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Major Questions About Presidentialism: Untangling the "Chain of Dependence" Across Administrative Law

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Abstract

A contradiction about the role of the president has emerged between the Roberts Court's Article II jurisprudence and its Major Questions Doctrine jurisprudence. In its appointment and removal decisions, the Roberts Court claims that the president is the "most democratic and politically accountable official in Government" because the president is "directly accountable to the people through regular elections," an audacious new interpretation of Article II; and it argues that tight presidential control of agency officials lends democratic legitimacy to the administrative state. We identify these twin arguments about the "directly accountable president" and the "chain of dependence" as the foundation of "Roberts Court presidentialism."

Meanwhile, each of the policies in dispute in the Major Questions cases over the past three decades are the product of the "directly accountable president" and the "chain of dependence" in action. This Article documents seven MQD cases, from 1990s tobacco regulation to the recent student debt waiver: presidents campaigning on the policy, directing agencies to adopt the policy, and then publicly taking credit and responsibility for the policy. Nevertheless, the Supreme Court has almost always ignored the presidents' role in Major Questions policies and has instead blamed the agency for overstepping its delegated power. The erasure of presidents serves the Court's narrative of blaming "unaccountable bureaucrats," rather than either granting the policy more democratic legitimacy for its presidential backing or holding the president who ordered the policy accountable for overstepping the separation of powers. The erasure also suggests the Court has an underlying ambivalence or anxiety about the problems of presidential power, which Roberts Court presidentialism has exacerbated. Ironies abound: relying on a theory of presidential accountability, but then retreating from holding presidents accountable; unaccountable judges expanding judicial power based on a narrative of "unaccountable bureaucrats."

The rule of law requires consistent reasoning. We suggest five doctrinal opportunities to resolve the contradictions between the Roberts Court's Article II presidentialism and its Major Questions' erasures of presidents: 1) SEC v. Jarkesy *on the removal of administrative law judges; 2) future MQD cases crediting or blaming presidents; 3) the applicability of MQD to presidents; 4) the future of* Chevron *deference; and 5) in applying the non-delegation doctrine. The Roberts Court can untangle the "chain of dependence" with more consistency in either direction, but perhaps the most important lessons from these contradictions are for judicial restraint and of acknowledging the costs of direct presidential power, not just the benefits.*

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INTRODUCTION

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

> [T]he Framers made the President the most democratic and politically accountable official in Government. Only the President (along with the Vice President) is elected by the

[1] Scholars have documented that the Roberts Court's account of presidential power is more a matter of political theory than of solid textual or originalist historical evidence. Cass R. Sunstein and Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83 (2020).
[2] Seila Law v. Consumer Financial Protection Bureau, 140 S.Ct. 2183, 2203 (2020).

> entire Nation. And the President's political accountability is enhanced by the solitary nature of the Executive Branch, which provides "a single object for the jealousy and watchfulness of the people."[3]

He went on to explain that, for this reason, executive branch officials must be connected to the president through a "chain of dependence" binding them to the president, who is ultimately accountable to the people.[4] These twin arguments (as a shorthand, "the directly accountable president" and "the chain of dependence") are the foundation for what we identify as "Roberts Court presidentialism": a new audacious claim that the president is "directly accountable" through "regular elections" and is the "most democratic and political accountable officer in Government," plus a more recurring argument that direct presidential control is necessary to lend democratic legitimacy to the administrative state.

On the other hand, in its decisions that are the basis for the major questions doctrine (MQD), the Roberts Court has repeatedly struck down policies that are the product of the "national presidency" and a highly visible "chain of dependence" in action, linking agencies under the president's formal supervisory control, to presidents who directed, actively supervised, and took responsibility for these agencies' key policy decisions, to an attentive public that was engaged in vigorous political debate about these high-profile policies. Mysteriously, despite the special national democratic character of presidential involvement in policies that have been struck down in MQD cases, the president is virtually invisible in these cases. For example, *Biden v. Nebraska* does not discuss President Joe Biden's extensive involvement and pivotal decision-making role in the student debt relief policy struck down by the Court in that case. *King v. Burwell* does not even mention President Barak Obama in its consideration of a challenge to the Affordable Care Act—his signature policy achievement, more commonly known as "Obamacare." A mix of conservative and liberal Justices similarly erased President George W. Bush from *Gonzales v. Oregon*, a case challenging regulatory action to curb physician-assisted suicide, which Bush personally directed and publicly supported. Despite the Court's insistence in appointment and removal cases that presidential control legitimates the actions of administrative agencies, the Court closes its eyes to the president's high-touch and high-visibility role in MQD cases.

Instead, the Court blames "major questions" indiscretions on unruly and unaccountable agencies: "hundreds of" them, "poking into every nook and cranny of daily life"[5]; agencies "laying claim to extravagant statutory power over the national economy"[6]; agencies lying in wait, seeking "to exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond its initial assignment."[7] According to the concurring Justices in *NFIB*

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[3] *Id.* at 2203.
[4] *Id.* at 2203 (citing 1 Annals of Cong. 499 (1789)). See also United States v. Arthrex, 141 S.Ct. 1970, 1979 (2021) (citing 1 Annals of Cong. 499 (1789)).
[5] City of Arlington v. Federal Communications Commission, 569 U.S. 290, 315 (2013) (Roberts, J., dissenting).
[6] Utility Air Regulatory Group v. EPA, 573 U.S. 302, 324 (2014).
[7] Nat'l Fe'd of Indep. Bus. V. Dep't of Lab., Occupational Safety & Health Admin., 142 S.Ct. 661, 669 (2022) (Gorsuch, J., concurring).

v. OSHA, "[t]he major questions doctrine guards against this possibility"[8] of unaccountable bureaucrats overreaching beyond democratic control.

What seems to have escaped the Court's notice is that its solution to the problem of agency accountability in appointment and removal cases—presidential control—has become the nub of its problem in MQD cases. The policies struck down by the Court using the MQD are paragons of presidential control, but that does not seem to have reined in the agencies that promulgated them—to the contrary, the president's influence arguably emboldened the agencies to take the ill-fated policy positions that they did. This seeming paradox might be reconciled if the Court had taken the opportunity in MQD cases to reflect on the soundness of its unitarian theory of agency accountability through presidential control. But it has done no such thing. Indeed, despite presidents taking the lead and taking responsibility for each of the MQD policies promulgated this century, the Court ignores the President's role and scapegoats the agencies that did the President's bidding. This is an odd way for unitarians to write and think about the executive branch,[9] unless they believe that these agencies were working in secret or somehow slipped the President's grasp. But there is no evidence of this—either that the agencies actually defied presidential directives or that the Court believes they did. In fact, as we document below, the historical record indicates the opposite: the president was a central driver of these policies.

If the agencies that burst the bonds of their statutory authority were, indeed, under firm presidential control, then the MQD cases raise serious questions about presidentialism and accountability that the Court has not acknowledged, much less resolved. Many scholars have debated whether the president actually represents the nation, whether the Founders intended for the president to represent the nation, and whether this would be a normatively a good idea.[10] This Article does not address those more general questions, but instead, joins a small handful of scholars critiquing Chief Justice Roberts's specific claims about presidentialism in recent removal

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[8] *Id.* at 669.

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

[10] *See, e.g.*, JOHN A. DEARBORN, POWER SHIFTS: CONGRESS AND PRESIDENTIAL REPRESENTATION (2021); JEREMY BAILEY, THE IDEA OF PRESIDENTIAL REPRESENTATION 1-41 (2019); ERIC NELSON, THE ROYALIST REVOLUTION (2005); JAMES CEASER, PRESIDENTIAL SELECTION: THEORY AND DEVELOPMENT (1979); B. DAN WOOD, THE MYTH OF PRESIDENTIAL REPRESENTATION (2009); DOUGLAS L. KRINER AND ANDREW REEVES, THE PARTICULARISTIC PRESIDENT: EXECUTIVE BRANCH POLITICS AND POLITICAL INEQUALITY (2015); JOHN HUDAK, PRESIDENTIAL PORK: WHITE HOUSE INFLUENCE OVER THE DISTRIBUTION OF FEDERAL GRANTS (2014); WILLIAM G. HOWELL AND TERRY M. MOE, RELIC: HOW OUR CONSTITUTION UNDERMINES EFFECTIVE GOVERNMENT 99-107 (2016); NANCY L. ROSENBLUM, ON THE SIDE OF ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP 41 (2008); NADIA URBINATI, DEMOCRACY DISFIGURED: OPINION, TRUTH, AND THE PEOPLE 4-8, 174 (2014); Robert A. Dahl, *The Myth of the Presidential Mandate*, 105 POLI.SCI.Q. 355 (1990); Jane Mansbridge, *Rethinking Representation*, 97 AM.POL.SCI.REV. 97, no. 4 (2003). For a parallel debates in administrative law, see Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) and the enormous literature debating it.

cases.[11] We point out additional contradictions (namely, within days of *Seila Law*'s claim of the president's "direct" popular election, the Supreme Court confirmed the Electoral College's indirectness and states' rights to appoint electors[12]). We show that his claims are more extreme and dubious leaps from Justices' earlier presidentialist arguments, which more modestly and persuasively focused on the president's unique representation of "the entire nation." And we extend these critiques by showing how the Roberts Court's presidentialism in appointment and removal cases contradicts its MQD jurisprudence.

Juxtaposing Court's recent appointment and removal decisions with its MQD decisions illuminate three particularly glaring contradictions of Roberts Court presidentialism. First, it reveals that the Court is playing an accountability shell game. In the appointment and removal cases, Congress is the problem (enacting unconstitutional laws that overreach the separation of powers), and the solution is the President, who is "directly accountable to the people through regular elections."[13] Meanwhile, in the MQD decisions, Congress is held up as the solution (as the democratic branch[14] to which the Constitution "gives the reins" to make "the Nation's policy"[15]) and "unaccountable" agencies are the problem. Presidents are rendered invisible, and their democratic mandate from national elections and the legitimating "chain of dependence" are suddenly irrelevant.

Second, the Court's erasure of presidents from the recitation of facts in MQD cases where presidents played outsize roles suggests that the Justices wish to avoid two potentially awkward confrontations: one with presidents who have potentially violated the separation of powers, and the other with the dangers of the Court's own long-term presidentialist project. Presidential power has been expanding for decades, and the Roberts Court's appointment and removal jurisprudence both validates and accelerates that expansion. The MQD decisions generally find that the executive branch overstepped, but the Roberts Court's insistence on hiding the role of presidents in its narrative of executive overreach suggests a hidden ambivalence about presidential power and an unwillingness to acknowledge that its presidentialist jurisprudence has increased those dangers. Ironically, although the Roberts Court repeatedly relies on the president's accountability to expand presidential control in appointment and removal cases, it strains to avoid holding presidents accountable—often not even mentioning them in the facts—in MQD cases.

Third, the Roberts Court's shifting use of presidentialism produces the ultimate contradiction: a jurisprudence fixated on the problems of "unaccountable bureaucrats" and the

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[11] Andrea Scoseria Katz and Noah Rosenblum, *Removal Rehashed*, 136 HARV. L. REV. F. 404, 405 (2023); Andrea Scoseria Katz & Noah A. Rosenblum, *Becoming the Administrator-in-Chief*, 123 COLUM. L. REV. (forthcoming 2023); Joshua J. Schroeder, *We Will All Be Free or None Will Be*, 27 TEXAS HISPANIC J. L. & POLICY 1, 17 (2021).
[12] *Chiafalo v. Washington*, 140 S.Ct. 2316 (2020).
[13] *Seila Law*, 140 S.Ct. at 2203.
[14] Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, 142 S. Ct. 661, 669 (Gorsuch, J., concurring) (By protecting Congress's Article I power, the non-delegation doctrine and the MQD "both serve to prevent 'government by bureaucracy supplanting government by the people.'").
[15] Biden v. Nebraska, 143 S.Ct. 2355, 2381 (2023) (Barrett, J., concurring).

importance of "democratic accountability" has created new legal doctrines that increase the power of the judiciary — the least democratic branch.[16]

These contradictions demand resolution, and the Court's current docket offers abundant opportunities to address them. *Securities and Exchange Commission v. Jarkesy*[17] invites the Court to extend presidential control to administrative law judges performing adjudicative functions. *Loper Bright Enterprises v. Raimondo* asks the Court to overturn *Chevron v. NRDC* and its rule of deference to agency interpretations of ambiguous statutes, or alternatively to expand the MQD exception to *Chevron* deference. Undoubtedly, the Court will be asked to further clarify the MQD for lower courts at a loss for how to coherently apply it. The Court should take these opportunities to reconcile its shifting theories of the president's role in agency accountability across its administrative law jurisprudence.

While there is a substantial literature on the MQD and its precursors, this scholarship (much like the Court) has paid little attention to the president. The bulk of MQD scholarship assesses the MQD's compatibility with various theories of statutory interpretation,[18] contemplates the MQD's implications for *Chevron* deference,[19] analyzes the MQD's relationship to the nondelegation doctrine,[20] and suggests how Congress could respond to the MQD.[21] The

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[16] Blake Emerson argues that with the latest iteration of the MQD, "the Justices are taking a share of executive power for themselves and acting collectively as the President's cochief of the federal government." Blake Emerson, *The Binary Executive*, 132 YALE L. J. FORUM 756, 764 (2022); Mark Lemley, *The Imperial Supreme Court*, 136 HARV. L.REV.F. (2022). See also *Biden*, 143 S.Ct. at 2384 (Kagan, J., dissenting) ("In every respect, the Court today exceeds its proper, limited role in our Nation's governance.)

[17] Jarkesy v. SEC, 34 F.4th 446, 464 (5th Cir. 2022); Case No. 22-859 (October 2023 Term).

[18] Daniel Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, IOWA L. REV. __ (forthcoming 2024); Ilan Wurman, *Importance and Interpretive Questions*, VA. L. REV. (forthcoming 2024); Benjamin Eidelson & Matthew Stephenson, *The Incompatibility of Substantive Canons and Textualism*, HARV. L. REV. (forthcoming 2024); Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1938 (2017); Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL'Y 463 (2021); Kevin O'Leske, *Major Questions about the "Major Questions" Doctrine*, 5 MICH. J. ENVTL. & ADMIN. L. 479 (2016); Kevin Tobia, *We're Not All Textualists Now*, 78 N.Y.U. ANN. SURV. AM. L. 243 (2023); Samuel Bray, *The Mischief Rule*, 109 GEO. L.J. 967 (2021).

[19] Thomas Merrill, *The Major Questions Doctrine: Right Diagnosis, Wrong Remedy*, COLUM. PUB. L. RSCH. (2023); Christopher Walker, *Toward a Context-Specific* Chevron *Deference*, 81 MO. L. REV. 1095 (2016); Johnathon Skinner-Thompson, *Administrative Law's Extraordinary Cases*, 30 DUKE ENVTL. L. & POL'Y F. 293 (2020); Keith Rizzardi, *From the Four Horsemen to the Rule of Six: The Deconstruction of Judicial Deference*, 12 MICH. J. ENVTL. & ADMIN. L. 63 (2022); William Buzbee, *Jazz Improvisation and the Law: Constrained Choice, Sequence, and Strategic Movement Within Rules*, U. Ill. L. Rev. 151 (2023); Kent Barnett & Christopher Walker, *Chevron Step Two's Domain*, 93 NOTRE DAME L. REV. 1441 (2018).

[20] Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. (forthcoming 2023); Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262 (2022); Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L.J. 465 (2023); Brian Chen & Samuel Estreicher, *The New Nondelegation Regime*, 102 TEX. L. REV. (forthcoming 2023); Ilan Wurman, *As-Applied Nondelegation*, 96 TEX. L. REV. 975 (2018); Randolph May & Andrew Magloughlin, NFIB v. OSHA*: A Unified Separation of Powers Doctrine and* Chevron*'s No Show*, 74 S.C. L. REV. 265 (2022); Alison Gocke, *Chevron's Next Chapter: A Fig Leaf for the Nondelegation Doctrine*, 55 U.C. DAVIS L. REV. 955 (2021); Marla Tortorice, *Nondelegation and the Major Questions Doctrine: Displacing Interpretive Power*, 67 Buff. L. Rev. 1075 (2019); Cass Sunsetin, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475 (2021); *The American Nondelegation Doctrine*, 86 GEO. WASH. L. REV. 1181 (2018); Ilya Somin, *Nondelegation Limits on COVID Emergency Powers: Lessons from the Eviction Moratorium and Title 42 Cases*, 15 N.Y.U. J. L. & LIBERTY 658 (2022).

[21] Christopher J. Walker, *Responding to the New Major Questions Doctrine*, 46 REGUL. 26 (2023).

contribution of this article is to center the President, and the Court's unitary theory of presidentialism, in the conversation about the MQD. Although a handful of articles have noted in passing the MQD's relationship to executive power—characterizing it either as an encroachment on executive power[22] or as a potentially useful check on executive power[23]—only one provides a thorough analysis of the executive branch separation of powers issues presented by the MQD.[24] This Article extends the emerging body of scholarship on the relationship between the MQD and executive power by focusing on the particularly jarring contradiction between the MQD and the theory of presidentialism underlying the Roberts Court's appointment and removal jurisprudence. It makes a further empirical contribution by laying out the voluminous evidence documenting that contradiction. Specifically, it catalogues the President's role in directing and supervising the agencies that adopted policies struck down as "major questions," it reveals the President's conspicuous absence from cases challenging these policies, and it considers the implications of this for the coherence of the Court's administrative law jurisprudence.

The Article proceeds as follows. Part I surveys the Court's appointment and removal jurisprudence and describes the theory of presidential accountability that underlies it: the "chain of dependence" through which agency action is justified when agencies are accountable to the president, who is "directly accountable to the people through regular elections," making him "the most democratic and politically accountable official in Government."[25] Even if these claims are dubious in terms of original public meaning and structure, they are the core of the Roberts Court's unitary executive theory to solve the problem of agency accountability. Part II presents detailed case studies of president's involvement in the policies challenged (and mostly struck down) in MQD cases decided by the Supreme Court this century. These case studies will show that each of these policies is a product of the Court's "chain of dependence" ideal: agency officials dependent on the President, and a President responsible to the electorate. Part III turns its focus to the Court's MQD decisions, demonstrating that these cases, like the appointment and removal cases, are driven by the Court's concerns about lack of agency accountability, yet they mysteriously erase the president from this story. They contain no mention of the president's close supervision of "major questions" policies and fail to consider whether it might be a basis for legitimizing the agency's actions. Part IV suggests ways for the Court to resolve these contradictions and untangle the "chain of dependence" in upcoming cases across a range of administrative law issues, including: appointment and removal; MQD and its applicability to presidents; the future of *Chevron* deference; and in applying the non-delegation doctrine.

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[22] Blake Emerson, *Administrative Answers to Major Questions*, 102 MINN. L. REV. 2019, 2081 (2018); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. (forthcoming 2023); Timothy Roth, *Major Questions Doctrine: Implications for Separation of Powers and the Clean Power Plan*, 29 GEO. ENVTL. L. REV. 555, 565 (2017); Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L. J. 465, 465 (2023). *Cf.* Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 276 (2022).

[23] Bijal Shah, *Statute-Focused Presidential Administration*, 90 GEO. WASH. L. REV. 1165, 1250 (2022); Ilya Somin, *A Major Question of Power: The Vaccine Mandate Cases and the Limits of Executive Authority*, 2022 CATO SUP. CT. REV. 69, 71 (2022).

[24] Blake Emerson, *The Binary Executive*, supra.

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

I. PRESIDENTIALISM IN APPOINTMENT AND REMOVAL CASES

In two lines of cases on presidential power, on appointment and removal, the Roberts Court has emphasized the special role of the president at the top of the "chain of dependence," an executive hierarchy under the only American official who has a national democratic mandate, a claim of "direct" electoral accountability to the American people.[26] Setting aside for now the historical accuracy of these originalist claims, we trace here their genealogy in the Court's jurisprudence, showing that the Roberts Court has escalated the rhetoric and theoretical claims beyond earlier Justices' arguments. Chief Justice Taft, and Justices Jackson[27] and Scalia, focused on the president's unique role in representing "the entire nation," a model we call "the nation's president." We contrast that model with the Roberts Court's "most accountable president" based on new claims about direct election and being "most democratic… official," period.

The concept that the president represents the nation goes back to the Founding, but it was mixed and complicated by compromises.[28] The Court's theory of the president's unique national democratic legitimacy emerged a century ago in *Myers v. U.S.*, went into exile for several decades, and then returned in the form of unitary executive theory[29] and "presidential administration."[30] The Supreme Court's first reference to the "chain of dependence" (a term coined by James Madison) was Chief Justice William Taft's 1926 decision in *Myers v. U.S.*, the key precedent establishing a presidential removal power as implied by Article II. Chief Justice Taft – the only former president to sit on the Supreme Court– is well known as the architect of a theory of expansive presidential power based on the president's status as the sole national representative officer in the federal government.[31] Taft recounted Madison's argument during the debate over the first departments and the removal power, known as the "Decision of 1789":[32]

> As Mr. Madison said in the debate in the First Congress: 'Vest this power [of removal] in the Senate jointly with the President, and you abolish at once that great principle of unity and responsibility in the executive department, which was intended for the security of liberty and the public good. If the President should possess alone the power of removal from office, those who are employed in the execution of the law will be in their proper

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[26] *Seila Law*, 140 S.Ct. at 2203. See Howard Schweber, *The Roberts Court's Theory of Agency Accountability*, 8 BELMONT L. REV. 460 (2021)

[27] Youngstown Sheet & Tube v. Sawyer 243 U.S. 579, 653 (1952) (Jackson, J., concurring) ("Executive power has the advantage of concentration in a single head in those choice the whole Nation has a part").

[28] BAILEY, THE IDEA OF PRESIDENTIAL REPRESENTATION 4, 10, 40-41.

[29] See generally Steven Calabresi & Kevin Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1165 (1992).

[30] See generally Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

[31] The perception of the president as the nation's singular representative has been shaped the last century and the rise of the modern administrative state and the "imperial presidency." ARTHUR SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1974); JOHN A. DEARBORN, POWER SHIFTS: CONGRESS AND PRESIDENTIAL REPRESENTATION (2021); JEREMY BAILEY, THE IDEA OF PRESIDENTIAL REPRESENTATION: AN INTELLECTUAL AND POLITICAL HISTORY (2019); Andrea Scoseria Katz and Noah Rosenblum, *Becoming the Administrator-in-Chief: Myers and the Progressive Presidency*, COLUM. L. REV. (forthcoming 2023)

[32] For evidence that the "Decision of 1789" was indecisive and that the First Congress rejected the unitary theory of Article II on removal, see Part IV; Shugerman, "Indecisions of 1789."

> situation, and *the chain of dependence* be preserved; the lowest officers, the middle grade, and the highest will depend, as they ought, on the President, and the President on the community.' [citing Madison at 1 *Annals of Congress*, 499].[33]

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

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

> The President is a representative of the people, just as the members of the Senate and of the House are, and it may be at some times, on some subjects, that the President, *elected by all the people*, is *rather more representative of them all* than are the members of either body of the Legislature, whose constituencies are local and not country wide, and as the President is elected for four years, *with the mandate of the people* to exercise his executive power under the Constitution, there would seem to be no reason for construing that instrument in such a way as to limit and hamper that power beyond the limitations of it, expressed or fairly implied.[34]

Taft's pivotal move here was elevating the president above Congress as the political branch most representative of the people as a whole, validating the president's actions because of the president's unique and sustained connection to the American people through past and future national elections.[35] Taft highlighted the president's "elect[ion] by all the people," consistent with the "nation's president" model. Legal scholars have recently characterized Taft's argument as a novel framing of the "Progressive President" and "the Administrator-in-Chief."[36] While Taft was emphasizing the president's unique national role, he did not make claims about the president as "directly accountable" via elections or the "most accountable." Those would be Roberts's dubious additions.

Just nine years later, the Supreme Court severely limited the extent of Taft's removal rule in *Humphrey's Executor*, the precedent allowing Congress to protect some officers from presidential removal at will. In *Humphrey's*, the Court did not focus on *Myers*'s conception of presidential power over executive offices, but instead recognized a separate category of offices as "quasi-judicial" and "quasi-judicial," with more congressional power over such offices.[37]

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[33] Myers, 272 U.S. 52, 131 (1926) (emphasis added). See 11 Documentary History of the First Federal Congress at 925 (June 17, 1789).

[34] *Myers*, 272 U.S. at 123 (emphasis added).

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

[36] Andrea Scoseria Katz & Noah A. Rosenblum, *Becoming the Administrator-in-Chief*, 123 COLUM. L. REV. (forthcoming 2023);

[37] Humphrey's Exec., 295 U.S. 602, 627-28, 630 (1935).

Humphrey's has applied primarily to allow Congress to statutorily insulate the heads of independent commissions and adjudicatory officers from presidential removal at-will.

Humphrey's may have limited *Myers* and removal, but presidential power kept expanding in many other ways through the twentieth century, and another generation of Justices continued the "nation's president" reasoning. In his famous *Youngstown* concurrence, Justice Robert Jackson wrote, "Executive power has the advantage of concentration in a single head in whose choice the whole Nation has a part."[38] Jackson may have voted against Truman's invocation of war powers, but overall, from World War II through the Cold War, the Commander-in-Chief's power continued to grow, based on another "chain of command" – to represent and defend "the nation."

Meanwhile, in domestic affairs, the unitary theory was revived as a check against the growth of the administrative state and the power of independent agencies. Critics identified the separation of powers, presidential appointment, and presidential removal as checks on what they saw as an unelected "fourth branch" (i.e., a branch of questionable constitutional legitimacy).[39] The clarion call for unitarians came in Justice Antonin Scalia's lone dissent in *Morrison v. Olson*, where he referred to a "chain of command" under the president's "direct" control, echoing Chief Justice Taft's reference to a "chain of dependence," to argue against the non-presidential appointment and the for-cause removal protections of the independent counsel. The Office of Independent Counsel was created by the Ethics in Government Act, enacted after Watergate to provide a means of investigating misconduct in the executive branch. Under this statutory scheme, when the Attorney General deemed the appointment of an independent counsel appropriate, a three-judge panel from the D.C. Circuit would appoint the counsel, who could only be removed by the Attorney General for good cause or impairment.[40] For a 7-1 majority, Chief Justice Rehnquist explained that such a good-cause requirement would not interfere with a president's duty to "take care that the laws be faithfully executed," and that the independent counsel was an inferior officer, and thus did not require presidential appointment with the advice and consent of the Senate.

Justice Scalia disagreed on both questions, grounding presidential appointment and removal powers squarely in the President's accountability to the people. He criticized the Court's categorization of the independent counsel as an inferior officer based on his understanding of the structure and history of an Appointments Clause which contemplates that inferior officers

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[38] Youngstown Sheet & Tube v. Sawyer 243 U.S. 579, 653 (1952) (Jackson, J., concurring)).

[39] Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1155 (1992); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994). For a later collection of unitary executive historical arguments, see STEVEN G. CALABRESI & CHRISTOPHER YOO, THE UNITARY EXECUTIVE (2008); MICHAEL MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING (2020).

[40] "An independent counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties."

"would, of course, *by chain of command still be under the direct control of the President*"[41] even if they had been appointed by others. He penned long passages explaining that "the people" are the primary source of discipline and accountability for the president's execution of prosecutorial functions, even in extreme cases of misconduct and abuse of power in the executive branch: "The prosecutors who exercise this awesome discretion are selected and can be removed by a President, whom the people have trusted enough to elect."[42] Scalia's chain of command was public opinion checking the president, so that the president would be the check on prosecutors:

> As Hamilton put it, "[t]he ingredients which constitute safety in the republican sense *are a due dependence on the people, and a due responsibility*." *Federalist No.* 70, p. 424. The President is directly dependent on the people, and since there is only *one* President, *he* is responsible [emphasis original here]. The people know whom to blame, whereas "one of the weightiest objections to a plurality in the executive ... is that it tends to conceal faults and destroy responsibility." [*Federalist No. 70],* at 427.[43]

However, if an independent prosecutor had been unfairly chosen or acted unfairly, "there would be no one accountable to the public to whom the blame could be assigned. … [T]he Founders envisioned when they established a single Chief Executive accountable to the people: the blame can be assigned to someone who can be punished."[44] Notably, Scalia never claimed the president was the *most* accountable or *most* democratic official. He made one reference to the president as "directly dependent on the people," apparently a half-step in the direction of Roberts suggesting the direct accountability through elections. However, it seems fair to interpret Scalia as putting the phrase "directly dependent" more in the context of the singularity of the president clarifying "responsibility," so "the people know whom to blame" – which is not the same as a claim of direct election.[45]

After Scalia's *Morrison* dissent in 1988, he continued to emphasize the president's special democratic imprimatur in interpreting the Appointments clause, now joined by other justices. Even though the Appointments clause, as applied to principal officers, empowers both the President and the Senate, these Justices put extra emphasis on the President and Presidents' connection to "the people." In 1991, the majority in *Freytag v. Commissioner* highlighted the special role of the president's "accountability to the people."[46] In concurrence, Justice Scalia even more strongly emphasized that the President is "responsible to *his* constituency for their appointments and has the motive and means to assure faithful actions by his direct lieutenants."[47] In 1997, Scalia's majority opinion in *Edmond v. United States* similarly focused on the president's

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[41] Morrison v. Olson, 487 U.S. 654, 721 (1988) (Scalia, J., dissenting) (citing Madison at 2 M. Farrand, Records of the Federal Convention of 1787, at 627 (rev. ed. 1966).
[42] *Morrison*, 487 U.S. at 728-29 (Scalia, J., dissenting) (emphasis added).
[43] *Id.*
[44] *Morrison*, 487 U.S. at 731 (Scalia, J., dissenting).
[45] *Id.* at 729.
[46] Freytag v. Comm'r., 501 U.S. 868, 886 ("Their heads are subject to the exercise of political oversight and share the President's accountability to the people.").
[47] *Freytag*, 501 U.S. 868, 907 (1991) (Scalia, J. concurring) (emphasis original).

responsiveness to national "reputation" and public opinion, which the Framers expected would produce better nominees than plural bodies:

> The Framers anticipated that the President would be less vulnerable to interest-group pressure and personal favoritism than would a collective body. "The sole and undivided responsibility of one man will naturally beget a livelier sense of duty, and a more exact regard to reputation." *The Federalist* No. 76, p. 387 (M. Beloff ed. 1987) (A. Hamilton).[48]

Justice Scalia acknowledged the Senate's role would "curb" the president, but the point of emphasis was on the president and on the president's responsiveness to the public: "If [the President] should ... surrender the public patronage into the hands of profligate men, or low adventurers, it will be impossible for him long to retain public favour."[49] Again, this theory of the Presidency is that its unity, its national character, and its public democratic accountability make the President's choices better, more reliable, and more in line with the national public interest.

In the major appointment and removal decisions over the last two decades, conservative Justices have built on Justice Scalia's national-representative theory of presidential accountability, and they have done so to curb what they see as the problem of unaccountable administrative agencies. The first turning point was *Free Enterprise Fund v. PCAOB*, a challenge to the double-layer of protection from presidential removal provided by statute to members of the Public Company Accounting Oversight Board. They were subject to removal only for good cause by the Security and Exchange Commissioners, who in turn were implicitly protected from the president's power of removal-at-will. When the D.C. Circuit rejected a challenge to this double-layer of protection from presidential removal, then-Judge Brett Kavanaugh dissented, relying on presidentialism, quoting Madison's "chain of dependence" from executive officers to the President to the people and invoking "that great principle of unity and responsibility in the Executive department."[50]

On appeal, Chief Justice Roberts, writing for a 5-4 majority, adopted the same arguments and the same sources. Roberts rejected multiple layers as not only "immunity" from the President, but irresponsibility to the people: "Indeed, if allowed to stand, this dispersion of responsibility could be multiplied. If Congress can shelter the bureaucracy behind two layers of good-cause tenure, why not a third?... The officers of such an agency—safely encased within a Matryoshka doll of tenure protections—would be immune from Presidential oversight, even as they exercised power in the people's name."[51] Then Roberts offered an extended account of the president's accountability, starting with the "chain of command" and the "chain of dependence"

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[48] *Edmond*, 520 U.S., at 659.

[49] *Id.* at 660 (citing 3 J. Story, Commentaries on the Constitution of the United States 374–375 (1833). See also Justice Scalia's opinion later that year in Printz: "The Framers 'insist[ed]' upon 'unity in the Federal Executive' to 'ensure both vigor and accountability' to the people." Printz v. United States, 521 U.S. 898, 922 (1997).

[50] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 537 F.3d 667, 691 (2008).

[51] Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 496 (2010).

back to the people, moving to the public's democratic scrutiny of the president, and ending with the Framers' vision of a president "chosen by the entire nation":

> Without a clear and effective chain of command, the public cannot "determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall." *[Federalist]* No. 70, at 476 (Hamilton). That is why the Framers sought to ensure that "those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community." 1 Annals of Cong., at 499 (J. Madison).
>
> By granting the Board executive power without the Executive's oversight, this Act subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts. The Act's restrictions are incompatible with the Constitution's separation of powers.
>
> No one doubts Congress's power to create a vast and varied federal bureaucracy. But where, in all this, is the role for oversight by an elected President? The Constitution requires that a President chosen by the entire Nation oversee the execution of the laws.[52]

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

> One can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts. Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people. This concern is largely absent from the dissent's paean to the administrative state.[53]

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

The Roberts Court continued to develop its theory of presidential accountability in *Seila Law* to include a puzzling new claim about the Framers' design of "direct" electoral accountability for the president. In ruling that the Director of the Consumer Finance Protection Bureau—the single head of an agency with significant executive power—could not be insulated from presidential removal at will, Roberts relied on the same sources and the same "chain of dependence" theory, but he added a surprising new claim: that the Framers "render[ed] the President *directly* accountable to the people through regular elections" and this "made the

[52] *Id.* at 497-99.
[53] *Id.* at 500.

President the *most* democratic and politically accountable official in Government. Only the President (along with the Vice President) is elected by the entire Nation."[54] This passage was the clearest turning point from Taft's and Scalia's more grounded framing of "the nation's president" to the Roberts Court's bolder reliance on the president as "the most accountable official." Although Justice Scalia – in his lone *Morrison* dissent – had referred to the president as "directly accountable," he was not talking about accountability in the context of an election. Instead, he was describing the more clear and direct lines of responsibility afforded by the unitary executive—because "the people know whom to blame".[55] Roberts went a step further: putting "direct accountability" in terms of presidential elections.

Roberts overlooked substantial evidence undermining this claim of "direct" presidential accountability to the people, such as the design of the Electoral College, the Framers' reasons for indirect presidential selection, and the historical practice of states opting against direct voting for electors.[56] He also overlooked features of congressional elections that arguably give Congress a more democratic pedigree than the president,[57] all in the service of turbo-charging presidentialism.

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

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[54] *Seila Law*, 591 S.Ct. 2183, 2203 (2020) (emphasis added).
[55] *Morrison*, 487 U.S. at 728-29 (Scalia, J., dissenting)
[56] See infra Part IV, especially on the "independent electors" case Chiafalo v. Washington, 140 S.Ct. 2316 (2020), decided just two days before *Seila Law*.
[57] Members of the House have always been directly elected by the people, and are elected every two years, arguably making them more directly democratic and politically accountable. After the Sixteenth Amendment, Senators are also more directly elected. Moreover, a larger election in terms of the number of voters and a bigger geographic area may produce less directness and accountability. (More on these critiques in Part IV.)

The latest Roberts Court decisions on appointment and removal more fully elaborate the role of the "directly accountable president" and the "chain of dependence" in constitutional structure, portraying it as essential to the protection of republican government and individual liberty. In *Collins v. Yellen*, Justice Gorsuch's concurrence charged that statutory removal restrictions protecting agency officials are constitutionally suspect because "[t]he chain of dependence between those who govern and those who endow them with power is broken."[58] This break in the chain jeopardizes the foundations of the constitutional structure because those links in the chain--"'a due dependence on the people' and 'a due responsibility' to them"[59]-- are the "key 'ingredients which constitute safety in the republican sense.'"[60]

In *Arthrex*, Roberts's majority opinion quoted Madison's "chain of dependence" once, and Gorsuch quoted it five different times (concurring on presidential power, dissenting in favor of a more robust remedy).[61] Roberts concluded his majority opinion highlighting the president's direct accountability to the people: "In this way, the President remains responsible for the exercise of executive power—and through him, the exercise of executive power remains accountable to the people."[62] Gorsuch added, "as Madison put it, 'no principle is more clearly laid down in the Constitution than that of responsibility.' Without presidential responsibility there can be no democratic accountability for executive action."[63] Gorsuch continued by emphasizing how the chain of dependence protects individual liberty: "But by breaking the chain of dependence, the statutory scheme denies individuals the right to be subjected only to *lawful* exercises of executive power that can ultimately be controlled by a President accountable to 'the supreme body, namely, ... the people.'"[64] Like Roberts, he concluded with the "the directly accountable president" model: "Our decision today represents a very small step back in the right direction by ensuring that the people at least know who's responsible for supervising this process—the elected President and his designees."[65]

Regardless of whether Scalia and the Roberts Court is right as a matter of historical record of the Founding or as a matter of political science, their bottom line is that the President is fundamentally and constitutionally different as a policy actor: Unlike other executive officers, the American chief executive is the president is "directly accountable" to the people through elections, chosen nationally, with the democratic legitimacy and the popular prerogative to direct the executive branch -- at least when the question is about the president's authority to appoint and remove executive branch officials. In the next two Parts, we examine whether the Presidency has a similarly special status when it comes to administrative law and statutory interpretation.

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[58] Collins v. Yellen, 141 S.Ct. 1761, 1797 (2021).
[59] *Id.* at 1797 (quoting *The Federalist* No. 70, p. 424 (C. Rossiter ed. 1961).
[60] *Id.* at 1797 (quoting *The Federalist* No. 70, p. 424 (C. Rossiter ed. 1961)).
[61] *Arthrex*, 141 S.Ct. 1970, 1979, 1989-90 (2021).
[62] *Arthrex*, 141 S.Ct. at 1988.
[63] *Id.* at 1988.
[64] *Id.* at 1990.
[65] *Id.* at 1994 (Gorsuch, J., concurring in part, dissenting in part).

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

It is conceivable that the concerns the Court expresses about agency accountability in appointments and removal cases come home to roost in MQD cases. Plausibly, the agency may have pursued its own ambitious agenda and "slip[ped] from the Executive's control, and thus from that of the people."[66] Perhaps the MQD policies are the work "of unelected officials barely responsive to" the President.[67] Or maybe, even if the agency was subject to formal presidential control through presidential removal power, "the president may not have the time or willingness to review [agency] decisions[.]"[68]

To the contrary, even a cursory review of the policies felled by the MQD this century reveals that this could not be further from the truth. Indeed, "major questions" policies epitomize the "chain of dependence" theory of agency accountability vaunted by the Court in appointment and removal cases.

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

We describe the presidents' role in the MQD cases in reverse chronological order, because the most recent cases over the past three years are especially salient examples of presidential involvement in administrative policymaking, thus the Roberts Court's omission of these facts from recent cases is particularly notable and telling. But these cases are only the most recent examples, and we show that presidents have been controlling major agency policies since the debut of the MQD in 2000.

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

The policy challenged in *Biden v. Nebraska* was a student loan forgiveness program adopted by the Department of Education during the administration of President Joe Biden. This program represented the culmination of a series of student loan relief policies implemented over the course of two presidential administrations in response to the COVID-19 pandemic. These policies were promulgated under a statutory grant of authority to the Secretary of Education to "waive or modify any statutory or regulatory provision applicable to [certain federal student financial assistance programs] as the Secretary deems necessary in connection with a … national

[66] *Free Enter. Fund*, 561 U.S. at 499.
[67] West Virginia v. EPA, 142 S.Ct. 2587, 2618 (2022) (Gorsuch, J., concurrence).
[68] *Id.* at 2618 (Gorsuch, J., concurrence, quoting S. Breyer, Making Our Democracy Work: A Judge's View 110 (2010)).

emergency" such as COVID-19.[69] The Secretary of Education is appointed by the President with the advice and consent of the Senate and is removable at will by the President. In addition to this formal control, Presidents Trump and Biden both made key decisions relating to the student debt relief policy and actively supervised the adopting agency. (The Court acknowledged President Trump's role in the initial suspension and extensions).[70] Starting during the Democratic primaries of in March 2020 and through the fall general election, President Biden campaigned on student debt relief.[71] On his first day in office, President Biden directed the Department of Education to pause federal student loan repayments through September 2021, and he ordered the Department to extend the pause three additional times.[72]

As the end of the final extension drew near, and as the midterm elections approached, President Biden prominently called for a broad student debt waiver. On August 24, 2022, the White House announced that the Department of Education would implement "targeted debt relief to address the financial harms of the pandemic, fulfilling the President's campaign commitment."[73] The announcement was featured in a variety of White House communications that day, including a background press call by senior administration officials,[74] an official Presidential Fact Sheet,[75] a press briefing by the White House Press Secretary,[76] and, notably, in highly personal remarks delivered by the President himself, recounting his father's shame at having failed to secure a bank loan for Biden's own college education.[77]

Importantly, he signaled his own ongoing, hands-on partnership with the Department of Education in crafting student debt relief: "Working closely with the Secretary of Education—he's got the hard job—you know, Secretary Cardona, here's what my administration is going to do:

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[69] Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act). 117 Stat. 904. 20 U.S.C. § 1098bb(a)(1).

[70] See summary in *Biden v. Nebraska*: "On March 13, 2020, the President declared the pandemic a national emergency. Presidential Proclamation No. 9994, 85 Fed. Reg. 15337–15338 (2020). One week later, then-Secretary of Education Betsy DeVos announced that she was suspending loan repayments and interest accrual for all federally held student loans."

[71] *See, e.g.,* Trevor Hunnicutt & Sharon Bernstein, *Democrat Biden Tacks Left, Backs Warren Bankruptcy Plan With Student Loan Relief*, REUTERS (Mar. 14, 2020) https://www.reuters.com/article/usa-election-bankruptcy-idUKL1N2B70BS; Press Release, Biden Campaign, The Biden Plan to Build Back Better by Advancing Racial Equity Across the Am. Econ. (July 28, 2020) (on file with the American Presidency Project) ("As President, Biden will make significant investments into educational institutions and programs that are designed to elevate Black and Brown students. He will [] provide relief from student debt."); Press Release, Biden Campaign, The Biden Agenda for the Latino Cmty. (Aug. 4, 2020) (on file with the American Presidency Project) (laying out plans to "alleviate student debt burdens"); Press Release, Biden Campaign, ICYMI: Young Ams. for Biden, Student Debt Crisis and Rise Host Student Loan Voter Townhall (Oct. 29, 2020) (on file with the American Presidency Project) (reporting support for the Biden campaign from Student Debt Crisis, an organization dedicated to reforming student debt and higher education policies in the U.S.).

[72] Press Briefing by Press Secretary Jen Psaki, 2022 WHITE HOUSE (Apr. 6, 2022).

[73] Fact Sheet: President Biden Announces Student Loan Relief, 2022 WHITE HOUSE (Aug. 24, 2022).

[74] Background Press Call by Senior Admin. Offs. on Student Loan Relief, 2022 WHITE HOUSE (Aug. 24, 2022).

[75] Fact Sheet: President Biden Announces Student Loan Relief, 2022 WHITE HOUSE (Aug. 24, 2022).

[76] Press Briefing by Press Secretary Karine Jean-Pierre, Domestic Policy Advisor Susan Rice, and NEC Deputy Dir. Bharat Ramamurti, 2022 WHITE HOUSE (Aug. 24, 2022).

[77] Remarks on Student Loan Debt Relief, 2022 DAILY COMP. PRES. DOC. 4 (Aug. 24, 2022).

provide more breathing room for people so they have less burden by student debt[.]"[78] As soon as the Department of Education promulgated the student debt relief program, it was subject to immediate legal attack by the President's political adversaries, and its implementation was stayed.[79] In the face of these legal challenges, President Biden continued to publicly express strong support for the program and confidence in his administration's legal authority to enact it.[80]

The student debt relief plan—and President Biden's responsibility for it—were widely covered in the press. From the expiration of the final student loan repayment pause to the Court's decision in *Biden v. Nebraska* striking down the student loan forgiveness plan, there were 1,018 articles in major U.S. newspapers discussing student debt relief[81]—924 (more than 90%) mention President Biden by name. Biden's name appears in the headline of more than a quarter of these articles.[82] Articles appearing prior to the announcement of the plan signaled that Biden would make a decision about student debt policy soon.[83] Once the plan was announced, headlines screamed, "Biden to Cancel $10,000 in Student Debt; Low-Income Students Are Eligible for More";[84] "Boon to borrowers: Biden announces student loan debt forgiveness plan";[85] and "Biden to forgive up to $20,000 on student loans, affecting millions of Floridians."[86] Articles appeared across a range of publications explaining the program and providing information about how beneficiaries could access its benefits.[87] Notably, student debt relief was routinely mentioned in articles discussing President Biden's political prospects generally—as one of several issues for

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[78] *Id.*

[79] *Biden,* 52 F.4th 1044.

[80] Remarks on the Federal Student Loan Debt Relief Program, 2022 COMP. PRES. DOC. 1 (Nov. 3, 2022) ("That's 16 million people who will be hearing from the Department of Education that they've been approved and who should be seeing relief in the coming days. … But it's temporarily on hold. Why? Well, because Republican Members of the Congress and Republican Governors are doing everything they can, including taking us to court, to deny the relief and even to their own constituents. And every lawyer tells me we're—there's—we've knocked two of them out of the way. There's only one thing left in the way, and that it's going to happen.").

[81] Search: ("student debt relief" or "student debt cancellation" or "student debt forgiveness" or "student loan cancellation" or "student loan forgiveness") in Nexis Major U.S. Newspapers (August 1, 2022-June 30, 2023) = 1,018 articles.

[82] 233/924

[83] Chris Quintana, *ITT Tech students to have debt erased*, USA TODAY, Aug. 17, 2022, at A2 ("President Joe Biden has said he'll announce a decision on wider student debt relief at the end of the month."); Shant Shahrigian, *New student-debt relief is on the way, says ed. secretary*, DAILY NEWS (NEW YORK), Aug. 22, 2022, at 24 ("The Biden administration will reveal new plans for student debt relief by the end of this month, Education Secretary Miguel Cardona said Sunday.").

[84] Zolan Kanno-Youngs et al., *Biden to Cancel $10,000 in Student Debt; Low-Income Students Are Eligible for More*, N.Y. TIMES (Aug. 24, 2022), https://www.nytimes.com/2022/08/24/us/politics/student-loan-forgiveness-biden.html.

[85] Seung Min Kim, et al., *Boon to borrowers: Biden announces student loan debt forgiveness plan*, CHRISTIAN SCI. MONITOR, Aug. 24, 2022.

[86] Ian Hodgson, *Biden to forgive up to $20,000 on student loans, affecting millions of Floridians*, TAMPA BAY TIMES, Aug. 24, 2022.

[87] *See, e.g.,* Lynn Sweet, *10 things to know about Biden's new student debt cancellation plan*, CHI. SUN-TIMES, Aug. 24, 2022; Ron Lieber & Tara Siegel Bernard, *What You Need to Know About Biden's Student Loan Forgiveness Plan*, N.Y. TIMES (Aug. 24, 2022); Medora Lee, *We dig into student debt forgiveness plan: What is the president's student loan forgiveness plan?*, USA TODAY, Aug. 25, 2022, at A8; Kathleen Pender, *Q&A: Who qualifies? How to apply for cancellation?*, S.F. CHRON., Aug. 25, 2022, at A9; Julia Carpenter & Gabriel T. Rubin, *How Loan-Forgiveness Plan Would Work*, WALL ST. J., Aug. 25, 2022, at A4.

which voters would hold him responsible.[88] And it was covered as a central issue in the November 2022 Congressional midterm elections.[89]

Members of Congress put a spotlight on the plan and associated it directly with President Biden.[90] In the spring of 2023, it became a focal point of negotiations between Congress and the President over raising the debt ceiling, and Republicans insisted on "reversing Biden's student debt forgiveness and repayment plan."[91] Just a few weeks before the Court struck down the plan, President Biden embraced the spotlight in vetoing a congressional vote to overturn it. At a campaign event one day before the Court's decision in *Biden v. Nebraska*, he again took credit for the plan and embraced it as part of his re-election campaign theme.[92]

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

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

The Clean Power Plan (CPP), promulgated by the Environmental Protection Agency (EPA) and challenged in *West Virginia v. EPA*, set national carbon pollution standards for power plants at a level designed to significantly cut carbon pollution and advance clean energy innovation development and deployment, "for the long-term strategy needed to tackle the threat of climate change."[93] President Obama's EPA adopted the CPP in 2015,[94] and President Trump's

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[88] *See, e.g.*, Will Bunch, *Suddenly, Joe is becoming Mr. Right; Biden could lose young voters with his recent turns on oil, the border, and crime*, PHILA. DAILY NEWS, Mar. 17, 2023, at X14 (specific reference to "the president's student-debt relief plan"); Linda Feldmann, *Why Biden's tack to center should come as no shock*, CHRISTIAN SCI. MONITOR, Mar. 17, 2023 (Biden "is attempting a massive student debt relief initiative").

[89] Dan Petrella et al., *Dems push for turnout; Bailey touts conservatism Harris rallies Black voters as Pritzker's opponent underlines Christian background*, CHI. TRIB., Nov. 7, 2022, at C1 (reporting on a candidate "ticking off a list of Democratic accomplishments, including student loan forgiveness[.]"); Maggie Astor, *Republican Defeats 2-Term Democrat to Win Iowa House Seat*, N.Y. TIMES (Nov. 9, 2022), https://www.nytimes.com/2022/11/09/us/politics/zach-nunn-cindy-axne-iowa-house.html (reporting that the winning republican candidate campaigned against "President Biden's student debt forgiveness plan.").

[90] Morgan Watkins, *McConnell slams Biden for debt forgiveness plan; Kentucky senator calls it 'student loan socialism'*, THE LOUISVILLE COURIER-J., Aug. 26, 2022, at A3; Arit John, *Advocates of loan forgiveness attend rally outside high court; 'Student debt is a crisis,' an activist says. Some lawmakers also defend Biden's plan*, L.A. TIMES, Mar. 1, 2023, at A1.

[91] Kevin Freking, *Debt limit deadline looms as Democrats, GOP spar on spending*, ST. LOUIS POST-DISPATCH, May 5, 2023, at A4.

[92] Michael D. Shear & Jim Tankersley, *Biden, in Campaign Mode, Lauds the Economy*, N.Y. TIMES, June 29, 2023, at A1.

[93] EPA, FACT SHEET: Overview of the Clean Power Plan, Cutting Carbon Pollution from Power Plants (Jan. 19, 2017), https://19january2017snapshot.epa.gov/cleanpowerplan/fact-sheet-overview-clean-power-plan_.html.

[94] Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64512 (Oct. 23, 2015).

EPA rescinded it in 2019.[95] President Biden took office shortly after the D.C. Circuit invalidated the 2019 rescission and quickly ordered its reinstatement – but it was delayed in order to allow the Biden EPA to address changed circumstances.[96] Before any new rule was proposed, the Court decided *West Virginia v. EPA*, striking down the 2015 CPP under the MQD.

To begin, the EPA Administrator is appointed by the President with the advice and consent of the Senate and is removable at will by the President. Beyond this formal source of presidential control over the agency, presidents actively promoted and supervised the CPP on its long policy path, highly visible in the public sphere. President Obama kicked off the CPP in 2013 with speech at Georgetown University, where he announced: "today, for the sake of our children and the health and safety of all Americans, I'm directing the Environmental Protection Agency to put an end to the limitless dumping of carbon pollution from our power plants and complete new pollution standards for both new and existing power plants."[97] This speech was a staged public event designed to rally political support for the President's climate agenda and rally young voters. As President Obama told the Georgetown students that day, "[i]t was important for me to speak directly to your generation, because the decisions that we make now and in the years ahead will have a profound impact on the world that all of you inherit."[98]

President Obama continued to advocate for the CPP throughout his second term. On the day EPA proposed the CPP, the President mobilized the political support of leading public health organizations, emphasizing his personal and political investment in the policy.[99] On the day EPA promulgated the final rule adopting the CPP, President Obama gave public remarks to an audience of stakeholders and politicians in the East Room of the White House, reminding them of his role in initiating the policy,[100] and he continued to take personal responsibility for the plan at clean energy summits and other fora.[101] The CPP was a high profile policy, widely covered in the media. During Obama's administration, there were 1,543 articles that discussed it in major U.S. newspapers, including articles explaining the plan, letters submitted by readers opining on the plan, and op-eds by newspaper editorial boards and high profile political figures. The articles reflected a deeply partisan divide on the policy.[102] On one side, for instance, *The Wall Street Journal*

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[95] Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32523 (July 8, 2019).
[96] Am. Lung Assoc. v. EPA, 985 F.3d 914 (2021).
[97] Remarks at Georgetown University, 2013 DAILY COMP. PRES. DOC. 1 (June 25, 2013).
[98] *Id.*
[99] Teleconference Remarks to Pub. Health Orgs. on the EPA's Clean Power Plan, 2014 DAILY COMP. PRES. DOC. 1 (June 2, 2014) ("I wanted to call you directly so you guys hear from me directly").
[100] Remarks by the President in Announcing the Clean Power Plan, 2015 OFFICE OF THE PRESS SECRETARY (Aug. 3, 2015) ("[T]wo years ago, I directed Gina and the Environmental Protection Agency to take on this challenge.")
[101] Remarks by the President at Nat'l Clean Energy Summit, 2015 OFFICE OF THE PRESS SECRETARY (Aug. 25, 2015).
[102] *See, e.g.,* Editorial, *Minnesota leads in cutting emissions*, STAR TRIB., June 6, 2014, at 8A; David Jackson, *Climate plan becomes torch in '16 race – 'This is our moment to get this right,' Obama says as presidential hopefuls take sides*, USA TODAY, Aug. 4, 2015, at 2A; Daniel Malloy & Dan Chapman, *Ga. needs to slash emissions by 25%*, ATLANTA J.-CONST., Aug. 4, 2015, at 1A ("[the President] dismissed 'scaremongering' by the fossil fuel industry, business groups and Republicans.").

editorial board accused President Obama of abusing his power by directing the EPA to adopt the CPP:

> Rarely do American Presidents display the raw willfulness that President Obama did Monday in rolling out his plan to reorganize the economy in the name of climate change. Without a vote in Congress or even much public debate, Mr. Obama is using his last 18 months to dictate U.S. energy choices for the next 20 or 30 years. This abuse of power is regulation without representation.[103]

On the other side, the editorial board of *The New York Times* lauded the CPP and emphasized the leverage it would give the President in global climate negotiations:

> President Obama's Clean Power Plan, announced on Monday, is unquestionably the most important step the administration has taken in the fight against climate change. (…) when taken together with the administration's other initiatives, (…) it reinforces Mr. Obama's credibility and leverage with other nations heading into the United Nations climate change conference in Paris in December.[104]

Whatever position different media outlets took on the CPP, they uniformly made one point crystal clear: President Obama's connection to the policy. Over 77 percent of the articles about the policy appearing in major American papers mentioned President Obama.[105] Some articles characterized the CPP as one of President Obama's hallmark political achievements.[106] Op-eds and reported commentary either praised[107] or blamed[108] President Obama by name for the policy. One in ten articles written about the CPP included "Obama" or "President" in the headline.[109]

In addition, political leaders at all levels of government were actively engaged in debate about the CPP. State and local government officials were frequently quoted in media articles

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[103] Editorial, *Climate-Change Putsch*, WALL ST. J., Aug. 4, 2015, at A12.
[104] Editorial, *A Tough, Achievable Climate Plan*, N.Y. TIMES, Aug. 4, 2015, at A22.
[105] Lexis Search: Major US Newspapers: "clean power plan" and ("Obama" or "president") between 1/20/2009-1/20-2017, RESULT: 1,194; Just "clean power plan" in that time frame = 1543 articles.
[106] Paul Monies, *U.S. Supreme Court grants stay on implementing Clean Power Plan*, DAILY OKLAHOMAN, Feb. 10, 2016, at 27 ("major blow to President Obama's legacy on climate change."); Henry Gass, *Supreme Court blocks Clean Power Plan but perhaps not its goals*, CHRISTIAN SCI. MONITOR, Feb. 10, 2016 ("But the plan is not only a centerpiece of Obama's domestic climate policy, but also his efforts to position the US as a global climate leader.").
[107] *See*, e.g., Richard Revesz & Jack Lienke, Op-Ed, *Obama Takes a Crucial Step on Climate Change*, N.Y. TIMES, Jan. 16, 2015 ("President Obama's Clean Power Plan has rightly been hailed as the most important action any president has taken to address the climate crisis."); Coral Davenport, *Obama Policy Could Force Robust Climate Discussion From '16 Candidates*, N.Y. TIMES, Aug. 3, 2015, at A13.
[108] *See*, e.g., Robert Robb, Opinion, *Arizona should boycott Obama's Clean Power Plan*, ARIZ. REPUBLIC, Aug. 9, 2015, at F7 ("President Barack Obama is looking for the states to do the dirty work on *his* Clean Power Plan (…)." [emphasis supplied]); Editorial, *Climate-Change Putsch*, WALL ST. J., Aug. 4, 2015, at A12 (referring to President Obama's announcement of the CPP as "*his* plan to reorganize the economy in the name of climate change." [emphasis supplied]); Richard Revesz, Op-Ed, N.Y. TIMES, Mar. 26, 2015, at A23.
[109] Lexis Search: Major US Newspapers: "clean power plan" and Headline("Obama" or "president") between 1/20/2009-1/20-2017, RESULT: 158; Just "clean power plan" in that time frame = 1543 articles.

about the policy,[110] and they authored op-eds.[111] Headlines announced high-profile legal challenges to the policy from Attorneys General and boycotts from Governors.[112] Members of Congress drafted op-eds on the policy.[113] Congress passed a joint resolution of disapproval that would have nullified EPA's CPP rule.[114] President Obama vetoed that resolution with an accompanying memorandum explaining the policy's urgency and his continued support.[115]

For all the attention it received, the CPP would never go into effect. The Supreme Court stayed the rule pending review by the D.C. Circuit of a challenge brought by numerous parties, including 27 state plaintiffs.[116] In response, President Obama continued to express his support for the policy and to identify himself with it, telling supporters "*we* are very firm in terms of our legal position here. … [T]his Supreme Court has said the Environmental Protection Agency is required to regulate carbon emissions if it's a threat to the public health. And *we* clearly can show that that's the case."[117] President Obama would not have the opportunity to make that case. Before the D.C. Circuit could issue a decision, there was a change in presidential administrations, and the EPA repealed the CPP rule in 2019.

President Trump made the CPP a campaign issue, pledging explicitly to repeal it.[118] Shortly after taking office, President Trump issued Executive Order 13783, rescinding President Obama's climate-related Executive Orders and Memoranda and directing the EPA to

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[110] *See*, e.g., Tony Barboza, *Climate plan should be a breeze for California*, L.A. TIMES, Aug. 4, 2015, at A1 (California leadership supporting the CPP: "Gov. Jerry Brown welcomed the president's 'bold and absolutely necessary carbon reduction plan.'"); James Bruggers, *Climate rule faces court challenge*, COURIER-J., Aug. 6, 2015, at A3 (attorneys general supporting EPA's legal basis for CPP: "Attorneys general from nine states signed a letter this week supporting the Clean Power Plan (…); Adam Wilmoth, *Oklahoma officials voice sharp criticism for Obama's emission rules*, DAILY OKLAHOMAN, Aug. 3, 2015; Coral Davenport, *Obama Policy Could Force Robust Climate Discussion From '16 Candidates*, N.Y. TIMES, Aug. 3, 2015, at A13.

[111] Jerry Sonnenberg, Opinion, DENVER POST, April 2, 2016, at 19A; Max Tyler & Anna McDevitt, Guest Commentary, *A call to climate action in this legislative session*, DENVER POST, Jan. 16, 2015.

[112] Paul Monies, *Pruitt sues again over EPA's plan*, DAILY OKLAHOMAN, July 2, 2015. Coral Davenport, *Governors Signal Intent to Thwart Climate Rules*, N.Y. TIMES, July 3, 2015, at A13. Bruce Finley, *Colorado AG Coffman may fight Obama's Clean Power Plan*, DENVER POST, Aug. 3, 2015. James Bruggers, *Ind., Ky. join call for Clean Power Plan elimination*, COURIER-J., Dec. 18, 2016, at A16. Coral Davenport, *States Fight Obama's Climate Plan, but Quietly Prepare to Comply*, N.Y. TIMES, July 20, 2016, at A14.

[113] Lamar Smith, Letter to the Editor, *What is the EPA hiding from the Public?*, WALL ST. J., June 24, 2014, at A15; Ed Whitfield, Opinion, *America's Pain is China's Gain*, USA TODAY, Aug. 4, 2014, at 8A; Mike Kelly, Letter to the Editor, *Pushing Back Against Obama's War on Coal*, WALL ST. J., Aug. 4, 2014, at A13.

[114] S.J. Res. 23, 114th Cong. (2015).

[115] Memorandum of Disapproval Concerning Legis. Regarding Cong. Disapproval of an EPA Rule on Carbon Pollution Emission Guidelines, 2015 DAILY COMP. PRES. DOC. 3 (Dec. 18, 2015).

[116] West Virginia v. EPA, 577 U.S. 1126 (2016).

[117] Remarks at a Democratic Nat'l Comm. Reception in Atherton, Cal., 2016 DAILY COMP. PRES. DOC. 3 (Feb. 11, 2016) (emphasis supplied).

[118] David R. Baker, *Clinton, Trump poles apart on climate change*, N.Y. TIMES, Sept. 11, 2016, at A1; Coral Davenport, *Trump Goes to Pittsburgh to Pledge the Impossible: a Boom for Coal and Gas*, N.Y. TIMES, Sept. 23, 2016, at A22 (candidate Trump promised to both grow the natural gas industry and "end the war on coal and the war on miners."); Amy Harder et al., *Election 2016: Nominee Pledges to Roll Back Energy Regulations*, N.Y. TIMES, Aug. 9, 2016, at A4; Donald Trump, Presidential Candidate, Remarks to the Econ. Club of N.Y. at the Waldorf Astoria in NYC (Sept. 11, 2016) (on file with the American Presidency Project).

"immediately" review the CPP.[119] The EPA complied and repealed the rule that had enacted the CPP in 2019.[120] In the lead-up to and the aftermath of the repeal, President Trump repeatedly claimed credit for "cancel[ing] the Obama administration's job-crushing Clean Power Plan."[121]

As with the initial promulgation of the CPP, its demise was widely covered in the media, vigorously debated, and explicitly attributed to President Trump.[122] President Biden took office shortly after the D.C. Circuit declared the 2019 rescission of the CPP unlawful.[123] On the day he took office, President Biden directed the EPA to reconsider a list of prior agency actions, including the 2019 CPP repeal.[124] Although President Biden did not direct EPA to reinstate the CPP, he embraced it as his own. For instance, Biden campaign materials refer to the policy as the "Obama-Biden Clean Power Plan,"[125] and once in office, the Biden administration publicly lauded "the Obama-Biden Administration's groundbreaking Clean Power Plan."[126] As part of that policy ownership, Biden's EPA sought to move beyond the CPP and promulgate a new, more ambitious climate policy. [127]

In sum, the Clean Power Plan exhibited all the hallmarks of the "chain of dependence." It was promulgated by an agency under the President's formal supervisory control. It was the product of active presidential supervision by three different Presidents, each of whom publicly associated themselves with the policy. Finally, both the policy and the various Presidents' association with it had high public visibility and political salience. Arguably, the shift in policy across different presidential administrations reflected the democratic process at work, holding presidents to account for their policies. The Court ignores this accountability context entirely in *West Virginia v. EPA*.

C. *National Federation of Businesses v. OSHA*: COVID Emergency Temporary Workplace Safety Standard

[119] Exec. Order No. 13783, 82 Fed. Reg. 16093 (Mar. 28, 2017).
[120] Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32523 (July 8, 2019).
[121] Remarks in Hackberry, La., 2019 DAILY COMP. PRES. DOC. 2 (May 14, 2019).
[122] See, e.g., Editorial, *Trump fired up to save Big Coal instead of Earth*, USA TODAY, Aug. 23, 2018, at 7A Tatiana Schlossberg, *What to Know About Trump's Order to Dismantle the Clean Power Plan*, N.Y. TIMES, Mar. 27, 2017; Editorial, *The EPA's stunning gift to polluters in Chicago and across the Midwest*, CHI. SUN-TIMES, Nov., 22, 2019; Tracie Mauriello, *Trump EPA Boosts Coal by Scrapping Clean Power Plan*, PITTSBURGH POST-GAZETTE, June 20, 2019, at A1 (quoting U.S. Rep. Ron Johnson, R-Wisc.).
[123] Am. Lung Assoc. v. EPA, 985 F.3d 914 (2021).
[124] Remarks in Hackberry, La., 2019 DAILY COMP. PRES. DOC. 2 (May 14, 2019).
[125] Joseph Biden, Presidential Candidate, Press Release (Aug. 11, 2020) (on file with the American Presidency Project).
[126] Joseph Biden, President-Elect, Press Release – President-elect Biden Announces Key Members of His Climate Team, (Dec. 17, 2020) (on file with the American Presidency Project).
[127] West Virginia, 142 S.Ct. 2587, 2628 (2023) (Kagan, J., dissent).

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

Unlike the other decisions discussed in this Part, the Court in *NFIB* included broad statements made by President Biden about the importance of increasing COVID vaccination rates generally. It selected those statements to imply that OSHA acted outside its statutorily prescribed role as a regulator of the *workplace*, that "occupational safety" was only a pretext for increasing the national vaccination rate.[128] In those comments, President Biden had been describing a five-step national pandemic plan, of which the workplace mandate was one step. The Court omits the facts we recount here, indicating that President Biden focused separately on the workplace mandate and specified a purpose of protecting workers and employers from the safety and economic harms of COVID-19 transmission in the workplace, directing specific policies (including the ETS) to address these concerns.

On Thursday, September 9, 2021, President Biden announced that he had instructed the Department of Labor to issue emergency rules requiring large employers to mandate the COVID-19 vaccine or require weekly testing and masking.[129] White House Press Secretary, Jen Psaki, explained that this was a piece of the president's broader efforts, since taking office, to protect workers:

> Well, first the President signed an executive order … maybe the third day he was in office, because he wants to ensure that workers are, of course, safe. He's asked the American people to do their part to help quickly beat the virus, and he's directed OSHA to determine if … an emergency temporary standard was necessary to protect workers from COVID. So his objective is actually to protect workers and members of the workforce."[130]

The White House consistently discussed the ETS in the context of broader efforts to vaccinate American workers[131] and explained why these policies were so important for advancing the

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[128] *NFIB*, *supra* note 14, at *663 ("On September 9, 2021, President Biden announced 'a new plan to require more Americans to be vaccinated.' … In tandem with other planned regulations, the administration's goal was to impose "vaccine requirements" on "about 100 million Americans, two-thirds of all workers." *Id.* at 3."). See infra Part III.

[129] Press Briefing by Press Secretary Jen Psaki, 2021 WHITE HOUSE (Sept. 9, 2021). https://www.whitehouse.gov/briefing-room/press-briefings/2021/09/09/press-briefing-by-press-secretary-jen-psaki-september-9-2021/; Remarks by President Biden on the COVID-19 Response and the Vaccination Program, 2021 WHITE HOUSE (September 24, 2021). https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/24/remarks-by-president-biden-on-the-covid-19-response-and-the-vaccination-program-8/.

[130] Press Briefing by Press Secretary Jen Psaki, 2021 WHITE HOUSE (March, 2021). https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/15/press-briefing-by-press-secretary-jen-psaki-march-15-2021/.

[131] Press Briefing by White House COVID-19 Response Team and Public Health Officials, 2021 WHITE HOUSE (September 10, 2021). https://www.whitehouse.gov/briefing-room/press-briefings/2021/09/10/press-briefing-by-

interests of workers and employers: "They're good for the economy. They bring people back into the labor force."[132] Psaki cited examples of successful private workplace vaccination policies as an inspiration for the OSHA policy:

> [W]e've seen a great deal of success across the board on this front, where companies have been able to—United Airlines, for example—ensure there was greater certainty, employees knew they were working with people who were vaccinated. There are fewer people who are, of course, out sick with COVID; fewer people who have even worse impacts than that. So, one of the big steps we've taken and announced is to—is to put in place these requirements for businesses. Hopefully, that will create more certainty. And we—there's no question, to your point, that a fear of COVID, a fear of work environments—that people are not sure if they're safe or not—is a contributor as we look at the number of open jobs out there.[133]

President Biden publicly supported the ETS by visiting companies that had successfully implemented workplace vaccine requirements,[134] and Psaki indicated that the White House would be in ongoing partnership with OSHA in implementing the ETS.[135]

Biden's workplace vaccine mandates and, specifically, the OSHA policy, were widely covered in the media. In the five short months between Biden's announcement of the ETS and the Supreme Court decision striking it down, major U.S. newspapers carried 619 articles specifically about the OSHA policy (amidst extensive reporting on other state and federal vaccine mandates). Coverage explicitly tied President Biden to the policy—85% (525) mentioned Biden by name, including in headlines such as "Biden Asks OSHA to Order Vaccine Mandates at Large Employers."[136]

D. *Alabama Association of Realtors v. DHA*: The Eviction Moratorium

The agency decision challenged in *Alabama Association of Realtors* was the reinstatement by the Centers for Disease Control (CDC) of a nationwide moratorium on evictions of tenants

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white-house-covid-19-response-team-and-public-health-officials-55/. (describing Biden's efforts to "help make employees, workplaces, and communities safer, and help accelerate our path out of the pandemic.").

[132] Press Briefing by White House COVID-19 Response Team and Public Health Officials, 2021 WHITE HOUSE (October 6, 2021). https://www.whitehouse.gov/briefing-room/press-briefings/2021/10/06/press-briefing-by-white-house-covid-19-response-team-and-public-health-officials-60/.

[133] Press Briefing by Press Secretary Jen Psaki, 2021 WHITE HOUSE (October 8, 2021). https://www.whitehouse.gov/briefing-room/press-briefings/2021/10/08/press-briefing-by-press-secretary-jen-psaki-october-8-2021/.

[134] Press Briefing by Press Secretary Jen Psaki, 2021 WHITE HOUSE (October 6, 2021). https://www.whitehouse.gov/briefing-room/press-briefings/2021/10/06/press-briefing-by-press-secretary-jen-psaki-october-6-2021/.

[135] Press Briefing by Press Secretary Jen Psaki, 2021 WHITE HOUSE (March, 2021). https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/15/press-briefing-by-press-secretary-jen-psaki-march-15-2021/. (explaining that after OSHA promulgates guidelines, "of course, we will work to ensure that people understand why and that they support workers being safe, which I think even many owners of businesses would support.").

[136] Lauren Hirsch, *Biden Asks OSHA to Order Vaccine Mandates at Large Employers*, N.Y. TIMES (Sept. 9, 2021), https://www.nytimes.com/2021/09/09/business/osha-vaccine-biden-mandate.html.

suffering COVID-related economic hardship.[137] This policy spanned the administrations of two different Presidents, both of whom supported it and were actively involved in supervising its adoption and implementation. As a formal matter, the President appoints the Director of the CDC and has the unfettered authority to remove this official. Indeed, a Congressional report documents that high-level CDC officials serving during the Trump Administration feared that they would be fired if they did not follow White House directives.[138]

Both President Trump and President Biden used their authority over the CDC to actively supervise the agency and push it to adopt a succession of eviction moratoria. Shortly after the expiration of a statutory moratorium, President Trump issued Executive Order 13945, declaring it to be "the policy of the United States to minimize, to the greatest extent possible, residential evictions and foreclosures during the ongoing COVID-19 national emergency."[139] The Order went on to direct: "Accordingly, my Administration, to the extent reasonably necessary to prevent the further spread of COVID-19, will take all lawful measures to prevent residential evictions and foreclosures resulting from financial hardships caused by COVID-19."[140] Specifically, it ordered the Director of the CDC to consider a moratorium,[141] and the CDC followed this lead, imposing a new moratorium covering all residential properties nationwide through the end of 2020.[142] President Trump proudly touted this policy as his own accomplishment in a Presidential Fact Sheet, where he stated: "I want to make it unmistakably clear that I'm protecting people from evictions."[143]

The CDC continued the eviction moratorium policy into the Biden administration, extending it on four separate occasions,[144] following Biden's Executive Order 14002, to address the "economic crisis resulting from the pandemic" with "the full resources of the Federal Government."[145] President Biden's issued additional orders coordinating a multi-agency effort to

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[137] Temporary Halt in Residential Evictions in Communities With Substantial or High Transmission of COVID-19 To Prevent the Further Spread of COVID-19, 86 Fed. Reg. 43244 (Aug. 6, 2021).
[138] House Select Subcommittee on the Coronavirus Crisis, *Preparing for and Preventing the Next Public Health Emergency: Lessons Learned from the Coronavirus Crisis* (December 2022), https://coronavirus-democrats-oversight.house.gov/sites/democrats.coronavirus.house.gov/files/2022.12.09%20Preparing%20for%20and%20Preventing%20the%20Next%20Public%20Health%20Emergency.pdf.
[139] Exec. Order No. 13945, 85 Fed. Reg. 49935 (Aug. 14, 2020).
[140] *Id.*
[141] *Id.* This authority was delegated by regulation to the CDC in 42 C.F.R. § 70.2 (2020).
[142] Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55292 (Sept. 4, 2020).
[143] FACT SHEET: President Donald J. Trump Is Working to Stop Evictions and Protect Americans' Homes During the COVID-19 Pandemic (Sept. 1, 2020) https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-working-stop-evictions-protect-americans-homes-covid-19-pandemic/#:~:text=Trump%20is%20taking%20action%20to,the%20spread%20of%20COVID%2D19
[144] Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 8020, 16731, 34010, 43244.
[145] Exec. Order No. 14002, 86 Fed. Reg. 7229 (Jan. 22, 2021).

prevent evictions involving Treasury,[146] the Department of Housing and Urban Development, the CDC,[147] the Consumer Financial Protection Bureau, and the Federal Trade Commission.[148]

President Biden remained out in front of the eviction moratorium policy up through its adoption by the CDC on August 3, 2021. President Biden told reporters at a press conference the day the new moratorium was announced: "[T]he CDC will have something to announce to you in the next hour to 2 hours."[149] Sure enough, the agency announced a new moratorium later that day.[150]

In addition to the two Presidents' formal control over the CDC and their active involvement in the promulgation and implementation of multiple eviction moratoria by that agency, these policies were highly politically salient. Major American newspapers contained extensive coverage of the eviction moratoria, with 1,605 articles appearing during the Trump administration and 2,029 during the Biden administration.[151] The articles reflected a vigorous debate about the policy, including the president's legal authority to order it and the relative merits or imposing it administratively versus legislatively.[152] In addition, the articles evidenced active engagement on the issue by Congress.[153] In addition to covering the policy itself, major American papers thoroughly documented the President's connection to it: 30 percent of articles during the Trump Administration mentioned President Trump[154] and 48.6 percent of articles during the Biden Administration mentioned President Biden.[155] For example, the *Tampa Bay Times* announced the CDC's first extension of the moratorium during the Biden administration with

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[146] FACT SHEET: The Biden-Harris Administration's Multi-Agency Effort to Support Renters and Landlords (March 24, 2021) https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/29/fact-sheet-the-biden-harris-administrations-multi-agency-effort-to-support-renters-and-landlords/.

[147] FACT SHEET: The Biden-Harris Administration's Multi-Agency Effort to Support Renters and Landlords (March 24, 2021) https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/29/fact-sheet-the-biden-harris-administrations-multi-agency-effort-to-support-renters-and-landlords/.

[148] FACT SHEET: The Biden-Harris Administration's Multi-Agency Effort to Support Renters and Landlords (March 24, 2021) https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/29/fact-sheet-the-biden-harris-administrations-multi-agency-effort-to-support-renters-and-landlords/.

[149] Remarks on the COVID–19 Response and National Vaccination Efforts and an Exchange With Reporters, 2021 DAILY COMP. PRES. DOC. 2 (Aug. 3, 2021).

[150] Temporary Halt in Residential Evictions, *supra* note 137.

[151] Lexis Nexis search: "Eviction Moratorium" between 01/01/2020 and 01/31/21(1,605 hits); Filter "President and Trump" (410 hits).
Lexis Nexis search: "Eviction Moratorium" between 01/31/21 and 12/31/22 (2,029 hits); Filter "President and Biden"(668 hits).

[152] *President Is Preparing To Bypass Lawmakers As Stimulus Talks Fail,* N.Y. TIMES, Aug. 8, 2020, at 7; *No agreement reached on stimulus package; Pelosi has harsh words for Republicans,* BOS. GLOBE, Aug. 7, 2020, at A8 (emphasizing how Trump considered using executive orders to address these issues, but Democrats expressed concerns about the legality and potential court challenges.).

[153] Maggie Haberman et al., *With Jobless Aid Expired, Trump Sidelines Himself in Stimulus Talks,* N.Y. TIMES (Aug. 3, 2020), https://www.nytimes.com/2020/08/03/us/politics/congress-jobless-aid-talks-trump.html; Emily Cochrane & Jim Tankersley, *President Is Preparing To Bypass Lawmakers As Stimulus Talks Fail,* N.Y. TIMES, Aug. 8, 2020, at 7; Paul Kiernan, *U.S. News: Mnuchin Presses Congress to Offer More Relief Funds*, WALL ST. J.,, Sept. 2, 2020, at A2.

the headline: "CDC officially extends eviction moratorium through March; President Joe Biden had requested the extension on his first day in office."[156]

In sum, the eviction moratorium exhibited all the hallmarks of the "chain of dependence." It was promulgated by an agency under the President's formal supervisory control. It was the product of active presidential supervision by two different Presidents, each of whom publicly associated themselves with the policy. Finally, both the policy and the Presidents' association with it had high public visibility and political salience. The Court ignores this accountability context entirely in *Alabama Association of Realtors*.

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

The policy challenged in *King v. Burwell* was a rule promulgated by the Internal Revenue Service (IRS) implementing the premium tax credit provision of the Patient Protection and Affordable Care Act (ACA). The ACA—more commonly known as "Obamacare"—was President Obama's signature policy achievement. It changed the way health care was delivered in the United States, transforming an industry that accounts for nearly 20% of the American economy. The availability of tax credits for insurance purchases was the cornerstone of these reforms. As the Court explained in *King*:

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

It was this last piece that was at issue in *King*. Although tax credits were central to the ACA's design,[157] the statutory provisions authorizing them were confusingly drafted, leaving questions about whether they authorized the IRS to provide tax credits for purchases on *all* health insurance exchanges (marketplaces where people can purchase health insurance) or only a limited subset of exchanges. The ACA provides for two different types of exchanges—exchanges established and operated by States and a federal exchange (Healthcare.gov) established and operated by the Department of Health and Human Services. The federal exchange markets insurance in States that elect not to establish their own exchanges. The precise issue in *King* was whether ACA tax credits are available in States that utilize the federal exchange or only in States that operate their own exchanges. Although the ACA provides that tax credits "shall be allowed" for any "applicable taxpayer,"[158] it goes on to state that the amount of the tax credit depends in

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[156] Emily Mahoney, *CDC officially extends eviction moratorium through March; President Joe Biden had requested the extension on his first day in office.*, TAMPA BAY TIMES (Feb. 2, 2021), https://www.tampabay.com/news/business/2021/02/02/cdc-officially-extends-eviction-moratorium-through-march/.

[157] *See* King v. Burwell, 576 U.S. 473, 480-81 (recounting the history of health policy reform in the states and demonstrating the failure of reforms adopted in the absence of tax credits).

[158] 26 U.S.C. § 36B(a).

part on whether the taxpayer has enrolled in an insurance plan through "an Exchange *established by the State* under section 1311 of the Patient Protection and Affordable Care Act[.]"[159]

This thorny issue of statutory interpretation is outside the scope of this article. For our purposes, the key point is that this interpretive question was understood at the time to be existential for the ACA. Because 33 States declined to establish their own exchanges and elected, instead, to utilize the federal exchange, disallowing tax credits in these states would have undermined the entire structure the Act and the functioning of its principal reforms. As the Court explained in *King*, the coverage requirements at the heart of the ACA "would not work without the tax credits."[160] Thus, the legal challenge to the tax credits was, in reality, an attempt by President Obama's opponents to take down the entire ACA.

It would be hard to overstate the political salience of the ACA and the identification between President Obama and this legislation. President Obama campaigned on expanding Americans' access to health care and expended significant political capital to get the ACA enacted. As a candidate in the Democratic primaries, Obama had opposed an individual mandate, but he campaigned vigorously for national health care reform that otherwise was consistent with the final ACA, including the reliance on tax credits and exchanges. As president, he changed his views, favoring the mandate.[161] After addressing the financial crisis, he personally invested much of the first two years of his administration in passing the ACA (and the administrative policies implementing it), and his political opponents zealously bound him to it when they thought it would hurt his political prospects. Opponents called it "ObamaCare" in order taint it, but its supporters often appropriated this label in order to promote it and credit Obama for it. The signing ceremony was famous for Vice President Biden saying to President Obama that it was a "B*F*D," a private comment audible to the media and which became the national tagline reflecting Obama's (and Biden's) public ownership of the ACA.

Even as President Obama trumpeted the ACA's big picture reforms at the signing ceremony,[162] he indicated that he would remain focused on the details of implementation.[163] Moreover, he characterized the ACA's tax credits as the beating heart of health insurance reform: "And when this exchange is up and running millions of people will get tax breaks to help them afford coverage, which represents the largest middle class tax cut for health care in history. *That's what this reform is about.*"[164]

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[159] 26 U.S.C. §§ 36B(b)-(c) (emphasis added).
[160] *Burwell*, 576 U.S. at 482.
[161] Andrew Cline, "*How Obama Broke His Promise on Individual Mandates*," ATLANTIC (June 29, 2012), https://www.theatlantic.com/politics/archive/2012/06/how-obama-broke-his-promise-on-individual-mandates/259183/.
[162] Remarks on Signing the Patient Protection and Affordable Care Act, 2010 WHITE HOUSE (March 23, 2010). https://obamawhitehouse.archives.gov/the-press-office/remarks-president-and-vice-president-signing-health-insurance-reform-bill.
[163] *Id.*
[164] *Id.* (emphasis supplied).

The Commissioner of Internal Revenue (the head of the IRS) is appointed by the President with the advice and consent of the Senate and is removable at will by the President. In addition to having formal control over the agency, President Obama personally acted on several occasions to protect the ACA tax credits from hostile legislation introduced in Congress and ensure that the IRS could effectively implement them. Specifically, he addressed the issue of IRS implementation authority in a series of policy statements in 2011,[165] 2012,[166] and 2014.[167] These statements indicate that the President saw the tax credits as inextricable from the broader ACA reforms and that he was actively involved in supporting IRS implementation of the tax credits. This specific policy was highly visible and politically salient. Discussion of the ACA tax credits appeared in 1,151 articles in major U.S. newspapers between March 2010 (the month the legislation was enacted) and June 2015 (when *King* was decided).[168] Articles explained how the tax credits operate,[169] made their significance clear by reporting on the number of affected individuals[170] and conveyed personal stories of individuals who benefitted from the tax credits.[171] As Obama staked his presidency on supporting the ACA, a generation of politicians built their careers trying to tear down "Obamacare."[172]

In sum, the ACA tax credit policy challenged in *King v. Burwell* exhibited all the hallmarks of the "chain of dependence." It was promulgated by an agency under the President's formal supervisory control. It was the product of active presidential supervision and support. Both the policy as well as President Obama's association with it had high public visibility and political salience. Indeed, the political branches each actively leveraged the tools at their disposal to advance their constituents' interests with respect to the policy. Although the Court ultimately upheld this policy, this accountability context plays no role in its analysis.

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

The policy challenged in *Gonzalez v. Oregon* was an interpretive rule issued by the U.S. Attorney General indicating that physicians who assist suicide of terminally ill patients pursuant to an Oregon statute authorizing them to do so[173] would be violating the federal Controlled

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[165] Statement of Administration Policy: H.R. 2354—Energy and Water Development and Related Agencies (November 10, 2011), https://www.presidency.ucsb.edu/documents/statement-administration-policy-hr-2354-energy-and-water-development-and-related-agencies.

[166] Statement of Administration Policy: H.R. 6020 – Financial Services and General Government Appropriations Act, 2013 (June 28, 2012), https://www.presidency.ucsb.edu/documents/statement-administration-policy-hr-6020-financial-services-and-general-government.

[167] Statement of Administration Policy: H.R. 5016 – Financial Services and General Government Appropriations Act, 2015 (July 14, 2014), https://www.presidency.ucsb.edu/documents/statement-administration-policy-hr-5016-financial-services-and-general-government.

[168] Lexis-Nexis search: (Obamacare or "Affordable Care Act") and "tax credit" between 03/01/2010-06/30/2015.

[169] Erin E. Arvedlund, *Your Money: How health law affects tax law*, PHILA. INQUIRER, Oct. 1, 2013, at A12.

[170] Jaclyn Cosgrove, *377,000 Oklahomans could receive 'Obamacare' credits*, DAILY OKLAHOMAN, Apr. 18, 2013, at 8A; Jerome R. Stockfisch, *1.3M in Florida keep coverage; Nationally, 6.4M people would have been affected*, TAMPA TRIB., June 26, 2015, at 1.

[171] Misty Williams, *Obamacare Stands*, ATLANTA J.-CONST., June 26, 2015, at 1A.

[172] *Id.*

[173] Oregon Death With Dignity Act, ORE. REV. STAT. § 127.800 et seq. (2003) (exempting "from civil or criminal liability state-licensed physicians who, in compliance with the specific safeguards in ODWDA, dispense or prescribe a lethal dose of drugs upon the request of a terminally ill patient.")

Substances Act (CSA), placing them at risk of criminal prosecution and the loss of their federal registration to lawfully prescribe drugs regulated by the CSA.[174] While seemingly a narrow, technical issue, this policy was a key piece of President George W. Bush's larger pro-life agenda, and his administration—his Attorney General, John Ashcroft, in particular—pursued it with gusto.

The Attorney General, at least for most of the last century, fits the model of presidential control—appointed by the President with the advice and consent of the Senate, removable at will by the President, and in charge of performing functions at the core of executive power.[175] While presidential removal authority is an abstract threat for many Department Heads, Presidents have asserted it throughout history to pressure Attorney Generals.[176]

Not only did President Bush enjoy formal control over his Attorney General, he endorsed the Attorney General's efforts to oppose the Oregon law that had authorized physician-assisted suicide in that state, and he publicly associated himself with these efforts. The White House press corps and the President himself publicly discussed his opposition to physician-assisted suicide and his commitment to mobilize the resources of the Department of Justice to oppose the Oregon law. For instance, in a press gaggle, White House Press Secretary Ari Fleischer was asked by a reporter, "On physician-assisted suicide, the President did step in and have John Ashcroft [the Attorney General] prosecute – I forget if it was Washington state or Oregon."[177] Fleischer responded that he did not recall specifically, but allowed that "there are a host of other issues where the President has a different position than states[.]"[178] Fleischer's successor, White House Press Secretary Scott McClellan, had a similar back-and-forth with a reporter in a press briefing just months later:

> Q: Scott, the White House is participating in a forum about end-of-life care, which is going on right now. And there's just been an address by the head of the faith-based initiative office. Does the Bush administration still believe it's wrong for Oregon and other parties to permit physician-assisted suicide for the terminally ill?
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> MR. McCLELLAN: Yes.[179]

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[174] *See* Gonzales v. Oregon, 546 U.S. 243, 914 (2006).
[175] *See* Morrison v. Olson, 487 U.S. 654 (1988). For the mixed history of the AG as independent and accountable, see Shugerman, "Professionals, Politicos, and Crony Attorneys General: A Historical Review of the U.S. Attorney General as a Case for Structural Reform," 87 FORDHAM L. REV. 1965 (2019); Shugerman "The Creation of the Department of Justice: Professionalization without Civil Rights or Civil Service," 66 STAN. L. REV. 121 (2014).
[176] Alberto Gonzales himself resigned under pressure from the Bush administration in 2007 amid controversy over the alleged political firing of U.S. attorneys. For five other examples, see Scott Bomboy, *Attorney General removals rare, but not unprecedented*, NAT'L CONST. CTR DAILY CONST. BLOG (July 26, 2017), https://constitutioncenter.org/blog/attorney-general-removals-rare-but-not-unprecedented.
[177] Press Gaggle by Ari Fleischer, 2002 WHITE HOUSE (September 23, 2022), https://georgewbush-whitehouse.archives.gov/news/releases/2002/09/20020923-8.html.
[178] *Id.*
[179] Press Briefing by Scott McClellan, 2002 WHITE HOUSE (November 18, 2002), https://georgewbush-whitehouse.archives.gov/news/releases/2002/11/20021118-2.html.

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

> I want to thank you very for including me in the celebration of life. … In our time, respect for the right to life calls us to defend the sick and the dying, persons with disabilities and birth defects, and all who are weak and vulnerable. … My administration is challenging the Oregon law that permits physician-assisted suicide.[180]

In another press briefing, White House Press Secretary McClellan made clear that the Department of Justice was acting on President Bush's personal beliefs about physician-assisted suicide.[181]

These presidential statements were made against the backdrop of a broader public conversation about physician-assisted suicide. As the Court recognized in *Gonzales*, Americans were engaged in "an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide."[182] Major U.S. newspapers carried 472 articles about physician-assisted suicide from the month the interpretive rule was adopted through the month it was struck down.[183] More than half of these (251) mentioned Bush by name or referred to the "President."

Attorney General John Ashcroft announced the interpretive rule with much fanfare.[184] There was vigorous public debate about the ethics of physician-assisted suicide[185] as well as the propriety of the Attorney General's interpretive rule, with editorials supporting[186] and opposing[187] it. Controversy over physician-assisted suicide fueled national political contestation in the years following the Attorney General's adoption of the interpretive rule. The national parties poured

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[180] Telephone Remarks to the March for Life, 2003 WHITE HOUSE (January 22, 2003), https://georgewbush-whitehouse.archives.gov/news/releases/2003/01/20030122-3.html.
[181] Press Gaggle by Scott McClellan, 2005 WHITE HOUSE (March 21, 2005), https://georgewbush-whitehouse.archives.gov/news/releases/2005/03/20050321-2.html.
[182] *Gonzales*, 546 U.S. at 248 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997)).
[183] Search: "physician assisted suicide" and NOT "bishops" (to eliminate irrelevant articles about the election of a Catholic Bishop to be president of the United States Conference of Catholic Bishops) in Major U.S. Newspapers, 10/01/2001-01/30/2006.
[184] Jill Carroll, *Physicians Who Assist in Suicides To Face Charges, Ashcroft Says*, WALL ST. J., A24 (November 7, 2001). Sam Howe Verhovek, *Ashcroft Goes After Doctors Using Assisted Suicide Law*, PITTSBURGH POST-GAZETTE (November 7, 2001).
[185] *Life-and-Death Decisions*, ST. LOUIS POST-DISPATCH, Nov. 8, 2001, at C18; Alicia Kerstyn & John T. Sinnott, *Local Physician Offers Tips for Facing Death*, TAMPA TRIB., Oct. 7, 2001; Kristin E. Holmes, *Jewish guidebook on dying offers broad perspectives on values*, PHILA. INQUIRER, May 26, 2002, at B05.
[186] Editorial, *Ashcroft: for Life Decision Reflects Sensible Judgment*, DAILY OKLAHOMAN, Nov. 11, 2001; Asa Hutchinson, *Drugs are to help, not harm*, USA TODAY, Nov. 14, 2001; Letters to the Editor, *Ashcroft is Not Alone on This One*, COLUMBUS DISPATCH, Dec. 29, 2001, at 11A.
[187] Editorial, *Ashcroft's moral stand out of line*, TAMPA BAY TIMES, Nov. 13, 2001, at 12A; Editorial, *Emergency matters must take priority*, INDIANAPOLIS STAR, Nov. 12, 2001, at A10; Bill McClellan, *When Ashcroft Turns Into an Activist, He Hurts His Credibility*, ST. LOUIS POST-DISPATCH, Nov. 12, 2001, at B1; Editorial, *Washington Shouldn't Be Tinkering with Oregon Law*, NEWSDAY, Nov. 12, 2001; Clarence Page, *The right to choose the quality of one's death*, CHI. TRIB., Nov. 11, 2001, at C21; *Ashcroft's Meddling*, BOS. GLOBE, Nov. 10, 2001.

money into Oregon's Senate race in 2002, which featured attacks on one of the candidates for "opposing abortion and Oregon's voter-approved physician-assisted suicide law."[188] Physician-assisted suicide became a hot-button issue in John Roberts' nomination to the Court in 2005, following the retirement of Justice Sandra Day O'Connor. Articles highlighted the Oregon case on the Court's docket and speculated about how he might rule.[189] When the Court ruled against the Attorney General in *Gonzales* (with Roberts in dissent), one headline brought it all together, capturing the ongoing political salience of the issue and the Bush administration's connection to it: "Oregon assisted-suicide law upheld; The Supreme Court rejected the Bush administration's challenge to the right-to-die law, removing a major obstacle to state initiatives."[190]

In sum, the Attorney General's interpretive rule challenged in *Gonzales v. Oregon* exhibited all the hallmarks of the "chain of dependence." It was promulgated by an agency under the President's formal supervisory control. It was the product of active presidential direction and support. Both the policy as well as President Bush's association with it had high public visibility and political salience. Arguably, it catalyzed political debate about the issue of physician-assisted suicide. Indeed, the political debate outlasted the rule itself. But this accountability context plays no role in the Court's analysis in *Gonzales v. Oregon*.

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

The policy challenged in *Brown & Williamson* was a rule promulgated by the Food and Drug Administration (FDA) regulating tobacco products to reduce youth consumption. President Bill Clinton was involved in the policymaking process from its earliest stages, made (and took public responsibility for) key policy decisions, and vigorously advocated for the FDA rule, expending significant political capital. Tobacco regulation fit squarely within President Clinton's core political agenda of improving health outcomes and supporting families. In remarks at a swearing-in ceremony for members of the newly created President's Council on Physical Fitness and Sports, President Clinton discussed the FDA's early consideration of its authority to regulate tobacco products: "An enormous amount of what we do involves the health of our people. … Our FDA is taking on a pretty tough fight with the tobacco industry and now looking into the whole issue of the narcotic or addictive effects and whether they can be varied based on certain production techniques."[191]

There was heightened media interest in the President's position on tobacco regulation following reports that the agency had found it had jurisdiction to regulate tobacco, with reporters pressing the President and the White House Press Secretary, Mike McCurry, on how the

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[188] V. Dion Haynes, *National parties pour money into Oregon's Senate race*, CHI. TRIB., Oct. 2, 2002, at N10.
[189] Gina Holland, *With court change, rulings become even less predictable; Appointee will face hot-button cases*, ST. LOUIS POST-DISPATCH, July 3, 2005, at B7; Jess Bravin & Jeanne Cummings, *Among Conservatives—Business Saw O'Connor as Ally But Religious Right Wants A Different Kind of Justice—Weighing the Gonzales Option*, WALL ST. J., A1 (July 5, 2005); Sheryl Gay Stolberg, *Nominee is Pressed on End-of-Life Care*, N.Y. TIMES, Aug. 10, 2005, at A18; John Aloysius Farrell, *First cases to quickly clear air on Roberts; Assisted suicide, abortion on agenda*, DENVER POST, Oct. 2, 2005, at A01.
[190] David Whitney, *Oregon assisted-suicide law upheld*, MINNEAPOLIS STAR TRIB., Jan. 18, 2006, at 1A.
[191] Remarks at the Swearing-In Ceremony for Members of the President's Council on Physical Fitness and Sports, 1994 WHITE HOUSE (May 31, 1994), https://clintonwhitehouse6.archives.gov/1994/05/1994-05-31-remarks-by-president-at-fitness-council-swearing-in.html.

President would respond. Both indicated that there was an ongoing, deliberative process in which the President was personally involved and stressed that the President would make a final decision on the policy at the conclusion of the process. When first asked about FDA action on tobacco, President Clinton underscored the identity of interest between him and the agency but cautioned that a final policy decision would require his supervisory input.[192]

In deliberating about the policy decision, the President and his staff met with FDA officials[193] and members of Congress[194] and solicited input from the tobacco industry.[195] Throughout the process, White House Press Secretary McCurry stressed the President's role as the "decider"[196] in the policy-making process:

> there are some complex legal, regulatory and policy issues at play here. I wouldn't rule out that it could be sooner rather than later, but I don't want to set artificially a timetable for the President either. I think *he* wants to make the right decision, make sure that *he's* got the information that *he* needs, make sure that *he* constructs a policy—regardless of some of the regulatory and legal decisions—there are some policy decisions here that *he* feels are very important as they relate to tobacco use by young people.[197]

Asked by reporters about the delay in announcing the rule, McCurry explained that the president had "been working—this is a complicated issue, involving both regulation and then *policymaking on the President's part. He's* very keen on making sure *he's* got the right policy to make good on a commitment *he* feels strongly about. *That's his responsibility as President*, to protect the nation's children from tobacco use."[198]

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[192] Remarks on Welfare Reform and an Exchange With Reporters, 1995 WHITE HOUSE (July 13, 1995), https://clintonwhitehouse6.archives.gov/1995/07/1995-07-13-president-remarks-after-welfare-reform-meeting.html.

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

[194] Press Briefing by Mike McCurry, 1995 WHITE HOUSE (July 26, 1995), https://clintonwhitehouse6.archives.gov/1995/07/1995-07-26-press-briefing-by-mike-mccurry.html. (revealing to reporters that "two members of Congress, Congressman Wyden and Congressman Rose, mentioned that they had come in, too. … They … had a good discussion with the Chief of Staff to pass on their views.").

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

[196] Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007).

[197] Press Briefing by Mike McCurry, 1995 WHITE HOUSE (July 26, 1995), https://clintonwhitehouse6.archives.gov/1995/07/1995-07-26-press-briefing-by-mike-mccurry.html (emphasis supplied). See also Press Briefing by Mike McCurry, 1995 WHITE HOUSE (July 13, 1995), https://clintonwhitehouse6.archives.gov/1995/07/1995-07-13-press-briefing-by-mike-mccurry.html.

[198] Press Briefing by Mike McCurry, 1995 WHITE HOUSE (Aug. 8, 1995), https://clintonwhitehouse6.archives.gov/1995/08/1995-08-08-press-briefing-by-mike-mccurry.html (emphasis supplied).

A reporter once literally asked McCurry "why is this a presidential issue?" and McCurry responded, "Well, that goes to the heart of FDA's determination or their interest in the issue itself."[199] The reporter followed up, "Of all the issues that the President is dealing with lately, why did he agree to make this an issue on his plate right now?"[200] McCurry situated FDA tobacco regulation in President Clinton's broader political agenda:

> Well, you've seen in recent weeks one after another scientific study coming forward that confirms some of the documented evidence that addiction to tobacco especially among young people is on the rise. It's a source of very real concern to him. And you remember the context for the discussion of this issue is a very real debate going on now about Medicare expenditures. And that speaks to the long-term health costs in America of what happens if we're paying 20, 30, 40 years down the road from the health damage done to today's children by tobacco use. So in a very real sense he's protecting future generations of taxpayers, in addition to protecting the current generation of children.[201]

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

> Today I am announcing broad executive action to protect the young people of the United States from the awful dangers of tobacco. … Today, and every day this year, 3,000 young people will begin to smoke. One thousand of them ultimately will die of cancer, emphysema, heart disease, and other diseases caused by smoking. That's more than a million vulnerable young people a year being hooked on nicotine that ultimately could kill them. *Therefore, by executive authority, I will restrict sharply the advertising, promotion, distribution, and marketing of cigarettes to teenagers.*[202]

President Clinton followed up the policy announcement with a media blitz in support of the FDA's regulations, including an interview with MTV (a cable TV channel with a large youth viewership),[203] a national radio address delivered from the Oval Office,[204] and an interview with Larry King on his then-highly-rated CNN talk show.[205] He continued to build political support for the initiative in remarks delivered in a wide variety of forums, including a Roundtable

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[199] *Id.*
[200] *Id.*
[201] *Id.*
[202] The President's News Conference, 1995 WHITE HOUSE (Aug. 10, 1995), https://clintonwhitehouse6.archives.gov/1995/08/1995-08-10-press-conference-by-the-president.html. (emphasis supplied).
[203] Interview with Tabitha Soren of MTV, 1995 WHITE HOUSE (Aug. 11, 1995), https://clintonwhitehouse6.archives.gov/1995/08/1995-08-11-mtv-interview-of-the-president.html.
[204] The President's Radio Address, 1995 WHITE HOUSE (Aug. 12, 1995), https://clintonwhitehouse6.archives.gov/1995/08/1995-08-12-radio-address-of-the-president-to-the-nation.html.
[205] Interview with Larry King in Culver City, Cal., 1995 WHITE HOUSE (Sept. 21, 1995), https://clintonwhitehouse6.archives.gov/1995/09/1995-09-21-president-remarks-on-larry-king-radio-town-meeting.html.

Discussion on Tobacco Use Prevention,[206] the Anticancer Initiative,[207] a proclamation marking Cancer Control Month,[208] an anti-smoking event on Kick Butts Day,[209] and to the Saxophone Club.[210] The President also shielded Dr. Kessler, the FDA Administrator, from personal attacks by the tobacco industry and calls for his resignation.[211]

The White House had a keen sense of the political salience of the issue. As Mike McCurry told reporters, "clearly there are many members of Congress that have a very active interest in the issue."[212] Reporters routinely highlighted the political stakes of the decision to regulate tobacco, noting the opposition of tobacco state lawmakers[213] and asking the President himself, "Mr. President, with your decision on tobacco you're taking on one of the biggest cash crops in a region where you've already got major political problems. Are you writing off the South for next year's elections?"[214]

Despite the political risks, President Clinton personally announced the issuance of the final FDA rule to protect youth from tobacco, framing it as a joint effort between him and the agency: "*We* have carefully considered the evidence. It is clear that the action being taken today is the right thing to do, scientifically, legally, and morally. So today *we* are acting."[215] Following the

[206] Remarks in a Roundtable Discussion on Tobacco Use Prevention and an Exchange With Reporters, 1996 WHITE HOUSE (Feb. 12, 1996), https://www.presidency.ucsb.edu/documents/remarks-roundtable-discussion-tobacco-use-prevention-and-exchange-with-reporters.
[207] Remarks on the Anticancer Initiative, 1996 WHITE HOUSE (Mar. 29, 1996), https://clintonwhitehouse6.archives.gov/1996/03/1996-03-29-president-remarks-at-anti-cancer-initiative-ceremony.html.
[208] Proclamation 6875—Cancer Control Month, 1996 WHITE HOUSE (Mar. 29, 1996), https://www.presidency.ucsb.edu/documents/proclamation-6875-cancer-control-month-1996.
[209] Remarks on Kick Butts Day in Woodbridge, 1996 WHITE HOUSE (May 7, 1996), https://clintonwhitehouse6.archives.gov/1996/05/1996-05-07-president-remarks-in-kick-butts-telephone-conference.html.
[210] Remarks to the Saxophone Club, 1995 WHITE HOUSE (Sept. 26, 1995), https://clintonwhitehouse6.archives.gov/1995/09/1995-09-26-president-remarks-at-saxophone-club-fundraiser.html.
[211] Press Briefing by Michael McCurry, 1995 WHITE HOUSE (August 11, 1995). https://clintonwhitehouse6.archives.gov/1995/08/1995-08-11-press-briefing-by-mike-mccurry.html.
[212] *supra,* fn195.
[213] *supra,* fn198.
[214] *supra,* fn203.
[215] Remarks Announcing the Final Rule to Protect Youth from Tobacco, 1996 WHITE HOUSE (Aug. 23, 1996), (emphasis supplied) https://clintonwhitehouse6.archives.gov/1996/08/1996-08-23-president-on-fda-rule-on-children-and-tobacco.html.

promulgation of the rule, President Clinton continued to advocate for it publicly.[216] Further, he attempted to build on the rule by proposing comprehensive tobacco legislation in Congress.[217]

The topic of tobacco regulation—and President Clinton's connection to it—was the subject of public discussion and debate throughout his tenure in office. In major U.S. newspapers, 357 articles addressed tobacco regulation, and more than seventy percent of them (253) mentioned the President.[218] Articles covered legislative and regulatory developments relating to tobacco regulation[219] and conveyed a range of viewpoints supporting[220] and opposing[221] regulation or simply reporting on the "hot debate over regulating teen smoking."[222] Press coverage clearly conveyed the President's decisive role in the policymaking process with headlines such as "FDA Dubs Nicotine a Drug, Backs Off on Regulating It; Bounces Recommendations, Issue to Clinton"[223] and "FDA urges nicotine curbs; But agency sidesteps issue, urges Clinton to draft regulations."[224] Indeed, Clinton's support for tobacco regulation (and his opponent Bob Dole's opposition to it) was a significant issue in the 1996 presidential campaign.[225]

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

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[216] The President's News Conference, 1997 WHITE HOUSE (Aug. 6, 1997). https://clintonwhitehouse6.archives.gov/1997/08/1997-08-06-press-conference-by-the-president.html; Statement on the Department of Justice Appeal of the District Court Decision on Tobacco Regulation, 1997 WHITE HOUSE (May 2, 1997), https://clintonwhitehouse6.archives.gov/1997/05/1997-05-02-president-on-appeal-in-tobacco-advertising-ruling.html; Remarks to the American Medical Association National Leadership Conference, 1998 WHITE HOUSE (Mar. 9, 1998), https://clintonwhitehouse6.archives.gov/1998/03/1998-03-09-remarks-by-the-president-to-ama.html.

[217] Remarks on Proposed Tobacco Legislation and an Exchange with Reporters, 1997 WHITE HOUSE (Sept.17, 1997), https://clintonwhitehouse6.archives.gov/1997/09/1997-09-17-president-remarks-on-the-tobacco-settlement-review.html.

[218] Lexis Nexis search: "tobacco regulation" between 01/01/1993 and 03/30/2000 (357 hits); Filter "Clinton or President" (253 hits).

[219] Marlene Cimons & Jeff Leeds, *Quick House Vote Sought on Regulation of Tobacco*, L.A. TIMES, June 14, 1994, at A21.

[220] Anita Manning, *AMA calls for tobacco regulation*, USA TODAY, June 8, 1994, at 1A; Philip J. Hilts, *Poll by Tobacco Industry Finds*, N.Y. TIMES, Jan. 11, 1995, at A14.

[221] Carol Jouzaitis, *High Stakes, Deep Worries of More Tobacco Regulation*, CHI. TRIB., June 24, 1994, at N1; *What about smokers' rights?* CHRISTIAN SCI. MONITOR, Oct. 28, 1994, at 20.

[222] Doug Levy, *Hot debate over regulating teen smoking*, USA TODAY, July 14, 1995, at 10D.

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

[224] Philip J. Hilts, *FDA urges nicotine curbs; But agency sidesteps issue, urges Clinton to draft regulations*, PITTSBURGH POST-GAZETTE, July 13, 1995.

[225] Judy Keen, *Dole still 'not certain' if tobacco is addictive; Supporters are baffled by his stance*, USA TODAY, July 3, 1996 (reporting that the Clinton campaign "has long planned to use a strong anti-tobacco stance as a major re-election theme."); Judy Keen & Judi Hasson, *Dole tries to regain the GOP's Southern ground*, USA TODAY, June 17, 1996.

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

It is jarring to read the MQD cases against the background of how the challenged policies were actually enacted. In each of these cases, despite the overwhelming evidence that these policies were the product of direct (and often highly personal) presidential control and supervision, the Court inexplicably lets the president off the hook and goes after the agency instead. Chief Justice Roberts sums it up nicely in *West Virginia v. EPA*, where he explains that the MQD is a response to "a particular and recurring problem: *agencies* asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[226]

A close reading of major questions cases confirms that the doctrine rests in no small part on what might be characterized as a theory of "agencies gone wild": agencies doing big, "aggressive"[227] things; agencies doing things they have never done before; agencies using slight of hand to pull these policy elephants out of the modest statutory mouseholes delegated to them by Congress. While the sins of bigness, novelty, and statutory sorcery have been widely remarked upon in case law and commentary on the major questions doctrine, what has largely escaped notice is the identity of the accused sinner: *the agency*. This assignment of blame is puzzling, given the Court's theory of a unitary executive branch, its implementation of that theory in expanding presidential power in appointment and removal, and a succession of Presidents' hands-on involvement in "major questions" policies (detailed in Part II above). Indeed, the President—so prominent in the Court's theory of accountability in appointment and removal cases—is virtually nowhere to be found in its major questions doctrine jurisprudence. This Part documents the Court's rhetoric of unruly and unaccountable agencies in MQD cases and its conspicuous silence about the Presidents who control them.

A. Blaming Unruly and Unaccountable Agencies

In identifying which policy decisions constitute major questions warranting distinctive treatment, the Court has focused on three key attributes: (1) policies with great "economic and political significance";[228] (2) novel policies that differ, in the Court's view, from the agency's historic use of its authority;[229] and (3) the manipulation of ambiguous statutory text to pull policy "elephants" out of statutory "mouseholes."[230] Notably, the Court consistently faults the agency that promulgated the policy for these transgressions rather than the President who ordered the agency to adopt it.

First, major questions cases portray agencies as free agents, untethered from democratic control, attempting to make big policy moves. For instance, in *Biden v. Nebraska*, the Court accuses the Secretary of Education of a power grab with large economic impacts: "*the Secretary*

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[226] West Virginia, *supra* note 127 at 2609. This particular gripe about agencies is, itself, recurring—quoted verbatim in J. Gorsuch's concurrence at 2620.
[227] *NFIB*, *supra* note 14, at *669 (Gorsuch, J., concurring).
[228] FDA v. Brown & Williamson, 529 U.S. 120, 160 (2000).
[229] *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014). ("When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' … we typically greet its announcement with a measure of skepticism.").
[230] *Gonzales*, 546 U.S. at 267 (quoting Whitman v. American Trucking Assns., Inc., 531 U.S. 457, 468 (2001)).

would enjoy virtually unlimited power to rewrite the Education Act… in which *the Secretary* may unilaterally define every aspect of federal student financial aid… The 'economic and political significance' of *the Secretary's* action is staggering by any measure. "[231] Similarly, in *Alabama Association of Realtors*, the Court found that "the kind of power that *the CDC* claims here"[232]—over "[a]t least 80% of the country, including between 6 and 17 million tenants at risk or eviction"[233]—is of "vast economic and political significance."[234] And in *West Virginia v. EPA*, the Court not only expressed its general concern, about "*agencies* asserting highly consequential power beyond what Congress could reasonably be understood to have granted",[235] it also registered more targeted criticism of the "*EPA* dictating the optimal mix of energy sources nationwide[.]"[236] The Court portrays the agencies sitting in the driver's seat rather than the presidential directives ordering them to reach a specific policy destination.

Second, MQD cases not only stress the significance of challenged agency policies, they highlight the perceived novelty of these policies and explicitly attribute responsibility for the shift in policy direction to the promulgating agency. As the Court began to stake out the contours of major questions in *Brown & Williamson*, it declared that the Clinton administration's attempt to regulate tobacco products was "hardly an ordinary case. Contrary to its representations to Congress since 1914, *the FDA* has now asserted jurisdiction to regulate an industry constituting a significant portion of the American economy."[237] This ignores the substantial (and public) evidence that the agency refused to make a move until President Clinton made the final policy decision on whether and how to regulate tobacco.[238] Similarly, in striking down the workplace vaccine or test emergency standard in *NFIB v. OSHA*, the Court found it "telling that *OSHA*, in its half century of existence, has never before adopted a broad public health regulation of this kind—addressing a threat that is untethered, in any causal sense, from the workplace."[239] And in *West Virginia v. EPA*, the Court highlighted what it characterized as a marked change in the EPA's approach to Clean Air Act policy design: "Prior to 2015, *EPA* had always set emissions limits under Section 111 based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly. … *It* had never devised a cap by looking to a 'system' that would reduce pollution simply by 'shifting' polluting activity 'from dirtier to

[231] *Id.* at 21 (emphasis supplied).
[232] Ala. Assoc. of Realtors v. United States Dep't of Health and Human Servs., 141 S. Ct. 2485, 2489 (2021). (emphasis supplied).
[233] *Ala. Assoc. of Realtors*, 141 S. Ct. at 2489.
[234] *Ala. Assoc. of Realtors*, 141 S. Ct.at 2489 (internal quotation marks omitted).
[235] *West Virginia*, *supra* note 137, at 2609.
[236] *Id.* at 2613. *See also*, *Utility Air Regulatory Group*, 573 U.S. at 24 (emphasis supplied) (arguing that the EPA's proposed policy to "require permits for the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide" was an example of the Court saw "an *agency* laying claim to extravagant statutory power over the national economy[.]").
[237] *Brown & Williamson*, 529 U.S. at 159 (emphasis supplied).
[238] *See, supra*, ___.
[239] *NFIB*, *supra* note 14, at *666 (emphasis supplied).

cleaner sources.'"[240] The Court levels these charges despite the substantial record documenting that these policy changes were ordered (and publicly owned) by the president.[241]

Third, several of the "major questions" cases suggest that agencies use statutory sleight-of-hand to identify legal authority for their bold, novel policies. For instance, in *Biden v. Nebraska*, the Court denounces the Secretary of Education both for promulgating a novel policy through statutory subterfuge: "What *the Secretary* has actually done is draft a new section of the Education Act from scratch by 'waiving' provisions root and branch and then filling the empty space with radically new text."[242] Similarly, the Court in *UARG* found it suspicious that "*an agency* claims to discover in a long-extant statute an unheralded power to regulate[.]"[243] Concurring Justices in *NFIB v. OSHA* warn generally that "*the agency* may seek to exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond its initial assignment."[244] The concurrence in *West Virginia v. EPA* cautions that in a world without the major questions doctrine, "*agencies* could churn out new laws more or less at whim."[245] Again, these charges are made despite the fact that these agencies' statutory interpretations were made in consultation with the president to advance the president's agenda, often with media scrutiny about the scope of the president's authority.[246]

The Court's pique with agencies is perhaps best explained by the strong anti-administrative strand threading through the arguments in these cases.[247] Justices have framed the major questions doctrine as an essential tool to prevent "government by bureaucracy"[248] and protect the republic from "a regime administered by a ruling class of largely unaccountable 'ministers.'"[249] Notably, this anti-administrative rhetoric is being embraced and amplified by lower federal courts, which have variously lamented "the impenetrable halls of an administrative agency"[250] and "the deep recesses of the federal bureaucracy."[251] In *Biden v. Nebraska*, the Court assures us that the MQD clear statement rule protects us from a bureaucratic nightmare in which "*a Department Secretary* can *unilaterally* alter large sections of the American economy."[252] Of course, the Court never acknowledges that the policy promulgated by the Department of Education was

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[240] *West Virginia*, *supra* note 137, at 2610 (emphasis supplied).
[241] *See, supra*, ___.
[242] *Nebraska* at slip op. 17 (emphasis supplied.
[243] *Utility Air Regulatory Group*, 573 U.S. at 324 (emphasis supplied).
[244] *NFIB, supra* note 14, at *669 (emphasis supplied).
[245] *West Virginia*, 577 U.S at 2618 (emphasis supplied).
[246] *See, supra*, ___.
[247] The Roberts Court's broad anti-administrative orientation is summarized in Gillian Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017). Commentators have noted the "anti-adminsitrativist[]" character of the MQD (Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174, 204 (2022)) and the "antibureaucratic philosophy of the modern state" that underlies it (Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2024 (2018)).
[248] *NFIB, supra* note 14, at 669.
[249] *West Virginia*, 577 U.S at 2617.
[250] Am. Lung Assoc. v. EPA, 985 F.3d 914, 1003 (2021).
[251] BST Holdings, L.L.C. v. Occupational Safety & Health Admin., 17 F.4th 604, 611 (5th Cir. 2021).
[252] *Id.* at 25.

not the brainchild of some rogue secretary, but was President Biden's own policy, a quintessential example of "presidential administration."[253]

B. Erasing Presidents

In stark contrast to the drubbing agencies and their leaders take in MQD cases, the President is virtually nowhere to be found. Many of the core MQD cases do not even mention the President.[254] A few allude to the President as part of the factual background and procedural posture of the case, but they draw no analytical significance from these facts.[255] This absence borders on the absurd in recent cases. Even though Presidents Obama and Biden played vocal and public roles in announcing health care reform, climate policy, the eviction moratorium policy, and student debt relief, the Roberts Court majorities never mentioned either president by name in the cases challenging these policies.[256] Remarkably, even in *King v. Burwell*, a challenge to the Affordable Care Act—known publicly as "ObamaCare"—the majority never mentioned "Obama" or even the word "president."[257]

There are two notable exceptions, where the Court strategically inserted the president into its narrative to bolster the claim that the promulgating agency had acted inappropriately. In *Biden v. Nebraska*, the Court noted that President Biden had publicly declared the COVID pandemic over, a statement that was in tension with his Department of Education's assertion of emergency authority to authorize student debt relief.[258] The Court included this isolated fact to imply that the Department of Education had strayed from President Biden, without acknowledging the prominent and personal role that Biden himself had taken in ordering, announcing, and supporting the student debt relief policy. Similarly, in *NFIB v. OSHA*, the Court recited several broad statements by President Biden describing a strategy to promote vaccines for "more Americans"[259] (which included the workplace mandate among five policies) to suggest that OSHA was using its authority to promulgate workplace standards as a pretext to increase vaccination rates generally. The Court ignored President Biden's more specific statements about the importance of vaccines to protect workplace safety.[260]

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[253] See generally Elena Kagan, Presidential Administration.

[254] *See* Ala. Assn. of Realtors v. Dep't of Health & Hum. Servs., 141 S.Ct. 2485 (2021); Brown & Williamson, supra note 229 (no mention in the majority opinion); Gonzales v. Oregon, supra note 175; King v. Burwell, supra note 158; MCI Telecommunications Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218 (1994).

[255] *See NFIB, supra* note 14 (majority opinion recounts President Biden's announcement of OSHA's emergency vaccine or test rule but draws no doctrinal significance from these facts); *West Virginia, supra* note 127 (majority notes without comment or analysis that there had been a change in presidential administrations).

[256] *West Virginia, supra* note 127; *Ala. Assn. of Realtors, supra* note 255.

[257] *King v. Burwell, supra* note 158.

[258] *Biden v. Nebraska,* No. 22-506, slip op. at 5 (U.S. June 30, 2023) ("But in August 2022, a few weeks before President Biden stated that "the pandemic is over," the Department of Education announced that it was once again issuing 'waivers and modifications' under the Act—this time to reduce and eliminate student debts directly.")

[259] *NFIB*, 142 S. Ct. at *663 ("On September 9, 2021, President Biden announced 'a new plan to require more Americans to be vaccinated.' … In tandem with other planned regulations, the administration's goal was to impose "vaccine requirements" on "about 100 million Americans, two-thirds of all workers." *Id.* at 3.").

[260] *See, supra*, ___.

Like Presidents themselves, discussion of the President's constitutional role and separation of powers principles are largely absent from the Court's MQD cases. The only MQD case to allude to the President's constitutional role in executing the laws is *Utility Air Regulatory Group*. There, the Court provides a basic primer on the separation of legislative and executive power: "Under our system of government, Congress makes laws and the President, acting at times through agencies like EPA, 'faithfully execute[s]' them."[261] The Court goes on to explain that while the "power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration … it does not include a power to revise clear statutory terms that turn out not to work in practice."[262] The Court states these truisms without joining the issues they raise about whether the President faithfully executed the law in that case and how presidential control relates to major questions more broadly. Indeed, no major questions case addresses these issues.

Similarly missing from major questions cases is the "take care" clause. Despite the significant work this clause does in supporting (indeed, demanding) presidential control in the Court's appointment and removal jurisprudence, it makes not a peep in MQD jurisprudence.[263] Perhaps tellingly, the phrase "take care" appears in only two MQD cases—where it refers not to the President's constitutional duty to faithfully execute the law, but to the *Court's* duty to faithfully interpret Congress' statutory purpose. In *Brown & Williamson*, the Court cautioned that "in our anxiety to effectuate the congressional purpose of protecting the public, *we* [the Court] must *take care* not to extend the scope of the statute beyond the point where Congress indicated it would stop."[264] And in *King v. Burwell*, the Court stated that "in every case *we* [the Court] must respect the role of the Legislature, and *take care* not to undo what it has done."[265]

The most sustained discussion of presidentialism and its implications for major questions jurisprudence is in Justice Breyer's dissent in *Brown & Williamson*, where he begins by quoting at length then-Judge Rehnquist's concurrence in *State Farm*, defending an agency change in policy direction based on the change in presidential administrations:

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

[261] *Utility Air Regulatory Group*, 573 U.S at 327.
[262] *Id.* at 327.
[263] *See Ala. Ass'n of Realtors, supra* note 257 (no mention of the take care clause); *Brown & Williamson*, supra note 229 (same); *Gonzales v. Oregon*, *supra* note 175 (same); *MCI Telecommunications Corp., supra* note 255.
[264] *Brown & Williamson*, 529 U.S. at 161 (emphasis supplied).
[265] *Burwell*, 573 U.S at 498 (emphasis supplied).

> assess administrative records and evaluate priorities in light of the philosophy of the administration.[266]

As in *State Farm*, Justice Breyer observes that "administration policy [with respect to tobacco regulation] changed."[267] He goes on to explain that the administration's policy change accounts for the FDA's changed position on its jurisdiction over tobacco (which the majority cited as evidence that the agency lacked statutory authority): "Earlier administrations may have hesitated to assert jurisdiction for the reasons prior commissioners expressed. … Commissioners of the current administration simply took a different regulatory attitude."[268] Justice Breyer further argues that the President's support justifies the agency's shift in policy:

> Insofar as the decision to regulate tobacco reflects the policy of an administration, it is a decision for which that administration, and those politically elected officials who support it, must (and will) take responsibility. And the very importance of the decision taken here, as well as its attendant publicity, means that the public is likely to be aware of it and to hold those officials politically accountable. Presidents, just like Members of Congress, are elected by the public. Indeed, the President and Vice President are the *only* public officials whom the entire Nation elects. I do not believe that an administrative agency decision of this magnitude—one that is important, conspicuous, and controversial—can escape the kind of public scrutiny that is essential in any democracy. And such review will take place whether it is the Congress or the Executive Branch that makes the relevant decision.[269]

The majority responds to this argument with the truism that an administrative agency's authority to regulate must always be grounded in valid statutory authority—"no matter how 'important, conspicuous, and controversial' the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable."[270] But that raises rather than answers the question what constitutes a valid grant of statutory authority—and who decides. The Court answers that "*we* [the Court] must *take care* not to extend the scope of the statute beyond the point where Congress indicated it would stop."[271] The Court's appropriation of this Article II terminology lends credence to Blake Emerson's charge that "[w]hile pumping up the presidency, the Justices are taking a share of executive power for themselves and acting collectively as the President's cochief of the federal government."[272]

Justice Breyer reprises presidential accountability themes in his dissent in *NFIB v. OSHA*, where he argues that OSHA's temporary emergency vaccine or test standard "has the virtue of political accountability, for OSHA is responsible to the President, and the President is

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[266] *Brown & Williamson*, 529 U.S. at 189 (quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 59, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (J. Rehnquist concurring in part and dissenting in part)).
[267] *Brown & Williamson*, 529 U.S. at 188.
[268] *Id.* at 188.
[269] *Id.* at 190-191.
[270] *Id.* at 161.
[271] *Id.* at 161 (emphasis supplied).
[272] Blake Emerson, *The Binary Executive*, 132 YALE L. J. FORUM 756, 764 (2022).

responsible to—and can be held to account by—the American public."[273] Breyer further suggests that the Court's relative lack of political accountability raises broader separation of powers concerns:

> Underlying everything else in this dispute is a single, simple question: Who decides how much protection, and of what kind, American workers need from COVID-19? An agency with expertise in workplace safety, acting as Congress and the President authorized? Or a court, lacking any knowledge of how to safeguard workplaces, and insulated from responsibility for any damage it causes?[274]

It is worth noting that explicit discussion of separation of powers considerations has surfaced only recently in MQD cases, and to date it remains rare. The debut appearance of the phrase "separation of powers" in a MQD case comes in *Utility Air Regulatory Group*, where the Court argues that recognizing the authority claimed by EPA to promulgate the challenged rule "would deal a severe blow to the Constitution's separation of powers."[275] As discussed above, the Court's concern was encroachment on legislative power by the Executive. The only other majority opinion to mention separation of powers is *West Virginia v. EPA*. There, the Court explains that "in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there."[276] However, the Court does not indicate the nature of separation of powers principles at stake.

Justice Gorsuch's concurrences in *NFIB* and *West Virginia* provide a more sustained elaboration of the separation of powers concerns he and some of his colleagues share. In *NFIB*, he details the relationship between the major questions doctrine and the nondelegation doctrine, explaining that "[b]oth are designed to protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands."[277] In *West Virginia*, he explicitly grounds the major questions doctrine in "Article I's Vesting Clause",[278] raising the stakes in major questions cases to include "basic questions about self-government, equality, fair notice, federalism, and the separation of powers."[279] These cases contain no acknowledgement of the tension this creates with the Court's interpretation of Article II's Vesting Clause in appointment and removal cases.

Perhaps this is precisely the clash the Court hopes to avoid. Many, including some Justices, have suggested that the Court's latest version of the MQD functions as a type of constitutional avoidance canon to ensure that Congress does not unwittingly violate the nondelegation doctrine. However, the Court's strenuous efforts to hide the actions of the

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[273] *NFIB*, 142 S. Ct. at *676.
[274] *NFIB*, 142 S. Ct. at *676.
[275] *Utility Air Regulatory Group*, 573 U.S at 327.
[276] *West Virginia*, 577 U.S at 2609.
[277] *NFIB*, 142 S. Ct. at *669.
[278] *West Virginia*, 577 U.S at 2619 (Gorsuch concurrence).
[279] *Id.* at 2620 (Gorsuch concurrence).

president in ordering agency policies that the Court believes violate the law suggest a different type of constitutional avoidance. The Court seems to be avoiding the constitutional issues that would be raised by confronting the President for failing to faithfully execute the law. This position is untenable if the Court insists on advancing presidentialism as the lodestar of administrative accountability.

IV. RESOLVING THE CONTRADICTION IN FIVE DOCTRINAL AREAS

One rejoinder to our account is that there are no contradictions in the Court's jurisprudence if one sees the through-line as a consistent effort to limit a federal bureaucracy that many conservative jurists see as an unconstitutional "fourth branch" (and that many conservative partisans see as a "deep state"). The unitary executive theory gives the president more power over appointment and removal in order to control and rein in agencies. The MQD and its development is most clearly a limitation on agency action and statutory interpretation. While anti-administrativism might explain the outcomes in these cases, it does not let the Court off the hook for its reasoning. Whether the Roberts Court's anti-"Fourth Branch" jurisprudence is a matter of legal theory, political theory, political economy, or policy preference, its inconsistencies about presidential accountability and the "chain of dependence" remain a problem undermining the legitimacy of these lines of cases. The next sections will suggest how the Court should address these contradictions through more legal consistency and coherent reasoning.

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

The clearest path to reconciliation is to abandon Roberts Court presidentialism or, at least, stop using this dubious theory to extend presidential control over appointment and removal.

In the upcoming term, the Supreme Court will be ruling on the constitutionality of administrative law judges' tenure protections in *SEC v. Jarkesy*.[280] It will be asked to extend *Myers*, *Free Enterprise*, and *Seila Law* and to overturn *Humprey's Executor*. Around the corner are challenges to the Federal Trade Commission and the Securities & Exchange Commission after deciding *Axon* and *Cochran* last term,[281] as well as challenges to other administrative appointments and to private rights of action as impermissible delegations of executive power, as invited by Justice Thomas in the past term and by the 11th Circuit.[282] These cases will provide the Roberts Court with an opportunity to consider the limits of presidentialism. We counsel judicial restraint in these cases, in light of Court's contradictory treatment of presidential power and its underlying anxiety about presidential control of administration, signaled by its mysterious erasure of presidents in the MQD cases.

[280] Jarkesy v. SEC, 34 F.4th 446, 464 (5th Cir. 2022).
[281] SEC v. Cochran and Axon Enter. v. Fed. Trade Comm'n, 143 S.Ct. 890 (2023).
[282] U.S. ex rel. Polansky v. Executive Health Resources, Inc., 143 S.Ct. 1720 (2023) (Thomas, J., dissenting); Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1136-37 (11th Cir. 2021) (Newsom, J., concurring) (arguing that standing should be denied when Congress attempts to vest executive power in private plaintiffs by "providing a right to sue on behalf of the community and seek a remedy that accrues to the public").

These troubling contradictions add to a chorus of concerns scholars across the ideological spectrum have raised about *Seila Law*'s presidentialist assumptions.[283] Many scholars have identified the problems with the unitary executive theory on appointment and removal as a matter of text, original public meaning, practice, and precedent.[284] These shortcomings may explain why the Roberts Court has leaned so heavily on its political theory of presidentialism. In trying to make up for those shortcomings, Chief Justice Roberts made a mix of dubious claims and exaggerations about the presidency in *Seila Law* to support his contention that the president is "the most democratically and politically accountable official in Government."[285] For instance, the specific claim that the Framers "render[ed] the President directly accountable to the people through regular elections"[286] is structurally, doctrinally, and formally incorrect. In making this claim, Roberts overlooked both the design of the Electoral College, attenuating the President's "direct" accountability to the people, and the arguably more "direct" democratic design of Congress.

Legal scholars, political scientists, and historians have debated the reasons for the electoral college for years, and they disagree about whether, on balance, it was a more democratic compromise or a more elite-oriented check on democracy[287] – but no one would claim that it is a "direct election." In fact, just a week after it decided *Seila Law*, the Roberts Court would explain the Electoral College's democratic deficit – and even confirm the states' discretion to deepen that deficit in the in *Chiafalo v. Washington*.[288] Namely, there is no requirement that states appoint their electors based on the voters' preferences. Article II gives states wide discretion on how to appoint electors "in such Manner as the Legislature thereof may direct."[289] Writing for a unanimous Court, Kagan reviewed a complicated history of the Electoral College's indirectness. Some of the Framers explained the indirectness was by design to allow independent judgment.

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[283] Examples of conservative and originalist critiques or concerns: ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 101; Gary Lawson, *Command and Control*, 92 FORD. L. REV. (2023). Examples of presidentialists' concessions and recognition of evidentiary problems, see Shugerman, *Movement on Removal*, 63 AM. J. L. HISTORY (forthcoming 2023).

[284] JONATHAN GIENAPP, SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 125-62 (2018); Jonathan Gienapp, *Removal and the Changing Debate over Executive Power at the Founding*, 63 AM. J. L. HIST. (forthcoming 2023); Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CONST. L. 323 (2016); Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 5 (2021); Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, 96 NOTRE DAME L. REV. 1, 3 (2020); Chabot, *Interring the Unitary Executive Theory*, 98 NOTRE DAME L. REV. 129, 172 (2022); Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 STAN. L. REV. 175 (2020); Katz and Rosenblum, *Removal Rehashed*, 136 HARV. L. REV. FORUM 4 (2023); Shugerman, *The Indecisions of 1789*, 171 U. PA. L. REV. 753 (2023); Shugerman, *Vesting*, 74 Stan. L. Rev. 1479 (2022); Shugerman, *The Marbury Problem and the Madison Solutions,* 89 FORD. L. REV 2085 (2022); Shugerman, *Removal of Context: Blackstone, Limited Monarchy, and the Limits of Unitary Originalism*, 33 YALE J. L. & HUMANITIES 125 (2022); Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2117-19 (2019), Freehold Offices v. "Despotic Displacement" : Why "Executive Power" Did Not Include Removal (forthcoming).

[285] *Seila Law, supra* note 2, at 2203.

[286] *Id.*

[287] BAILEY, THE IDEA OF PRESIDENTIAL REPRESENTATION 40-41; JACK RAKOVE, ORIGINAL MEANINGS 265-68 (1997); LAWRENCE LONGLEY & NEAL PEIRCE, THE PEOPLE'S PRESIDENT: THE ELECTORAL COLLEGE IN AMERICAN HISTORY AND THE DIRECT VOTE ALTERNATIVE (1968), JAMES CEASER, PRESIDENTIAL SELECTION, supra; James P. Pfiffner & Jason Hartke, *The Electoral College and the Framers' Distrust of Democracy*, 3 WHITE HOUSE STUDIES 261 (2003).

[288] Chiafalo v. Washington, 140 S. Ct. 2316 (2020) (otherwise known as the "independent electors," the "faithless electors," or the "Hamilton electors" case).

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

Kagan cited Hamilton defending the Electoral College as empowering "men most capable of analyzing the qualities" to choose among the candidates "under circumstances favorable to deliberation." Kagan also quoted John Jay's Federalist essay also inviting the Electors' "discretion and discernment."[290] She also recognized that states had the choice of whether to appoint electors or to have a popular vote: "In the Nation's earliest elections, state legislatures mostly picked the electors, with the majority party sending a delegation of its choice to the Electoral College."[291] Over the course of the early nineteenth century, states shifted to popular votes for electors, but states retained discretion about the bindingness of the popular vote, as the Court merely held that states *may* "penalize an elector for breaking his pledge and voting for someone other than the presidential candidate who won his State's popular vote."[292] States may choose not to make the popular vote binding, and some states do not. And states remain free to abandon the popular vote entirely. It is odd that the majority in *Seila Law* would compartmentalize this entire discussion in *Chiafalo* of the Founders' intent to design an indirect system for presidential selection.

Moreover, the President is not the only elected official in the federal government, and Congress has its own claims to being the "most" democratically accountable branch. Members of the House of Representatives are elected directly (without the Electoral College filter) and must stand for election every two years, arguably making them more politically accountable. After the Seventeenth Amendment, ratified in 1913, Senators are also, literally, directly elected. While the Roberts Court has made much of the size and scale of presidential elections, these features do not obviously produce more accountability to the electorate. Of course, a presidential election is the only formally national election, but in terms of accountability, arguably local and state-wide elections could provide for more scrutiny of a candidate and their policy choices. Many scholars have argued that presidential elections are still driven by special interests, particular swing states ("purple" states rather than reliably "blue" or "red"), and swing voting groups, and that national elections are "noisier" and create information problems.[293] The merits of this debate are beyond the scope of this Article. We merely point out that the question of whether national presidential elections are more "democratic" or "representative" is far from clear and actively contested. Chief Justice Roberts provided no support for his remarkable assertions about the president as "the most democratic" official in Government.

The bottom line is that history, constitutional structure, and (as we show above) the Court's own MQD jurisprudence, belie the myth that the Court has spun of a "directly accountable president" tethered to the people through a "chain of dependence." The Court should refrain from expanding its incoherent "presidentialist" political theory as it is invited to do

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[290] *Chiafalo*, 140 S. Ct. 2316, 2325-26 (citing Federalist No. 68 (Hamilton) and Federalist No. 64 (Jay)).
[291] *Id.* at 2316, 2321
[292] *Id.* at 2320.
[293] See, e.g., JEREMY BAILEY, THE IDEA OF PRESIDENTIAL REPRESENTATION 1-10 (2019); JOHN A. DEARBORN, POWER SHIFTS: CONGRESS AND PRESIDENTIAL REPRESENTATION (2021); B. DAN WOOD, THE MYTH OF PRESIDENTIAL REPRESENTATION (2009); DOUGLAS L. KRINER & ANDREW REEVES, THE PARTICULARISTIC PRESIDENT: EXECUTIVE BRANCH POLITICS AND POLITICAL INEQUALITY (2015); JOHN HUDAK, PRESIDENTIAL PORK: WHITE HOUSE INFLUENCE OVER THE DISTRIBUTION OF FEDERAL GRANTS (2014); NANCY L. ROSENBLUM, ON THE SIDE OF ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP 41 (2008); NADIA URBINATI, DEMOCRACY DISFIGURED: OPINION, TRUTH, AND THE PEOPLE 4-8, 174 (2014); Robert A. Dahl, *The Myth of the Presidential Mandate*, 105 POLI. SCI. Q. 355 (1990); Jane Mansbridge, *Rethinking Representation*, 97 AM. POL. SCI. REV. 97, no. 4 (2003).

in upcoming cases. In *SEC v. Jarkesy*, the Court has an immediate opportunity to address those errors with a mix of restraint and candor.

B. Major Questions and Presidential Answers

Alternatively, if the Court remains committed to the "directly accountable president" and the "chain of dependence" in appointment and removal cases, then presidentialism should inform the Court's application of the MQD. The Court should either give more weight to policies that are the product of direct presidential supervision, or it should confront the president directly if the Court believes that the president has commanded an agency to act outside the bounds of statutory law.

On the one hand, if the Court maintains a commitment to the theory that the president represents "the people" and democratically legitimates the actions of administrative agencies through the "chain of dependence," then the Court should accord more legitimacy to those agency actions when the president has initiated that policy and exercised that chain of command. Presidential involvement obviously would not automatically rescue the policy, because the core issue remains whether it is authorized by statute. But presidential involvement should inform the Court's analysis of fidelity to statutory authority. The Roberts Court's MQD is based on the inferences drawn from claims about the legitimacy of Congress relative to *agencies*. The Court's argument is that because *agencies* are less democratically legitimate than Congress, we can infer that Congress would "not leave [major policy] decisions to *agencies*,"[294] and we should worry about "*agencies* asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[295] If, however, the president at the top of the chain takes responsibility for the policy, and if the "chain of dependence" applies even-handedly, then the Court should abandon its reasoning about the democratic deficit of agencies in its MQD decisions. The Court cannot base its analysis on the preference for an accountable Congress over an unaccountable agency as the policy decision-maker; it must contend with the relative scope of policymaking authority granted by the constitution to two democratically accountable branches: Congress and the President. The president's control of the agency policy does not answer the statutory-interpretation question about the meaning of an act of Congress, but it changes the analysis. In fact, it could clean up and simplify the analysis: set aside the political theory, the substantive preferences about who is more "democratic" than whom, and focus on the tools of statutory interpretation.

In appointment and removal cases, the Roberts Court has interpreted checks and balances with a thumb on the scale in favor presidential power. It would bring some coherence across administrative law doctrines to put a similarly weighted thumb on the scale in favor of a "major questions" policy that the president has commanded. Or it would bring more coherence by taking the presidentialist thumb off the scale across administrative law, by treating both Congress and the President as similarly democratically legitimate, even if their electoral designs differ. (In fact, those differences are a feature, not a bug, of the Framers' mixed democratic representation systems).

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[294] *Biden v. Nebraska,* (Barrett, J., concurring) (emphasis added). See also *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. at 2489 (per curiam) ("We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.").

[295] *West Virginia*, 577 U.S at 2609 (emphasis added).

In appointment and removal cases, the Roberts Court justifies the expansion of presidential power to protect the separation of powers and democracy but fails to recognize that each expansion of one branch's power comes at the cost of the others, with concomitant risks to democracy. Sometimes presidents use their increased power to protect checks and balances, but of course, presidents sometimes use that increased power to overrun checks and balances. MQD cases invite the Court to reflect with candor and caution about the risks of presidential power and emergency powers.[296] It is revealing that the Roberts Court has declined these invitations, instead contorting the facts to conceal presidents' association with the executive branch overreach it decries in these cases.

This dodge is not just from the six current conservatives. The liberal Justices, present and past, also have avoided calling out presidential abuses. For example, the liberal Justices did not identify President George W. Bush's role in *Gonzales v. Oregon*.[297] Liberal Justices in other areas have been more critical of specific presidents' abuses,[298] but not in the domain of statutory interpretation and the question of *Chevron* deference. Even though they criticize and dissent from the Roberts Court's unitary executive theory decisions, liberals have endorsed a parallel accountability argument for expanding presidential power, notably Justice Kagan[299] and Justice Stevens.[300] Despite their polarization on many legal questions, the left and right of the Court are both surprisingly quiet about the risks of presidentialism – which sustains the Court's continued silence.

It is imperative that Justices from across the political spectrum candidly acknowledge the president's role in misusing executive power where such abuses have occurred—whether they are in the majority or in dissent. While some have suggested that the MQD is an important tool for reining in abuses of power by the president,[301] the doctrine cannot serve that function if the Court is unwilling to candidly confront presidents for breaches of statutory authority. Rather than use MQD cases as an occasion to check presidential power, the Court's erasure of the president from the MQD cases serves to protect a myth of the president as the nation's protector of democracy and the rule of law. Instead of promoting presidential accountability, the Court's erasure of presidents undermines a key tool of accountability: the judiciary's deliberation, fact-finding, and reason-giving to foster public debate. In the very least, both the majority's and the dissenters' recitation of the facts of each case should provide a more accurate and complete record of what actually happened.

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[296] Shugerman, "An Emergency Question Doctrine," SSRN.
[297] See supra Section II.x and Section III.x
[298] Trump v. Hawaii, 138 S.Ct. 2392 (2018); Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S.Ct. 1891 (2020).
[299] Kagan, *Presidential Administration*.
[300] See Part IV.D on *Chevron*, 467 U.S.
[301] Bijal Shah, *Statute-Focused Presidential Administration*, 90 GEO. WASH. L. REV. 1165, 1250 (2022) (arguing that the major questions doctrine, applied in a way that narrows the scope of agency authority "could serve to constrain presidential administration that is inconsistent with the statute."); Ilya Somin, *A Major Question of Power: The Vaccine Mandate Cases and the Limits of Executive Authority*, 2022 CATO SUP. CT. REV. 69, 71 (2022) ("Americans across the political spectrum have much to gain from judicial enforcement of limits on executive power. The kind of sweeping unilateral authority the Biden administration claimed in *NFIB* could easily have been misused by a future Republican administration.").

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

C. Does MQD or *Chevron* Deference Apply to Presidential Delegations?

Should the Major Question Doctrine apply to statutory delegations of authority to the president? If so, that would mean courts would deny *Chevron* deference to agencies and presidents, even if Congress specifically delegated the decision to the president.

This is an open question precisely because the Roberts Court so clearly focuses on agencies as problematic in its MQD reasoning (Part III and Section IV.C). Thus, there is a valid question about whether the doctrine should apply when Congress delegates explicitly to the *president*. The Supreme Court has held that "the President is not an agency within the meaning" of the Administrative Procedure Act.[302] Some legal commentators have pointed to the Roberts Court's reasoning in *Seila Law* about the president's special "most democratic" role to distinguish presidents from "unaccountable agencies" and to argue for more deference to presidents:[303] "Applying the major questions doctrine to the President as if the President were an agency ignores the President's heightened political accountability and Congress's intent to delegate to the President in light of that accountability."[304] Nevertheless, four Circuit Courts have concluded that the Major Questions Doctrine does apply to congressional delegations explicitly to the President.[305]

However, the "chain of dependence" model would break through the president vs. agency divide. If the Court is committed to the "chain of dependence" account of the executive branch, then there should be a uniform application of the *Chevron* deference and the MQD exception to *Chevron* deference, because the president and the agencies would be interlocked in an Article II chain of supervision and control. According to the unitary logic of the chain of dependence, once the Court applies the MQD to agencies, then it formally would apply to presidents, too.

But if the Court backs away from its presidentialism, the question gets more complicated. With less of "the chain of dependence" half of the theory, there is less reason the same rules would apply to presidents and agents. Thus, there would be more reason to preserve *Chevron* deference when Congress specifically delegates to a president, and not to require "clear statements" for a president to make major policy. On the other hand, with less of "the nation's president" or "the most accountable officer" half of the theory, the president would lose some of its special democratic legitimacy relative to agencies; thus, less reason to preserve *Chevron*

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[302] Franklin v. Massachusetts, 505 U.S. 788, 796 (1992).
[303] Case Comment, *Georgia v. President of the United States*, 136 HARV. L. REV. 2020, 2026 (2023)
[304] *Id.* at 2025.
[305] *See* Louisiana v. Biden, 55 F.4th 1017 (5th Cir. 2022); Kentucky v. Biden, 57 F.4th 545 (6th Cir. 2023); Georgia v. President of the United States, 46 F.4th 1283 (11th Cir. 2022); Mayes v. Biden, 67 F.4th 921(9th Cir. 2023).

deference and more reason for the same strict "clear statement" rules of the Major Question exception.

The bottom line in this doctrinal area is that if the Roberts Court chooses the path of more presidentialism, "the chain of dependence" upon the powerful president ironically would lead to less *Chevron* deference to presidents. The alternative path -- less presidentialism – does not lead to a clear result.

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

In *Loper Bright Enterprises* this fall, the Supreme Court is revisiting *Chevron* deference, and it may be poised to overturn it.[306] If the Roberts Court is committed to presidentialism, it must acknowledge that presidentialism was one of the original justifications for deference to agency statutory interpretations in *Chevron*, and the Roberts Court's jurisprudence has only fortified this foundation.

Justice Stevens explained why judges should defer to agencies in terms of this democratic theory of accountability:

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.[307]

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

The Roberts Court has only strengthened presidentialism, both normatively and descriptively, both *de jure* and *de facto*. The Roberts Court has thus strengthened a core argument for *Chevron* deference. If the Roberts Court is considering overturning or further scaling back *Chevron*, it must explain why its stronger theory of presidentialism and its strengthening of the bonds in the chain of dependence has not also bolstered the case for *Chevron.* If the Roberts Court overturns *Chevron*, it has little justification to continue expanding presidential control of administrative agencies based on its presidentialist theories. Alternatively, if it is committed to its presidentialism, the Roberts Court should exercise judicial restraint and not further erode *Chevron*. Otherwise, the Roberts Court would make it clear that its presidential theory is only conveniently and selectively applied when it cuts against agencies.

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[306] Loper Bright Enterprises, 45 F. 4th 359 (D.C. Cir. 2022), Docket No. 22-451.
[307] *Chevron*, 467 U.S. at 865-66.

E. Continued Restraint on Non-Delegation

Finally, a revival of the non-delegation doctrine is looming, after its endorsement by five Justices,[308] and with three Justices offering a non-delegation doctrine rationale of constitutional avoidance in the MQD cases. The proponents of a more muscular application of the non-delegation doctrine rely on arguments about democracy and structural design, but instead of the president, it is Congress that they celebrate. Justice Gorsuch's dissent in *Gundy*, joined by Chief Justice Roberts and Justice Thomas, hailed Congress's representative design, its open deliberation, and its accountability. As Gorsuch summed up, "by directing that legislating be done only by elected representatives in a public process, the Constitution sought to ensure that the lines of accountability would be clear: The sovereign people would know, without ambiguity, whom to hold accountable for the laws they would have to follow."[309] In a recent MQD case, Justices Gorsuch, Thomas, and Alito placed the MQD squarely in the context of the non-delegation doctrine, emphasizing the same points about Congress's democratic accountability: "Whichever the doctrine [MQD or Non-Delegation], the point is the same. Both serve to prevent 'government by bureaucracy supplanting government by the people.'"[310]

The non-delegation doctrine could be revived solely on the basis of separation of powers and the meaning of "all legislative power" in the Legislative Vesting Clause, but the passages quoted above indicate that some Justices would ground it outside pure constitutional structure in a theory of democratic accountability—this time Congress's. It is a cliché that it takes a theory to beat a theory. Perhaps Gorsuch's congressionalist theory of the non-delegation doctrine will compete with the Roberts Court's presidentialist theories, provoking a resolution between the two. For now, we offer two alternative paths to resolving this tension. On the one hand, if the Court continues in its appointment and removal jurisprudence to theorize the legitimacy and accountability of an administrative state controlled by the president, and to fortify the "chain of dependence" through tightened presidential control, these arrangements should also lend democratic legitimacy to statutory delegations to the executive branch. The Roberts Court should continue to apply the nondelegation doctrine with restraint if it wants to maintain judicial consistency. On the other hand, if the Court expands its application of the non-delegation doctrine, it must abandon its theories of democratic presidentialism or acknowledge the problems and limitations this theory creates.

Conclusion

Regardless of which direction the Supreme Court chooses – more or less emphasis on the the president as "most accountable officer" and on "the chain of dependence," perhaps the most

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[308] Justice Roberts and Thomas joined Gorsuch's dissent in *Gundy,* 139 S.Ct. 2116 (2019); Justice Alito wrote separately of his "willing[ness] to reconsider the approach we have taken for the past 84 years" Id. at 2131 (Alito, J., concurring in the judgment).; and Justice Kavanaugh stated his own interest a few months later. Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari) ("Justice Gorsuch's thoughtful *Gundy* opinion raised important points that may warrant further consideration in future cases.").
[309] *Gundy*, *supra* note 309, at 2134 (2019) (Gorsuch, J., dissenting).
[310] *NFIB*, 142 S. Ct. at 669 (Gorsuch, J., concurring) (citing A. Scalia, *A Note on the Benzene Case*, 1980 J. ON GOVT. & SOC., 27). See also Cass Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475, 483-84 (2021). Justice Barrett's concurrence in *Biden v. Nebraska* disclaims the non-delegation background for MQD, but in doing so, she acknowledges the common interpretation that it is a substantive canon, the constitutional avoidance of non-delegation. *Biden v. Nebraska*, No. 22-506, slip op. at 1-2, 4-5 (Barrett, J., concurring).

important lessons from these contradictions are for judicial restraint, interpretive modesty,[311] and judicial candor and balance. The shell game of which branch is the "most democratic" fails the consistency test that the rule of law demands. And it is a shell game where the winner either way is judicial supremacy over Congress, the president, and the administrative state. The Roberts Court's critique of "unaccountable bureaucrats" ignores how the resulting doctrines empower unaccountable Justices.

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

[311] Heidi Kitrosser, *Interpretive Modesty*, 104 GEO. L.J. 459 (2016),