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Overseeing the Administrative State

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Overseeing the Administrative State

*Jill E. Fisch**

ABSTRACT

In a series of recent cases, the Supreme Court has reduced the regulatory power of the Administrative State. Pending cases offer vehicles for the Court to go still further. Although the Court's skepticism of administrative agencies may be rooted in Constitutional principles or political expediency, this Article explores another possible explanation—a shift in the nature of agencies and their regulatory role. As Pritchard and Thompson detail in their important book, *A History of Securities Law in the Supreme Court*, the Supreme Court was initially skeptical of agency power, jeopardizing Franklin Delano Roosevelt (FDR)'s ambitious New Deal plan. The Court's acceptance of agency regulation was premised on the belief that the expertise of administrative agencies coupled with their insulation from political influence afforded them distinctive regulatory advantages.

Today there are questions about the extent to which agencies continue to reflect these characteristics. Instead, as the Article explains, agency decisionmaking has become increasingly polarized and the product of political influence rather than scientific or technical expertise. The possibility that Congress and the President are using agencies as political tools to avoid the accountability associated with direct legislation is potentially troubling. One response is the reduction in agency power suggested by the Court. Alternatively, this Article suggests modest practical reforms to align agencies with the legitimating principles of the New Deal settlement.

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CONTENTS

INTRODUCTION	900
I. FEDERAL AGENCY POWER IN JEOPARDY	902
II. JUDICIAL OVERSIGHT OF AGENCY POWER: THE HISTORICAL CONTEXT	906
<i>A. The New Deal Settlement</i>	906
<i>B. Rationalizing the Settlement—Justifications for the Administrative State</i>	909
III. RETHINKING THE ADMINISTRATIVE STATE	913
IV. IMPLICATIONS.....	923
CONCLUSION.....	926

INTRODUCTION

The Supreme Court has expressed growing reservations about the power and role of administrative agencies in the United States.¹ In *West Virginia v. EPA*,² the Supreme Court formally announced the major questions doctrine³ which, it explained, precluded administrative agencies from making decisions on “major questions” of extraordinary economic and political significance without explicit congressional authorization.⁴ In *Axon Enterprise, Inc. v. FTC*, the Court adopted a new procedure allowing defendants to bring a challenge to the constitutionality of a regulatory process immediately in federal court, bypassing a pending administrative proceeding.⁵ In *National Federation of Independent Business v. DOL, OSHA*, the Court reasoned that the scope of OSHA’s regulatory authority did not extend to imposing a Covid-19 vaccine mandate.⁶

This pattern is likely to continue. During the 2023–24 term, the Court’s docket included several opportunities to restrict agency authority further. *SEC v. Jarkesy* raised the question of when agencies can bring their cases before internal administrative law judges rather than Article III

1. See, e.g., John C. Coffee, Jr., *The Most Dangerous Branch: Is the Supreme Court Dismantling the Administrative State?*, CLS BLUE SKY BLOG (Mar. 7, 2022), <https://clsbluesky.law.columbia.edu/2022/03/07/the-most-dangerous-branch-is-the-supreme-court-dismantling-the-administrative-state/> [<https://perma.cc/WJ8F-2NJY>] (“[T]he Court’s newly ascendant conservative wing appears to be moving at a rapid pace to dismantle much of the Administrative State.”).

2. 597 U.S. 697 (2022).

3. Hints of the major questions doctrine can be found as early as the Court’s 2000 opinion in *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 160 (2000) where, in concluding that Congress had not intended to give the FDA the authority to regulate the sale of tobacco and nicotine products to minors, the Court explained “we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”

4. *West Virginia v. EPA*, 597 U.S. at 724 (“Under our precedents, this is a major questions case.”).

5. 598 U.S. 175 (2023).

6. 595 U.S. 109 (2022).

courts.⁷ *Consumer Financial Protection Bureau v. Community Financial Services Association of America* presented a challenge to the Constitutionality of the funding structure of the Consumer Financial Protection Bureau that allows the agency to obtain its funding directly from the Federal Reserve rather than going through the congressional appropriations process.⁸ And *Loper Bright Enterprises v. Raimondo*⁹ provided the Court the opportunity to reconsider or abandon *Chevron* deference, the principal that courts should defer to any reasonable agency interpretation of a statute it administers rather than substituting their own views.¹⁰ These cases assume greater importance in light of statements by several sitting Justices about their desire to constrain administrative agencies further, a desire that may extend to reconsidering the extent to which Congress may permissibly delegate lawmaking authority to administrative agencies.¹¹

In their provocative book, *A History of Securities Law in the Supreme Court*, Pritchard and Thompson remind us that judicial concern over the administrative state is nothing new.¹² From its inception as a central component of FDR's New Deal, the administrative state, with its broad delegation of rulemaking and adjudicative authority to agencies that are largely independent of the legislative and judicial branches, has drawn criticism. Pritchard and Thompson describe a political battle over administrative authority, with FDR and his supporters as the victors. At the same time, they offer insights into the basis upon which the legitimacy of the early administrative state rested. As we consider the current debate, it is worth revisiting those insights.

This Article proceeds as follows. Part I briefly summarizes the current debate over the authority of administrative agencies, explaining how the Court is rethinking critical components of administrative law such as the nondelegation doctrine and *Chevron* deference while, at the same time, developing new principles to constrain agency power such as the major questions doctrine. Part II situates the debate in historical context, drawing

7. 143 S. Ct. 2688 (2023) (granting petition for writ of certiorari).

8. *Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., Ltd.*, 143 S. Ct. 978 (2023) (granting petition for writ of certiorari).

9. *Loper Bright Enters. v. Raimondo*, 143 S. Ct. 2429 (2023) (granting petition for writ of certiorari).

10. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

11. For example, in *Gundy v. United States*, four sitting justices expressed a desire to reconsider and potentially expand the nondelegation doctrine. *See* 139 S. Ct. 2116, 2131 (2019) (Alito, J., concurring in the judgment) ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort."); *id.* at 2131, 2144 (Gorsuch, J., dissenting) ("If the separation of powers means anything, it must mean that Congress cannot give the executive branch a blank check to write a code of conduct governing private conduct for a half-million people.").

12. A.C. PRITCHARD & ROBERT B. THOMPSON, *A HISTORY OF SECURITIES LAW IN THE SUPREME COURT* (Oxford 2023).

key insights from Pritchard and Thompson. Part III considers the extent to which the functioning of the administrative state has evolved from the New Deal era premises of expertise and insulation, focusing on the increasing degree to which agencies have become politicized. Part IV discusses the implications of this analysis and offers lessons going forward. In all cases, the focus of the discussion, as with Pritchard and Thompson, is with the Securities & Exchange Commission (SEC), the agency responsible for implementing and enforcing the federal securities laws, although a discussion of these issues, as applied to the SEC, cannot be wholly divorced from developments with respect to other agencies.

I. FEDERAL AGENCY POWER IN JEOPARDY

The Court's concerns over the legitimacy of administrative agencies and how they exercise their powers are not new.¹³ As Brian Feinstein explains, those concerns have grown over the past two decades.¹⁴ Similarly, Gillian Metzger wrote in 2017 about the growing appearance of what she terms "rhetorical anti-administrativism" in judicial opinions.¹⁵ Although Metzger questioned the extent to which judicial attacks on the administrative state would gain traction,¹⁶ even before Justice Gorsuch's confirmation in 2017, the Court was signaling its willingness to restrain administrative agencies. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*,¹⁷ for example, the Court held that the dual "for-cause" restrictions on the removal of members of the Public Company Accounting Oversight Board violated separation of powers.¹⁸ The Court followed this in *Lucia v. SEC* by determining that the then-current procedure for appointing SEC administrative law judges violated the Constitution's

13. Moreover, efforts to reign in administrative state have not been limited to the Court. See Gillian E. Metzger, *Forward: 1930s Redux: The Administrative State Under Siege*, 141 HARV. L. REV. 1, 11 (2017) (describing the political attacks of the Trump administration, congressional decisions reducing agency budgets and legislative efforts such as the proposed RAA).

14. Brian Feinstein, *Legitimizing Agencies*, U. CHI. L. REV. (forthcoming 2024), <https://www.law.nyu.edu/sites/default/files/Legitimizing%20Agencies%20-%20NYU.pdf> [<https://perma.cc/V7ZY-WNNQ>] ("The New Deal consensus—under which opposing interests skirmish over specific regulations, and the political branches and courts occasionally modify or add procedural requirements, but do not challenge the fundamental premise that agencies validly exercise authority—has shattered.")

15. Metzger, *supra* note 13, at 4.

16. *Id.* at 5 ("On the judicial front, the most radical constitutional challenges so far have gained little traction, with majority support limited to claims that tinker with the administrative state at the margin.")

17. 561 U.S. 477 (2010).

18. See Metzger, *supra* note 13, at 18 (explaining that *Free Enterprise Fund* "represent[ed] a new constitutional limit[] on Congress's power to fashion administrative arrangements").

Appointments Clause.¹⁹ In *King v. Burwell*, Justice Roberts, writing for the majority, rejected the proposition that, under *Chevron*, the Court should defer to the Internal Revenue Service's interpretation of a section of the Affordable Care Act, reasoning that, such deference was not appropriate in cases involving questions of "deep economic and political significance."²⁰

The trend continued. In *Kisor v. Wilkie*, the Court considered overturning *Auer* deference before declining to do so on stare decisis grounds by a bare five-Justice majority.²¹ Concurring in the judgment, Justice Gorsuch argued that the majority opinion had transformed *Auer* into a "paper tiger" and argued that it should be overruled.²²

The subsequent confirmation of Justices Kavanaugh and Barrett strengthened the force of judicial skepticism over agency power. As noted in the introduction, the Court's announcement of the major questions doctrine in *West Virginia v. EPA* is widely viewed as one of the most significant threats to the modern administrative state.²³ Although the major questions doctrine is not new—it had roots in earlier opinions²⁴—the Court explicitly stated in *West Virginia*, that the significance of the policy question at issue fundamentally shifts the scope of judicial review of an agency's statutory authority. As such, the decision reduced the ability of agencies to rely on generic statutory grants of authority to exercise new powers and increased the role of Congress in making policy determinations at the expense of agencies. The Court reiterated these concerns in

19. *Lucia v. SEC*, 585 U.S. 237, 251 (2018) (holding that the SEC's ALJs are "'Officers of the United States,' subject to the Appointments Clause" and that the ALJ in question lacked "the kind of appointment the Clause requires").

20. *King v. Burwell*, 576 U.S. 473, 484–86 (2015) (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

21. 139 S. Ct. 2400 (2019).

22. *Id.* at 2426.

23. See, e.g., Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1011–12 (2023) ("the major questions doctrine has become an important—perhaps the most important—constraint on agency power, particularly when it comes to some of the most pressing problems of our time."); Jan Wolfe & Timothy Puko, *Supreme Court Puts Brakes on EPA in Far-Reaching Decision*, WALL ST. J. (June 30, 2022), <https://www.wsj.com/articles/supreme-court-limits-environmental-protection-agencys-authority-11656598034> (terming the Court's decision a "blockbuster").

24. See, e.g., Nathan Richardson, *Antideference: Covid, Climate and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174, 175–77 (2022) (explaining the development of the major questions doctrine since the 1990s); *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (explaining that the EPA's interpretation of its governing statute was "unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization").

Biden v. Nebraska, in which it applied the major questions doctrine to invalidate the Secretary of Education's student loan forgiveness program.²⁵

In *Seila Law*, the Court held that the CFPB's structure in which its sole director was insulated from Presidential oversight pursuant to a provision preventing the President from removing that director except for cause violated Article II.²⁶ In *United States v. Arthrex, Inc.*, Justices Kavanaugh and Barrett lent their support to a 5-4 decision expanding on the principles articulated in *Free Enterprise* and *Lucia*, holding that the power exercised by Administrative Patent Judges was inconsistent with the Appointments Clause.²⁷ In *Axon Enterprises*, the Court adopted a new procedure to facilitate constitutional challenges to an agency's regulatory process, holding that such challenges could be brought directly in federal court rather than through the appeal after the conclusion of an administrative proceeding.²⁸

In *National Federation of Independent Business v. DOL, OSHA*,²⁹ the Court determined that the Department of Labor lacked the authority to impose a Covid-19 vaccine mandate, again by a 5-4 vote. The Court criticized the substance of the mandate, reasoning that OSHA was limited to regulating work-related dangers. The Court further questioned the propriety of OSHA's use of an emergency exception to the normal failure standard-setting procedure, observing the applicable statute required OSHA to use "a rigorous process that includes notice, comment, and an opportunity for a public hearing" and that the Act's exception for emergencies was applicable under the "narrowest of circumstances" and has rarely been upheld.³⁰

Several Justices, particularly Justice Gorsuch, have signaled a willingness to go further. In his concurring opinion in *National Federation*, Justice Gorsuch explained that a broader reading of agency power would turn an agency into "little more than a roving commission to inquire into evils and upon discovery correct them."³¹ In his dissent from the denial of a petition for certiorari in *Buffington v. McDonough*, Justice Gorsuch took

25. *Biden v. Nebraska*, 143 S. Ct. 2355, 2369 (2023) (holding that the Secretary "created a novel and fundamentally different loan forgiveness program.").

26. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020). The Court applied a similar analysis to invalidate a restriction to the President's removal authority with respect to the Federal Housing Finance Agency. *Collins v. Yellen*, 141 S. Ct. 1761 (2021).

27. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021).

28. 598 U.S. 175 (2023). Justice Thomas wrote separately to express his "grave doubts about the constitutional propriety of Congress vesting administrative agencies with primary authority to adjudicate core private rights with only deferential judicial review on the back end." *Id.* at 196 (Thomas, J., concurring).

29. 595 U.S. 109 (2022).

30. *Id.* at 114.

31. *Id.* at 126 (Gorsuch, J., concurring) (internal quotation marks omitted).

issue with the Court's "overbroad" reading of *Chevron* that, in his words, caused judges to fail to live up to their responsibilities to protect individual rights.³² Justice Thomas stated that the Court had become too willing to enable agencies to exercise lawmaking powers that should be confined to the "the constitutionally prescribed legislative process."³³ And in *Gundy*, seven Justices raised nondelegation concerns,³⁴ with Justice Alito explicitly signaling his willingness to reconsider the Court's approach to the non-delegation doctrine, an approach dating from 1935.³⁵

Several cases argued during the 2023–24 term present the opportunity for the Court to limit agency power further. *Loper Bright Enterprises v. Raimondo* affords the Court the opportunity to reconsider the doctrine of *Chevron* deference.³⁶ *Chevron*, which was decided in 1984, provides a framework for determining when a federal court must defer to an agency's interpretation of a statute it administers.³⁷ *Chevron* held that, although an agency court may not deviate from the scope of a clear statute, if a statute was ambiguous, the court should defer to the agency's reasonable interpretation of that statute. Although *Chevron* is one of the most frequently cited cases in administrative law,³⁸ the questions posed by the Justices during oral argument suggest a willingness to at least limit if not entirely eliminate the scope of *Chevron* deference.

Although *Loper Bright* has perhaps the most attention, it is not the only case pending before the Court that implicates the scope of agency power. *SEC v. Jarkesy* considers the extent to which an agency can enforce the law before an administrative law judge as opposed to an Article III court. *CFPB* examines the constitutionality of the funding of the Consumer Financial Protection Bureau (CFPB), which was established by the Dodd Frank Act.³⁹ To insulate the CFPB from political pressure, Congress provided that the CFPB would be funded by the Federal Reserve rather

32. *Buffington v. McDonough*, 143 S. Ct. 14, 21–22 (2022).

33. *DOT v. Ass'n of Am. R.R.*, 575 U.S. 43, 77 (2015) (Thomas, J., concurring in the judgment).

34. *Gundy v. United States*, 139 S. Ct. 2116 (2019).

35. *Id.* at 2131 (Alito, J., concurring in the judgment).

36. 143 S. Ct. 2429 (2023) (granting petition for writ of certiorari). *Loper Bright* was argued together with a companion case presenting the same issue. *Relentless, Inc. v. Department of Commerce*, OYEZ, <https://www.oyez.org/cases/2023/22-1219> [<https://perma.cc/P4LM-UCZW>] (last visited Feb. 10, 2024).

37. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984).

38. Shay Dvoretzky & Emily J. Kennedy, *The Evolving Landscape of Administrative Law*, SKADDEN INSIGHTS (Sept. 2023), <https://www.skadden.com/insights/publications/2023/09/quarterly-insights/the-evolving-landscape-of-administrative-law> [<https://perma.cc/X6S6-7L3Y>] ("*Chevron* is probably the most cited case in administrative law.>").

39. *Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., Ltd.*, 143 S. Ct. 978 (2023) (granting petition for writ of certiorari).

than being subject to Congress' annual appropriations process.⁴⁰ The pending case challenges that funding structure as “an unconstitutional abdication of congressional authority.”⁴¹ Finally *Corner Post v. Board of Governors* addresses the seemingly technical question of when a claim under the Administrative Procedure Act (APA) accrues.⁴² In *Corner Post*, petitioner brought a lawsuit in 2021 seeking to challenge a rule adopted by the Board of Governors of the Federal Reserve System in 2011. The lower court held that the challenge was barred by the statute of limitations.⁴³ A decision accepting petitioner's argument would expand the window in which agency rules are subject to litigation challenges.

The recent and pending cases highlight the potential for the Court to reexamine the fundamental legitimacy of the administrative state itself, cut back on the permissible extent to which agencies exercise their authority, and reduce the extent to which courts are required to defer to agency judgments and interpretations. Although critics of the administrative state raise a variety of arguments as to why the New Deal Court got things wrong as a matter of Constitutional interpretation, the cases highlight a second theme underlying judicial skepticism—the evolution of the modern administrative state since the New Deal Era. The New Deal Court's acceptance of the administrative state was premised on several key themes about the scope and nature of agency action. As detailed further below, there are reasons to question the extent to which those principles remain true.

II. JUDICIAL OVERSIGHT OF AGENCY POWER: THE HISTORICAL CONTEXT

A. The New Deal Settlement

As Pritchard and Thompson explain, when Congress passed the Securities Act of 1933 and the Securities Exchange Act of 1934, the prospect that the administrative state would even survive much less evolve into its current form, was far from certain. For the Supreme Court, Roosevelt's New Deal presented several questions. The first was the permissible scope of congressional regulatory power. The New Deal, at its core, sought to

40. Lilith Fellowes-Granda, Devon Ombres, Alexandra Thornton & Crystal Weise, *CFPB v. CFSA: How the Supreme Court Could Harm Consumers and Financial Markets*, CENT. FOR AM. PROG. (Sept. 28, 2023), <https://www.americanprogress.org/article/cfpb-v-cfsa-how-the-supreme-court-could-harm-consumers-and-financial-markets/> [https://perma.cc/4Q3Z-K3R4].

41. *Id.*

42. *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 2023 U.S. LEXIS 2962 (U.S. September 29, 2023) (granting petition for writ of certiorari).

43. *N.D. Retail Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys.*, 55 F.4th 634, 643 (8th Cir. 2022).

use government regulatory power to constrain business, and one line of battle involved the extent to which that Constitution limited that power. The Supreme Court was initially unwilling to accept the New Deal's regulatory approach, holding twelve separate statutes unconstitutional before 1937.⁴⁴ After a period of some uncertainty, during which FDR threatened to dilute the power of those Justices who opposed the New Deal with his court-packing plan, his ability to replace the opposing Justices changed the composition of the Court, making the court-packing plan unnecessary.⁴⁵ With its changed composition, in 1946, the Supreme Court broadly upheld congressional regulatory power under the Commerce Clause. In *North American Company*, the Court sweepingly described Congress's regulatory power as "plenary" and reaffirmed that it "may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."⁴⁶

A second question was whether Congress had the authority to delegate lawmaking and adjudicative power to administrative agencies.⁴⁷ Again, the early signs were not promising. In 1935, the Supreme Court issued two decisions invalidating the National Industrial Recovery Act as beyond the scope of Congress's power to delegate regulatory authority.⁴⁸ In 1936, in *Jones v. SEC*,⁴⁹ the Court's first securities case, the Court's response "was hostile."⁵⁰ Although the Court upheld the regulatory authority of Congress to require the registration of securities, it questioned the actions of the SEC in enforcing that requirement.⁵¹ The Court

44. JOEL SELIGMAN, MISALIGNMENT: THE NEW FINANCIAL ORDER AND THE FAILURE OF FINANCIAL REGULATION, 1141 (2020).

45. See, e.g., PRITCHARD & THOMPSON, *supra* note 12, at 49–50 (observing that Roosevelt's Supreme Court appointees came to dominate the Court in his second term, causing an "abrupt shift in the Court's balance of power").

46. *N. Am. Co. v. SEC*, 327 U.S. 686, 704 (1946) (quoting *Gibbons v. Ogden*, 22 U.S. 1 (1924)).

47. The Court first identified concerns about congressional authority to delegate its lawmaking power in *Field v. Clark*, 143 U.S. 649 (1892).

48. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Co. v. United States, Schechter Poultry*, 295 U.S. 495 (1935).

49. 298 US 1 (1936).

50. PRITCHARD & THOMPSON, *supra* note 12, at 34.

51. The Court observed that,

if the various administrative bureaus and commissions, necessarily called and being called into existence by the increasing complexities of our modern business and political affairs, are permitted gradually to extend their powers by encroachments—even petty encroachments—upon the fundamental rights, privileges and immunities of the people, we shall in the end, while avoiding the fatal consequences of a supreme autocracy, become submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of constitutional guaranties.

Jones v. SEC, 298 U.S. 1, 24–25 (1936).

subsequently retreated from its skepticism of congressional delegation.⁵² Having determined in *J.W. Hampton, Jr., & Co. v. United States*,⁵³ that a congressional delegation is not improper if Congress provides an “intelligible principle” to guide the agency’s actions,⁵⁴ the Court broadened its acceptance of congressional delegation while further developing appropriate boundaries.⁵⁵ In *Humphrey’s Executor*, the Court went further, upholding not just Congress’s delegation of power to the FTC, but its ability to limit the President’s power to remove FTC commissioners without cause.⁵⁶ In so doing, the Court explicitly recognized that insulation from political influence was a legitimate mechanism for ensuring an agency’s independence.⁵⁷

The third and perhaps most challenging issue was the relationship between the Court and the agency—specifically the level of scrutiny to which the Court would subject agency action. This question is the primary focus of Pritchard and Thompson’s book.⁵⁸ In *Chenery I*,⁵⁹ the Supreme Court suggested that courts should take an aggressive role, at least in cases in which the agency did not fully justify the rationale for its decision.⁶⁰ As P&T explain, however, by the time the Court reconsidered the issues raised in *Chenery I*, the Court had adopted a broad acceptance of agency discretion.⁶¹ The decision in *Chenery II* opened the door to greater judicial deference both to agencies’ substantive expertise and the manner in which they reached their decisions. This acceptance, in turn, led to subsequent doctrines of judicial deference such as *Chevron*.

52. See, e.g., *United States v. Ambert*, 561 F.3d 1202, 1213 (11th Cir. 2009) (“Indeed, since 1935, the Supreme Court has not struck down a single statute as an impermissible delegation of legislative power.”). Nonetheless, the Court has occasionally issued “conflicting signals.” Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 333 (1999).

53. 276 U.S. 394 (1928).

54. *Id.* at 409.

55. See *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946) (holding that congressional delegation of authority to the SEC was “constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority”); *United States v. Ambert*, 561 F.3d 1202, 1213 (11th Cir. 2009) (“In the eighty years since the promulgation of the test, the Court has clarified the meaning of an “intelligible principle” and articulated the boundaries of permissible delegation.”).

56. *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935).

57. *Id.* at 629 (“[I]t is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter’s will.”).

58. See, e.g., PRITCHARD & THOMPSON, *supra* note 12, at ch. 3 (examining Court’s oversight of SEC’s procedures); *id.* at ch. 4 (discussing Court’s delineation of the SEC’s authority).

59. 318 U.S. 80 (1943).

60. See *id.* at 94–95 (observing that, although Court’s scope of review is narrow, “an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained”).

61. PRITCHARD & THOMPSON, *supra* note 12, at 80 (“a little over a decade after Jones, the transformation of the Court’s attitude toward the SEC was complete”).

As Pritchard and Thompson detail, the shift in the political composition of the Supreme Court led to a series of decisions accepting the administrative state generally and the SEC in particular. Although the Court's willingness to defer to the SEC with respect to specific issues ebbed and flowed over the subsequent 90 years, the Court's intervention was limited to discrete substantive issues and did not challenge the proposition that Congress could and had delegated to the SEC primary authority to regulate the capital markets.⁶² Nor did the Court challenge the SEC's expertise and competence to so do. The more recent cases then, reflect a departure from historical practice and a return to the skepticism of the 1930s.

B. Rationalizing the Settlement—Justifications for the Administrative State

Why did the Court accept the premise of the Administrative State? At the time of the New Deal, defenders argued that regulation by administrative agencies would differ from that imposed by the political branches. Specifically, the New Deal would involve regulation by agencies that were both expert—using scientific and technical knowledge to inform their decisions—and insulated from the political process.⁶³ The “theme of expertise” was coupled with the idea that some problems had solutions that could be described as “objectively correct” rather than the result of policy preferences.⁶⁴

As James Landis put it: “the art of regulating an industry requires knowledge of the details of its operations, ability to shift requirements as the condition of the industry may dictate.”⁶⁵ As a result, “[e]xpertise plays a starring role in administrative law.”⁶⁶ Pritchard and Thompson explain that a major component of the Court's acceptance both of congressional delegation to agencies and its deference to the decisions made by those

62. See, e.g., *Int'l Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 566 n.20 (1979); see also Steven J. Cleveland, *Resurrecting Court Deference to the Securities and Exchange Commission: Definition of “Security”*, 62 CATH. U.L. REV. 273 (2013) (arguing that Court has not applied *Chevron* deference to SEC views on the scope of the statutory definition of a security).

63. See, e.g., STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 61 (1993) (emphasizing the “inherent” bureaucratic virtues of expertise, rationalization, and insulation); Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 413–18 (2007) (describing views of Frankfurter and Landis in believing “government without expertise was a recipe for demagoguery”).

64. Schiller, *supra* note 63, at 417 (“This theme of expertise . . . was usually coupled with the idea that there was an objectively correct solution to the country's problems.”).

65. Joel Seligman, *Self-Funding for the Securities and Exchange Commission*, 28 NOVA L. REV. 233, 235–36 (2004).

66. Sidney A. Shapiro, *The Failure to Understand Expertise in Administrative Law: The Problem and the Consequences*, 50 WAKE FOREST L. REV. 1097, 1097 (2015).

agencies was the principle that agencies possessed specialized expertise.⁶⁷ Now-Justice Kagan wrote that “The need for expertise emerged as the dominant justification for this enhanced bureaucratic power.”⁶⁸ Even in *Chenery I*, in which the Court expressed skepticism over agency authority, it recognized that courts should defer to an agency’s exercise of its “special administrative competence.”⁶⁹

Supporters of the administrative state have argued that one feature of agency expertise is the selection of agency heads and staffers who possess relevant technical background.⁷⁰ Donna Nagy observes that “As the individuals who administer the federal securities laws on a daily basis, the SEC staff can certainly claim particular expertise in applying often complex and technical regulatory provisions to equally complicated transactions and undertakings.”⁷¹

Another reason is the ability of agencies to inform their decisions through the acquisition of substantial information. As Paul Mahoney observes, the early New Deal agencies engaged in extensive factfinding, conducting investigations on technical issues such as directions of passenger flows and levels of power consumption, generating voluminous data that made it difficult for a court to second-guess.⁷² Mahoney notes that, because they lacked the capacity to replicate this process, courts were compelled to apply a certain level of deference to the agencies’ conclusions.⁷³ Congress too would have been challenged to engage in investigations of this nature as a foundation for regulatory decisions.

That agencies focus on a specialized area enhances the role of expertise.⁷⁴ As Sidney Shapiro explains, those who work in a given agency both

67. PRITCHARD & THOMPSON, *supra* note 12, at 31 (“The New Deal vision was that administrative experts, not business leaders, should control the direction of the economy.”).

68. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2261 (2001).

69. SEC v. *Chenery Corp.*, 318 U.S. 80, 92 (1943). The Court further observed that it should not rather “determine independently what is ‘detrimental to the public interest or the interest of investors or consumers’ or ‘fair or equitable’ within the meaning of §§ 7 .and 11 of the Public Utility Holding Company Act of 1935.” *Id.* at 94.

70. See Thomas Smith, Comment, *Reclaiming Humphrey’s Executor: Expertise and Impartiality in the FTC*, 37 BYU J. PUB. L. 437, 441 (2023) (“Days after the FTC Act was signed by President Wilson, the Federal Trade Reporter echoed Congress’s intent to establish a commission whose exacting and difficult work would require the appointment of those with ‘experience in the problems to be met . . . not only a knowledge of finance and transportation, but a comprehensive understanding of the practical economic and legal aspects of the whole field of industry of the country, with exceptional experience, training and judgment.’” (internal citation omitted)).

71. Donna M. Nagy, *Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework*, 83 CORNELL L. REV. 921, 1009 (1998).

72. Paul G. Mahoney, *The SEC, the Supreme Court, and the Administrative State*, 47 SEATTLE U. L. REV. 927, 932 (2024).

73. *Id.*

74. The great advantage of administrative agencies, in his view, was specialization and expertise. Edward H. Stiglitz, *Delegating for Trust*, 166 U. PA. L. REV. 633, 644 (2018).

bring expertise to the agency and develop that expertise through their work there, enabling them to analyze technical information, interface with experts, evaluate the credibility of evidence presented to the agency and assess the feasibility of implementing regulatory policies.⁷⁵ FDR's personal notes describe the expertise of the first SEC commissioners including their knowledge of securities and capital market regulation and the fact that some of them played a critical role in drafting the federal securities laws.⁷⁶ From its inception, the SEC was headed and staffed by lawyers of high repute,⁷⁷ many of which went on to other prominent positions.⁷⁸ Expertise need not be limited to agency heads. Cox and Thomas describe, for example, how, in the 1980s, the SEC's need for greater expertise led to an increased reliance on outside lawyers to staff positions such as the heads of divisions and the General Counsel.⁷⁹

A similar rationale supported the premise of agency independence. As Joel Seligman explains “only with independence can regulatory agencies be largely depoliticized and achieve resolution of specific problems on the basis of standards other than election results.”⁸⁰ Indeed, commentators viewed the fact that agency decisionmaking was premised on scientific and technical expertise as inherently insulating those decisions from partisanship.⁸¹ Many features of how agencies are structured promote their insulation from politics, such as heading agencies with multi-member bipartisan boards, protecting agency heads from presidential removal,⁸² and

75. Shapiro, *supra* note 66.

76. Stock Exchange Commission Memorandum (June 15, 1934), https://www.sechistorical.org/collection/papers/1930/1934_06_15_SEC_Membership_Li.pdf [<https://perma.cc/5VH4-HDZP>]; see also *431 Days: Joseph P. Kennedy and the Creation of the SEC (1934–35)*, SEC HIST. SOC'Y, https://www.sechistorical.org/museum/galleries/kennedy/building_b.php [<https://perma.cc/2VHS-V2UZ>] (last visited Feb. 12, 2024) (describing the background and expertise of the original SEC Commissioners).

77. JOEL SELIGMAN, *THE TRANSFORMATION OF WALL STREET 1–2* (1982).

78. See Harvey L. Pitt & Karen L. Shapiro, *Securities Regulation by Enforcement: A Look Ahead at the Next Decade*, 7 YALE J. ON REG. 149 n.31 (1990) (citing examples of SEC officials who went on to hold positions including that of Supreme Court Justice).

79. James D. Cox & Randall S. Thomas, *Revolving Elites: The Unexplored Risk of Capturing the SEC*, 107 GEO. L.J. 855 (2019) (describing “the growing demand for talent and specialized expertise”)

80. SELIGMAN, *supra* note 44, at 1142–43.

81. See Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1134 n.108 (2020) (“The scientific expert was seen as one removed from partisan politics.”).

82. See, e.g., Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 18 (2010) (describing “[r]emoval protection for agency heads [as] the touchstone” of agency independence).

self-funding mechanisms.⁸³ Lisa Bressman and Robert Thompson explain that

At the broadest level, the structural characteristics of independent agencies are aimed at insulating them, to some degree, from politics. Other membership qualifications also ensure that no single political interest dominates regulatory policy by guaranteeing others a seat at the table. For example, the requirement that members of independent agencies represent both political parties is an overt attempt at achieving political balance. It is also a means to promote nonpartisan decisionmaking, which is particularly important for agencies that perform quasi-adjudicatory functions, such as holding hearings to determine possible violations of law.⁸⁴

Expertise and insulation are the most frequently cited justifications for the administrative state, but regulation through agencies, rather than by Congress, offers additional advantages. Two frequently cited advantages are flexibility and stability. Because agencies possess a range of tools through which they can regulate—enforcement, rulemaking, adjudication and the promulgation of informal guidance—they can respond to new and evolving regulatory challenges in ways that were targeted yet incremental.⁸⁵ Unlike courts, agencies can set their own regulatory agendas and need not wait for problems to come to them.⁸⁶

At the same time, insulated agencies offer the prospect of stability.⁸⁷ Unlike politicians, bureaucrats are unlikely to revise their regulatory policies with each election. “The insulated agency, its designers hope, will better resist short-term partisan pressures and instead place more emphasis on empirical facts that will serve the public interest in the long term.”⁸⁸ The promulgation of detailed procedural requirements for agencies to adopt and repeal regulations increases the stability of the policies they implement by making those policies more difficult to change. The resulting

83. See, e.g., HENRY B. HOGUE, BAIRD WEBEL & MARC LABONTE, CONG. RSCH. SERV., R43391, INDEPENDENCE OF FEDERAL FINANCIAL REGULATORS: STRUCTURE, FUNDING, AND OTHER ISSUES 28–31 (2023) (observing that many financial regulators set their own budgets which are funded through the collection of fees, eliminating the need for congressional budget authorization).

84. Lisa S. Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599 (2010).

85. See, e.g., Edward L. Metzler, *The Growth and Development of Administrative Law*, 19 MARQ. L. REV. 209, 216 (1935) (observing that the administrative state “is a more flexible system, adapted to the handling of complex problems of a specialized and technical character without being bound by too many technicalities of procedure and evidence, capable of initiating action where necessary and of doing large volumes of work in an inexpensive manner.”).

86. *Id.* at 218 (noting that agencies could take the initiative to address future harm and to do so cheaply and efficiently as opposed to the reactive role of adjudication.)

87. “We want traditions; we want a fixed policy; we want trained experts; we want precedents; we want a body of administrative law built up.” *Crowell v. Benson*, 285 U.S. 22, 46 (1932).

88. Barkow, *supra* note 82, at 17.

“stickiness” of regulations has been criticized for reducing flexibility, but it enhances predictability, reducing regulatory costs for affected parties.⁸⁹

III. RETHINKING THE ADMINISTRATIVE STATE

Pritchard and Thompson’s historical analysis makes it clear that the Court’s current skepticism of the administrative state is nothing new.⁹⁰ Until recently, however, defenses of the administrative state have largely dominated objections to it.⁹¹ Nonetheless, as noted in Part I, all three of the concerns raised by the Court in the New Deal era have resurfaced in recent challenges. This Part will explore potential reasons for this shift.

Perhaps the New Deal Court was simply incorrect in its analysis of the structural and Constitutional limits on agency power.⁹² As Pritchard and Thompson explain, there were those critics in the 1930s who raised serious challenges to the New Deal settlement, commentators have continued to raise those challenges, and the Justices who now question doctrines like *Chevron* may just have the better argument. In addition, as the Court’s Constitutional jurisprudence and its methodological approach to statutory interpretation have evolved, and the shifts offer reasons to rethink some of the previously established doctrines. For example, the Supreme Court has increasingly relied on a textualist approach to statutory interpretation rather than incorporating lessons from the legislative history or weighing potential policy considerations. Under a textualist approach, concerns that activist courts will attempt to circumvent policies developed

89. See, e.g., Aaron L. Nielson, *Sticky Regulations*, 85 U. CHI. L. REV. 85 (2018) (“Even though the APA does not allow the agency to contract not to change the law, the fact that agencies must conduct ‘Herculean’ efforts to change a rule provides certainty, at least de facto.”).

90. Other commentators have made similar observations. See, e.g., Metzger, *supra* note 13, at 6 (“Like today, the 1930s attack on ‘agency government’ took on a strongly constitutional and legal cast, laced with rhetorical condemnation of bureaucratic tyranny and administrative absolutism.”).

91. See, e.g., Lisa Heinzerling, *How Government Ends*, BOST. REV. (Sept. 28, 2022), <https://www.bostonreview.net/articles/how-government-ends/> [<https://perma.cc/SN7V-8GDJ>] (explaining that until recently, the legal arguments that agency exercises of regulatory power violate constitutional limits on the separation of powers “were fringe at best”).

92. Commentators have developed the Constitutional arguments against the administrative state in detail. See, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994) (“The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution. . . . Faced with a choice between the administrative state and the Constitution, the architects of our modern government chose the administrative state, and their choice has stuck.”); Philip Hamburger, IS ADMINISTRATIVE LAW UNLAWFUL? (2014) Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 2 (1994) (“In short, the administrative state is unconstitutional.”).

by more expert agencies—concerns that in part motivated the *Chevron* doctrine—seem less compelling.⁹³

Politics may also explain the current attack on the administrative state. Deregulation has long been an agenda item for conservative political leaders,⁹⁴ and, as a general matter, agency power is correlated with increased regulation.⁹⁵ Moreover Trump’s successful campaign to appoint conservative judges not just to the Supreme Court but to the lower federal courts as well means that a shift from traditional deference to greater judicial oversight enables courts to play a greater role in restricting regulatory initiatives.⁹⁶

Both these explanations are somewhat unsatisfying, however. While reasonable jurists and scholars may disagree on the core separation of powers principles or the parameters of the non-delegation doctrine, the New Deal settlement has endured for almost a century. Congressional reliance on agencies has grown, and it is difficult to imagine how modern regulation could function if agency powers were substantially curtailed. As a result, the current and potentially dramatic effort to do so demands a more compelling explanation than legal error. Similarly, although the political landscape has shifted many times, prior shifts have resulted in the

93. Transcript of Oral Argument at 27–28, *Loper Bright Enter. v. Raimondo*, 143 S. Ct. 2429 (2024) (No. 22-451), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-451_o7jp.pdf [<https://perma.cc/N7XA-XBEK>] (statement by Paul Clement).

What has changed is we’ve come a long way in statutory interpretation. And, you know, if *Chevron* was a response to some of the excesses of the D.C. Circuit in the freewheeling days of the late ’70s and the use of legislative history and . . . we now, I think, are all textualists. The focus is much greater on the text of the statute.

Id. To be fair, the Court has varied in the degree of its commitment to textualism. *See, e.g.*, *West Virginia v. EPA*, 597 U.S. 697, 779 (2022) (Kagan, J., dissenting) (“The current Court is textualist only when being so suits it.”)

94. *See* Cary Coglianese, Natasha Sarin & Stuart Shapiro, *The Deregulation Deception* (U. Pa. L. Sch. Pub. L. Rsch. Paper No. 20-44, June 21, 2021), <https://ssrn.com/abstract=3723915> [<https://perma.cc/89A7-ARPN>] (describing Trump’s deregulatory campaign platform and subsequent deregulatory initiatives once elected).

95. This is for two reasons. First, litigation typically involves a challenge to an agency’s exercise of authority, and judicial deference to the agency increases the likelihood that such a challenge will be unsuccessful. Second, a variety of doctrines limit the extent to which an agency’s failure to regulate is justiciable. *See, e.g.*, *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 61–65 (2004) (summarizing limits on judicial review of agency non-action and explaining bases for such limits). *But see* Daniel E. Walters, *Symmetry’s Mandate: Constraining the Politicization of American Administrative Law*, 119 MICH. L. REV. 455, 475-76 (2020) (arguing that agencies can make deregulatory “Type II” errors by regulating less extensively than warranted by the applicable statute).

96. *See, e.g.*, Priyanka Boghani & James O’Donnell, *How McConnell’s Bid to Reshape the Federal Judiciary Extends Beyond the Supreme Court*, FRONTLINE (Oct. 31, 2023), <https://www.pbs.org/wgbh/frontline/article/how-mcconnell-and-the-senate-helped-trump-set-records-in-appointing-judges/> [<https://perma.cc/2EBG-7MYA>] (describing impact of Trump’s exercise of his appointments power, with Senator Mitch McConnell’s help, on the composition of the federal judiciary).

reversal of specific agency decisions or policies without questioning the foundational agency structure.

Instead, this Article considers a third possible explanation. Perhaps the original circumstances that warranted acceptance of the administrative state no longer hold true. Put simply, as noted above, the New Deal settlement was premised on the belief that agencies had several characteristics that provided them with distinctive regulatory advantages. This Part considers the possibility that changes to the administrative state have undercut those advantages, at least to a degree.

Some changes to the administrative state are obvious. Both the size and the role of government in modern life have expanded, and administrative agencies are themselves a large part of this expansion. At the time of the New Deal, there were fewer agencies, agencies were smaller, and their regulatory scope was far less extensive. Congress has delegated lawmaking power to agencies in an ever-widening range of areas and continues to do so.⁹⁷ As of February 2024, the Federal Register reported the existence of 436 U.S. agencies and subagencies.⁹⁸ The rules adopted and enforced by administrative agencies are not limited to large, regulated entities but extend to a broad range of ordinary people.⁹⁹ As the Justice Gorsuch recently observed: “Today, administrative law doesn’t confine itself to the regulation of large and sophisticated entities. Our administrative state ‘touches almost every aspect of daily life.’”¹⁰⁰ Similarly in the oral argument in *Jarkesey*, Chief Justice Roberts noted “The extent of impact of government agencies on daily life today is enormously more significant than it was 50 years ago.”¹⁰¹

Congress has also expanded the discretionary authority of existing agencies. The *Jarkesey* case offers an example. The SEC’s power to enforce the securities laws through in-house administrative proceedings was, prior to 2010, limited to cases against regulated persons and entities.¹⁰² In

97. For example, Congress created the CFPB in 2010 as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), and the PCAOB in 2002 as part of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (to be codified at scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

98. *Agencies*, FED. REG., <https://www.federalregister.gov/agencies> [<https://perma.cc/6MT7-YZXF>] (last visited Feb. 7, 2024).

99. *Buffington v. McDonough*, 143 S. Ct. 14 (2022) (Gorsuch, J., dissenting from the denial of certiorari).

100. *Id.* (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010)).

101. Zach Schonfeld, *Supreme Court’s Conservatives Voice Concerns About SEC’s In-House Enforcement*, HILL (Nov. 29, 2023), <https://thehill.com/regulation/court-battles/4333751-supreme-courts-conservatives-voice-concerns-sec-in-house-enforcement/> [<https://perma.cc/Z3JK-6LM2>] (quoting *Jarkesey* oral argument).

102. *See, e.g.*, Joseph Quincy Patterson, *Many Key Issues Still Left Unaddressed in the Securities and Exchange Commission’s Attempt to Modernize Its Rules of Practice*, 91 NOTRE DAME L. REV.

2010, however, Congress gave the SEC the authority, through an administrative proceeding to impose civil penalties on any person who violates the securities laws, rather than bringing such actions in federal court.¹⁰³ Similarly in the Securities Enforcement Remedies and Penny Stock Reform Act of 1990 Congress substantially expanded the SEC's authority to enforce the securities laws through the application of civil penalties.¹⁰⁴

Arguably the most fundamental shift, however, is in the increasing politicization of administrative agencies. Today's agencies are increasingly less insulated and expert in the way contemplated at the time of the New Deal.

Despite the New Deal Court's acceptance of the administrative state, the insulation of administrative agencies unraveled quickly. One early concern was that agencies would bring insufficient regulatory attention to business because they were subject to interest group capture.¹⁰⁵ The transparency of the APA was understood as a response to this concern.¹⁰⁶ The adoption of the APA reflected an increasing desire to hold agencies politically accountable, but the resulting transparency was inherently in tension with the premise of insulation.¹⁰⁷ The Federal Advisory Committee Act was adopted in 1972 to provide a formal mechanism for outside groups to provide advice to agencies.¹⁰⁸ Although advisory committees can provide agencies with useful information, they can wield substantial political influence, particularly over career civil servants.¹⁰⁹ The adoption of the Sunshine Act, similarly sought to respond to agency abuse of power by

1675, 1685 (2016) (“[I]n the past, the SEC could only impose civil monetary penalties through administrative proceedings on persons or entities regulated by the SEC . . .”).

103. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(a).

104. Samuel N. Liebmann, Note, *Dazed and Confused: Revamping the SEC's Unpredictable Calculation of Civil Penalties in the Technological Era*, 69 DUKE L.J. 429, 436 (2019) (explaining that the Act “represented a huge jump in power, permitting SEC penalties for violations of any of the four major securities acts”).

105. Kagan, *supra* note 68, at 2261.

106. *Id.*

107. *See, e.g.*, George Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996) (Explaining that the 1946 Administrative Procedure Act was a “fierce compromise” balancing the competing goals of bureaucratic expertise and legislative accountability.).

108. Pub. L. No. 92-463, 86 Stat. 770 (1972); *see, e.g.*, Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REG. 451, 451 (1997) (explaining that “FACA advances good-government goals such as openness and administrative efficiency”).

109. *See, e.g.*, Brien D. Feinstein & Daniel J. Hemel, *Outside Advisers Inside Agencies*, 108 GEO. L.J. 1139, 1198 (2020) (finding that “political appointees stack advisory committees with individuals who share the administration's ideological inclinations and then use those committees as counterweights to career civil servants whose preferences diverge from the party in power”).

subjecting agency deliberations to greater transparency.¹¹⁰ Critically, the Sunshine Act¹¹¹ prohibits the heads of multimember agencies from deliberating in private.¹¹² The requirement that such deliberations be conducted in public reduces the potential for political compromise among the heads of bipartisan commissions.¹¹³ More recently, President Reagan’s implementation of Office of Information and Regulatory Affairs (OIRA) review subjects significant rules to oversight and potential modification by the White House.¹¹⁴ As Wendy Wagner explains, despite OIRA’s lack of scientific expertise, it has been heavily involved in altering EPA rules, risking “compromising the accountability and legitimacy of science-intensive and technical rulemaking.”¹¹⁵

Indeed, today, insulation no longer seems to be a valued agency characteristic. As noted above, the Supreme Court has issued several decisions invalidating structures designed to insulate agencies from political influence.¹¹⁶ The Court defended these decisions in terms of the need for agency officials to be politically accountable. For example, in *Free Enterprise Board*, the Court struck down the provision that PCAOB officials could only be removed for cause by the SEC, holding that this two-tiered removal provision improperly insulated such officials from Presidential control.¹¹⁷

The Senate confirmation process has also played a role in shifting the nature of agency heads from industry leaders to congressional staffers. As Brian Feinstein and Todd Henderson document, “there has been a marked and sustained influx from Capitol Hill onto multimember independent

110. See, e.g., James T. O’Reilly & Gracia M. Berg, *Stealth Caused by Sunshine: How Sunshine Act Interpretation Results in Less Information for the Public about the Decision-making Process of the International Trade Commission*, 36 HARV. INT’L L.J. 425, 432 (1995) (“[T]he 1976 Sunshine Act responded to concerns about ‘secret government’ and the abuse of power that could be putatively cured through greater public access to the inner workings of the federal bureaucracy.”).

111. 5 U.S.C. § 552b (1988).

112. This limit may have the effect of shifting regulatory authority from agency heads to the civil servants who are not subject to the rule. In turn, such shifts contribute to the broader exercise of delegated authority, a topic beyond the scope of this article but which is explored in detail in Brian D. Feinstein and Jennifer Nou, *Submerged Independent Agencies* (forthcoming U. Pa. L. Rev. 2024).

113. See, e.g., Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 216 (1997) (observing that “[d]ecisionmakers may lose the ability to meet and discuss items critically without backlash from the public, forcing superficial, cooled, or disingenuous discussion”).

114. E.O. 12866; see Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1767–70 (2013) (discussing history of OIRA review).

115. Wendy E. Wagner, *A Place for Agency Expertise: Reconciling Agency Expertise with Presidential Power*, 115 COLUM. L. REV. 2019, 2045 (2015).

116. Rebecca S. Eisenberg & Nina A. Mendelson, *The Not-So-Standard Model: Reconsidering Agency-Head Review of Administrative Adjudication Decisions*, 75 ADMIN. L. REV. 1 (2023).

117. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 497 (2010) (“The diffusion of power carries with it a diffusion of accountability.”).

agencies in the past fifteen years or so.”¹¹⁸ The authors explain this trend in terms of increasing the political nature of agency decisions. Hill staffers have a “demonstrated commitment to their party’s policy goals.”¹¹⁹

The focus on political commitment may come at the expense of expertise.¹²⁰ Although some statutes mandate that agency heads possess expertise in certain areas, the number of agencies in which such requirements apply is limited.¹²¹ As a result, the expertise of agency heads varies. Anne Khademian recounts, for example, the securities expertise of various SEC Commissioners and explains how that expertise affected the work of the Commission.¹²² In contrast, critics have long complained about the lack of expertise at the FTC among both Commissioners and staff.¹²³

The political commitments of agency officials also reduce the potential for bipartisan compromise.¹²⁴ As former SEC Chair Mary Jo White reported of her experience at the SEC, “The degree of partisanship was a surprise.”¹²⁵ Instead of moderating agency decisions, partisanship leads to an increasing number of agency decisions in which the agency is split

118. Brian D. Feinstein & M. Todd Henderson, *Congress’s Commissioners*, 38 YALE J. ON REG. 175, 190 (2021).

119. *Id.* at 209.

120. *See, e.g.*, Thomas Smith, Comment, *Reclaiming Humphrey’s Executor: Expertise and Impartiality in the FTC*, 37 BYU J. PUB. L. 437, 442 (2023) (“[I]t is easy to see how expertise may be supplanted for other politically desirable qualities.”).

121. Feinstein & Henderson, *supra* note 118, at 181–82.

122. Anne M. Khademian, *The Securities and Exchange Commission: A Small Regulatory Agency with a Gargantuan Challenge*, 62 PUB. ADMIN. REV. 515, 518 (2002) (“The SEC’s regulatory experience is extensive and carries weight among members of Congress in the legislative process.”). On the other hand, prominent and highly qualified nominees were not confirmed after they faced opposition based on political issues. *See, e.g.*, Dave Michaels, *SEC Nominee Caught in Crossfire Over Corporate Political Spending*, WALL ST. J. (Apr. 11, 2016), <https://www.wsj.com/articles/sec-nominee-caught-in-crossfire-over-corporate-political-spending-1460410963> (discussing how nominee Lisa Fairfax’s position on requiring disclosure of corporate political spending split the Democratic party); Patrick Temple-West, *Warren Allies Delay Obama’s SEC Pick*, POLITICO (July 7, 2015), <https://www.politico.com/story/2015/07/barack-obama-elizabeth-warren-sec-wall-street-119780> [<https://perma.cc/6RAV-4JVU>] (describing liberal opposition to nominee Keir Gumbs because of his work advising companies on how to deal with activist shareholders).

123. *See, e.g.*, Smith, *supra* note 120, at 441–445 (reporting criticism of FTC incompetence dating back to 1969); *id.* at 445 (stating that, according to one profile, “the current commission lacks substantial experience and accomplishment in FTC-type consumer protection and antitrust issues”).

124. To be fair, polarization within agencies may reflect increasing polarization within Congress. The willingness of members of Congress to engage in bipartisan compromise has also declined. *See, e.g.*, Samuel A. Marcossan, *Fixing Congress*, 33 BYU J. PUB. L. 227, 228 (2019) (discussing “the extent to which the House of Representatives is beset by polarization and reduced to partisan gridlock, deeply compromising the effectiveness of democratic decision-making”).

125. Lindsey Huang, *Mary Jo White on Surprises, Disappointment, Criticism During Her SEC Career*, JAMES E. ROGERS ARIZ. COLL. L. (Apr. 5, 2017), <https://law.arizona.edu/news/2017/04/mary-jo-white-surprises-disappointment-criticism-during-her-sec-career> [<https://perma.cc/M5F5-8LGQ>].

along party lines.¹²⁶ Well known examples include the FTC's rules on net neutrality,¹²⁷ the FCC's 2016 data breach notification rule, and the SEC's 2024 adoption of new rules governing SPACs.¹²⁸ Party line splits also strengthen the influence of agency heads, who are typically of the same political party as the President and who, under the "strong chair" model applicable in most agencies, "have the sole authority to decide which items are even voted upon, [and] they also can decide which items receive staff attention and are developed into policy proposals or effective policy."¹²⁹

Although the level of partisanship appears to differ among agencies,¹³⁰ the number of ideologically based split decisions suggests that the bipartisan structure of agencies is not leading to policy compromises. Split decisions indicate that Congress's intent in creating multimember commissions, that decisions be the product of deliberation and negotiating, is not being met.¹³¹ Today's commissions do not produce compromises that accommodate a range of viewpoints.¹³² Not only do minority commissioners frequently dissent, but they often write strong critiques of the agency's action, critiques that can impact the likelihood that the agency's decision will survive judicial review.¹³³

Partisanship also contributes to flip-flopping—an agency reversing its prior decision in response to a shift in the administration and, as a result, the balance of political power within the agency.¹³⁴ The Supreme Court appeared to conclude that flip-flopping, even flip-flopping based on politics, was permissible, stating in *Brand X*, that an agency was permitted to change its interpretation of a statute "in response to changed factual

126. See, e.g., Daniel E. Ho, *Congressional Agency Control: The Impact of Statutory Partisan Requirements on Regulation*, 8 tbl.1 (Am. Law & Econ. Ass'n Annual Meetings, Paper No. 73, 2007), <http://law.bepress.com/cgi/viewcontent.cgi?article=2219&context=alea> [<https://perma.cc/N83U-YRCD>] (finding a strong correlation between politics of FCC commissioners and voting behavior).

127. Feinstein & Henderson, *supra* note 118, at 202.

128. *SEC Adopts Final SPAC Rules*, DAVIS POLK (Jan. 29, 2024), <https://www.davispolk.com/insights/client-update/sec-adopts-final-spac-rules> [<https://perma.cc/CB76-E77Z>].

129. Todd Phillips, *Commission Chairs*, 40 YALE J. ON REG. 277, 332 (2023).

130. See, e.g., Sharon Jacobs, *Administrative Dissents*, 59 WM. & MARY L. REV. 541, 572 (2017) (reporting that votes at FERC "do not split cleanly along party lines").

131. See, e.g., Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 794 (2013) (defending multimember agency structures as "lead[ing] to better-informed and reasoned policy outcomes from the agency").

132. See Phillips, *supra* note 129 at 311 ("[R]equiring a majority of political appointees to agree on a course of action allows for representation in the decision-making process and, perhaps, accommodation of divergent interests in policy outcomes in that requiring multiple individuals to agree on a policy forces the final policy decision to be palatable to all agreeing parties.").

133. Jacobs, *supra* note 130.

134. See Richard J. Pierce, Jr., *The Combination of Chevron and Political Polarity Has Awful Effects*, 70 DUKE L.J. ONLINE 91, 92 (2021) (describing administrative agency flip-flops on major national policies).

circumstances, or a *change in administrations*.”¹³⁵ The Court further concluded that a political motivation for the change in position did not undermine the application of *Chevron* deference to the agency’s new position.¹³⁶ The concern about agency flip flopping surfaced in both the briefing and oral argument in *Loper Bright*.¹³⁷ As one amicus wrote, “Examples of agency flip-flopping abound and result in enormous squandering of litigant and judicial resources.”¹³⁸ Capital market regulation reflects similar flip-flopping. After many years of debating the enhanced regulation of proxy advisory firms, in 2020, the SEC adopted rules imposing new conditions on proxy advisors’ use of exemptions from the proxy solicitation rules.¹³⁹ With the election of President Biden and the shift of the SEC to Democratic control, in 2022, the SEC immediately rescinded those rules.¹⁴⁰

Agency flip-flopping, especially flip-flopping in response to a change in administration, both reduces stability and undercuts the claim that agencies are implementing apolitical policies. As Judge Edith Jones observed in a litigation challenge to the SEC’s rescission of the proxy advisor rule:

The whole point of administrative agencies is that they are supposed to be disinterested and experts, but the trend in today’s administrative world—and we’ve now had three administrations affected by this trend—is that there is one change in the balance on the commission,

135. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (emphasis added).

136. *See Pierce*, *supra* note 134, at 103 (“The combination of *Chevron* and political polarity makes it certain that government policies in many important contexts will change dramatically every four to eight years.”).

137. *See, e.g.,* Stefania Palma, *US Supreme Court Reconsiders Longstanding Doctrine on Agency Power*, *FIN. TIMES* (Jan. 17, 2024), <https://www.ft.com/content/1e619fb8-46bf-4dd8-b8fc-4b6121825ce7> (reporting that, at oral argument, Justice Kavanaugh “defined *Chevron* as a ‘shock to the system’, giving regulators the latitude to flip-flop on policy every time an administration takes office”).

138. Amicus Brief of the American Center for Law and Justice in Support of Petitioners, *Loper Bright Enters. v. Raimondo*, 2023 U.S. S. CT. BRIEFS LEXIS 2079, at *21 (July 20, 2023) (No. 22-451).

139. Exemptions from the Proxy Rules for Proxy Voting Advice, Release No. 34-89372 (July 22, 2020) [85 FR 55082 (Sept. 3, 2020)]; *see* Jay Clayton, Chairman, SEC, Proxy Voting—Reaffirming and Modernizing the Core Principles of Fiduciary Duty and Transparency to Provide for Better Alignment of Interest Between Main Street Investors and the Market Professionals Who Invest and Vote on Their Behalf (July 22, 2020), <https://www.sec.gov/news/public-statement/clayton-open-meeting-2020-07-22> [<https://perma.cc/Q94K-746G>] (explaining that the new rules were “informed by, among other things, SEC initiatives that spanned almost a decade”).

140. Press Release, Securities & Exchange Commission, SEC Adopts Amendments to Proxy Rules Governing Proxy Voting Advice (July 13, 2022), <https://www.sec.gov/news/press-release/2022-120> [<https://perma.cc/ZJU6-7LA6>] (“The final amendments rescind two rules applicable to proxy voting advice businesses that the Commission adopted in 2020.”).

and suddenly the experts have a different view It undercuts the whole idea of the administrative state.¹⁴¹

Moreover, agencies can change their positions through alternatives to notice and comment rulemaking such as informal guidance and interpretive releases, and such changes may be even more difficult to challenge.¹⁴² For example, Exxon Mobil's 2024 lawsuit against two of its shareholders in connection with the shareholder proposal rule noted that the SEC staff had adopted "shifting staff interpretations" in interpreting the rule that did not reflect changes in the language of the statute or the rule.¹⁴³

That agencies are vulnerable to political pressure is unsurprising. In addition to the appointment and confirmation process, the political branches can exercise control over agencies through narrowly drawn legislation, limiting appropriations and removing agency heads. But these branches frequently and openly seek to extend their influence beyond those mechanisms. Lisa Bressman and Michael Vandenbergh report the results of an empirical study, for example, in which they document extensive contacts between the White House and the EPA during both a democratic and a republication administration.¹⁴⁴ They find both that eighteen different White House offices (other than OIRA) attempted to influence EPA policies and that those offices had more influence than OIRA over the most important EPA policy decisions. Individual members of Congress too seek to influence agency decisions. Elizabeth Warren, for example, has regularly writes public letters criticizing or challenging the decisions of both the SEC and other financial regulators, often with some degree of success.¹⁴⁵ For example, Warren and other legislators joined a January 2024 letter to the SEC urging it to prohibit the public offering of JBS, S.A. because of the company's alleged "track record of corruption, human

141. Cydney Posner, *In Fifth Circuit Oral Argument, SEC Faces Challenge to Preserve 2022 Changes to Proxy Advisor Rules*, COOLEY (Aug. 10, 2023), <https://cooleypubco.com/2023/08/10/sec-oral-argument-proxy-advisor-rules/> [<https://perma.cc/7TAM-9F5B>].

142. *See, e.g.*, *Perez v. Mortgage Bankers Association, et al.*, 575 U.S. 92 (2015) (holding that an agency flip flop through interpretive guidance does not require notice and comment rulemaking).

143. Complaint at 14, *Exxon Mobil Corp. v. Arjuna Cap. LLC & Follow This*, Case 4:24-cv-00069-O (N.D. Tex. 2024), <https://www.documentcloud.org/documents/24376561-exxon-complaint> [<https://perma.cc/4MCN-382Z>].

144. Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 68 (2006).

145. Portia Crowe, *Everyone Thinks Elizabeth Warren Went Too Far in a Too-Personal Letter She Wrote to the SEC Chairwoman*, BUS. INSIDER (June 2, 2015), <https://www.businessinsider.com/elizabeth-warrens-letter-to-mary-jo-white-2015-6> [<https://perma.cc/392X-GSJJ>] (observing that "[u]sually, when Warren wants to see changes within a government institution, she's pretty good at making that happen").

rights abuses, monopolization of the meatpacking market, as well as environmental risks.”¹⁴⁶

To the extent that agencies are headed by political players rather than industry experts and making decisions that are influenced more heavily by political pressure than scientific or technical analysis, it is difficult to rationalize allowing them a major role in policymaking rather than reserving such decisions for more politically accountable government actors. Although commentators have argued that congressional gridlock heightens the need for agencies to meet the country’s need for regulation,¹⁴⁷ Congress may, at the same time, avoid political accountability for hard policy choices by using vague legislation to punt policymaking to agencies.¹⁴⁸

At a more general level, the analysis raises questions about the effort to legitimize agency power by increasing agency political accountability. Rather than doing so, this Article argues that accountability has the potential directly to undermine the distinctive advantages that agencies bring to regulation. The ability of the President to remove agency heads without cause reduces the ability of those heads to make decisions that are independent of party politics.¹⁴⁹ The requirement that agency deliberations be open to and reflect public comment suggests that uninformed public views have the potential to sway decisions grounded in expertise. This concern is heightened if a court may invalidate an agency decision on the basis that, in the court’s view, the agency has not adequately responded to public comments.¹⁵⁰

146. Letter from Senator Cory Booker, et al., to Gary Gensler, Chair, SEC 1 (Jan. 11, 2024), <https://www.testersenate.gov/wp-content/uploads/2024-01-11-Letter-to-SEC-on-Potential-JPS-IPO.pdf> [<https://perma.cc/6GM6-4PR4>].

147. See Pierce, *supra* note 134, at 105 (“Presidents have no choice but to assert unprecedented power to act in response to serious national problems because Congress has lost its ability to address problems by enacting legislation.”).

148. See Transcript of Oral Argument, *supra* note 93, at 17 (statement of Paul Clement) (“[I]t’s really convenient for some members of Congress not to have to tackle the hard questions and to rely on their friends in the executive branch to get them everything they want.”); see also Mahoney, *supra* note 72, at 949 (“Congress often takes advantage of an agency’s broad policy discretion by engaging in symbolic lawmaking, giving regulators the authority to address a problem without making difficult policy choices that might generate political pushback.”).

149. The Supreme Court appears to believe that presidential control makes agencies more accountable to the people. See Brian D. Feinstein, *Identity-Conscious Administrative Law: Lessons from Financial Regulators*, 90 GEO. WASH. L. REV. 1, 16 (2022) (“Eight current Supreme Court Justices endorse the view that presidential control confers legitimacy on agencies based on the President’s perceived democratic accountability”). Brian Feinstein presents evidence suggesting, however, that ordinary people disagree with this premise. Brian Feinstein, *Presidential Administration vs. The People* (Feb. 6, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4718674 (on file with author).

150. See, e.g., *Bloomberg L.P. v. SEC*, 45 F.4th 462, 477 (D.C. Cir. 2022) (finding that “the Commission’s failure to respond to relevant and significant comments about the direct and indirect costs of FINRA’s proposed data service was sufficient to render its decision arbitrary and capricious”).

IV. IMPLICATIONS

The foregoing analysis suggests that, regardless of one's political views or Constitutional methodology, at least some of the current Court concern over the administrative state may be well founded, or at least that developments in how agencies function offer cause to revisit the New Deal settlement. One potential response is, as the decisional trend portends, to restrict agency power substantially. An alternative, however, is instead to rethink agency structure and functioning. This Part offers a few possibilities.

One valuable step would be an increased focus on agency expertise. Part of this involves the selection of agency heads. Congress could specify greater qualifications in the operative statute, the President could weigh expertise more heavily in appointment decisions, and expertise rather than politics could play a more central role in the Senate confirmation process.¹⁵¹ Notably, a greater emphasis on expertise would, for many agencies, involve drawing from members of regulated industries and lawyers who represent them. Consequently, a greater emphasis on expertise would reduce necessarily reduce the degree to which industry background, potential conflicts of interest and the revolving door are considered disqualifying attributes.¹⁵² To the extent that revolving door concerns limit the ability of agencies to draw from talented members of industry, the agency may sacrifice both expertise and its ability to stay current.¹⁵³

By way of example, Mary Jo White served as Chair of the SEC from 2013 to 2017. Prior to her service, she was a partner at a NY law firm as well as the only woman to serve as the U.S. Attorney for the Southern District of New York. There is little question that White was one of the top securities lawyers in the country, yet she faced countless challenge for alleged conflicts of interest that critics characterized as making her too protective of Wall Street.¹⁵⁴

Congress could also reduce politicization in multimember bipartisan commissions by limiting the power of the Chair. As Todd Phillips has argued, Congress could limit the power of agency chairs and create

151. By analogy, a number of statutes impose representational requirements with respect to heads of certain agencies. See Feinstein, *supra* note 149, at 24–26 (describing these requirements).

152. David Dayen, *A Corporate Defender at Heart, Former SEC Chair Mary Jo White Returns to Her Happy Place*, INTERCEPT (Feb. 17, 2017), <https://theintercept.com/2017/02/17/a-corporate-defender-at-heart-former-sec-chair-mary-jo-white-returns-to-her-happy-place/> [<https://perma.cc/CL8Q-RE2U>] (criticizing former SEC Chair Mary Jo White for her sixth trip “through the revolving door” between government service and the private sector)

153. James D. Cox & Randall S. Thomas, *Revolving Elites: The Unexplored Risk of Capturing the SEC*, 107 GEO. L.J. 845 (2019).

154. Joe Patrice, *Watch The SEC's Mary Jo White Get Publicly Shamed*, ABOVE THE L. (Sept. 15, 2015), <https://abovethelaw.com/2015/09/watch-the-secs-mary-jo-white-get-publicly-shamed/> [<https://perma.cc/7NV9-7ZFQ>] (describing a mobile billboard set up by a White critic).

structures in which all commissioners have greater power to raise proposals and determine “which items receive staff attention.”¹⁵⁵

In addition, agencies could better ground their decisions in scientific and technical criteria. That agency decisions are frequently based on policy considerations, and sometimes do not even engage with the technical features of the regulatory environment makes it easier for courts to second guess agency determinations. Even lengthy rulemaking releases frequently lack supporting empirical support for the agency’s claims, making the agency’s conclusions vulnerable to criticism.¹⁵⁶ As Paul Mahoney suggests, “The SEC would be better off returning to its roots as an apolitical, technocratic organization whose positions do not shift with the political winds.”¹⁵⁷

In addition to reemphasizing expertise, justifying the administrative state requires restoring the insulation necessary to ensure that agency decisions are driven by that expertise rather than politics. Simply put, starting as early as the adoption of the APA, U.S. law has increasingly sacrificed insulation for accountability. This approach is misguided. The quest for accountability undermines the critical distinction between agencies and the political branches.¹⁵⁸ Political accountability is a useful constraint when agencies are implementing policies based on contested values. By

155. Phillips, *supra* note 129, at 332.

156. For example, in its release proposing rules requiring climate risk disclosure, the SEC devoted a single footnote to the extent to which investors are demanding such disclosure through the shareholder proposal process and relied on a blog posting rather than conducting its own empirical analysis. *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, Sec. Act Rel. No. 11042 (March 21, 2022), at 322 n.803, <https://www.sec.gov/files/rules/proposed/2022/33-11042.pdf> [<https://perma.cc/CW64-GXRR>]. Instead, the SEC could have supported its rule proposal with data on the types of information sought by investors and the extent to which issuers were providing that information voluntarily. *See, e.g.*, Jill E. Fisch & Adriana Robertson, *Shareholder Proposals and the Debate over Sustainability Disclosure*, in *BOARD-SHAREHOLDER DIALOGUE: POLICY DEBATE, LEGAL CONSTRAINTS AND BEST PRACTICES* (Cambridge Univ. Press, forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4477680 [<https://perma.cc/UME2-KN U4>] (empirically analyzing shareholder proposals seeking ESG disclosure and considering implications with respect to a mandatory disclosure requirement); *see also* Jill E. Fisch & Adriana Z. Robertson, *What’s in a Name? ESG Mutual Funds and the SEC’s Names Rule* (forthcoming S. Cal. L. Rev. 2024) (contesting the empirical basis for the SEC’s conclusion that regulatory reform to the Names Rule was required to protect investors from greenwashing).

157. Mahoney, *supra* note 72, at 950.

158. A notable byproduct of the procedural mechanisms designed to increase agency accountability is a reduction in responsiveness and flexibility. Agency rulemaking has become increasingly time-consuming. The need to provide exhaustive details about the rationale for regulation, to analyze its costs and benefits, to comply with the notice and comment process and, in the cases of most agencies, OIRA review, contributes both to agency overreaching in an effort to implement its entire regulatory agenda in a single rulemaking and ossification because the costs of regulatory reform are too high. On the other hand, some commentators defend ossification as improving the quality of regulation. *See generally* Aaron L. Nielson, *Optimal Ossification*, 86 GEO. WASH. L. REV. 1209 (2018) (summarizing criticisms and benefits of ossification).

contrast, it hamstrings agency action that is grounded in technical criteria that agency officials are better suited to develop and evaluate than political actors.

Congress could facilitate the emphasis on expertise by identifying with greater specificity the issues or problems that a particular agency is intended to address. Rather than providing agencies with a broad mandate to regulate in the public interest, statutes could also identify the intended scope of that analysis or the projected beneficiaries of the regulation.¹⁵⁹ Greater statutory precision would provide guidance in terms of the nature of the agency's expertise. Thus, for example, when Congress ordered the SEC to adopt rules requiring conflict minerals disclosure,¹⁶⁰ the agency reasonably objected that such disclosure rules were far afield from its expertise regarding capital market disclosure.¹⁶¹

The distinction between issues that are peculiarly within the competence of an administrative agency and issues that involve the agency getting outside its lane may be a better way of understanding the Supreme Court's evolution of the major questions doctrine. This Article disagrees with the Supreme Court's characterization of that doctrine in *West Virginia v. EPA*, however as based on whether the congressional delegation of agency power is clear.¹⁶² For the reasons discussed above, Congress should not be able to evade its own accountability by delegating what are essentially political decisions to an agency. Instead, the legitimacy of the agency's exercise of power should be evaluated by whether the nature of the underlying question is within the scope of the agency's specialized expertise. In *West Virginia*, the Clean Air Act delegated to the EPA the task of reducing air pollution. As Justice Kagan explained in dissent, the task of balancing the nation's energy needs and the potential environmental benefits, in making its regulatory decisions, is "smack in the middle of [the] EPA's wheelhouse."¹⁶³ By way of comparison, the evaluation of the

159. The nondelegation doctrine offers a plausible basis for the Court to demand that Congress impose such limits, although an extensive treatment of that doctrine is beyond the scope of this Article. Cf. Daniel E. Walters & Elliott Ash, *If We Build It, Will They Legislate? Empirically Testing the Potential of the Nondelegation Doctrine to Curb Congressional "Abdication"*, 108 CORNELL L. REV. 401, 410–414 (2023) (questioning whether the resurrection of the nondelegation doctrine will address congressional abdication of its lawmaking responsibility).

160. Dodd-Frank Wall Street Reform and Consumer Protection Act § 1502(a).

161. See, e.g., Celia R. Taylor, *Drowning in Disclosure: The Overburdening of the Securities & Exchange Commission*, 8 VA. L. & BUS. REV. 85, 100 (2014) ("Then-Chairman Mary Shapiro acknowledged that the Commission lacked expertise on the mining of conflict minerals and the disclosure matters mandated by the statute.")

162. *West Virginia v. EPA*, 597 U.S. 697, 724 (2022) ("[T]he major questions doctrine . . . took hold because it refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted.")

163. *Id.* at 771 (Kagan, J., dissenting).

CDC's eviction moratorium in *Alabama Association of Realtors* looks quite different.¹⁶⁴ There is little reason to believe that the CDC possesses any specialized expertise in the regulation of landlord-tenant relationships.

Indeed, the debate among the Justices in *West Virginia v. EPA* over the application of the major questions doctrine highlights the importance of evaluating the administrative state in historical context. Pritchard and Thompson's detailed investigation of the key figures both at the SEC and on the Court, both at the time of the New Deal and through the subsequent history of the SEC reveal the importance of both expertise and politics in evaluating the legitimacy of SEC regulation. As this Article has explained, a renewed focus on those factors is equally important today.

CONCLUSION

As Pritchard and Thompson remind us, judicial skepticism of administrative agencies in general, and the SEC in particular, is nothing new. Since the New Deal, the Supreme Court has expressed concern about expansive exercises of agency power. Yet agencies in the modern administrative state have evolved from the insulated and technical bureaucracy that drew the Court's grudging acceptance to play an ever-greater role in not just implementing but formulating regulatory policy over an expansive range of issues. That the modern Court would express concern over these developments is not surprising.

What remains unclear is the extent to which these concerns will lead the Court to cut back dramatically on agency power by expanding the scope of the nondelegation doctrine, eliminating *Chevron* deference and extending the major questions doctrine. This Article suggests a more nuanced approach. For the Court, the Article counsels greater consideration of the extent to which agency actions are the product of the agency's expertise and grounded in technical as opposed to political considerations. For Congress and the President, the Article argues the political branches can increase agency legitimacy and the quality of agency regulation by paying greater attention to staffing and heading agencies with true experts, providing agencies with clear guidelines premised on that expertise and then relying on agencies to make policies consistent with that expertise rather than attempting to override agency judgments.

164. *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021).