussing the Court's last stand against New Deal era regulation). As examples of cases in which the Court initially took a stand against the New Deal, see generally *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *United States v. Butler*, 297 U.S. 1 (1936).

106. Whether the Court “switched” its pre-New Deal position has been a matter of hot debate among New Deal scholars. See BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998) (finding no switch). Compare Daniel E. Ho & Kevin M. Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69 (2010) (finding empirical evidence that there was a switch in time), with Laura Kalman, *The Constitution, the Supreme Court, and the New Deal*, 110 AM. HIST. REV. 1052, 1055 (2005) (summarizing the debate).

107. *Gundy v. United States*, 139 S. Ct. 2116, 2130–31 (2019) (Alito, J., concurring) (“[S]ince 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards.”). The key cases include *Nebbia v. New York*, 291 U.S. 502 (1934), and *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). For a classic telling of this story, see ACKERMAN, *supra* note 11, at 49–50, 105–30; ACKERMAN, *supra* note 96, at 279–311.

by individual agencies or departments themselves.¹⁰⁸ The end of the Second World War brought a reconsideration of the system, albeit only a partial one.¹⁰⁹ Congress had little interest in demolishing the administrative state, but with war and the Great Depression mostly past, it realized that it was in danger of being left on the sidelines if it did not act to empower itself as a coequal superintendent.¹¹⁰ America's complex of agencies had grown too large and too sprawling to be left without top-down control. Typically for the age, Congress would decide that, rather than ponder too deeply *which* political branch the administrative state would be responsive to, a "more is more" approach would be best—it would be responsive to all of them.

Hammering out statute after statute—including the Legislative Reorganization Act of 1946,¹¹¹ the Employment Act of 1946,¹¹² the Administrative Procedure Act of 1946, and the National Security Act of 1947¹¹³—Congress enlisted the three branches in a collective project of supervision that has been called the "system of 1946."¹¹⁴ Under the new system, consistent with its new stature as the face of American government, the executive was given sweeping power to make policy and to centralize decisions emerging from agencies.¹¹⁵ Congress willingly drew up new tools for the president like the Executive Office of the President, the Council of Economic Advisers, plus a new national military establishment in the National Security Council, Central Intelligence Agency (CIA), Joint Chiefs of Staff, and Department of Defense.¹¹⁶ Courts were brought into the system by the APA, which gave agencies a mandate to comply with a set of transsubstantive procedures (applicable to all agencies) whenever they made rules or held hearings; the APA also instructed courts to invalidate any

108. See JERRY L. MASHAW, RICHARD A. MERRILL & PETER M. SHANE, *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 150–68 (6th ed. 2009).

109. SKOWRONEK, *supra* note 30 (manuscript at 112–14, 193) (discussing the APA as a solution to the problem of accommodating administrative power under the Constitution).

110. *Id.* at 113–14.

111. Ch. 753, 60 Stat. 812 (codified as amended in scattered sections of 2 and 33 U.S.C.).

112. Ch. 33, 60 Stat. 23 (codified as amended at 15 U.S.C. §§ 1021–1024).

113. Ch. 343, 61 Stat. 495 (codified as amended in scattered sections of 50 U.S.C.).

114. Stephen Skowronek & Karen Orren, *The Adaptability Paradox: Constitutional Resilience and Principles of Good Government in Twenty-First-Century America*, 18 *PERSP. ON POL.* 354, 358 (2020); see JOHN A. DEARBORN, *POWER SHIFTS: CONGRESS AND PRESIDENTIAL REPRESENTATION* 4–5 (2021).

115. On the history of Congress voluntarily building up presidential capacity in this period, see DEARBORN, *supra* note 114, at 11, 72–125; ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR* 227–64 (1995); STEPHEN KEMP BAILEY, *CONGRESS MAKES A LAW: THE STORY BEHIND THE EMPLOYMENT ACT OF 1946*, at 1–35 (3d ed. 1957).

116. At the same time, Congress denied some of the president's requests, protecting expertise and independence, including independent regulatory commissions and audits of federal expenditures. See, e.g., Reorganization Act of 1939, ch. 36, 53 Stat. 561. Likewise, the Hatch Act required that administrators be insulated from politics, so as to prevent undue presidential influence over civil servants. See Hatch Political Activity Act, ch. 410, 53 Stat. 1147 (1939). The APA also rejected a suggestion by "presidentialists" for a Federal Office of Administrative Procedure directly answerable to the White House. See Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.). At the same time, there is no denying that this Congress-led expansion of the president's organizational capacity was "monumental." See DEARBORN, *supra* note 114, at 5.

agency action that failed to meet these procedures or that was otherwise “arbitrary and capricious.”¹¹⁷ Individuals aggrieved by agency action were guaranteed access to judicial review provided they had already exhausted administrative remedies.¹¹⁸ Congress acted to ensure it could hold its own, too, boosting the capacity of House and Senate standing committees to “exercise continuous watchfulness” over agency programs.¹¹⁹ Congress also legislated itself new staff to draft technically complex statutes, another bid to counterbalance the technical advantages it had now vested in the executive branch.¹²⁰

In its way, the system of 1946 signaled that running the country was a cooperative enterprise involving legislators, executive branch officials, and technocrats alike—and for the most part, our government still reflects the compromises Congress reached eighty years ago. This system has had its critics, especially on the bench: In the 1960s, the Warren Court’s “rights revolution” gave new litigants a foothold in the formulation of agency policy, while the 1970s saw judges start to engage in “hard look” review of agency decision-making.¹²¹ But these challenges left the core of the administration intact. With the rise of an emboldened conservative movement in the early 1980s, the system started to fracture.

117. 5 U.S.C. § 706(2)(A). During its passage, the APA triggered fierce debate between business interests concerned for due process and property protections, which favored stricter judicial review of agencies, and reformers fearing a hostile takeover of the administration by the courts. Congress viewed the APA as striking a sensible balance between them. For historical accounts of the APA’s origins, see generally Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447, 449 (1986); Joanna Lynn Grisinger, *Law in Action: The Attorney General’s Committee on Administrative Procedure*, 20 J. POL. HIST. 379 (2008); McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L., ECON. & ORG. 180 (1999); George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996); Christopher J. Walker, *The Lost World of the Administrative Procedure Act: A Literature Review*, 28 GEO. MASON L. REV. 733 (2021); Roni A. Elias, *The Legislative History of the Administrative Procedure Act*, 27 FORDHAM ENV. L. REV. 207 (2016).

118. See Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (1990) (codified as amended in scattered sections of the U.S. Code).

119. See Legislative Reorganization Act of 1946, ch. 753, § 136, 60 Stat. 812, 832; George B. Galloway, *The Operation of the Legislative Reorganization Act of 1946*, 45 AM. POL. SCI. REV. 41, 59 (1951).

120. See Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 812.

121. On administrative review in the Warren era, see Roger Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525, 525 (1972); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1714–16 (1975). See generally Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945-1970*, 53 VAND. L. REV. 1389 (2000); Sidney A. Shapiro, *United Church of Christ v. FCC: Private Attorneys General and the Rule of Law*, 58 ADMIN. L. REV. 939 (2006). On the rise of hard-look review, see Stewart, *supra* note 121, at 1802–05; Gillian E. Metzger, *The Story of Vermont Yankee*, in ADMIN. L. STORIES 124, 126 (Peter Strauss ed., 2005).

*B. The New Way: Juristocratic
Isolation (1981 to Present)*

At the height of American state-building, the probusiness Republican Party had been, if not exactly enamored with the administrative state, at least tolerant of it.¹²² Moderates like Governor Thomas Dewey and Vice President Nelson Rockefeller captured the presidential nomination in every election year between 1948 and 1976 except 1964, when Arizona Senator Barry Goldwater won the nomination, then lost the general election in a landslide.¹²³ Early in his presidency, Richard M. Nixon governed as a moderate, signing off on the creation of the U.S. Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA) and the U.S. Consumer Product Safety Commission, and even coming out in support of public health insurance.¹²⁴ But over his two terms, President Nixon grew frustrated at his own agencies, particularly the U.S. Department of Education and the DOJ's Civil Rights Division, which insisted on enforcing race-based remedial programs that the South disfavored.¹²⁵ President Nixon turned to a new strategy of governance famously dubbed the "administrative presidency."¹²⁶ Circumventing Congress and acting unilaterally through the bureaucracy, President Nixon filled influential agency positions with loyalists, prevented career civil servants from performing their jobs in agencies and programs he opposed, and impounded agency funds to cripple their performance.¹²⁷

After revelations broke that President Nixon had personally ordered the break-in and wiretapping of his Democratic rivals in the 1972 election, the disgraced president left the scene, and a lasting switch in the parties' views of the presidency occurred.¹²⁸ As the New Deal and Great Society passed out of memory and Vietnam and Watergate took their place, liberals soured on presidential power. They lined up behind Congress and a series of

122. See generally PETER A. SWENSON, *CAPITALISTS AGAINST MARKETS: THE MAKING OF LABOR MARKETS AND WELFARE STATES IN THE UNITED STATES AND SWEDEN 191–302* (2002). For sources telling this story in an earlier period, see generally ALFRED DUPONT CHANDLER JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* (2002); GABRIEL KOLKO, *RAILROADS AND REGULATIONS, 1877–1916* (2d ed. 2015).

123. See Howell & Moe, *supra* note 36, at 157; DANIEL SCHLOZMAN & SAM ROSENFELD, *THE HOLLOW PARTIES: THE MANY PASTS AND DISORDERED PRESENT OF AMERICAN PARTY POLITICS* 145–53 (Paul Frymer, Suzanne Mettler, Eric Schickler, Ira Katznelson, Theda Skocpol & Martin Shefter eds., 2024).

124. See Howell & Moe, *supra* note 36, at 13; see also Richard P. Nathan, *A Retrospective on Richard M. Nixon's Domestic Policies*, 26 PRES. STUD. Q. 155, 161 (1996).

125. See generally John A. Dearborn, *Contesting the Reach of the Rights Revolution: The Reagan Administration and the Unitary Executive*, 39 STUD. AM. POL. DEV. 83 (2025).

126. See Richard P. Nathan, *The "Administrative Presidency"*, NAT'L AFFAIRS, Summer 1976, at 40, 40; Christopher Kelley, *The Unitary Executive and the Clinton Administration*, in *THE UNITARY EXECUTIVE AND THE MODERN PRESIDENCY* 107, 109 (Ryan J. Barilleaux & Christopher S. Kelley eds., 2010); Dearborn, *supra* note 125, at 13.

127. See generally RICHARD P. NATHAN, *THE PLOT THAT FAILED: NIXON AND THE ADMINISTRATIVE PRESIDENCY* (1975) (describing the rise of this model as a script patterned on President Nixon's clashes with his agencies).

128. See Howell & Moe, *supra* note 36, at 157.

statutes—the War Powers Resolution¹²⁹ of 1973, the Congressional Budget and Impoundment Control Act of 1974,¹³⁰ the Ethics in Government Act of 1978,¹³¹ the Inspector General Act of 1978,¹³² and the Presidential Records Act of 1978¹³³—intended to break a pattern of high-handed presidential behavior.¹³⁴ Conservatives began to rethink their priorities, too, rankled by Congress’s disciplinarian turn and starting to recognize, after President Nixon’s example, that an antigovernment conservative in the White House could be used to destroy the dominant progressive components of the administrative state.¹³⁵ John Hart, a senior editor of the *National Review*, wrote in a 1974 article that conservatives needed a strong president “who is willing virtually to go to war within his own executive branch.”¹³⁶

Cut short by Watergate, President Nixon’s administrative approach was famously called “the plot that failed.”¹³⁷ But in the grand scheme of things, it did not fail. It established a model that future presidents would build on and deploy. By the time former California Governor Ronald Reagan was elected president in a landslide, a plan had been hatched.¹³⁸ The president’s formal powers would need to be not just used but vastly expanded.¹³⁹ For that, a new constitutional theory was needed.

129. Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541–1548).

130. Pub. L. No. 93-344, 88 Stat. 297 (codified as amended in scattered sections of 2 U.S.C.).

131. Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended in scattered sections of the U.S. Code).

132. Pub. L. No. 95-452, 92 Stat. 1101 (codified as amended in scattered sections of 5 U.S.C.).

133. Pub. L. No. 95-591, 92 Stat. 2523 (codified as amended in scattered sections of 44 U.S.C.).

134. On Congress’s suspicions of the president and the legislative resurgence, see Andrew Rudalevige, *The “Contemporary Presidency: The Decline and Resurgence and Decline (and Resurgence?) of Congress”: Charting a New Imperial Presidency*, 36 PRES. STUD. Q. 506, 509 (2006). See generally JAMES L. SUNDQUIST, *THE DECLINE AND RESURGENCE OF CONGRESS* 199–416 (1981).

135. See Howell & Moe, *supra* note 36, at 157–58; Stephen Skowronek, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070, 2092 (2009). In 2016, former Vice President Dick Cheney—a staunch conservative who, as a staffer in the administration of President Gerald R. Ford, had witnessed Congress’s disciplining attempts—told Professor Philip Zelickow that, on his view, “the combination of Vietnam and Watergate had significant negative impact on the Presidency,” solidifying his belief that Congress had “infringed upon executive prerogatives.” *Richard B. Cheney Oral History: Transcript*, MILLER CTR., <https://millercenter.org/the-presidency/presidential-oral-histories/richard-b-cheney-oral-history> [https://perma.cc/VQJ8-LN SC] (last visited Sep. 4, 2025).

136. Howell & Moe, *supra* note 36, at 158.

137. See generally NATHAN, *supra* note 127.

138. For a source recounting the development of these ideas firsthand, see CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* 17–18 (1991).

139. Dearborn, *supra* note 125, at 13 (showing that under President Reagan, disputes over civil rights enforcement and affirmative action not only led to assertions of presidential power but to increasingly formalistic assertions about the president’s constitutional authority). Relatedly, Professor Calvin TerBeek has argued that the revivalist strain of originalism that arose in the 1970s and 1980s was, in fact, a backlash to the Warren Court’s famous school

Built around the president's powers, the theory was carried forward by a conservative legal movement that built up networks within law schools, professional associations, think tanks, and the judiciary.¹⁴⁰ Known as "unitary executive theory" (UET), named after language in Alexander Hamilton's *Federalist 70* on "unity" in the executive,¹⁴¹ the theory claims that the president's powers are indivisible, preclude statutory limitation, and include a power to fire all executive branch officers.¹⁴² Patterned after President Nixon's clashes with his own agencies, UET first appeared in a handful of law review articles in the mid-1970s; took shape as a legal mantra in the Reagan DOJ; then made its way to universities, the private sector, and, eventually, the Supreme Court.¹⁴³ Along the way, as Professor Amanda L. Hollis-Brusky writes, UET matured "from a rather limited critique of the modern administrative state into a full-blown prescription for presidential power; what [political scientist] Robert J. Spitzer has described as 'Article II on Steroids.'"¹⁴⁴

Now-familiar players had a vital role in UET's development. This included the brand-new Federalist Society, which held its inaugural symposium at the Yale Law School in 1982. The group managed to draw some 200 of the country's most notable right-leaning thinkers, including Antonin Scalia, a then-law professor making a name for his critiques of agency rulemaking; famed torts professor Robert Bork; and President Reagan's assistant attorney general Theodore B. Olson, who told the crowd, "I sense that we are at one of those points in history where the pendulum may be beginning to swing in another direction."¹⁴⁵ Over the next decade, the

integration decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). See Calvin TerBeek, "Clocks Must Always Be Turned Back": *Brown v. Board of Education* and the Racial Origins of Constitutional Originalism, 115 AM. POL. SCI. REV. 821, 821 (2021).

140. See TELES, *supra* note 37.

141. THE FEDERALIST NO. 70 (Alexander Hamilton), reprinted in HAMILTON, MADISON & JAY, *supra* note 26, at 355; JEFFREY P. CROUCH, MARK ROZELL & MITCHEL A. SOLLENBERGER, THE UNITARY EXECUTIVE THEORY: A DANGER TO CONSTITUTIONAL GOVERNMENT 18–22 (2020); Ashraf Ahmed, Lev Menand & Noah A. Rosenblum, *The Making of Presidential Administration*, 137 HARV. L. REV. 2131, 2186–98 (2024); Skowronek, *supra* note 135, at 2075.

142. See generally CALABRESI & YOO, *supra* note 44; Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756 (2023).

143. See Hollis-Brusky, *supra* note 38, at 198–200 (stating that under President Reagan, UET "took shape from the primordial soup of loosely formed ideas and premises that had hitherto defined it"); TELES, *supra* note 37, at 11–12 (describing a "supply side" of litigants who "create legal ideas and strategies" to bring into the courtroom).

144. Hollis-Brusky, *supra* note 38, at 200 (quoting ROBERT J. SPITZER, SAVING THE CONSTITUTION FROM LAWYERS 92–93 (2008)).

145. Michael Kruse, *The Weekend at Yale That Changed American Politics*, POLITICO MAG. (May 8, 2020), <https://www.politico.com/magazine/story/2018/08/27/federalist-society-yale-history-conservative-law-court-219608/> [<https://perma.cc/Y4TK-B7EJ>]; David Montgomery, *Conquerors of the Courts*, WASH. POST MAG. (Jan. 2, 2019), <https://www.washingtonpost.com/news/magazine/wp/2019/01/02/feature/conquerors-of-the-courts/> [<https://perma.cc/DFE2-QHLV>]. Professor Steven G. Calabresi, one of the founding members, "said that notion crystallized after the 1980 election of Ronald Reagan when a professor asked a class of 90 who had voted for the new president. 'I and one other person raised our hands,' Calabresi said." Michael A. Fletcher, *What the Federalist Society Stands*

Federalist Society built a symbiotic relationship with the Reagan DOJ.¹⁴⁶ Administration officials spoke at Federalist Society conferences, lending them visibility, while the society spread conservative ideas at law schools and served as a talent pool for the administration.¹⁴⁷ DOJ top brass invested considerable resources into transforming “the broader terrain” of constitutional thought, hosting academic seminars and long-term planning retreats, and even making its Office of Legal Policy into a “vibrant constitutional think tank.”¹⁴⁸ One DOJ alumnus, Federalist Society cofounder Steven G. Calabresi, reflected that in these years, the department “had the feel of a faculty.”¹⁴⁹

Within the executive branch, a cadre of young lawyers brought new ideas on how the president could dismantle the welfare-bureaucratic state, some radical enough to shock the old guard.¹⁵⁰ The most important was *centralized regulatory review*, rolled out in the iconic Executive Order (EO) 12,291,¹⁵¹ which mandated that all significant agency rules had to meet a cost-benefit analysis performed by a small team in the Office of Management and Budget (OMB).¹⁵² Despite its dry, technical formulation, EO 12,291 “revolutionized” the rulemaking process. As legal scholar Peter M. Shane puts it, the executive order “tilted the playing field in the direction of deregulation” and made the president less an “overseer” of agency policy and more a “decider.”¹⁵³

Centralized regulatory review in the policy sphere was a close relative to unitary executive theory in the constitutional sphere, and by President Reagan’s second term, UET themes cut through DOJ communications.¹⁵⁴ One Office of Legal Counsel (OLC) memo asserted a presidential privilege

For, WASH. POST (July 29, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/28/AR2005072801779.html> (on file with the *Fordham Law Review*).

146. Kruse, *supra* note 145; see also AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION 18–19 (2015).

147. Hollis-Brusky, *supra* note 38, at 214–15. In fact, of seventy-six speakers listed on the published agendas of Federalist Society national meetings from 1981 to 1988, nineteen of those speakers (equivalent to 25 percent) would serve in the Reagan administration. *Id.* at 215.

148. *Id.* at 202.

149. *Id.* at 203.

150. MICHAEL AVERY & DANIELLE McLAUGHLIN, THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS 66 (2013).

151. Exec. Order No. 12,291, 3 C.F.R. § 127 (1981), reprinted in 5 U.S.C. § 601 (1982).

152. On the story behind and the significance of EO 12,291, see CASS R. SUNSTEIN, THE COST-BENEFIT REVOLUTION 6 (2019) (calling EO 12,291 the most important moment in the cost-cutting revolution sweeping government); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2247 (2001); Jerry Louis Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REGUL. 549, 555 (2018).

153. PETER M. SHANE, MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 150 (2016). For contemporary critiques of the EO, see Morton Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291*, 80 MICH. L. REV. 193, 193 (1981); Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1062 (1986).

154. Hollis-Brusky, *supra* note 38, at 199.

to ignore subpoenas: the administration had “nothing to apologize for when it legitimately resist[ed]” the “erosion of presidential prerogatives by repeated production of information which should be properly withheld.”¹⁵⁵ An OLC letter to the U.S. Senate Committee on the Judiciary warned that a bill barring the Cabinet from staying on between presidential terms was “at odds with separation of powers principles.”¹⁵⁶ A 1988 memo produced in response to a statute ordering the Centers for Disease Control’s director to publicize information on the AIDS epidemic proclaimed in now-familiar language:

As head of a unitary executive, the President controls all subordinate officers within the executive branch. The Constitution vests in the President of the United States “The executive Power,” which means the *whole* executive power Any attempt by Congress to constrain the President’s authority to supervise and direct his subordinates in this respect, violates the Constitution.¹⁵⁷

Two young lawyers socialized into these views were an assistant to the attorney general named John Roberts and a then-deputy assistant attorney general named Samuel Alito.¹⁵⁸ In 1984, Roberts ghostwrote an article for President Reagan exalting the UET view of the office, complete with references to the president’s “popular mandate” to “speak for all the people” and “pervasive” and nondelegable responsibility to administer the executive branch.¹⁵⁹ For his part, Alito penned a memo in 1986 arguing that the president should make “fuller use” of signing statements to “shape the law,” even if this “new” use “will not be warmly welcomed by Congress.”¹⁶⁰ Notably, the memo seemed to acknowledge—as its proponents generally do not today—that UET was a constitutional novelty, not originalist doctrine.¹⁶¹

155. Its author was none other than OLC head Theodore B. Olson. See Jonathan Shaub, *Previously Undisclosed OLC Opinions Illuminate the Growth of Executive Power*, LAWFARE (Sep. 23, 2022), <https://www.lawfaremedia.org/article/previously-undisclosed-olc-opinions-illuminate-growth-executive-power> [<https://perma.cc/9UEP-LV4D>].

156. This letter was signed by a thirty-nine-year-old John Bolton, then the Assistant Attorney General for Legislative Affairs. Letter from John Bolton, Assistant Att’y Gen., Off. Legis. Aff., to Joe Biden, Chairman, S. Comm. Judiciary, Constitutionality of Proposed Legislation Requiring Renomination and Reconfirmation of Executive Branch Officers Upon the Expiration of a Presidential Term (Mar. 6, 1987).

157. Statute Limiting the President’s Authority to Supervise the Director of the Centers for Disease Control in the Distribution of an AIDS Pamphlet, 12 Op. O.L.C. 47, 48 (1988).

158. PETER M. SHANE, *DEMOCRACY’S CHIEF EXECUTIVE: INTERPRETING THE CONSTITUTION AND DEFINING THE FUTURE OF THE PRESIDENCY* 6 (2022).

159. Ronald W. Reagan, *The Presidency: Roles and Responsibilities*, NAT’L F., Fall 1984, at 22, 23. For an argument that unitary executive theory’s idea of an originalist president with a “democratic mandate” is an anachronism dating to the twentieth century, not the founding, see Katz & Rosenblum, *supra* note 17, at 2247.

160. Memorandum from Samuel A. Alito, Jr., Deputy Assistant Att’y Gen., Off. of Legal Counsel, to the Litig. Strategy Working Grp., Using Presidential Signing Statement to Make Fuller Use of the President’s Constitutionally Assigned Role in the Process of Enacting Law 1–2 (Feb. 5, 1986), <https://www.archives.gov/files/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf> [<https://perma.cc/NR5B-MWVT>].

161. *Id.* at 2.

Around this time, the new “formalist” arguments began to trickle into case law.¹⁶² A Supreme Court whose center had shifted to the right proved increasingly willing to reprimand Congress for using its power to structure agencies in ways that it felt violated the separation of powers.¹⁶³ Within a decade, the Court had blocked Congress from appointing members of a nonpartisan election oversight board;¹⁶⁴ struck down the legislative veto, which had allowed Congress to override agency decisions by vote of a single house;¹⁶⁵ and overturned a statute authorizing a legislative official to give the president binding recommendations for cuts to the federal budget, a scheme that, per the Court, unconstitutionally “intruded into the executive function.”¹⁶⁶

On the administrative side, rising scrutiny of agencies brought a brief judicial flirtation with “hard-look review,” then a reversal. The 1983 *Motor Vehicles Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*¹⁶⁷ decision dealt the Reagan administration a surprise loss by blocking an attempt to reverse a Carter-era regulation requiring airbags in new cars.¹⁶⁸ *State Farm*’s stern gaze at the administration’s “nonexistent” analysis of airbags’ safety benefits seemed to signal that courts would put more muscle behind the APA’s ban on “arbitrary or capricious” action when it came to swift policy reversals.¹⁶⁹ A year later, however, the Court itself appeared to reverse course when the fabled *Chevron, U.S.A. v. National Resources Defense Council*¹⁷⁰ upheld a 1981 rule by the Reagan EPA exempting certain parts of emissions-producing plants from regulation under the Clean Air Act Amendments of 1977.¹⁷¹ *Chevron*’s famous two-step formula for reviewing agency action instructed courts to decide whether Congress had explicitly delegated decision-making authority to the agency, and if so, whether the

162. For a source characterizing the Court’s separation-of-powers decisions in such terms, see generally Strauss, *supra* note 40. For examples, see Brief for Appellant, *Buckley v. Valeo*, 424 U.S. 1 (1976) (No. 75-436) (authored by John R. Bolton); *Nixon v. Adm’r of Gen. Servs.*, 403 U.S. 425, 505 (1977) (Burger, C.J., dissenting) (“To ‘punish’ one person, Congress—and now the Court—tears into the fabric of our constitutional framework.”); *id.* at 545 (Rehnquist, J., dissenting) (stating that “today’s decision countenances the power of any future Congress to seize the official papers of an outgoing President as he leaves the inaugural stand” and is a “clear violation of the constitutional principle of separation of powers”).

163. Chief Justice Burger replaced Chief Justice Warren in 1969; consistent New Dealers Justices Stanley F. Reed and Hugo Black were succeeded by Justices Byron R. White (1962) and Lewis F. Powell Jr. (1971), respectively; and liberal lion Justice Arthur J. Goldberg’s seat was filled by the moderate Justice Harry Blackmun in 1970. Two years later, the centrist Justice John Marshall Harlan’s chair was taken by conservative Justice Rehnquist.

164. *Buckley*, 424 U.S. at 118.

165. See generally *INS v. Chadha*, 462 U.S. 919 (1983).

166. *Bowsher v. Synar*, 478 U.S. 714, 734 (1986); see also *Clinton v. City of New York*, 524 U.S. 417 (1998) (striking down a line-item veto legislated by Congress to allow the president to make specific cuts to the budget).

167. 462 U.S. 29 (1983).

168. *Id.* at 37.

169. *Id.* at 42–44, 48.

170. 467 U.S. 837 (1984), *overruled by*, *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024).

171. Pub. L. No. 95-95, 91 Stat. 685 (codified as amended in scattered sections of 15 and 42 U.S.C.). See generally *Chevron*, 467 U.S. 837.

agency's interpretation of its authority was permissible within the statute's terms.¹⁷² If the answer to either was yes, judges were to defer to the agency.¹⁷³

Taken together, these two lines of cases suggest that the 1980s-era Court was preoccupied not so much with agencies exercising too much power as with Congress trampling on the president's powers. Despite *Chevron*'s later progressive reputation, it was considered a "win" for the Reagan administration,¹⁷⁴ and, in practical effect, it proved a "win" for the presidency, too. *Chevron*'s rule of deference accepted that the president and the agencies could make policy change even where Congress had not spoken on (or at least reconsidered) an issue. "While agencies are not directly accountable to the people," the Court explained, "the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make . . . policy choices [within the limits of Congress's delegation]."¹⁷⁵

Despite these changes, the formalism of the 1980s was different in kind from what followed for several reasons. For one, much of the old "system of 1946" survived, including, most importantly, Congress's creative power to structure agencies as it wished.¹⁷⁶ *Chevron* had emphasized that the Clean Air Act¹⁷⁷ was a "lengthy, detailed, technical, complex, and comprehensive" response to a complicated problem and, thus, its broad delegations of power were deserving of judicial respect.¹⁷⁸ Moreover, even where justices enforced the Constitution against statutes, these decisions rested on a considered textualism, *not* unwritten rules separating "executive" from "legislative" powers.¹⁷⁹ None of these decisions endorsed a "unitary

172. *Id.* at 842–44, 848.

173. *Id.* at 842–45.

174. In context, *Chevron*, with its hands-off stance toward President Reagan's air pollution reversal, was initially considered a win for conservatives. See, e.g., Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 372–82 (1986); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 452 (1989).

175. *Chevron*, 467 U.S. at 865. On this reading of *Chevron*, whereby courts should defer to government officials' readings of their own statutes based on deference to the presidency, see Jed H. Shugerman & Jodi L. Short, *Major Questions About Presidentialism: Untangling the "Chain of Dependence" Across Administrative Law*, 65 B.C. L. REV. 511, 511 (2023) (identifying, in the Court's view, a "chain of dependence" linking officials to the president); Kagan, *supra* note 152, at 2376 ("Chevron's primary rationale suggests [an] approach [that] would link deference in some way to presidential involvement.").

176. See *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting) (arguing that the Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to" the executive in response to the majority's decision upholding the U.S. Sentencing Commission). See generally *Auer v. Robbins*, 519 U.S. 452 (1997) (upholding the secretary of labor's classification of certain officials as salaried employees not entitled to overtime pay requirements); *Loving v. United States*, 517 U.S. 748 (1996) (upholding the specification, by executive order, of factors that warrant the death penalty in a case of military justice).

177. 42 U.S.C. §§ 7401–7671q.

178. *Chevron*, 467 U.S. at 848, 866.

179. *Chadha* rejected the legislative veto because it transgressed the "[e]xplicit and unambiguous provisions of the Constitution" that structured the legislative process. *INS v. Chadha*, 462 U.S. 919, 945 (1983). Meanwhile, *Buckley* turned on the text of the

executive” nor a “total separation” between branches.¹⁸⁰ And none invalidated agency decisions on abstract theoretical grounds; at most they critiqued them based on procedural guidelines—which, after all, the APA had directed courts to review in the first place.¹⁸¹

Four years after *Chevron*, one case portended a future landslide. *Morrison v. Olson*¹⁸² arose out of special prosecutor Alexia Morrison’s investigation of the Reagan DOJ’s failure to comply with a subpoena.¹⁸³ Ten years earlier, in the post-Watergate era, Congress had created Morrison’s position, an independent counsel charged with investigating wrongdoing in the executive branch.¹⁸⁴ Calling on the new unitary executive theory, the government argued that Morrison’s appointment was unconstitutional because, as a prosecutor, she exercised a quintessentially *executive* power, despite being neither appointed nor removable by the president.¹⁸⁵ In a seven to one decision, the Court rejected the idea that every executive officer “must serve at the pleasure of the President and be removable by him at will.”¹⁸⁶ In a lone dissent, Justice Scalia wrote that the Constitution vests not “*some* of the executive power, but *all* of the executive power” in a single person and warned that “it is now open season upon the President’s removal power.”¹⁸⁷

Justice Scalia’s reasoning failed to attract a single additional vote in 1988, but his dystopic vision of a president handcuffed by Congress and faceless executive branch officers spoke to a prevailing mood. Soon, his dissent’s rigid formalism—each branch in its proper place, exercising its proper powers—would characterize the Court’s separation-of-powers decisions, not *Morrison*’s pragmatic accommodationism, reflective of an older time. A new “presidentialist” era for American government was about to begin.

III. DOCTRINE: SEPARATION-OF-POWERS LOCHNERISM

This part canvasses Roberts Court case law on the president, Congress, and the agencies to bring into relief the separated-powers government that

Appointments Clause, which allows Congress to vest appointment of officers “in the President alone, in the Courts of Law, or in the Heads of Departments,” but *not* in itself. U.S. CONST. art. II, § 2, cl. 2; *Buckley v. Valeo*, 424 U.S. 1, 118 (1976).

180. See, e.g., *Buckley*, 424 U.S. at 121 (“[T]he Constitution by no means contemplates total separation of each of these three essential branches of Government.”).

181. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 462 U.S. 29, 48 (1983) (“Expert discretion is the lifeblood of the administrative process, but ‘unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion.’” (citations omitted) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962))).

182. 487 U.S. 654 (1988).

183. *Id.* at 665–67. Note that Assistant Attorney General Olson himself had earlier argued, in writing, that the president was entitled to ignore subpoenas. See Shaub, *supra* note 155.

184. Ethics in Government Act of 1978, Pub. L. No. 95-521, §§ 601–602, 92 Stat. 1824, 1867–73 (codified as amended at 28 U.S.C. §§ 591–598).

185. See *Morrison*, 487 U.S. at 673.

186. *Id.* at 690.

187. *Id.* at 705, 726–27 (Scalia, J., dissenting).

the Court is building. When the dust settles, what emerges is a rebalanced constitutional landscape of separated branches poorly equipped to check each other. The president sits atop the executive branch, wielding a host of judicially aggrandized powers. A weakened Congress faces higher and higher hurdles to controlling administrative agencies and its coequal branch, the executive. Embattled agencies are caught in a cross fire of arbitrary judicial and executive commands they cannot predict. And of course, there is an emboldened Court acting as a backstop for the whole design. Part III examines this model in greater detail.

A. A Unitary President

For well over a century, the powers of the American president have been on the rise, for reasons—including war, globalization, terrorism, and demographic shifts, among others—that have nothing to do with our political institutions.¹⁸⁸ However, if war is indeed “the nurse of executive aggrandizement,”¹⁸⁹ to borrow James Madison’s famous phrase, judicial doctrine has become another. Over the last decades, the Roberts Court has “aided and abetted” the growth of presidential power through “doctrinal innovations weakening constraints” on it, seemingly without regard for the possibility that an emboldened president might, one day, lead to the end of democracy itself.¹⁹⁰

Recall that, when UET was first put before the Court in the 1988 *Morrison* case, a majority rejected the newfangled doctrine in strenuous terms:

The dissent says that the language of Article II vesting the executive power of the United States in the President requires that every officer of the United States exercising any part of that power must serve at the pleasure of the President and be removable by him at will. This rigid demarcation—a demarcation incapable of being altered by law in the slightest degree, and applicable to tens of thousands of holders of offices neither known nor foreseen by the Framers—depends upon an extrapolation from general constitutional language which we think is more than the text will bear.¹⁹¹

In other words, UET was ahistorical, a poor reading of the text, and dangerously “rigid,” creating a configuration of constitutional powers that future reformers could not change.¹⁹²

188. For leading accounts of presidential growth, see generally, for example, SCHLESINGER, *supra* note 34; ANDREW RUDALEVIGE, *THE NEW IMPERIAL PRESIDENCY: RENEWING PRESIDENTIAL POWER AFTER WATERGATE* (2006); SKOWRONEK, DEARBORN & KING, *supra* note 28; Keith E. Whittington & Daniel P. Carpenter, *Executive Power in American Institutional Development*, 1 PERSP. ON POL. 495 (2003).

189. ALEXANDER HAMILTON & JAMES MADISON, *THE PACIFICUS-HELVIDIUS DEBATES OF 1793–1794: TOWARD THE COMPLETION OF THE AMERICAN FOUNDING* 87 (Morton J. Frisch ed., 2007).

190. DAVID M. DRIESEN, *THE SPECTER OF DICTATORSHIP: JUDICIAL ENABLING OF PRESIDENTIAL POWER* 1–2 (2021).

191. *Morrison*, 487 U.S. at 690 n.29.

192. *Id.*

Twenty-two years after *Morrison v. Olson*, Justice Scalia's solo dissent became law. Chief Justice Rehnquist, *Morrison*'s author, and the centrist Justice Sandra Day O'Connor were replaced by Chief Justice Roberts and Justice Alito, respectively, two Reagan alums and early believers in the UET. In 2010, the remade Court had its chance to speak in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,¹⁹³ striking down a board created in the wake of the Enron accounting scandal to audit public companies, the Public Company Accounting Oversight Board (PCAOB).¹⁹⁴ The Sarbanes-Oxley Act of 2002¹⁹⁵ had specified that the PCAOB's five members could be fired only "for good cause shown" by commissioners of the U.S. Securities and Exchange Commission, who also were not removable by the president.¹⁹⁶ In one of his first separation-of-powers cases, Chief Justice Roberts reasoned that PCAOB members, "safely encased within a Matryoshka doll of tenure protections," were being kept "immune from Presidential oversight, even as they exercised power in the people's name."¹⁹⁷ The PCAOB's "two-layer" structure, Roberts concluded, violated "the basic principle that the President cannot delegate ultimate responsibility or the active obligation to supervise that goes with it, because Article II makes a single President responsible for the actions of the Executive Branch."¹⁹⁸ The phrasing is curious, since the "delegation" at issue was not the president's, but *Congress's*, as it attempted to insulate the board from politics and industry.¹⁹⁹ Notably, the 1984 article that Chief Justice Roberts had written for President Reagan had said nearly the same thing.²⁰⁰

The first case in almost ninety years to strike down a statute for intruding on the president's removal powers, *Free Enterprise*, was an anomaly, but it was supposed to be limited to its facts, according to the majority.²⁰¹ But the Court soon moved on, deploying the same reasoning to strike down statutes that insulated officers from presidential or other political supervision, including administrative law judges,²⁰² patent judges,²⁰³ the head of the Consumer Financial Protection Bureau (CFPB),²⁰⁴ and the head of the

193. 561 U.S. 477 (2015).

194. *Id.*

195. Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of the U.S. Code).

196. *Free Enter. Fund*, 561 U.S. at 484–86 (quoting 15 U.S.C. § 7211(e)(6)).

197. *Id.* at 497.

198. *Id.* at 488, 496–97 (construing the case as a "a question of first impression," as the court had never "considered a situation where a restriction on removal passes through two levels of control").

199. *Id.* at 531.

200. Reagan, *supra* note 159, at 23 ("Any individual president is a trustee of the powers of the office and cannot yield those powers for expediency or any other purpose. Presidents may at times prefer that another branch make a difficult decision or take action vested in the executive; or they may sometimes be willing to countenance an intrusion on their powers to achieve a particular result. At such times, the chief executive must recall that the Constitution allocated powers not simply for efficiency but to preserve liberty.").

201. See *Free Enter. Fund*, 561 U.S. at 514.

202. See *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018).

203. See *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1979–83 (2021).

204. See *generally* *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020).

Federal Housing Administration.²⁰⁵ Each case featured a divided result largely along political lines. In each, the dissent objected that the Court was moving the goalposts, ignoring limiting principles it had announced earlier: “two layers of ‘for cause’ protection,”²⁰⁶ “significant executive power,”²⁰⁷ and so forth.²⁰⁸ In each case in this sequence, the majority’s logic was familiar: the President’s executive power was “singular” because Article II said so; this generic power contained other inferable ones “essential” to the office; the power of removal, although not in the Constitution, was just such a “core” function of the office, necessary to ensure that the president could “take care” that the laws were faithfully executed.

This formula was capable of repetition, and the Court would soon apply it in two other contexts: foreign affairs²⁰⁹ and presidential privilege.²¹⁰ In 2015, the Roberts Court discovered another “nontextual”²¹¹ executive power: the power to recognize a foreign government.²¹² *Zivotofsky v. Kerry*²¹³ centered on a diplomatic tug-of-war between Congress and the president occasioned by the U.S. Department of State’s refusal to comply with a 2003 statute requiring it to issue a passport listing a Jerusalem-born U.S. citizen’s birthplace as Israel “upon the [citizen’s] request.”²¹⁴ Applying the logic of *Youngstown*, the Court might have concluded that the State Department’s position was entitled to no deference, particularly as it was in flagrant defiance of a clear statutory command.²¹⁵ It might have ordered the two branches to work out a political solution, seeing as the Constitution divides foreign relations powers between them.²¹⁶ Instead, a six-justice majority

205. See generally *Collins v. Yellen*, 141 S. Ct. 1761 (2021).

206. *Free Enter. Fund*, 561 U.S. at 525 (Breyer, J., dissenting).

207. *Id.* at 514 (majority opinion) (emphasis added).

208. See *id.* at 536 (Breyer, J., dissenting) (suggesting there is “considerable uncertainty about the scope of [the Court’s] holding”); *Collins*, 141 S. Ct. at 1801 (Kagan, J., concurring in part and concurring in the judgment) (pointing out that *Seila Law* emphasized that its rule was limited to single-director agencies “wield[ing] significant executive power” (alteration in original)).

209. See generally *Zivotofsky v. Kerry*, 576 U.S. 1 (2015).

210. See generally *Trump v. Vance*, 140 S. Ct. 2412 (2020); *Trump v. United States*, 144 S. Ct. 2312 (2024).

211. *Free Enter. Fund*, 561 U.S. at 519 (Breyer, J., dissenting).

212. See generally *Zivotofsky*, 576 U.S. 1.

213. 576 U.S. 1 (2015).

214. *Id.* at 29 (quoting Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214(d), 116 Stat. 1350, 1366).

215. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring) (arguing that presidential acts taken in defiance of a statute have the weakest legal authority). In a recent line of administrative law cases, the Court has limited executive branch action where it has reason to think that the claimed authority is beyond that which Congress would reasonably have granted. See *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994) (holding that “an agency’s interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear”); see also *United States v. Mead Corp.*, 533 U.S. 218, 227–31 (2001) (limiting the category of agency decisions owed deference).

216. See U.S. CONST. art. I, § 8 (authorizing Congress to legislate on foreign relations); *id.* art. II, § 2 (describing the president’s power to receive ambassadors and other foreign officials).

found univocally for the president, determining that the executive power encompassed a “limited” but “exclusive” recognition authority that Congress “[could] not qualify.”²¹⁷ In foreign affairs, the majority claimed, it was essential for the nation to speak “with one voice.”²¹⁸ Besides, the Court added, an exclusive recognition power “is essential to the conduct of Presidential duties.”²¹⁹

Executive privilege and immunity are another area of stunning recent presidential growth manufactured by the judiciary.²²⁰ In 2020, the Court ruled that President Donald J. Trump’s private papers were *not* absolutely privileged from a legislative subpoena, a result hailed as a “win” for Congress.²²¹ But this was a red herring. “For over two centuries,” Chief Justice Roberts explained, Congress and the president had worked out subpoena-related disputes among themselves, a fact that “imposes on us a duty of care to ensure that we not needlessly disturb ‘the compromises and working arrangements that [those] branches . . . themselves have reached.’”²²² But the decision actually did the opposite. Rather than uphold a power Congress had fully exercised for centuries, the Court *qualified* it, setting down four tests Congress had to meet when it subpoenaed papers belonging to the president—who enjoyed special immunity ordinary citizens did not.²²³ A “balanced approach” was not a win for Congress, but a clear defeat.

This approach reached a peak in 2024, when *Trump v. United States* declared the president “absolutely immune” from criminal prosecution for all conduct “within his exclusive constitutional authority.”²²⁴ The opinion expanded prior immunity doctrine in two senses. First, it baldly suggested that it was at least debatable whether former President Trump had been acting in an “official” capacity when he sought to overturn the 2020 presidential election by, among other things, pressuring the vice president to refuse to certify the election results, conspiring with state officials to organize false slates of electors, and encouraging a violent crowd to descend on the U.S.

217. *Zivotofsky*, 576 U.S. at 17–18.

218. *Id.* at 28 (quoting *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 381 (2000)).

219. *Id.* at 17.

220. *See generally* *United States v. Nixon*, 418 U.S. 683 (1974). In *Nixon*, the Court concluded that the president’s “presumptive” immunity from a criminal subpoena was outweighed by the “the fundamental demands of due process of law in the fair administration of criminal justice.” *Id.* at 708, 713.

221. *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2035 (2020); *see* Kimberly Wehle, *Actually, the Supreme Court Just Gave Congress a Big Win*, POLITICO (July 11, 2020, at 07:00 ET), <https://www.politico.com/news/magazine/2020/07/11/actually-the-supreme-court-just-gave-congress-a-big-win-356274> (on file with the *Fordham Law Review*); Quinta Jurecic, *Mazars Is a Victory for Rule of Law*, ATLANTIC (July 11, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/mazars-victory-rule-law/614026/> (on file with the *Fordham Law Review*).

222. *Mazars*, 140 S. Ct. at 2031 (alterations in original) (quoting *NLRB v. Noel Canning*, 573 U.S. 513, 526 (2014)).

223. *Id.* at 2035–36.

224. 144 S. Ct. 2312, 2319, 2335 (2024).

Capitol to delay the certification of the election.²²⁵ Second, like *Zivotofsky*, *Trump v. United States* confidently transformed presidential criminal immunity—a prerogative nowhere to be found in the text—into one that was absolute. The president enjoyed “conclusive and preclusive” immunity over all communications between himself and his agencies (here, the DOJ), irrespective of the content, and no court could “examin[e]” or use these as evidence in other criminal proceedings.²²⁶ The dissent immediately grasped the rule’s potential to authorize a vast spectrum of wrongdoing.²²⁷ Justice Ketanji Brown Jackson asked whether the president’s inherent removal power entitled him to “remove the Attorney General by, say, poisoning him to death.”²²⁸ The majority rejected such suggestions as “fear mongering on the basis of extreme hypotheticals”²²⁹ but did not rebut them so much as simply suggest that the extreme contrary scenario was worse.

Courtesy of the Court, the president’s growing basket of “inherent” powers now includes the appointment,²³⁰ regulation,²³¹ and removal²³² of executive officers, as well as executive privilege²³³ and immunity,²³⁴ the veto,²³⁵ the pardon,²³⁶ and decisions over national security and foreign affairs.²³⁷ The president’s first-mover advantage over administrative policy has made recent patterns of judicial avoidance largely favorable to the president’s interests, too. In President Trump’s first term, litigation over the diversion of defense funds to build a border wall, alleged violations of the Emoluments Clause, border policies, and potential disqualification from the ballot for alleged engagement in insurrection all fizzled out, preserving the presidential status quo.²³⁸ Overall, the Court’s recent interventions have weakened checks on

225. *Id.* at 2321–22 (suggesting, following *Nixon*, that the public interest is greater “in an ongoing criminal prosecution” than in a “merely private suit for damages based on a President’s official acts,” so as to imply that the president would not have absolute immunity for the former); *cf.* *Clinton v. Jones*, 520 U.S. 681, 703 (1997) (holding that acts committed prior to a president’s tenure in office are clearly “unofficial” and not entitled to immunity).

226. *Id.* at 2328, 2333. *See generally* *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218 (1994); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); *United States v. Mead Corp.*, 533 U.S. 218 (2001); *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457 (2001).

227. *Trump v. United States*, 144 S. Ct. at 2371 (Sotomayor, J., dissenting) (suggesting that, on the majority’s reasoning, the president could face no criminal consequences for organizing a military coup to hold onto power, taking a bribe in exchange for a pardon, or ordering the Navy’s Seal Team 6 to assassinate a political rival).

228. *Id.* at 2377 n.5 (Jackson, J., dissenting).

229. *Id.* at 2346 (majority opinion).

230. *See generally* *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649 (2020).

231. *See generally* *Trump v. United States*, 144 S. Ct. 2312.

232. *See generally* *Collins v. Yellen*, 141 S. Ct. 1761 (2020).

233. *See generally* *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020).

234. *See generally* *Trump v. United States*, 144 S. Ct. 2312.

235. *See* *INS v. Chadha*, 462 U.S. 919, 920–21 (1983).

236. *See generally* *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872).

237. *See generally* *Zivotofsky v. Kerry*, 576 U.S. 1 (2015); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

238. *See generally* *Trump v. Citizens for Respons. & Ethics in Wash.*, 141 S. Ct. 1262 (2021) (vacating a lower court judgment on the Emoluments Clause and remanding with

the president, other than Congress's (practically obsolete) power of impeachment, and aided the chief executive by keeping him out of the courts.

When push comes to shove, the Lochnerized president is fearsomely unitary, vested with something approaching undiluted authority over the whole executive branch. This vision of the president rests on novel constitutional arguments that bid lawyers to identify "inherent" executive powers and unwritten separation-of-powers rules and call on judges to enforce them. During the *Lochner* era, the realist Justice Holmes called such arguments "spider's webs"—gossamer and insubstantial.²³⁹ But the Holmesian position has lost, and Lochnerizing presidential powers is the order of the day.

B. The Embattled Agencies

For many federal agencies, the last two decades have been a time of retreat in the face of an "anti-administrativist" one-two punch from the White House and courts.²⁴⁰ On the one hand, as discussed above, since the time of President Reagan, unitary theory on the bench has rendered increasing portions of the government unconstitutional while ratifying presidents' use of expansive tools of management to impose control over the agencies.²⁴¹ Most prominently, this has involved the power of presidential removal, extended by the Court to sweep up financial regulators, administrative law and patent judges, and other officers exercising "significant" executive power.²⁴²

With the judiciary's blessing, the president's practices of administrative management have changed as well. As presidential scholars Professor Terry Moe and Dean William Howell point out, efforts by presidents to impose control over the bureaucracy are a constant across all administrations, both

instructions to dismiss as moot); Todd Richmond, *Court Battle Over Trump-Era Border Wall Funding Is Over, as Last State Ends Lawsuit*, AP NEWS (July 25, 2023), <https://apnews.com/article/trump-border-wall-lawsuit-wisconsin-eff57d04ec65a2fe39470e8530aaa5c1> [https://perma.cc/7F46-GMLN]; *Trump v. Anderson*, 144 S. Ct. 662 (2024). Litigation is pending against several of the second Trump Administration's executive orders, although it remains too early to know what their resolution will be. Lydia Wheeler, *Trump Actions Spark Potential Legal Challenges for Supreme Court*, BLOOMBERG L. (Jan. 31, 2025, at 11:36 ET), <https://news.bloomberglaw.com/us-law-week/trump-actions-spark-potential-legal-challenges-for-supreme-court> (on file with the *Fordham Law Review*).

239. *Myers v. United States*, 272 U.S. 52, 177 (1926).

240. See generally Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017); Jack M. Beermann, *The Never-Ending Assault on the Administrative State*, 93 NOTRE DAME L. REV. 1599 (2018).

241. See *supra* Part II.B; DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* 23–27 (2008); Dearborn, *supra* note 125, at 172.

242. See generally *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010); *Lucia v. SEC*, 138 S. Ct. 2044 (2018); *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021); *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020); *Collins v. Yellen*, 141 S. Ct. 1761 (2021). The issue is ongoing, as President Trump's dismissal of an NLRB commissioner in January 2025 has triggered a legal challenge, which at the time of this writing is still in the procedural stage. See *Trump v. Wilcox*, No. 24A966, slip op. at 1–2 (U.S. May 22, 2025) (order staying reinstatement); see also *supra* notes 202–08 (canvassing UET cases).

“Republican and Democratic alike.”²⁴³ But prior to President Trump, no other president had ever gone so far as to actively sabotage their own agencies.²⁴⁴ During his two terms, President Trump has become famous for his unprecedented assaults on the independence of civil servants.²⁴⁵ This includes his extreme prioritization of loyalty above competence in hiring.²⁴⁶ President Trump has also suppressed knowledge-based outputs from his own agencies, including by ordering environmental, epidemiological, and energy scientists to take down data that has been publicly available for years.²⁴⁷ He has ordered tens of thousands of merit-based civil service jobs reclassified as at-will positions.²⁴⁸ Most significantly, he has utilized his removal power in unprecedented fashion with a series of deep cuts to the federal workforce of such magnitude as to hollow out whole agencies altogether.²⁴⁹ Some of these

243. Howell & Moe, *supra* note 36, at 153.

244. For more on this concept, see David Noll, *Administrative Sabotage*, 120 MICH. L. REV. 753 (2022).

245. See, e.g., Ali Swenson, *Trump Has Long Warned of a Government ‘Deep State.’ Now in Power, He’s Under Pressure to Expose It*, AP (May 30, 2025, at 07:37 ET), <https://apnews.com/article/epstein-files-assassination-trump-fbi-conspiracies-aueb07814bb8b6b3fe595f5b68e4163a> [<https://perma.cc/TFJ4-PFEC>]; *Trump-Initiated Mass Exodus of More Than 150,000 Public Servants Harms the American People, Places Essential Services in Limbo*, DEMOCRACY FORWARD (Sep. 30, 2025), <https://democracyforward.org/updates/trump-initiate-d-mass-exodus-of-more-than-150000-public-servants-harms-the-american-people-places-essential-services-in-limbo/> [<https://perma.cc/E9PN-ZHKD>].

246. For instance, the appointment of Robert F. Kennedy Jr. as secretary of health and human services was opposed by an organization of physicians. See Statement Release, Drs. for Am., *Doctors for America Calls for the Resignation of Removal of HHS Secretary Robert F. Kennedy Jr.* (Apr. 15, 2025), <https://doctorsforamerica.org/statement-release-rfk-resignation/> [<https://perma.cc/3RK9-63FB>]. Trump’s former criminal defense attorney, Emil Bove, was appointed to the U.S. Court of Appeals for the Third Circuit, similarly over many objections. Hailey Fuchs, *Senate Confirms Emil Bove to Third Circuit, as Dems Fail to Thwart Trump Pick*, POLITICO (July 29, 2025, at 21:12 ET), <https://www.politico.com/news/2025/07/29/senate-confirms-emil-bove-to-third-circuit-as-dems-fail-to-thwart-trump-pick-00482965> [<https://perma.cc/G4DE-L7GZ>]. During President Trump’s first term, he appointed former Texas Governor Rick Perry as secretary of energy, who had famously forgotten the name of the agency during a presidential debate. MICHAEL LEWIS, *THE FIFTH RISK* 47 (2018).

247. See India Edwards, *Key CDC Health Websites Vanish Following Trump Orders*, U.S. NEWS & WORLD REP. (Feb. 3, 2025, 10:30 AM), <https://www.usnews.com/news/health-news/articles/2025-02-03/key-cdc-health-websites-vanish-following-trump-orders> [<https://perma.cc/8BVE-U223>]; Justine Calma, *How Scientists Scrambled to Stop Donald Trump’s EPA from Wiping Out Climate Data*, THE VERGE (Mar. 8, 2021, 09:00 ET), <https://www.theverge.com/22313763/scientists-climate-change-data-rescue-donald-trump> (on file with the *Fordham Law Review*); Romany M. Webb & Lauren Kurtz, *Politics v. Science: How President Trump’s War on Science Impacted Public Health and Environmental Regulation*, 188 PROGRESS MOLECULAR BIOLOGY TRANSLATIONAL SCI. 65 (2022); Dino Grandoni & Brady Dennis, *Biden Administration Revives EPA Web Page on Climate Change Deleted by Trump*, WASH. POST (Mar. 18, 2021), <https://www.washingtonpost.com/climate-environment/2021/03/18/epa-website-climate/> (on file with the *Fordham Law Review*).

248. Erich Wagner, *Trump Vows to ‘Shatter the Deep State,’ Revive Schedule F and Move More Agencies Out of DC*, GOV’T EXEC. (Mar. 21, 2023), <https://www.govexec.com/workforce/2023/03/trump-vows-shatter-deep-state-revive-schedule-f-and-move-more-agencies-out-dc/384266/> [<https://perma.cc/RVF9-TXEX>].

249. For example, the U.S. Agency for Global Media has seen 84.8 percent of its staff cut, the Institute of Museum and Library Services 100 percent, and U.S. Agency for International Development (USAID) 100 percent. Annette Choi, Danya Gainor & Kate Carroll, *Tracking*

actions have been met with legal challenges, but the notion of a president turning on his own agencies is arguably consistent with the UET's own premises.²⁵⁰

As presidentialism cuts into federal agency structure, judicial second-guessing of agency decision-making is on the rise, too, as judges assign themselves greater and greater latitude to define agency authority.²⁵¹ This includes two recent administrative law doctrines: the MQD and the “independent judgment” rule from *Loper Bright Enterprises v. Raimondo*.²⁵² Both can be seen as *Lochnerian* in their treatment of legislative statutes in service of an inscrutable higher law: in recent cases chastising agencies for stretching their authority, the Court has construed statutes in ways that many scholarly interpreters criticize as implausible and, sometimes, even seemingly ignoring statutory text altogether.²⁵³

Back in 1984, *Chevron* seemed to stand for the reassuring proposition that agency programs long in the making would not be capriciously invalidated by judges. As the years went by, however, the Court chipped away at this understanding, clarifying that *some* types of agency decisions were entitled to deference—others, not so much.²⁵⁴ Still, this period is distinguishable from what followed: however skeptical the Rehnquist Court might have been of agency power, it employed orthodox methods of statutory interpretation. Two cases that are somewhat misleadingly identified today as precursors to the major questions doctrine are best understood in these terms.²⁵⁵ In the

Trump's Overhaul of the Federal Workforce, CNN, <https://www.cnn.com/politics/tracking-federal-workforce-firings-dg> [<https://perma.cc/E7X3-YM6Q>] (last visited Sep. 7, 2025).

250. Shalev Roisman, *President Trump in the Era of Exclusive Powers*, HARV. L. REV. BLOG (Apr. 12, 2025), <https://harvardlawreview.org/blog/2025/04/president-trump-in-the-era-of-exclusive-powers/> [<https://perma.cc/2LRL-S5KH>].

251. Blake Emerson, *The Binary Executive*, 132 YALE L.J.F. 756, 758–59 (2022).

252. 144 S. Ct. 2244 (2024); see Jody Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 SUP. CT. REV. 1, 20–46 (2022) (considering the possible consequences of the MQD on the separation of powers); Christopher J. Walker, *What Loper Bright Enterprises v. Raimondo Means for the Future of Chevron Deference*, YALE J. ON REGUL.: NOTICE & COMMENT (June 28, 2024), <https://www.yalejreg.com/nc/what-loper-bright-enterprises-v-raimondo-means-for-the-future-of-chevron-deference/> [<https://perma.cc/CC9M-RVA9>].

253. See generally Ron Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, 112 CALIF. L. REV. 899 (2024); Beau Baumann, *Americana Administrative Law*, 111 GEO. L.J. 465 (2022); Walters, *supra* note 43.

254. See, e.g., *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229–31, 234 (1994); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 137–39 (2000); *United States v. Mead Corp.*, 533 U.S. 218, 221, 226, 230–31 (2001); *Barnhart v. Walton*, 535 U.S. 212, 218–20 (2002). On the so-called “*Chevron* Step Zero,” see Thomas Merrill & Kristin Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 835 (2001) (asking “[t]o what sorts of statutes and what sorts of agency interpretations should the mandatory deference doctrine of *Chevron* apply?”); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006) (noting that *Chevron* has a “step zero”—the question of whether its framework applies at all).

255. Despite the Court's claim that the major questions doctrine is grounded in long-standing precedent, these latest cases show a different approach to statutory text. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2633 (2022) (Kagan, J., dissenting) (pointing out that earlier MQD cases performed “normal statutory interpretation,” unlike the present case); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1011–14 (2023) (arguing that the strong form of the MQD is relatively new); Jody

1994 case *MCI Telecommunications Corp. v. AT&T Co.*,²⁵⁶ the Court invalidated a Federal Communications Commission rule waiving a tariff-filing requirement on grounds that a statutory command to “modif[y]” said requirement was *not* compatible with a program waiving it entirely.²⁵⁷ Likewise, in *FDA v. Brown & Williamson Tobacco Corp.*,²⁵⁸ which famously struck down a U.S. Food and Drug Administration (FDA) rule regulating nicotine, the Court conducted a sixteen-page parsing of legislative and postenactment history to illustrate that Congress’s intent in drafting the Federal Food, Drug, and Cosmetic Act²⁵⁹ of 1938 had not been to delegate the FDA authority to regulate cigarettes.²⁶⁰

In the prior cases, the Court had followed, and enforced, the statute’s commands. But under a new chief justice, the Court’s posture changed. Now, where an agency action was of “vast economic and political significance,”²⁶¹ courts were entitled to demand more-than-ordinary authorization for it. If we can date the UET’s first case-law appearance to 2010 (*Free Enterprise*), the emergence of the Lochnerian administrative equivalent would be when *Utility Air Regulatory Group v. EPA*²⁶² struck down large portions of an EPA greenhouse gas program in 2014.²⁶³ Despite language in the Clean Air Act that spoke of “air pollutant[s],” which the Court itself had recognized to include greenhouse gases in 2007,²⁶⁴ the Court

Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 SUP. CT. REV. 1, 4–6 (2023) (identifying three forms of the MQD, ranging in strength). Compare *Brown & Williamson*, 529 U.S. 120 (representing early precedent for the MQD, as the Court has noted), with *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014) (representing later precedent for the MQD), and *King v. Burwell*, 576 U.S. 473 (2015) (same). In *Brown & Williamson*, the Court relied on sixty years of FDA inaction on nicotine to infer that Congress had not intended the agency to regulate cigarettes. See 529 U.S. at 143–59. Although *Brown & Williamson* did note that the FDA rule was of great “economic and political significance,” it devoted less than two pages to this point and a full sixteen pages of the forty-page opinion to parsing Congress’s intent through a review of previous legislation. *Id.* at 131–59 (discussing the Federal Food, Drug, and Cosmetic Act (FDCA) and subsequent legislative enactments to assess whether Congress “ratified” the FDA’s position); *id.* at 159–61 (discussing, in the context of *MCI*, the FDA rule’s “economic and political significance”). The latter cases took a very different attitude toward Congress’s work products. See *infra* notes 316–29.

256. 512 U.S. 218 (1994).

257. *Id.* at 229.

258. 529 U.S. 120 (2000).

259. Ch. 675, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. §§ 301–399).

260. See *Brown & Williamson*, 529 U.S. at 131–59 (discussing the FDCA and subsequent legislative enactments to assess whether Congress “ratified” the FDA’s position); *cf. id.* at 159–61 (discussing, in the context of *MCI*, the FDA rule’s “economic and political significance”); see also Theodore W. Ruger, *The Story of FDA v. Brown & Williamson: The Norm of Agency Continuity*, in STATUTORY INTERPRETATION STORIES 335, 356–59 (William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett eds., 2010).

261. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quoting *Brown & Williamson*, 529 U.S. at 160).

262. 573 U.S. 302 (2014).

263. See generally *id.*

264. 42 U.S.C. § 7521(a)(1) (“[The EPA] shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class . . . of new motor vehicles . . . which in [the EPA Administrator’s] judgment cause[s], or contribute[s] to, air

still concluded that the EPA's authority to implement the program was deficient.²⁶⁵ Justice Scalia's opinion seemingly underwent some contortions to sustain that "air pollutants" did not include greenhouse gases:

To be sure, Congress's profligate use of "air pollutant" where what is meant is obviously narrower than the Act-wide definition is not conducive to clarity. One ordinarily assumes "that identical words used in different parts of the same act are intended to have the same meaning." In this respect (as in countless others), the Act is far from a *chef d'oeuvre* of legislative draftsmanship. But we, and EPA, must do our best, bearing in mind the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." . . . [T]he presumption of consistent usage "readily yields" to context, and a statutory term—even one defined in the statute—"may take on distinct characters from association with distinct statutory objects calling for different implementation strategies."²⁶⁶

Despite accusing the EPA of textual infidelity, it was ultimately the *Utility Air* Court that was arguably guilty of rewriting the Clean Air Act.

Between 2014 and 2021, only two significant Supreme Court cases used an agency action's "majorness" as reason to depart from ordinary statutory meaning: *King v. Burwell*,²⁶⁷ the third major challenge to the Affordable Care Act²⁶⁸ (ACA), and *United States v. Texas*,²⁶⁹ which invalidated a signature Obama-era immigration program exempting undocumented parents of U.S.-born children from deportation.²⁷⁰ But President Trump's appointment of Justices Gorsuch, Kavanaugh, and Barrett, along with the spread of the viral COVID-19 pandemic and the inauguration of President Joseph R. Biden Jr., breathed new life into the doctrine.²⁷¹ In the fall of 2021, the Court struck down a nationwide moratorium on tenant evictions by the U.S. Centers for Disease Control and Prevention (CDC).²⁷² Despite the broad language of an old public health statute entitling the agency's secretary to take measures "as in his judgment may be necessary" to prevent "the spread of communicable diseases,"²⁷³ the Court saw manifest evidence of

pollution . . . reasonably . . . anticipated to endanger public health or welfare."); *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007).

265. *Utility Air*, 573 U.S. at 308–10.

266. *Id.* at 319–20 (citations omitted) (first quoting *Env't Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007); then quoting *Brown & Williamson*, 529 U.S. at 133; and then quoting *Duke Energy*, 549 U.S. at 574).

267. 576 U.S. 473 (2015).

268. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code). See generally *King*, 576 U.S. 473.

269. 579 U.S. 547 (2016).

270. See *id.* at 547. For the U.S. Court of Appeals for the Fifth Circuit's full discussion of the MQD, see *Texas v. United States*, 809 F.3d 134, 170–88 (5th Cir. 2015).

271. Andrea Scoseria Katz & Ofra Bloch, *Taking Legality Seriously: What the Major Questions Doctrine Is—and Isn't*, 94 GEO. WASH. L. REV. (forthcoming 2026) (manuscript at 9–10) (on file with the *Fordham Law Review*); Ron Levin, *The Major Questions Doctrine: Unfounded, Unbounded, and Confounded*, 112 CALIF. L. REV. 899, 901 (2024).

272. *Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2488–90 (2021).

273. 42 U.S.C. § 264(a).

bad faith on the part of the agency: “It strains credulity” to think that “a decades-old statute” authorizing the CDC to take measures like “fumigation and pest extermination” grants it “the sweeping authority that it asserts.”²⁷⁴ Soon after, the Court invalidated an OSHA vaccine mandate addressing COVID-19 in the workplace.²⁷⁵ Then the following year, the Court invalidated a massive Department of Education program that reduced student loan debt for some forty million borrowers on grounds that the viral pandemic had hurt their ability to pay.²⁷⁶ Thereafter, in *West Virginia v. EPA*,²⁷⁷ the Court invalidated another massive Obama-era environmental program that set emissions caps on power plants.²⁷⁸ Then, in 2024, *Loper Bright Enterprises v. Raimondo*, a case involving regulators of fishing boats, overruled *Chevron* entirely.²⁷⁹ Concurring, Justice Thomas insisted: “*Chevron* compels judges to abdicate their Article III ‘judicial Power.’”²⁸⁰

In all of these cases, a dissenting bloc of liberal justices lamented that the will and express instructions of Congress were being ignored. In the student loan case, Justice Kagan characterized the majority’s reading of the authorizing statute as implausible (“[that] is not the statute Congress wrote”) and argued that the “new” MQD “works not to better understand—but instead to trump—the scope of a legislative delegation.”²⁸¹

Lochnerian echoes abound. Just as the original *Lochner*’s undisciplined invocation of natural rights threatened to free the justices to do whatever they liked, the Court’s latest administrative law doctrines seem to likewise respond to a logic of their own making. *Loper Bright*’s allegation is that *Chevron* deference unlawfully required judges “to ignore, not follow” their own “independent judgment,” but this is a poor reading of both *Chevron* and of the APA, a statute that simply asks courts to “decide all relevant questions of law.”²⁸² Justice Kagan pointed out that a court that applies a deferential standard “just as much decides” a question of law as one that uses a de novo standard.²⁸³ As for what Justice Kagan unsparingly calls the “so-called major-questions doctrine,” the Court itself has struggled to come up with a rationale for it.²⁸⁴ Writing in the student-loan-debt case, Justice Kagan alleged the MQD is no legal doctrine, but an expression of crude political favoritism:

274. See *Ala. Ass’n of Realtors*, 141 S. Ct. at 2486–87.

275. See generally *Nat’l Fed’n of Indep. Bus. v. U.S. Dep’t of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661 (2022).

276. See *Biden v. Nebraska*, 143 S. Ct. 2355, 2364, 2368–69 (2023).

277. 142 S. Ct. 2587 (2022).

278. *Id.* at 2614.

279. *Id.* at 2273, 2255–56; see also *id.* at 2274 (Thomas, J., concurring).

280. *Id.* at 2274 (Thomas, J., concurring) (quoting U.S. CONST. art. III, § 1).

281. *Biden*, 143 S. Ct. at 2396–97 (Kagan, J., dissenting).

282. 5 U.S.C. § 706; see also *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2260 (2024).

283. *Loper Bright*, 144 S. Ct. at 2302 (Kagan, J., dissenting).

284. See Levin, *supra* note 271, at 902 (arguing that the MQD cannot be defended on its own terms and that the Court’s account of its origins is unpersuasive); see also *Biden*, 143 S. Ct. at 2391 (Kagan, J., dissenting).

[T]he majority again reveals that doctrine for what it is—a way for this Court to negate broad delegations Congress has approved, because they will have significant regulatory impacts. Thus the Court once again substitutes itself for Congress and the Executive Branch—and the hundreds of millions of people they represent—in making this nation’s most important, as well as most contested, policy decisions.²⁸⁵

Dissenting in the original *Lochner*, Justice John Marshall Harlan pointed out, “[t]he manner, occasion, and degree in which the State may interfere with the industrial freedom of its citizens is one of the most debatable and difficult questions of social science.”²⁸⁶ For that reason, he counseled the Court to leave the New York bakery statute alone.²⁸⁷

Fast forward one hundred years, and the issues of climate change, consumer debt, and epidemiology pose essentially the same “debatable and difficult” question. Can we really say that judges have gotten any better at solving the nation’s problems?

C. An Enfeebled Congress

Congress is not an “it” but a “they,” and increasingly, *they* find themselves adrift and aimless.²⁸⁸ Passing laws is *supposed* to be difficult, goes the oft-repeated truism (and the justices repeat it frequently).²⁸⁹ But these days, Congress is not spending time painstakingly crafting grand programs—it is coping, weakened by its own lack of capacity and internal division.²⁹⁰ The

285. *Biden*, 143 S. Ct. at 2391 (Kagan, J. dissenting).

286. *Lochner v. New York*, 198 U.S. 45, 72 (1905) (Harlan, J., dissenting).

287. *Id.* at 72–74.

288. See generally Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992).

289. See, e.g., *West Virginia v. EPA*, 142 S. Ct. 2587, 2618 (2022) (“Admittedly, lawmaking under our Constitution can be difficult.”); *Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (“An ‘excess of law-making’ was, in their words, one of ‘the diseases to which our governments are most liable.’ To address that tendency, the framers went to great lengths to make lawmaking difficult.” (quoting THE FEDERALIST NO. 62 (James Madison))).

290. For recent examples, see Ryan Lizza, Rachael Bade & Eugene Daniels, *Playbook: The House GOP Sinks Deeper into Chaos*, POLITICO (Oct. 13, 2023, at 06:11 ET), <https://www.politico.com/newsletters/playbook/2023/10/13/the-house-gop-sinks-deeper-into-chaos-00121390> [<https://perma.cc/RU5M-UD87>]; Brendan Buck, *The Freedom Caucus Started Believing in the Myth of Its Own Power*, N.Y. TIMES (Apr. 22, 2024), <https://www.nytimes.com/2024/04/22/opinion/mike-johnson-ukraine-mtg.html> (on file with the *Fordham Law Review*). A vibrant scholarly debate interrogates whether Congress is “the broken branch.” See, e.g., THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* (2008); PHILLIP A. WALLACH, *WHY CONGRESS* (2023); CONGRESS OVERWHELMED: THE DECLINE IN CONGRESSIONAL CAPACITY AND PROSPECTS FOR REFORM (Timothy M. Lapira, Lee Drutman & Kevin R. Kosar eds., 2020) [hereinafter *CONGRESS OVERWHELMED*]; Sarah Binder, *The Dysfunctional Congress*, 18 ANN. REV. POL. SCI. 85 (2015); WILLIAM G. HOWELL & TERRY M. MOE, *RELIC: HOW OUR CONSTITUTION UNDERMINES EFFECTIVE GOVERNMENT AND WHY WE NEED A MORE POWERFUL PRESIDENCY* (2016). Its defenders disagree with the “broken” characterization but set expectations far lower than the potential for systemic transformation. See DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946–2002* (2d ed. 2005); MAYA L. KORNBERG, *INSIDE CONGRESSIONAL COMMITTEES: FUNCTION AND DYSFUNCTION IN THE LEGISLATIVE PROCESS* (2023); E. SCOTT ADLER & JOHN D. WILKERSON,

problem is partly political: party polarization, which has grown worse and worse since the mid-twentieth century, has paralyzed legislative output.²⁹¹ It is partly technological: the rise of primary elections gradually transformed governing into a “permanent campaign,” while perversely, the introduction of cameras (now, social media) onto the floor of Congress in 1986 debilitated the art of negotiation, producing posturing and grandstanding instead.²⁹² It is also partly self-imposed: in the 1990s, seized with a deregulatory fervor, Congress cut its own staff by a third, dealing a further blow to its capacities of legislation, investigation, and oversight.²⁹³

But Congress’s problems go beyond these factors. With the rise of the new formalism of the 1970s and 1980s, the Court began to judicialize separation-of-powers boundaries for the first time in decades, striking down statutes it considered to transgress these lines.²⁹⁴ Under Chief Justice Roberts, this trend has accelerated. On the one hand, in its presidentialism cases, the Court punishes Congress for overstepping invisible constitutional boundaries and violating unwritten separation-of-powers principles, particularly as concern the executive branch. Meanwhile, in its administrative decisions, the Court casts itself as Congress’s defender, “speaking for” Congress as the Court defines statutes for it, even while invalidating agency action taken in its name.

* * *

The present-day status quo is a long ways away from the late 1970s, when Congress still had a plausible claim to being the “imperial branch.”²⁹⁵ After

CONGRESS AND THE POLITICS OF PROBLEM SOLVING (2012); JAMES M. CURRY & FRANCES E. LEE, *THE LIMITS OF PARTY: CONGRESS AND LAWMAKING IN A POLARIZED ERA* (2020).

291. See APSA PRESIDENTIAL TASK FORCE ON POLITICAL PARTIES, *MORE THAN RED AND BLUE: POLITICAL PARTIES AND AMERICAN DEMOCRACY* 84 (2023) (identifying gridlock and policy stagnation as symptomatic of party polarization).

292. On the rise of the “permanent campaign,” see Brendan J. Doherty, *The Rise of the President’s Permanent Campaign* (2012); SAMUEL KERNELL, *GOING PUBLIC: NEW STRATEGIES OF PRESIDENTIAL LEADERSHIP* (4th ed. 2007). For a source diagnosing such behavior in Congress, see THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* 25, 43 (2012).

293. JULIAN E. ZELIZER, *BURNING DOWN THE HOUSE: NEWT GINGRICH, THE FALL OF A SPEAKER, AND THE RISE OF THE NEW REPUBLICAN PARTY* 279–307 (2020); ALEXANDER BOLTON & SHARECE THROWER, *CHECKS IN THE BALANCE: LEGISLATIVE CAPACITY AND THE DYNAMICS OF EXECUTIVE POWER* 74–78 (2022); Lee Drutman & Steven M. Teles, *Why Congress Relies on Lobbyists Instead of Thinking for Itself*, ATLANTIC (Mar. 10, 2015), <https://www.theatlantic.com/politics/archive/2015/03/when-congress-cant-think-for-itself-it-turns-to-lobbyists/387295/> (on file with the *Fordham Law Review*); Frances E. Lee, *Senate Deliberation and the Future of Congressional Power*, 43 PS: POL. SCI. & POL. 227, 227 (2010); CONGRESS OVERWHELMED, *supra* note 290.

294. See generally *Buckley v. Valeo*, 424 U.S. 1, 118 (1976); *INS v. Chadha*, 462 U.S. 919, 951 (1983); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Clinton v. City of New York*, 524 U.S. 417 (1998) (striking down a line-item veto legislated by Congress to allow the president to make specific cuts to the budget); Strauss, *supra* note 40; Erwin Chemerinsky, *A Paradox Without a Principle: A Comment on the Burger Court’s Jurisprudence in Separation of Powers Cases*, 60 S. CAL. L. REV. 1083, 1084 (1987).

295. RUDALEVIGE, *supra* note 188, at 138.

President Nixon was forced to resign his office in 1974, legislators hoped to place Congress back “in the driver’s seat.”²⁹⁶ Launching what political scientist Andrew Rudalevige calls the “resurgence regime,” legislators passed a series of laws that reinserted Congress into policy domains President Nixon had tried to claim and committed the legislative branch to aggressive oversight of presidential and agency behavior.²⁹⁷ Among other things, Congress reasserted its role in initiating military action, ordered the president to spend funds appropriated by law, required the White House to keep and preserve records of all its communications, and created a phalanx of whistleblowers and inspectors to report presidential wrongdoing.²⁹⁸

Then, just after capturing the initiative, Congress lost it entirely.²⁹⁹ The party realignment of the 1960s and 1970s played a part, as the South left the Democratic Party and legislative majorities became more precarious.³⁰⁰ Congress lost the capacity for organized legislating as the committee system was abandoned; the filibuster was routinized; and “sunshine laws” brought cameras to the floor, creating an atmosphere of public grandstanding and demands for ideological purity that further obstructed action.³⁰¹

Partisanship—and, notably, the rise of presidentialism and anti-administrativism in the Republican Party—worsened these trends. For example, after the Iran-Contra scandal revealed extensive wrongdoing within President Reagan’s executive branch, a minority report produced by eight Republican legislators, including future Vice President Dick Cheney, warned Congress not to second-guess the President’s foreign policy decisions lest it “usurp judgments that constitutionally are not its to make.”³⁰² In 1995, as part of House Speaker Newt Gingrich’s “Contract with America,” Congress made drastic cuts to its own staff, dealing a further blow to its capacities and

296. DEARBORN, *supra* note 114, at 172.

297. RUDALEVIGE, *supra* note 188, at 138.

298. See *supra* note 120 and accompanying text (listing statutes).

299. On the dissipation of congressional initiative, see RUDALEVIGE, *supra* note 188, at 139–40. See also AM. POL. SCI. ASS’N, CONGRESSIONAL REFORM TASK FORCE REPORT 8 (2019).

300. FRANCES E. LEE, INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN 1–17 (2016).

301. See Sarah A. Binder & Frances E. Lee, *Making Deals in Congress*, in SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA 240, 252–53 (Nathaniel Persily ed., 2015) (noting that, perversely, with more “transparency laws” tends to come more public dislike for Congress). On congressional organization and lawmaking, see generally BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS (5th ed. 2017); CURRY & LEE, *supra* note 290. On the rise of the filibuster, see generally SARAH A. BINDER & STEVEN S. SMITH, POLITICS OR PRINCIPLE?: FILIBUSTERING IN THE UNITED STATES SENATE (1997); GREGORY KOGER, FILIBUSTERING: A POLITICAL HISTORY OF OBSTRUCTION IN THE HOUSE AND SENATE (Benjamin I. Page, Susan Herbst, Lawrence R. Jacobs & James Druckman eds., 2010); GREGORY J. WAWRO & ERIC SCHICKLER, FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE (2006); STEVEN S. SMITH, THE SENATE SYNDROME: THE EVOLUTION OF PROCEDURAL WARFARE IN THE MODERN U.S. SENATE (2014). On sunshine laws, see KERNELL, *supra* note 292, at 29–47.

302. Nat’l Sec. Archive, Minority Report of Members of House and Senate Select Committees on Secret Military Assistance to Iran and the Nicaraguan Opposition 457 (Nov. 18, 1987) (on file with the *Fordham Law Review*).

allowing more policy generation work to pass into the hands of special interest lobbyists and partisan think tanks.³⁰³

The judiciary piled on, too, with cases like *Buckley v. Valeo*,³⁰⁴ *INS v. Chadha*,³⁰⁵ *Bowsher v. Synar*,³⁰⁶ and *Clinton v. City of New York*,³⁰⁷ which struck down innovations Congress had designed to aid with election monitoring, immigration, and the budget.³⁰⁸ For the most part, though, as before, these exceptions remained exceptions. In 1989, reviewing a structural oddity in the field of federal criminal sentencing, the Court gave a strong nod to deference: “[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”³⁰⁹

But since 2005, with the installation of Chief Justice Roberts, presidentialists populating the bench have wielded judicial review in a way increasingly menacing to Congress’s experiments.³¹⁰ Now the problem was not that these laws “intruded into the executive function”³¹¹ in the literal sense of trying to seize the office’s powers, commandeer the president’s judgment, or keep a meddlesome watchful eye over his actions.³¹² In 1988, the *Morrison* decision protected Congress’s authority to insulate officers who exercised a politically delicate function, so long as these schemes did not “impermissibly interfere with the President’s authority under Article II.”³¹³

Today, however, the Court reads structural insulation of agencies and officers as an interference with the president’s powers per se. Since 2010, it has rendered a series of decisions restricting Congress’s authority to protect officials from presidential meddling.³¹⁴ These cases have diminished

303. See generally BOLTON & THROWER, *supra* note 293; Drutman & Teles, *supra* note 293; Lee, *supra* note 293; LEE, *supra* note 300; CONGRESS OVERWHELMED, *supra* note 290.

304. 424 U.S. 1 (1976).

305. 462 U.S. 919 (1983).

306. 478 U.S. 714 (1986).

307. 524 U.S. 417 (1998).

308. *Buckley*, 424 U.S. at 1, 118; *Chadha*, 462 U.S. at 951; *Bowsher*, 478 U.S. at 734; *Clinton v. City of New York*, 524 U.S. at 448–49 (striking down a line-item veto legislated by Congress to allow the president to make specific cuts to the budget); Strauss, *supra* note 40; Chemerinsky, *supra* note 294, at 1084.

309. *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

310. See Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 1 (asserting that the Roberts Court has rendered administrative law the “legal equivalent of mortal combat”). The “New Federalism” of the Rehnquist Court (1986–2005) also saw a rise in judicial invalidation of statutes based on principles of federalism. It may be argued that this, too, constituted a form of separation-of-powers Lochnerism, although I do not pursue that argument here. For a critical take on the “New Federalism” warning of underenforcement of federal statutes, see David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 377–78 (2001); Justin Weinstein-Tull, *Abdication and Federalism*, 117 COLUM. L. REV. 839, 841–43 (2014).

311. *Bowsher*, 478 U.S. at 734.

312. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 535 (2010) (Breyer, J., dissenting).

313. *Morrison v. Olson*, 487 U.S. 654, 660 (1988).

314. See *supra* note 42 (canvassing the cases). Court watchers speculate that there may be more to come, with the National Labor Relations Board perhaps next on the chopping block.

Congress's power in two senses: (1) the legislative branch has fewer tools of oversight with which to root out executive wrongdoing, and (2) even if it has reason to believe that politically insulated agencies will execute the law more faithfully than politicized ones, it is prevented from creating the structures "necessary and proper" to do so.

Simultaneously, the Court's administrative cases suggest another, more oblique threat to the legislative power: the prospect of a court telling us that Congress's laws *cannot mean what they plainly say*.³¹⁵ Recall that *Utility Air* chastised the EPA for targeting greenhouse gases *and* the Congresses of the 1970s for producing a statutory scheme that was unartfully drafted.³¹⁶ The next year, *King v. Burwell* also pointed out that the ACA contained "more than a few examples of inartful drafting"³¹⁷—the result, Chief Justice Roberts supposed, of the bill's having been written "behind closed doors, rather than through the traditional legislative process," and passed through "reconciliation," which bypasses the Senate's sixty-vote filibuster requirement.³¹⁸ "As a result," Chief Justice Roberts wrote, "the Act does not reflect the type of care and deliberation that one might expect of such significant legislation."³¹⁹ Was Chief Justice Roberts's point that the ACA's drafting entitled it to less-than-usual deference? It is hard to mistake the tone of superiority toward a Congress that does not legislate in the way the Court would like. Ironically, in *Burwell*, it was a dissenting Justice Scalia who pointed out that the Court "has no free-floating power 'to rescue Congress from its drafting errors.'"³²⁰

The MQD has always been described by the Court as a defense of Congress.³²¹ But one of the MQD's calling cards is a strange relationship to statutory text: "plain meaning," a methodological tenet of the late Justice Scalia, whose thought has influenced several of the new members, has been superseded.³²² "Textual gerrymandering," scholars have pointed out, is not

Robert Ioafolla, *Employers Intensify Constitutional Attacks Against Labor Board*, BLOOMBERG L. (Aug. 12, 2024, at 05:00 ET), <https://news.bloomberglaw.com/daily-labor-report/employers-intensify-constitutional-attacks-against-labor-board> (on file with the *Fordham Law Review*).

315. See Baumann, *supra* note 253, at 470 (referring to this as "congressional gaslighting").

316. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014).

317. *King v. Burwell*, 576 U.S. 473, 491 (2015) (quoting John Cannan, *A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History*, 105 L. LIBR. J. 131, 163 (2013)).

318. See *King*, 576 U.S. at 491–92.

319. *Id.* at 492.

320. *Id.* at 514 (Scalia, J., dissenting) (quoting *Lamie v. United States Tr.*, 540 U.S. 526, 542 (2004)).

321. See, e.g., *Biden v. Nebraska*, 143 S. Ct. 2355, 2381 (2023) (Barrett, J., concurring) (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)); see *id.* at 2381 ("[W]hen it comes to the Nation's policy, the Constitution gives Congress the reins."); *West Virginia v. EPA*, 142 S. Ct. 2587, 2617 (2022) (Gorsuch, J., concurring) ("[S]ome might describe the Constitution as having designed the federal lawmaking process to capture the wisdom of the masses.").

322. For examples of recent critics alleging that the Roberts Court seems to be flying free of statutory language, see William N. Eskridge & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*,

a way to vindicate Congress's primacy.³²³ Nor is the "clear statement rule" a realistic model of how Congress actually writes.³²⁴ If the Court were genuinely interested in upholding Congress's privileged position in policymaking, we would expect to find judges developing canons of statutory interpretation that closely track how Congress works. Instead, as Chief Justice Roberts did in *Burwell*, courts have projected an idealized lawmaking process onto Congress and then faulted it for failing to live up to their expectations.³²⁵ It is this dynamic that one critic describes as "congressional gaslighting."³²⁶ As Professor Stephen Skowronek writes: "Behind the Court's helping hand, nudging the Congress to produce a better product, lies a thinly veiled disdain for what it perceives as an ineffectual collaborator unable to pull its own weight."³²⁷

Congress is now doubly boxed in. The MQD's "clear statement rule" leaves Congress, as one justice worried decades ago, with "a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape."³²⁸ To require such specificity hollows out the *raison d'être* of administration entirely.³²⁹ The Court seems to have seized control over Congress's statutory creations. On the other hand, the Court has walled off agencies from Congress's attempts

96 N.Y.U. L. REV. 1718, 1720–21 (2021); Baumann, *supra* note 253, at 467–69 (discussing the majority's failure to address text in *National Federation of Independent Business*); Anita S. Krishnakumar, *What the New Major Questions Doctrine Is Not*, 92 GEO. WASH. L. REV. 1117, 1117 (2024) (concluding that the MQD may be best thought of as either a new multifactor test or standard of review for "'major' agency decisions or as a form of naked pragmatism that uses clear statement rule rhetoric in an effort to sound more textualist than it is"); Walters, *supra* note 43, at 467 (concluding that the MQD is a particularly unbounded substantive canon that threatens to destroy the limits of statutory interpretation altogether).

323. Eskridge & Nourse, *supra* note 322, at 1718.

324. On the Court's unempirical account of the legislative process, see Baumann, *supra* note 253; Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1934 (2017) (arguing that the MQD "has no basis in law"). For sources arguing for more empirically realistic accounts of the lawmaking process, see Abbe R. Gluck & Lisa S. Bressmann, *Statutory Interpretation from the Inside—an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 905–07 (2013); Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541, 1545–50 (2020). On the difficulty of giving the MQD enforceable content, see Walters, *supra* note 43, at 467 (arguing that the MQD is more unbounded than most canons). On the Clear Statement Rule, see generally BENJAMIN M. BARCZEWSKI & VALERIE C. BRANNON, CONG. RSCH. SERV., LSB11084, CLEAR STATEMENT RULES, TEXTUALISM, AND THE ADMINISTRATIVE STATE (2023).

325. SKOWRONEK, *supra* note 30 (manuscript at 189).

326. Baumann, *supra* note 253, at 470.

327. SKOWRONEK, *supra* note 30 (manuscript at 189–90).

328. *INS v. Chadha*, 462 U.S. 919, 968 (1983) (White, J., dissenting).

329. See, e.g., *Biden v. Nebraska*, 143 S. Ct. 2355, 2397 (2023) (Kagan, J., dissenting) ("The new major-questions doctrine works not to better understand—but instead to trump—the scope of a legislative delegation"); *West Virginia v. EPA*, 142 S. Ct. 2587, 2628 (2022) (Kagan, J., dissenting) ("A key reason Congress makes broad delegations . . . is so an agency can respond, appropriately and commensurately, to new and big problems. Congress knows what it doesn't and can't know when it drafts a statute; and Congress therefore gives an expert agency the power to address issues—even significant ones—as and when they arise.").

to shape them.³³⁰ Tending to emphasize Congress's worst qualities—depicting it, in turn, as an intrusive micromanager,³³¹ a jealous and self-aggrandizing partner,³³² or an irresponsible absentee principal³³³—the Court's cases portray a legislative branch destroying a carefully calibrated constitutional balance through statutory incursions on other branches.³³⁴ If this was true once, it certainly is not now. The Court sees ghosts: the specter of the failed Nixon presidency and the rise of an “imperial Congress.” Like the “Social Statics” of Herbert Spencer, alluded to in *Lochner* by a dissenting Justice Holmes, these “general propositions” appear to be doing the work of judging where the text does not.³³⁵

IV. CRITIQUE: SILOED, NOT SHARED POWERS

One case from the October 2023 term, *Consumer Financial Protection Bureau v. Community Financial Services Ass'n of America*³³⁶ received comparatively little attention, perhaps because its result was expected.³³⁷ Two consumer payday lender associations challenged the CFPB's funding mechanism as unconstitutionally divorced from the ordinary appropriations process because the agency finances its operations by withdrawing from an existing fund at a level it sets itself, capped by a statutory limit.³³⁸ The challengers' claim was rejected, with Justice Thomas writing for the Court

330. The Court's separation-of-powers cases dovetail with several other recently articulated doctrines that have invalidated statutes under the Free Speech Clause, principles of federalism, and enforcement power under the Fourteenth Amendment. *See generally* *United States v. Lopez*, 514 U.S. 549 (1995); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Printz v. United States*, 521 U.S. 898 (1997); *Alden v. Maine*, 527 U.S. 706 (1999); *United States v. Morrison*, 529 U.S. 598 (2000); *Davis v. FEC*, 554 U.S. 724 (2007); *Citizens United v. FEC*, 558 U.S. 310 (2010); *United States v. Stevens*, 559 U.S. 460 (2015); *Coleman v. Ct. of Appeals of Md.*, 566 U.S. 30 (2012); *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013); *United States v. Windsor*, 570 U.S. 744 (2013); *McCutcheon v. FEC*, 572 U.S. 185 (2014); *Murphy v. Nat'l Coll. Athletic Ass'n*, 138 S. Ct. 1461 (2018); *FEC v. Cruz*, 142 S. Ct. 1638 (2022).

331. *Chadha*, 462 U.S. at 955 (“Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.”).

332. *See Bowsher v. Synar*, 478 U.S. 714, 727 (1986) (“The dangers of congressional usurpation of Executive Branch functions have long been recognized.”).

333. *See West Virginia v. EPA*, 142 S. Ct. at 2619; *see also Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 672 (1980) (Rehnquist, J., concurring) (“[T]he widely varying positions advanced in the briefs of the parties and in the opinions of [the Court] demonstrate, perhaps better than any other fact, that Congress, the governmental body best suited and most obligated to make the choice confronting us in this litigation, has improperly delegated that choice to the Secretary of Labor and, derivatively, to this Court.”).

334. *See Nat'l Fed'n of Indep. Bus. v. U.S. Dep't of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring) (“Sometimes lawmakers may be tempted to delegate power to agencies to reduc[e] the degree to which they will be held accountable for unpopular actions.” (alteration in original) (quoting Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. PUB. POL'Y 147, 154 (2017))).

335. *Lochner v. New York*, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting).

336. 144 S. Ct. 1474 (2024).

337. *Id.*

338. *Id.* at 1478–79.

in finding that the flexible funding mechanism “fits comfortably” with early congressional practices.³³⁹ Justice Ketanji Brown Jackson, who joined the seven-justice majority, took the time to pen a brief, three-page concurrence.³⁴⁰ It contained a lecture on the role of the judiciary:

When the Constitution’s text does not provide a limit to a coordinate branch’s power, we should not lightly assume that Article III implicitly directs the Judiciary to find one. . . . An essential aspect of the Constitution’s endurance is that it empowers the political branches to address new challenges by enacting new laws and policies—without undue interference by courts. . . . [N]othing in the Constitution gives federal courts “some amorphous general supervision of the operations of government.” Put another way, the principle of separation of powers manifested in the Constitution’s text applies with just as much force to the Judiciary as it does to Congress and the Executive.³⁴¹

Justice Jackson was not really writing about the CFPB, or the case at hand. Her hope, though an unlikely one, was to curb a rising tendency among her colleagues to heed litigants’ entreaties to find “unstated limits in the Constitution’s text” and, in so doing, “undercut the considered judgments of a coordinate branch about how to respond to a pressing national concern.”³⁴² For two decades now, the Roberts Court has been doing the opposite of what Justice Jackson counsels.

Our Constitution creates three branches of power and gives each tools to govern and to mutually check and balance the others. Separation-of-powers Lochnerism takes this fact and distorts it beyond recognition into a constitutional higher law requiring three isolated branches—each in its place, forbidden from reaching into another’s sphere, and exercising fixed powers defined by the judiciary. Separation-of-powers Lochnerism elevates separations over cooperation, judge-made doctrine over politically negotiated compromises, and inscrutable higher truths over practical wisdom. It advances what one pair of scholars calls a “superstitious” rule of law, making the “discretion of five Justices, unrestrained by any democratic procedure” and largely unchecked in their reasoning, “supreme over institutions whose decisionmaking is more consistent with political equality.”³⁴³ It also renders each branch in isolation less capable of constituting a “respect-worthy” system of governance.³⁴⁴

This part zooms out from doctrine to institutions, asking how the American government bears traces of the latest decisions. Our government has always been defined by sweeping statutory regimes that remake relationships in provisional and temporary ways. But interbranch isolation makes it more difficult for the system to adapt and for the branches to govern and to mutually check and balance each other. The three results of this are:

339. *Id.* at 1477.

340. *Id.* at 1492–93 (Jackson, J., concurring).

341. *Id.* at 1492 (citation omitted) (quoting *Raines v. Byrd*, 521 U.S. 811, 829 (1997)).

342. *Id.* at 1493.

343. Bowie & Renan, *supra* note 17, at 2084.

344. *Id.* at 2100.

(1) *policy stagnation*, as Congress's output dries up and is replaced by unstable executive branch unilateralism; (2) a constitutional *power imbalance*, as power is concentrated in the executive branch; and (3) growing *constitutional rigidity*, with change short of formal amendment choked off by judicial review. The following sections consider each of these results in turn.

A. Isolated Branches, Stagnating Policy

In June 2020, President Trump issued a plaintive, unintentionally comedic tweet after his hasty repeal of Deferred Action for Childhood Arrivals (DACA), an Obama-era immigration policy, was rebuffed: “Do you get the impression that the Supreme Court doesn’t like me?”³⁴⁵ It had been over a decade since Congress passed a significant immigration statute in 2006, with presidents thereafter exercising significant control over immigration policy.³⁴⁶ President Trump also thought he would have an easy time in front of a Supreme Court he had helped to pack with three justices. He had it wrong, of course, and a 5–4 court struck down the repeal, finding the U.S. Department of Homeland Security’s internal processes defective and Secretary Kirstjen M. Nielsen’s explanation for the reversal a “post hoc rationalization.”³⁴⁷ But President Trump raised an important point. *Could* the government have known ahead of time that its plan would be rebuffed?

What indicia has the Roberts Court left for determining when a president’s signature policy program will be upheld?³⁴⁸ On one hand, the Court’s presidentialism cases require unity in the executive branch, while its administrative cases cast a withering glance on presidential initiatives that smack of lawmaking—major programs and plans, or economically significant rules. Put these two together, and the emergent rule seems to be that a legitimate presidential program must (1) be passed through a “clear and effective chain of command” down from the president through agency

345. Donald J. Trump (@realDonaldTrump), X (June 18, 2020, at 11:10), <https://twitter.com/realdonaldtrump/status/1273634152433188865> [<https://perma.cc/Z7G5-FWLE>].

346. Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638; see 8 U.S.C. § 1103; 14 U.S.C. § 637. On the president’s control over immigration policy, see generally ADAM B. COX & CRISTINA M. RODRÍGUEZ, *THE PRESIDENT AND IMMIGRATION LAW* (2022).

347. See U.S. Dept. of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1909 (2020); see also U.S. Dep’t of Com. v. New York, 139 S. Ct. 2551, 2573–76 (2019).

348. As this and other examples suggest, the Court’s deregulatory thrust occasionally entails policy losses for the president. This pattern appears to conflict with UET’s rule that the president’s personal approval of an administrative program gives it democratic legitimacy. See, e.g., Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2203–04 (2020). As it turns out, when push comes to shove, the Court prefers to limit regulatory action than to endorse the president’s unfettered supervisory power over administration. This is not inconsistent, however, with a “binary executive” in which the president acts as the day-to-day overseer of administration, but the Court steps in now and then on important questions. For further discussion of this point, see *infra* Part II.A. See generally Emerson, *supra* note 251; Shugerman & Short, *supra* note 175.

officials³⁴⁹ and (2) have “clear congressional authorization,” provided it is “major”—or perhaps even when it is not.³⁵⁰

This two-part test is full of unknowns. Which actions by the president require a “clear and effective chain of command” down? Do executive orders fall under these requirements? What about memorandums (through which the Obama DACA and Deferred Action for Parents of Americans (DAPA) programs were passed)? Is this structural constraint enforceable with regard to a particular policy decision, and if so, by requiring a certain fact-finding, deliberative, or publicity-oriented process in the executive branch?³⁵¹ Does public opinion matter? On the other hand, and as many have asked, after the development of the MQD and *Loper Bright*, how “clear” does “clear” statutory authorization have to be? What level of predictive specificity must Congress’s delegations meet?

The result suggests that President Trump’s consternation will be shared by many future presidents. While Congress’s decades-long decline and the president’s growing portfolio have funneled policymaking toward the executive, the Court’s review makes even this safety valve unreliable.³⁵² It is difficult for agencies to devise long-term policy because the Court’s tests introduce doubts about whether an agency has “clear” statutory authority and about how it must craft rules. Worse, of late, the Court’s unpredictable application of textualism—as scholars point out that there now appear to be several warring forms of textualism on the bench—exacerbates the problem.³⁵³

It may be that the Court, with its solidly conservative slant, believes that policy stagnation is the same as a small government judiciously acting where it should and refraining where it should not. But stagnation and restraint are not the same. A functioning small government is able to justify the absence of intervention on reasoned grounds; an internally divided government simply cannot summon the collective will to act. It is “destitute of energy,”³⁵⁴ like the Articles of Confederation—even more so as the Court peels apart cooperative projects, separating the branches from each other like parents of squabbling children and rejecting all legitimating mechanisms save its own review.

This gives *Loper Bright* a, sadly, ironic quality. Justice Gorsuch is correct that *Chevron*’s regime of presidential administration *did* “upset” reliance interests, exposing litigants to a whiplash-inducing world of policy

349. *United States v. Arthrex*, 141 S. Ct. 1970, 1979 (2021) (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 498 (2010)) (“[Agency] power acquires its legitimacy and accountability to the public through ‘a clear and effective chain of command’ down from the President, on whom all the people vote.” (quoting *Free Enter. Fund*, 561 U.S. at 498)).

350. *West Virginia v. EPA*, 142 S. Ct. 2587, 2623 (2022).

351. See Shalev Roisman, *Presidential Law*, 105 MINN. L. REV. 1269, 1271 (2021); Shalev Roisman, *Presidential Factfinding*, 72 VAND. L. REV. 825, 828 (2019).

352. See *supra* Part III.C; *supra* notes 302–10 and accompanying text.

353. See *supra* note 322 (discussing the Court’s textualism and criticisms thereof).

354. Reagan, *supra* note 159, at 22 (quoting THE FEDERALIST NO. 15 (Alexander Hamilton)).

flip-flops.³⁵⁵ But if reducing policy mutability were truly the Court's concern, the solution would be to return administration to its more cooperative foundations, *not* to raise collective action costs for Congress and expose agencies to an inscrutable judicial review.

This suggests a second problem with separation-of-powers Lochnerism. A functioning small government would make decisions through the Constitution's preordained channels: congressional deliberation and execution by the president and the agencies. By championing separation over collective balancing, the Court pushes us toward a regime of presidential unilateralism, hamstringing Congress while hobbling administration's ability to plan and execute.³⁵⁶ Problems requiring long-term planning—disaster readiness, climate change, epidemiological preparedness, infrastructural improvements, promotion of scientific research and development—will remain unaddressed. Policy will be decided based on a potentially capricious presidential will, will more likely be poorly executed, and will depend on passing muster before ninety-plus federal judicial districts. As Justice Kagan lamented in her *West Virginia* dissent, “[t]he Court appoints itself—instead of Congress or the expert agency—the decisionmaker on climate policy. I cannot think of many things more frightening.”³⁵⁷

B. Imbalance in Powers

Presidential power is not per se bad for democracy. It is vital to it, in fact. A single head of government gives a human face to abstract ideas, sharpening the public's focus and interest in politics. Unlike a deliberating Court or an unruly legislative assembly, a president can act quickly and decisively when emergencies warrant it. Laws cannot execute themselves: without a person making choices about what statutes mean, written law would remain an empty form. But a constitution of balanced powers cannot survive without *balance*. If one branch grows at the expense of the others, the structure threatens to collapse. Across the globe, executive branches have expanded over the twentieth century thanks to forces like war, globalization, and technological development that transcend the politics of any one country.³⁵⁸ The American presidency has seen a similar expansion but with a twist: as we have seen, the growth of presidential power is being pushed by the Roberts Court.³⁵⁹

355. Transcript of Oral Argument at 140, *Trump v. United States*, 144 S. Ct. 2312 (2024) (No. 23-939); see also *Trump v. United States*, 144 S. Ct. at 2347 (emphasizing that the Court's perspective must be “more farsighted”).

356. See Freeman & Stephenson, *supra* note 252, at 21; Lisa Heinzerling, *The Supreme Court Is Making America Ungovernable*, ATLANTIC (July 26, 2022), <https://www.theatlantic.com/ideas/archive/2022/07/supreme-court-major-questions-doctrine-congress/670618/> (on file with the *Fordham Law Review*).

357. *West Virginia v. EPA*, 142 S. Ct. 2587, 2644 (2022) (Kagan, J., dissenting).

358. See generally SCHLESINGER, *supra* note 34; RUDALEVIGE, *supra* note 188; SKOWRONEK, DEARBORN & KING, *supra* note 28; Whittington & Carpenter, *supra* note 188; DEMOCRACY IN TIMES OF PANDEMIC: DIFFERENT FUTURES IMAGINED (Miguel Poiares Maduro & Paul W. Kahn eds., 2020).

359. DRIESEN, *supra* note 190, at 1–2.

Lochnerism in a separated-powers context favors presidentialism in at least three ways. It discovers “inherent” presidential powers where the Constitution does not provide for them.³⁶⁰ It suggests that the president may sometimes be justified in ignoring, or disobeying, congressional statutes.³⁶¹ And, by striking down the (rarer and rarer) legislative compromises that do materialize from our political branches, it encourages executive branch unilateralism even while chastening it through periodic reversals of agency decisions. Championing separation over cooperation, the Court bolsters presidential democracy and upsets a “finely wrought” legislative procedure on its own.³⁶²

One thing is critical to realize: we can have clogged policy channels *and* rising executive authoritarianism at the same time. Return, one more time, to the presidential immunity decision. *Trump v. United States* delineated three categories of presidential acts: (1) those that are *absolutely immune* from punishment (anything involving the president’s official duties), (2) those that are *presumptively immune* (powers shared with Congress), and (3) those that are *not immune* (unofficial acts taken as a private citizen).³⁶³ In his majority opinion, Chief Justice Roberts seemed stung by the ferocity of the dissent’s lament that the president had been made “a king above the law.”³⁶⁴ But *Trump*’s funhouse mirror version of the *Youngstown* tripartite division of presidential power had, instead, all the typical vices of separation-of-powers Lochnerism: no textual support, difficulty of application, and the practical effect of freezing action by other branches. And one more, to boot: It gives any president the perverse incentive to use all the weapons inside the sphere of “absolute immunity,” which seemingly includes the ability to weaponize the departments of the executive branch—in other words, to abuse the core powers of the most powerful executive office in the world. Lamented Justice Kentanji Brown Jackson, “it is when the President commits crimes using his unparalleled official powers that the risks of abuse and autocracy will be most dire.”³⁶⁵

Troublingly, a larger literature in comparative law and politics suggests that Justice Jackson is right.³⁶⁶ Chief executives seizing the powers of the executive branch—over prosecutors, tax collectors, the police, the military, regulators of elections and the media—are so common that a wide literature

360. See *supra* notes 233–37.

361. See, e.g., *Zivotofsky v. Kerry*, 576 U.S. 1, 61 (2015) (Roberts, C.J., dissenting) (“Never before has this Court accepted a President’s direct defiance of an Act of Congress in the field of foreign affairs.”); Bowie & Renan, *supra* note 17, at 2100–02.

362. *INS v. Chadha*, 462 U.S. 919, 921 (1983).

363. *Trump v. United States*, 144 S. Ct. 2312, 2331–32 (2024).

364. *Id.* at 2371 (Sotomayor, J., dissenting); *id.* at 2344 (majority opinion) (“As for the dissents, they strike a tone of chilling doom that is wholly disproportionate to what the Court actually does today.”).

365. *Id.* at 2382 (Jackson, J., dissenting).

366. See generally STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018); Oren Gross, *The Normal Exception*, in *CONSTITUTIONAL DEMOCRACY IN CRISIS?* (Mark A. Graber, Sanford Levinson & Mark V. Tushnet eds., 2018); TOM GINSBURG & AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* (2018).

calls this the “authoritarian playbook.”³⁶⁷ According to this script, the president invokes, then abuses, a threat to the nation to justify a swift response requiring temporary concentrated powers. Often, the emergency may be genuine, but too often it is extended and used as a pretext to clear out obstacles to the president’s program—opposition judges, civil servants, watchdogs, uncooperative elites, and an independent media. Eventually, the government’s power is turned against democracy itself: politicized law enforcement agencies intimidate political opponents, judges bend the rule of law in the incumbent’s favor, and election rules are tilted to protect the president from losing future elections.

This is the endgame: the three branches of government survive, but the conditions that democracy depends on are destroyed. There are plenty of democracies in the world that function this way: they have a constitution but no “constitutionalism.”³⁶⁸ But instead of absorbing the lessons of democratic backsliding elsewhere in the world, the Supreme Court has leaned into the storm. Together, UET and the MQD create a sort of pincer movement tending toward executive unilateralism.

On one hand, unitary executive theory is, in the hands of the wrong president, an invitation to executive branch takeover. The Court’s idea of a “chain of dependence” between the president and administrators confuses civil servants’ oaths to support the Constitution with a mandate to support the president.³⁶⁹ This was trivially but memorably represented by the “Sharpie” episode, when President Trump doctored a meteorological map with black marker, apparently because he had already told the public that a storm would pass through Alabama and his scientists refused to corroborate this false information.³⁷⁰ A military that behaved how President Trump hoped his climate scientists would is a far worse thought.

UET also fetishizes presidential election as sufficient to supply a democratic element to administration. This is poor political theory—on which the framers did not rely—and an insufficient guarantee of good

367. RUTH BEN-GHIAT, *STRONGMEN: MUSSOLINI TO THE PRESENT* 7–8 (2021). On the similarities of such executives across systems, see, for example, DRIESEN, *supra* note 190, at 119–20; CAN IT HAPPEN HERE?: *AUTHORITARIANISM IN AMERICA* (Cass R. Sunstein ed., 2018); WOJCIECH SADURSKI, *POLAND’S CONSTITUTIONAL BREAKDOWN* 269–70 (1st ed. 2019). On backsliding in the U.S. specifically, see, for example, Thomas M. Keck, *The U.S. Supreme Court and Democratic Backsliding*, 46 L. & POL. 197 (2024); Stephen Gardbaum, *Courts and Democratic Backsliding: A Comparative Perspective on the United States*, L. & POL. 1 (2024); Aziz Z. Huq, *The Supreme Court and the Dynamics of Democratic Backsliding*, 699 ANN. AM. ACAD. POL. & SOC. SCI. 50 (2022).

368. See Giovanni Sartori, *Constitutionalism: A Preliminary Discussion*, 56 AM. POL. SCI. REV. 853, 853–57, 861–62 (1962) (discussing the ideal of constitutionalism as one not all constitutional systems and constitutions meet); Dieter Grimm, *Types of Constitutions*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 98, 104 (Michel Rosenfeld & András Sajó eds., 2012).

369. SKOWRONEK, DEARBORN & KING, *supra* note 28, at 64 (“[D]emands for executive branch unity elevate loyalty to the president above all other qualifications.”).

370. Nancy Cook, *The Short Arc of a Sharpie Captures the Long Arc of Trump*, POLITICO (Sep. 5, 2019), <https://www.politico.com/story/2019/09/05/hurricane-dorian-sharpie-trump-1482839> [<https://perma.cc/ZY2L-B5A6>].

behavior. Public checks on the president, elected only once every four years and, even then, through a mediating electoral college, are too weak to stop backsliding in real time; and history shows that once an executive branch has centralized power over officials close to him—prosecutors and civil servants—the judicial backstop is too weak to do very much.³⁷¹

Meanwhile, by toppling popular policies for obscure reasons, the MQD raises the cost of government action and induces popular cynicism, fatigue, and frustration with democracy.³⁷² Americans' trust in democracy is declining, polls show, and gridlock is indeed one reason why.³⁷³ Policy stagnation of the sort increasingly seen in the United States is *not* a defense against the authoritarian playbook; it is an invitation to it. A public increasingly impatient with its inept governing institutions is one that is more receptive to a president's claimed need to clean house. This has been seen in weak democracy after democracy—as in Perú under Alberto Fujimori in 1992, Vladimir Putin's false flag bombing in 1999 Russia, the backsliding of Hungarian democracy after 2021, and in self-coups in Perú and Pakistan in 2022.³⁷⁴ They all started with gridlock and popular discontent before ending in executive branch abuse.

Bad faith by the executive branch is exactly what the MQD cases seem most concerned about. *West Virginia* warned of “a *particular and recurring problem*: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted.”³⁷⁵ Writing in *Biden v. Nebraska*, the student-loan-debt case, the Court concluded, “The dissent is correct that this is a case about one branch of government arrogating to itself power belonging to another. But it is the Executive seizing the power of the Legislature.”³⁷⁶

371. See David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 245 (2013). For a source using India as a case study, see generally Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India*, 14 L. & ETH. HUM. RTS. 49 (2020).

372. See Richard H. Pildes, *The Neglected Value of Effective Government*, U. CHI. LEG. F. (2024), <https://legal-forum.uchicago.edu/print-archive/neglected-value-effective-governme nt#heading-8> [<https://perma.cc/7QRW-UQUR>] (arguing that voters reward competence in addition to, or even above and beyond, ideology); David French, Opinion, *MAGA Is Misreading Its Mandate*, N.Y. TIMES (Jan. 16, 2025), <https://www.nytimes.com/2025/01/16/opinion/trump-hegseth-california.html> (on file with the *Fordham Law Review*).

373. *Congress and the Public*, GALLUP (Oct. 12, 2007), <https://news.gallup.com/poll/1600/Congress-Public.aspx> [<https://perma.cc/YC6R-48BT>] (indicating that only 17 percent of Americans approve of the job Congress is doing).

374. Maxwell A. Cameron, *Self-Coups: Peru, Guatemala, and Russia*, 9 J. DEM. 125, 125 (1998); Alexander Noyes, *The Return of the Presidential Putsch*, RAND (Jan. 11, 2024), <https://www.rand.org/pubs/commentary/2024/01/the-return-of-the-presidential-putsch.html> [<https://perma.cc/LH6P-3L2M>]; Yaniv Roznai, *Constitutional Transformation: Hungary, in CONSTITUTIONALISM IN CONTEXT* 136, 141 (David S. Law, ed., 2022); Charles Call, *No, It's Not a Coup—It's a Failed 'Self-Coup' That Will Undermine US Leadership and Democracy Worldwide*, BROOKINGS (Jan. 8, 2021), <https://www.brookings.edu/articles/no-its-not-a-coup-its-a-failed-self-coup-that-will-undermine-us-leadership-and-democracy-worldwide/> [<https://perma.cc/H2FA-6CA2>].

375. *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (emphasis added).

376. *Biden v. Nebraska*, 143 S. Ct. 2355, 2373 (2023).

The tragic irony is that the problem is in large part (though not exclusively) one of the Court's own making. UET pushes policymaking authority toward the president; the MQD frets that it has gone too far and tries to draw a line in the sand. By forsaking collective controls of constitutionalism, the Court has created a tidal wave and made itself the only barrier standing against it.

C. *The Constitution as a Straitjacket*

There was a time, believe it or not, when separation-of-powers controversies were rarely litigated before the Court. For most of American history, when Congress or the president believed that the other branch was unconstitutionally infringing on its prerogatives, each defended itself with the tools available, namely "Congress's power to pass statutes and the President's power to veto them."³⁷⁷ This has been called the "republican separation of powers," and among its virtues is the fact that it is provisional, flexible, and broad-based, with the *political* branches working out governing arrangements and applying them as the situation dictates.

When our government behaves in this way, it creates settlements that are collective, provisional, and inclusive of all three branches. Yet increasingly through the Lochnerism of the last twenty years, the Constitution's separations have become more pronounced. The Court sometimes claims to be wary of acting rashly so as to tie future governments' hands. "We are writing a rule for the ages," said Justice Gorsuch during oral arguments in the presidential immunity case.³⁷⁸ But effectively, the Court is tying Congress's hands when it prescribes "artificial constraints on what modern-day adaptable governance must look like"³⁷⁹ or picks winners and losers in debates over "[policy] questions of great political significance."³⁸⁰ This is judicial supremacy through a presidentialist and anti-administrativist lens.³⁸¹ In principle, Congress could reconfigure the system again. But its disadvantages are growing worse and worse.

The Constitution is stuck. The great constitutional debates of the age—sex equality, abortion, religion, federalism, and the powers of the presidency—take place before the bench, and most people take it for granted that actual constitutional amendment is impossible, superfluous, or undesirable.³⁸² Social movements *do* exercise agency in molding

377. Bowie & Renan, *supra* note 17, at 2078.

378. See generally Transcript of Oral Argument, *supra* note 355.

379. SEC v. Jarkesy, 144 S. Ct. 2117, 2175 (2024) (Sotomayor, J., dissenting).

380. West Virginia v. EPA, 142 S. Ct. at 2620 (Gorsuch, J., concurring).

381. Metzger, *supra* note 240, at 4 (summarizing the movement as "strong on rhetorical criticism of administrative government out of proportion to their bottom-line results"; opposed to "administration and bureaucracy, but not greater presidential power"; advocating a "greater role for the courts to defend individual liberty against the national state"; and prone to "condemn[ing] contemporary national government for being at odds with the constitutional structure the Framers created, though rarely—with the marked exception of Justice Thomas—do they develop this originalist argument with any rigor").

382. Katz, *supra* note 8, at 738. For discussions on popular constitutionalism and social movements, see, for example, Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de Facto ERA*, 94 CALIF. L. REV. 1323,

constitutional culture, as does public opinion, which judges often heed, especially at the state level.³⁸³ Yet the movements' achievements lie essentially at the whim of judges.³⁸⁴ Those, for instance, who viewed the New Deal or the Civil Rights era as constitutional settlements have witnessed with dismay the Court's rollback of labor rights, protections for reproductive autonomy, affirmative action, and voting.³⁸⁵ Those regimes, not to put too fine a point on it, were passed through broad-based democratic processes and ratified over the course of decades, while it is an unelected judiciary that now picks them apart. Separation-of-powers Lochnerism is a poor substitute for real democratic constitutional politics.³⁸⁶

It may be no exaggeration to say that the Constitution worked as long as it did because we were willing, as the framers intended, to reinvent, criticize, and continually rework it so as to accommodate new challenges. Now, rather than the sweeping legislation of the New Deal and the Great Society, we have ersatz reinventions through presidential sloganeering (e.g., "The Green New Deal," "Build Back Better"). Rather than a "republic of statutes" based on continuous congressional improvisations to make our Constitution work more efficiently, we have judicial paternalism, which leaves us with rules we cannot change.³⁸⁷ "When it comes to the separation of powers, this Court tells the American public and its coordinate branches that it knows best."³⁸⁸ With the polity too divided to formally amend its higher law any time in the

1324 (2006) (considering that while the Equal Rights Amendment failed, sex equality was mostly delivered through the courts); Gerald Magliocca, *Constitutional Change*, in THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 909, 919 (Mark Tushnet, Mark A. Graber & Sanford Levinson eds., 2015) ("[C]onstitutional amendments are typically unnecessary to change constitutional law or culture" because "[t]here is no significant advantage to using the Article Five process when other options are available, which is why political activists of all stripes focus on litigation and influencing public opinion rather than hammering out proposed changes to the Constitution itself.").

383. See generally, e.g., BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009) (arguing that, in exercising judicial review, judges are often enforcing the will of the people).

384. See Thomas W. Merrill, *Interpreting an Unamendable Text*, 71 VAND. L. REV. 547, 552 (2018) (arguing that an interpreter of an unamendable text "will increasingly substitute analysis of *precedent* interpreting the text for interpretation of the text itself," rendering the process an "echo chamber"). But see generally DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION 1776-2015 WITH A NEW AFTERWORD (2016) (arguing that constitutional amendment-by-judicial-interpretation is not as durable as the real thing).

385. See generally *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps.*, 138 S. Ct. 2448 (2018); *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023); *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013).

386. See generally KYVIG, *supra* note 384.

387. Bowie & Renan, *supra* note 17, at 2031.

388. *SEC v. Jarkesy*, 144 S. Ct. 2117, 2174 (2024).

near future, for now, our constitutional fate lies in the Court's hands.³⁸⁹ The Lochnerized separation of powers is a constitutional straitjacket.

CONCLUSION: THE END OF *LOCHNER* AND
A RETURN TO COLLECTIVE CONTROLS

These days, many court watchers argue that the Supreme Court has grown high-handed, unreachable, and unethical.³⁹⁰ Use of the shadow docket has grown, and in a series of early procedural holdings on President Trump's actions, the Court has refrained from even giving reasons.³⁹¹ Political checks on the judiciary are weak. Disciplinary tools of Congress and the People lie moldering: court-packing has not been seen since 1868; no constitutional decision has been overridden since 1971; and recent court reform proposals have all come to naught.³⁹² When it comes to America's separation of powers, the Roberts Court is in the driver's seat and, on top of everything, is methodologically unbound, as this Article has argued.

389. See generally Katz, *supra* note 8. See also Andrea Scoseria Katz, *Why Write?: The Desuetude of Article V and the Democratic Costs of Informal Constitutional Amendment*, 30 IND. INT'L & COMPAR. L. REV. 365, 366 (2020).

390. See generally, e.g., LINDA GREENHOUSE, *JUSTICE ON THE BRINK: A REQUIEM FOR THE SUPREME COURT* (2022); JOAN BISKUPIC, *NINE BLACK ROBES: INSIDE THE SUPREME COURT'S DRIVE TO THE RIGHT AND ITS HISTORIC CONSEQUENCES* (2023); STEPHEN VLADECK, *THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC* (2023). Allegations of ethical improprieties have also plagued the Court. Within the last few years, the public learned that Justice Thomas accepted lavish gifts from wealthy conservatives, including some whose cases appeared before the Court; Justice Gorsuch sold a piece of property to—and failed to disclose the identity of—the chief executive of a law firm with a robust Supreme Court practice; and Justice Alito (or at least his wife) flew flags in support of President Trump's bid for an electoral coup in January 2021. Greg Sargent, *The Saga of Clarence Thomas and His Luxury RV Takes a Disturbing Turn*, NEW REPUBLIC (May 16, 2024), <https://newrepublic.com/article/181627/clarence-thomas-rv-loan-democrats-letter> [<https://perma.cc/3VWM-F3GS>]; Heidi Przybyla, *Law Firm Head Bought Gorsuch-Owned Property*, POLITICO (Apr. 25, 2023, at 04:30 ET), <https://www.politico.com/news/2023/04/25/neil-gorsuch-colorado-property-sale-00093579> [<https://perma.cc/9WT6-FE DU>]; Justin Jouvenal, *Alito's Account of the Upside-Down Flag Doesn't Fully Add Up. Here's Why.*, WASH. POST (June 5, 2024), <https://www.washingtonpost.com/politics/2024/06/05/justice-alito-flags-unanswered-questions/> (on file with the *Fordham Law Review*).

391. VLADECK, *supra* note 390; Quintera Jurecic, *The Supreme Court Won't Explain Itself*, THE ATLANTIC (July 15, 2025), <https://www.theatlantic.com/politics/archive/2025/07/scotus-education-department/683536/> (on file with the *Fordham Law Review*).

392. See *Oregon v. Mitchell*, 400 U.S. 112, 118, 124–31 (1970) (holding that the federal government had no power to enfranchise eighteen-year-olds voting in state elections), *superseded by constitutional amendment*, U.S. CONST. amend. XXVI. President Biden's single term was bookended by Supreme Court reform proposals, but neither produced any binding recommendations. See PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., FINAL REPORT 294 (2021); Joe Biden, Opinion, *Joe Biden: My Plan to Reform the Supreme Court and Ensure No President Is Above the Law*, WASH. POST (July 29, 2024), <https://www.washingtonpost.com/opinions/2024/07/29/joe-biden-reform-supreme-court-presidential-immunity-plan-announcement/> (on file with the *Fordham Law Review*). The plan would have initiated a constitutional amendment specifying former presidents are not immune from crimes committed while in office, set a single 18-year term limit for justices, and established a binding code of judicial conduct that would require disclosure of gifts, abstention from political activity, and recusal in cases in which they or their spouses have a conflict of interest. See *id.*

That is not to say that the Court does not care what the public thinks. Indeed, one curious feature of the recent decisions on presidential powers is the tendency, on both sides, to claim the mantle of Justice Robert Jackson's fabled *Youngstown* concurrence.³⁹³ In *Trump*, the majority self-consciously pronounced, quoting Justice Jackson, that in deciding the immunity question, it had to consider the "enduring consequences upon the balanced power structure of our Republic."³⁹⁴ It applied Justice Jackson's famous tripartite scheme of power to conclude that where an action falls within the president's "conclusive and preclusive" authority, absolute immunity must lie.³⁹⁵ The dissent retorted that Justice Jackson's framework had been misused.³⁹⁶

If a Justice Jackson revival is truly underway, then it is worth clarifying what his *Youngstown* concurrence did say. "The actual art of governing under our Constitution," wrote the former attorney general, "does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context."³⁹⁷ Executive powers are "not fixed but fluctuate," depending on the president's relationship to Congress.³⁹⁸ Justice Jackson would have abhorred the practice of inferring new presidential powers from constitutional silence. In fact, he made the point explicitly: "[T]he President does not enjoy unmentioned powers."³⁹⁹ Nor did the office, "already so potent and so relatively immune from judicial review"⁴⁰⁰ (in 1952!), need a helping hand from the judiciary.⁴⁰¹

Back to the present day, for two decades, the Roberts Court has steadily "judicialized" the Constitution's separation of powers, inferring new powers for the president alongside limits on Congress and the agencies; the Court has frozen in place interbranch relationships on the basis of "isolated clauses" of text "torn from context" (to echo Justice Jackson).⁴⁰² As this Article has argued, separation-of-powers Lochnerism produces an unbound judiciary, an impotent legislature, and a president with a dangerous warrant to act "above

393. See, e.g., *Zivotofsky v. Kerry*, 576 U.S. 1, 6 (2015); *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2245 (2020) (Kagan, J., dissenting); *Trump v. Mazars USA, LLP*, 40 S. Ct. 2019, 2026 (2020); *Trump v. United States*, 144 S. Ct. 2312, 2345 (2024).

394. *Trump v. United States*, 144 S. Ct. at 2326 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring)).

395. *Id.* at 2319.

396. *Id.* at 2368 (Sotomayor, J., dissenting).

397. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

398. *Id.*

399. *Id.* at 640.

400. *Id.* at 654.

401. *Id.* at 634 (warning that the Court should not fall into the temptation of sustaining "comprehensive and undefined presidential powers"); see also *id.* at 655 ("With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.").

402. *Id.* at 635. On the concept of judicialization, see Rachel E. Barkow, *More Supreme than Court?: The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 325–29 (2002); Ferejohn, *supra* note 47, at 41–43.

the law.” Properly put into view, the Roberts Court’s handiwork is a repudiation of Justice Jackson’s concurrence in every sense.

Justice Jackson’s opinion was also a leading exemplar of midcentury legal pragmatism—precisely the tradition that replaced *Lochner* on the bench.⁴⁰³ Justice Jackson argued for a *realistic* approach to separation-of-powers cases, one that acknowledges that textual guidelines are sometimes limited, and that government works well when Congress’s powers to structure it are respected.⁴⁰⁴ By contrast, the *Lochner* era ended, we might say, with a whimper when its worldview came to seem intolerably rigid and anachronistic. In 1935, the Supreme Court won a pyrrhic victory when it invalidated an early New Deal program, leading to President Franklin D. Roosevelt’s biting remark: “We have been relegated to the horse-and-buggy definition of interstate commerce.”⁴⁰⁵ To an American public suffering from crushing debts, unemployment, and uncertainty, *Lochnerism* effectively said, “We are sorry, but government has no power to help you.”⁴⁰⁶ Eventually this reading of the Constitution came to seem no longer true nor desirable.

What brought about the end of *Lochner*? The Court was finally brought to heel by a political movement that not only swept government but remade its capacities entirely.⁴⁰⁷ Scholars still debate whether the Court’s “switch in time” really existed, but there is no doubt that *Lochner* collapsed under the weight of its intended results, a victim of its own success.⁴⁰⁸

Justice Holmes, a *Lochner* dissenter, once wrote, “The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong.”⁴⁰⁹ Even in a polarized America, today’s Court finds itself increasingly at odds with public opinion, having helped to cultivate a presidency now being exploited to its fullest capacity, a government incapable of functioning and thus of attracting public allegiance, and a judiciary widely perceived to have no limits.⁴¹⁰ Will all of this matter? Rather than whether, the better question is *when*.

403. See generally, e.g., Posner, *supra* note 87; Steilen, *supra* note 87 (discussing Justice Jackson’s reputation).

404. *Youngstown*, 343 U.S. at 634–35 (Jackson, J., concurring) (reflecting that his time as a presidential advisor shaped his future views as a judge more than legal doctrine did).

405. LAURA KALMAN, *FDR’S GAMBIT: THE COURT PACKING FIGHT AND THE RISE OF LEGAL LIBERALISM* 35 (2022).

406. See generally, e.g., *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330 (1935); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

407. ACKERMAN, *supra* note 11, at 47–50, 105–30.

408. See *Youngstown*, 343 U.S. at 634 (Jackson, J., concurring) (debating whether the Court bent to political pressure in making way for the New Deal).

409. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 39 (2009).

410. See *supra* note 14.