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Partisanship Creep

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PARTISANSHIP CREEP

Katherine Shaw

ABSTRACT—It was once well settled and uncontroversial—reflected in legislative enactments, Executive Branch practice, judicial doctrine, and the broader constitutional culture—that the Constitution imposed limits on government partisanship. This principle was one instantiation of a broader set of rule of law principles: that law is not merely an instrument of political power; that government resources should not be used to further partisan interests, or to damage partisan adversaries.

For at least a century, each branch of the federal government has participated in the development and articulation of this nonpartisanship principle. In the legislative realm, federal statutes beginning with the 1883 Pendleton Act have dramatically limited the role of partisanship in federal employment decisions. Since 1939, the Hatch Act has reflected a related constitutional principle: just as most federal workers should not be selected or terminated on the basis of partisanship, neither should they be permitted to use their positions, once attained, for partisan pursuits. Executive Branch law and practice have long reflected a similar set of principles in the employment realm and beyond. The Supreme Court has also enforced a nonpartisanship principle across a range of cases, including the political patronage cases, in which the Court has announced and elaborated a constitutional requirement that most local government hiring, firing, and other employment decisions be made independent of partisanship.

But these settled understandings, across institutions and bodies of law and practice, have come under attack in recent years. Over the course of his term in office, President Donald Trump grew increasingly willing to challenge nonpartisanship principles directly, culminating in his issuance of an executive order that would have given him the authority to reclassify large swaths of the federal workforce as outside of the civil service—an effort he has pledged to revive if given the chance. In perhaps less obvious ways, the nonpartisanship principle has been undermined by recent decisions of the Roberts Court. Across a range of cases—involving gerrymandering, public corruption, campaign finance, and manipulation or abuse of the political process—the Court has begun to evince a degree of sympathy for partisan political motives, either holding or at least suggesting that the Court is limited in its ability to prevent government officials from pursuing partisan ends. At the same time, the Court has increasingly emphasized the

importance of presidential control over Executive Branch actors, a growing body of law that may represent yet another threat to long-standing principles of government nonpartisanship.

Upending the long-standing constitutional settlement in favor of nonpartisanship could have dramatic consequences for both constitutional theory and constitutional practice—and could radically change the face of American governance.

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INTRODUCTION	1565
I. THE EXISTING SETTLEMENT	1571
A. <i>Legislative Authority</i>	1573
B. <i>Executive Branch Law and Practice</i>	1582
C. <i>Impeachment History</i>	1586
D. <i>Judicial Authority</i>	1593
II. THE PARTISANSHIP TURN IN THE EXECUTIVE BRANCH	1599
A. <i>Personnel</i>	1600
B. <i>Impeachment Defenses</i>	1603
C. <i>Litigation</i>	1604
III. THE PARTISANSHIP TURN IN JUDICIAL DOCTRINE	1609
A. <i>Presidential Control</i>	1609
B. <i>Partisan Gerrymandering</i>	1614
C. <i>Regulating Elections</i>	1617
D. <i>Public Corruption</i>	1618
E. <i>Campaign Finance</i>	1621
F. <i>Public Employee Speech</i>	1622
IV. IMPLICATIONS AND POTENTIAL RESPONSES	1625
CONCLUSION	1631

INTRODUCTION

It was once well settled and uncontroversial—reflected and grounded in legislative enactments, Executive Branch practice, judicial doctrine, and the broader constitutional culture—that the Constitution imposed limits on partisanship in public employment and by public officials. This principle was one instantiation of a broader set of rule of law principles: that law is not merely an instrument of political power; that government resources should not be used to further partisan interests, or to damage partisan adversaries. In the legislative realm, federal statutes beginning with the 1883 Pendleton Act have implemented this constitutional value, dramatically limiting the role of partisanship in most federal employment decisions.¹ Since 1939, the Hatch Act has reflected a related principle. Just as most federal workers should not be selected or terminated on the basis of partisanship, neither should they be permitted to use their positions, once attained, for partisan pursuits.² And for nearly a century, every state has imposed limits on political hiring and firing, as well as on the permissible political activities of state

¹ Pendleton Act, Pub. L. No. 47-27, 22 Stat. 403 (1883); *see infra* Section I.A.

² Hatch Act, Pub. L. No. 76-252, 53 Stat. 1147 (1939) (codified as amended at 5 U.S.C. §§ 1501–08, 7321–26).

employees.³ In addition to these state and federal statutes, federal Executive Branch practice, beginning with the Jefferson Administration, has reflected a similar set of principles in the employment realm and beyond.⁴ These same nonpartisanship principles feature prominently in impeachment history.⁵

The Supreme Court has also enforced a nonpartisanship principle across a range of cases. The best known of these are the political patronage cases, in which the Court has announced and elaborated a constitutional requirement that most local government hiring, firing, and other employment decisions be made independently of political considerations.⁶ And the Court has invoked the principle in a variety of other contexts, well beyond patronage.⁷

These settled understandings, across institutions and bodies of law and practice, largely endured even during the Trump Administration, when many of the norms of legal and political culture were routinely flouted.⁸ Administration officials for the most part declined to assert, and instead disclaimed, partisan motives for controversial policies—the travel bans,⁹ the Census citizenship question,¹⁰ and the revocation of the Deferred Action for Childhood Arrivals program.¹¹ Across a range of venues, Trump Administration officials insisted that their actions were driven by national

³ See U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 563 (1973) (“[A]ll 50 States have restricted the political activities of their own employees.”). I should note, however, that, in a number of states, this status quo has been under fire in recent years. See, e.g., Melissa Maynard, *States Overhaul Civil Service Rules*, STATELINE (Aug. 27, 2013), <https://stateline.org/2013/08/27/states-overhaul-civil-service-rules/> [https://perma.cc/JR27-WZ9B] (“Now a handful of governors are working to change [state civil service] rules.”).

⁴ See *infra* Section I.B.

⁵ See *infra* Section I.C.

⁶ See *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); *Branti v. Finkel*, 445 U.S. 507, 517 (1980); *Rutan v. Republican Party*, 497 U.S. 62, 65 (1990); *infra* Section I.D.1.

⁷ See *infra* Section I.D.2.

⁸ See, e.g., Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 7 (2020) (describing “President Donald J. Trump’s attack on the basic norms and institutions of democracy at the national level”); Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 IND. L.J. 177, 178 (2018) (“[Trump] flout[ed] nonlegal but obligatory ‘constitutional conventions’ that had previously guided and disciplined occupants of the White House.”); Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2214 (2018) (detailing the Trump Administration’s testing of “[t]he norm of investigatory independence”).

⁹ *Trump v. Hawaii*, 138 S. Ct. 2392, 2417, 2421 (2018).

¹⁰ Transcript of Oral Argument at 42–43, *Dep’t of Com. v. New York*, 139 S. Ct. 2551 (2019) (No. 18-966).

¹¹ Transcript of Oral Argument at 5, *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020) (Nos. 18-587, 18-588, 18-599).

security imperatives,¹² efforts to enforce the Voting Rights Act,¹³ or concerns about the lawfulness of prior initiatives.¹⁴ Much of this may well have been “animus laundering.”¹⁵ But the effort to give reasons that were *not* political reflected the power of the norm against grounding—or at least explaining—government action in purely political terms.

The power of the nonpartisanship principle was even on display in some presidential removals, despite broad consensus that limits on partisanship by government officials do not apply to the President’s employment decisions vis-à-vis the highest ranking officials, who are understood to serve at the pleasure of the president. Take President Trump’s firing of FBI Director James Comey. Notwithstanding the widely held view that the FBI Director may be fired for any reason,¹⁶ Trump offered a public explanation for the firing that relied on apolitical principles—in particular, Comey’s flouting of the FBI’s policies when it came to Hillary Clinton.¹⁷ And Trump enlisted the

¹² Brief of Petitioners at 37, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965), 2018 WL 1050350, at *37 (“[T]he President determined that it was in the national interest to restrict entry of aliens who could not be vetted with adequate information—both to protect national security and to elicit improvement by those governments.”).

¹³ Brief of Petitioners at 3, *Dep’t of Com. v. New York*, 139 S. Ct. 2551 (2019) (No. 18-966), 2019 WL 1093052, at *3 (explaining that the Commerce Secretary’s “decision and memorandum” announcing the addition of the citizenship question “responded to a December 12, 2017 letter . . . from the Department of Justice . . . stat[ing] that citizenship data is ‘critical’ to DOJ’s enforcement of Section 2 of the Voting Rights Act of 1965”); *see* Hearing with Commerce Secretary Ross, Joint Appendix (Volume 3) at 956, *New York*, 139 S. Ct. 2551 (No. 18-966) (containing the testimony of Secretary Wilbur Ross before the House Committee on Ways and Means on March 22, 2018).

¹⁴ Brief of Petitioners at 33, *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020) (Nos. 18-587, 18-588, 18-589), 2019 WL 3942900, at *33 (“DHS’s decision to wind down the DACA policy was more than justified by DHS’s serious doubts about the lawfulness of the policy and the litigation risks in maintaining it.”).

¹⁵ *See* Joshua Matz, *Trump’s Despicable Decisions Look Awfully Alike*, WASH. POST (Mar. 27, 2018), https://www.washingtonpost.com/opinions/getting-deja-vu-on-trumps-transgender-ban-youre-not-alone/2018/03/27/4e78091e-312e-11e8-8bdd-cdb33a5eef83_story.html [<https://perma.cc/V99F-QLTV>] (describing the process by which Trump Administration advisors and lawyers sought to refashion policies enacted for impermissible reasons in more legally defensible forms); *cf.* Ekow N. Yankah, *Legal Hypocrisy*, 32 *RATIO JURIS* 2, 5 (2019) (describing “hypocrisy” as “deceit that violates avowed standards”).

¹⁶ *See, e.g.*, Memorandum from Daniel L. Koffsky, Acting Assistant Att’y Gen., Off. Legal Couns., DOJ, to Stuart M. Gerson, Acting Att’y Gen., DOJ 2, 4 (Jan. 26, 1993), <https://www.justice.gov/olc/page/file/1085346/download> [<https://perma.cc/3ZQT-BAFV>]; Benjamin Wittes & Susan Hennessey, *The Nightmare Scenario: Trump Fires Comey, the One Man Who Would Stand Up to Him*, *LAWFARE* (May 9, 2017), <https://www.lawfareblog.com/nightmare-scenario-trump-fires-comey-one-man-who-would-stand-him> [<https://perma.cc/Y4NX-EUKB>].

¹⁷ *See* Michael D. Shear & Matt Apuzzo, *F.B.I. Director James Comey Is Fired by Trump*, *N.Y. TIMES* (May 9, 2017), <https://www.nytimes.com/2017/05/09/us/politics/james-comey-fired-fbi.html> [<https://perma.cc/3R9N-8HAH>].

assistance of Deputy Attorney General Rod Rosenstein in making the public case that those principles justified or even required removing Comey.¹⁸

But despite these markers of stability, the nonpartisanship principle has been under attack in recent years. Over the course of his term in office, President Trump grew increasingly willing to challenge nonpartisanship values directly, culminating in his issuance of an executive order that, had its provisions gone into effect, might have reclassified large swaths of the federal workforce as outside of the career civil service, and thus no longer covered by long-standing protections against political reprisal or removal.¹⁹ Trump's postpresidential rhetoric has become even more explicit on this score, as he has begun to suggest making *all* federal workers fireable by the President at will²⁰—a suggestion other aspiring politicians have echoed.²¹

In perhaps less obvious ways, the nonpartisanship principle has also been drawn into question by recent decisions of the Roberts Court. This was most explicit in *Rucho v. Common Cause*, in which a five-Justice majority closed the door to federal court challenges to partisan gerrymanders.²² The Court explained that when it comes to redistricting, federal courts are powerless to determine the point at which “partisanship become[s] unconstitutional.”²³ But the Court's move in *Rucho* did not happen in isolation. Rather, across a range of cases—public corruption prosecutions,²⁴

¹⁸ See Memorandum from Rod J. Rosenstein, Deputy Att’y Gen., DOJ, to Jeff Sessions, Att’y Gen., DOJ 3 (May 9, 2017), <https://www.justice.gov/oip/foia-library/moss/download> [<https://perma.cc/GGC3-7H4B>] (“Although the President has the power to remove an FBI director, the decision should not be taken lightly [T]he FBI is unlikely to regain public and congressional trust until it has a Director who understands the gravity of the mistakes and pledges never to repeat them.”). As quickly became clear, Trump's firing of Comey was likely a result of Comey's refusal to pledge loyalty to Trump and to commit to “letting [former National Security Advisor Michael] Flynn go,” see *Open Hearing with Former FBI Director James Comey: Hearing Before the S. Select Comm. on Intel.*, 115th Cong. 16, 50 (2017) (testimony of James B. Comey, former Director, FBI), as well as Comey's refusal to publicly assert that President Trump was not under investigation. See ROBERT S. MUELLER III, 2 REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 4 (2019), https://www.justice.gov/storage/report_volume2.pdf [<https://perma.cc/2KZF-EUWP>].

¹⁹ Exec. Order No. 13,957, 85 C.F.R. §§ 67632–33; see also *infra* Section II.A (summarizing the effect of Executive Order 13,957 on civil servants). No employees were actually reclassified under this executive order because agencies were in the early stages of implementation when President Joseph Biden Jr. rescinded the order two days after his inauguration. See Exec. Order No. 14,003, 86 Fed. Reg. 7231 (Jan. 22, 2021).

²⁰ *Former President Trump in Florence, South Carolina*, C-SPAN (Mar. 12, 2022), <https://www.c-span.org/video/?518447-1/president-trump-florence-south-carolina> [<https://perma.cc/F2N7-FWV7>] (“We will pass critical reforms making *every* executive branch employee fireable—fireable—by the President of the United States. The deep state must and will be brought to heel.” (emphasis added)).

²¹ See *infra* Section II.A.

²² 139 S. Ct. 2484, 2506–07 (2019).

²³ *Id.* at 2501.

²⁴ See *infra* Section III.D.

campaign finance cases,²⁵ challenges to manipulation or abuse of elections and the political process²⁶—the Court has begun to evince sympathy for partisan motives, either holding or at least suggesting that the Court is limited in its ability to prevent government officials from pursuing partisan ends. Commentators have, of course, noted this move in *Rucho*, a case in which partisan motives were front and center.²⁷ But the trend does not begin with *Rucho*, and it may not end there.

A separate line of cases, emphasizing the importance of presidential control over Executive Branch actors, represents yet another serious threat to long-standing principles of government nonpartisanship. In those cases, the Court has invalidated statutes that limit the President’s ability to remove Executive Branch officials, reasoning that those limitations impermissibly undermine presidential control and thus presidential power. The Court has explained in those cases that the executive power the Constitution vests in the President generally includes unconstrained removal authority, since it is “‘only the authority that can remove’ such officials that they ‘must fear and, in the performance of [their] functions, obey.’”²⁸ To date, this logic has been deployed only in the context of “officers of the United States,”²⁹ who are by definition “political” appointees.³⁰ And yet it is not clear that the reasoning of the cases is limited to such officials, rather than also encompassing members of the “civil service,” whose selection and service are merit-based and apolitical under current law.

Extending these appointment and removal cases beyond just “officers” could have sweeping implications for both constitutional theory and constitutional practice. As a matter of theory, virtually all of today’s most important debates in federal administrative and structural constitutional law

²⁵ See *infra* Section III.E.

²⁶ See *infra* Sections III.B–C.

²⁷ See, e.g., Adam Liptak, *Supreme Court Bars Challenges to Partisan Gerrymandering*, N.Y. TIMES (June 27, 2019), <https://www.nytimes.com/2019/06/27/us/politics/supreme-court-gerrymandering.html> [<https://perma.cc/ELG8-MWV3>].

²⁸ *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020) (quoting *Bowsher v. Synar*, 478 U.S. 714, 726 (1986)); see also *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 513–14 (2010) (“The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so. That power includes, as a general matter, the authority to remove those who assist him in carrying out his duties.”); *Collins v. Yellen*, 141 S. Ct. 1761, 1787 (2021) (“The President must be able to remove not just officers who disobey his commands but also those he finds ‘negligent and inefficient,’ those who exercise their discretion in a way that is not ‘intelligen[t] or wis[e],’ those who have ‘different views of policy,’ those who come ‘from a competing political party who is dead set against [the President’s] agenda,’ and those in whom he has simply lost confidence.” (alterations in original) (emphasis added) (citations omitted)).

²⁹ U.S. CONST. art. II, § 2, cl. 2.

³⁰ See *Buckley v. Valeo*, 424 U.S. 1, 126 (1976); *Freytag v. Comm’r*, 501 U.S. 868, 919, 921 (1991); *Lucia v. SEC*, 585 U.S. 237, 244–45 (2018).

unfold against a background assumption that a majority of the federal workforce is composed of “civil service” employees rather than political appointees and that political actors are limited in their ability to control the composition and activities of the government workforce on partisan terms.³¹ As a matter of practice, upending the long-standing settlement around limits on partisanship in federal employment would have dramatic consequences for American governance.

These threats to the nonpartisanship principle raise serious concerns in the present moment, when there is broad consensus about the precarious state of American constitutional democracy. Surveys reveal that a significant majority of Americans believe that our democracy is in serious peril.³² Scholars of comparative democracy and democratic decline were sounding the alarm about the health and resilience of the American democratic system well before the election of 2020.³³ And that election, although removing an avowedly antidemocratic official from the office of the presidency, does not appear to have effected a restoration of democratic health. Indeed, many of the pathologies on display in the years leading up to 2020 appear only to have increased in that election’s aftermath. A majority of Republican voters embrace former President Trump’s claims that he was the rightful winner of the 2020 election.³⁴ The January 6 attack on the U.S. Capitol, undertaken with the explicit purpose of disrupting the peaceful transfer of power, is viewed by more Republicans as an instance of “legitimate protest” than as a riot.³⁵ Election law scholars and commentators across the ideological

³¹ See *infra* Section I.A.

³² Joel Rose & Liz Baker, *Six in Ten Americans Say U.S. Democracy Is in Crisis as the ‘Big Lie’ Takes Root*, NPR (Jan. 3, 2022), <https://www.npr.org/2022/01/03/1069764164/american-democracy-poll-jan-6> [https://perma.cc/4AGY-RMF3]; DAVID SCHLEIFER & ANTONIO DIEP, PUB. AGENDA, STRENGTHENING DEMOCRACY: WHAT DO AMERICANS THINK? 2 (2019), https://www.publicagenda.org/wp-content/uploads/2019/08/Strengthening_Democracy_WhatDoAmericansThinkFINAL.pdf [https://perma.cc/P6ZS-W84R].

³³ See generally TOM GINSBURG & AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* (2018) (arguing that the United States is susceptible to democratic backsliding); TIMOTHY SNYDER, *ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY* 10 (2017) (drawing on history to highlight the vulnerability of contemporary American democracy); JAN-WERNER MÜLLER, *WHAT IS POPULISM?* 1, 6 (2016) (identifying populism as a threat to democracy, including in the United States).

³⁴ Lane Cuthbert & Alexander Theodoridis, *Do Republicans Really Believe Trump Won the 2020 Election? Our Research Suggests That They Do*, WASH. POST (Jan. 7, 2022), <https://www.washingtonpost.com/politics/2022/01/07/republicans-big-lie-trump/> [https://perma.cc/V8LW-P6M8].

³⁵ Aaron Blake, *More Republicans Now Call Jan. 6 a “Legitimate Protest” Than a “Riot,”* WASH. POST (July 7, 2022), <https://www.washingtonpost.com/politics/2022/07/07/many-republicans-no-longer-call-jan-6-an-insurrection-or-even-riot/> [https://perma.cc/P3AY-6FCX]; see also REPUBLICAN NAT’L COMM., *RESOLUTION TO FORMALLY CENSURE LIZ CHENEY AND ADAM KINZINGER AND TO NO LONGER SUPPORT THEM AS MEMBERS OF THE REPUBLICAN PARTY* (2022), <https://prod-static.gop.com/media/2->

spectrum warn that despite the relative calm of the 2022 midterm elections, future American elections, including the 2024 presidential election, are at serious risk of subversion.³⁶

Although former President Trump features prominently in all accounts of the crisis in American democracy, there is also broad consensus that the crisis began well before Trump's entry into national politics.³⁷ It also seems likely that it will persist after Trump definitively exits the national political stage. So it is imperative to look beyond any particular political actor, to other developments in American law and governance.

This Article identifies one such development—a set of serious threats to long-standing limits on government partisanship. Part I describes the constitutional nonpartisanship principle. Canvassing legislation and other congressional activity (including impeachment history), Executive Branch law and practice, and case law, this Part identifies a constitutional principle, acquiesced in and reinforced by each branch of government for at least a century, that there are limits on government officials' ability to engage in partisan political activity. Part II describes the increasingly explicit challenges to this settled principle lodged by political actors in recent years. Part III identifies a developing judicial shift away from the nonpartisanship principle, across a range of areas of judicial doctrine. Part IV draws out implications and offers some potential responses.

I. THE EXISTING SETTLEMENT

It was once largely beyond dispute that limits on government officials' ability to advance purely partisan goals were firmly grounded in the Constitution. Indeed, each branch of the federal government has long worked to implement, across various fora and in different forms, versions of this nonpartisanship principle. This Part walks through that background. It begins with congressional implementation of the nonpartisanship principle. It then surveys Executive Branch practice and precedent before considering impeachment history. Finally, it turns to a series of cases in which the Supreme Court has identified and enforced a nonpartisanship principle

RESOLUTION-TO-FORMALLY-CENSURE-LIZ-CHENEY-AND-ADAM-KINZINGER.pdf [https://perma.cc/3N8S-XQ9U] (describing the January 6th Select Committee as engaged in "persecution of ordinary citizens engaged in legitimate political discourse").

³⁶ Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. F. 265, 265 (2022); J. Michael Luttig, *Opinion: The Republican Blueprint to Steal the 2024 Election*, CNN (Apr. 22, 2022), <https://www.cnn.com/2022/04/27/opinions/gop-blueprint-to-steal-the-2024-election-luttig/index.html> [https://perma.cc/JE55-PULT].

³⁷ See, e.g., STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018) (discussing threats to American democracy in the context of global trends in democratic decline).

rooted in the Constitution. To be clear, the claim in this Part is not that the precise content of that principle is fixed and unchanging; indeed, its contours have shifted substantially over time. And it does not, nor should it, apply identically in all circumstances.³⁸ But until recently, the principle's existence and constitutional foundations appeared beyond dispute.

My focus, as well as the focus of the sources canvassed here, is primarily on the approach of both law and institutions to official *partisanship*—that is, the “activity of public officeholders benefitting or harming adherents of particular political parties”³⁹—rather than politics or political motives writ large.⁴⁰ Clearly, the work of government cannot be separated from what is sometimes referred to as “high politics”—that is, the “struggle[] over competing values and ideologies.”⁴¹ By contrast, the consensus I am describing here is over the permissibility of efforts to place limits on “low politics”—at base, “struggles over which group or party will hold power.”⁴² Put differently, all constitutional politics contain a heavy dose of low politics.⁴³ But against that backdrop, the materials discussed here reveal a striking consensus around the impermissibility of government action taken to benefit or harm a particular political party—that is, overt and explicit partisanship.⁴⁴

³⁸ See Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325, 1331–32 (2018).

³⁹ Justin Levitt, *The Partisanship Spectrum*, 55 WM. & MARY L. REV. 1787, 1794 (2014); Tonja Jacobi & Dylan Schweers, *Justice, Interrupted: The Effect of Gender, Ideology, and Seniority at Supreme Court Oral Arguments*, 103 VA. L. REV. 1379, 1485 n.197 (2017) (“‘Partisan’ . . . typically signifies ideologically predictable preferences that are defined by party affiliation.”).

⁴⁰ Cf. Shalev Gad Roisman, *Presidential Motive*, 108 IOWA L. REV. 1, 5–6 (2022) (discussing the role of presidential motive in analyses of presidential power); Katherine Shaw, *Speech, Intent, and the President*, 104 CORNELL L. REV. 1337, 1339–40 (2019) (considering the role of presidential speech and presidential intent in considering the lawfulness of presidential action).

⁴¹ Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1061 (2001); see also Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 GA. L. REV. 699, 750 (2006); FELIX FRANKFURTER, *The Zeitgeist and the Judiciary*, in LAW AND POLITICS: OCCASIONAL PAPERS OF FELIX FRANKFURTER 1913–1938, at 3, 6 (Archibald MacLeish & E.F. Prichard eds., 1939) (“[C]onstitutional law, in its relation to social legislation, is not at all a science, but applied politics, using the word in its noble sense.”).

⁴² Balkin & Levinson, *supra* note 41, at 1061. Although both Balkin and Levinson now appear dubious about the continued force of these labels when it comes to judicial actors, they seem to me to retain some utility in the context of the nonjudicial actors who are my focus here. See Sanford Levinson, *Cock-Eyed Optimist Meets Chicken Little: Jack Balkin on the American Future*, 86 MO. L. REV. 555, 567 (2021) (approvingly referencing Balkin’s conclusion that “the distinction might have outlived its use-by date”).

⁴³ See JOSH CHAFETZ, CONGRESS’S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 16 (2017).

⁴⁴ My use of the term is also different from scholars such as Cass Sunstein, who I take in some works to be using the term to mean something like nonneutrality on the part of government actors, but not necessarily low or party politics. See Cass R. Sunstein, *Neutrality in Constitutional Law (with Special*

A. Legislative Authority

A strong norm against partisanship in federal employment—a norm with explicit, though complex, constitutional foundations—is well established as a matter of federal statutory law.⁴⁵ The most important federal statute here is the 1883 Pendleton Act,⁴⁶ passed in the wake of President James Garfield’s assassination by a disgruntled office seeker.⁴⁷ Although Garfield’s assassination catalyzed the bill’s passage, the final push followed decades of efforts by reformers determined to reduce the power of patronage in federal employment.⁴⁸ The “spoils system,” although today largely associated with Andrew Jackson, existed to some degree in every early presidential administration. Political leaders installed cronies—sometimes manifestly unqualified ones—in a range of positions, with the ever-present prospect of turnover undermining expertise, morale, and the quality of government service.⁴⁹ Efforts at reform date back nearly as far as the practice itself, with roots stretching back to the Revolutionary Era.⁵⁰ By the early 1880s, the increased desire for both expertise and stability in the ranks of government officials, together with a “popular clamor for a reorientation of

Reference to Pornography, Abortion, and Surrogacy), 92 COLUM. L. REV. 1, 2 (1992) (“[G]overnment decisions that disturb existing distributions raise the spectre of constitutionally questionable partisanship. Decisions that respect existing distributions are neutral and constitutionally unobjectionable.”).

⁴⁵ Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section 5 Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1946–47 (2003); Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351, 353, 379 (2017).

⁴⁶ Pendleton Act, Pub. L. No. 47-27, 22 Stat. 403 (1883).

⁴⁷ ARI HOOGENBOOM, *OUTLAWING THE SPOILS: A HISTORY OF THE CIVIL SERVICE REFORM MOVEMENT 1865–1883*, at 215–17, 249 (1968).

⁴⁸ HAROLD H. BRUFF, *BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE* 409 (2006); *Elrod v. Burns*, 427 U.S. 347, 354 (1976) (“[A] few decades after Andrew Jackson’s administration, strong discontent with the corruption and inefficiency of the patronage system of public employment eventuated in the Pendleton Act, the foundation of modern civil service.”). The first serious legislative effort was undertaken by Massachusetts Republican Senator Charles Sumner, who in 1864 introduced a series of civil service bills “aimed at the eventual extinction of the power of patronage through the application of modern merit system techniques.” PAUL P. VAN RIPER, *HISTORY OF THE UNITED STATES CIVIL SERVICE* 65 (1958).

⁴⁹ Ari Hoogenboom, *The Pendleton Act and the Civil Service*, 64 AM. HIST. REV. 301, 301–02 (1959).

⁵⁰ See NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940*, at 9, 83 (2013) (describing “the civic republican dream of the revolutionary era” as in part “to divorce governmental power from individual self-interest”).

the underlying ethics of officeholding,”⁵¹ resulted in passage of the Pendleton Act—the first federal civil service legislation.⁵²

The Pendleton Act provided for the creation of competitive examinations for entering the federal workforce,⁵³ although initially only for a relatively small subset of federal workers.⁵⁴ The Act also provided that “no person in the public service is . . . under any obligations to contribute to any political fund, or to render any political service,” and guaranteed that federal workers “will not be removed or otherwise prejudiced for refusing to do so.”⁵⁵ In addition to prohibiting political discharges for covered employees, the law announced a broader principle of civil service neutrality, barring employers from “coerc[ing] the political activity of any person or body.”⁵⁶ The law also created what was essentially a new agency, the Civil Service Commission.⁵⁷ (In 1871, an appropriations rider had authorized the President to prescribe “rules and regulations for the admission of the persons into the civil service”; pursuant to that authorization President Ulysses S. Grant had created a Commission by the same name, but Congress allowed its funding to lapse by 1875, so the 1883 law essentially created a new agency.)⁵⁸ The new, congressionally created, bipartisan commission was tasked with creating and enforcing civil service rules, including the nonpartisanship rules.⁵⁹

The debates surrounding the passage of the Pendleton Act reflect mostly parochial concerns about the timing of the bill, as well as its

⁵¹ VAN RIPER, *supra* note 48, at 537; see David E. Lewis, *Testing Pendleton's Premise: Do Political Appointees Make Worse Bureaucrats?*, 69 J. POL. 1073, 1073, 1086 (2007) (“One of the primary motivations for the 1883 passage of the Pendleton Act was to ensure competent administration of federal programs by creating a merit-based civil service system.”).

⁵² See VAN RIPER, *supra* note 48, at 537. In addition, even before the creation of the civil service, “robust statutory constraints on appointment, promotion, and removal . . . have long applied to military officers.” Zachary S. Price, *Congress's Power over Military Offices*, 99 TEX. L. REV. 491, 576 (2021).

⁵³ Pendleton Act, Pub. L. No. 47-27, § 7, 22 Stat. 403, 406 (1883). In addition, the rules prohibited service in covered positions by more than two members of a single family, *id.* § 9, provided that “no person habitually using any intoxicating beverages to excess” could be appointed to a covered position, *id.* § 8, and provided that applicants could only support their applications with recommendation as to character and residence. *Id.* § 10; see also CARL RUSSELL FISH, *THE CIVIL SERVICE AND THE PATRONAGE* 221 (1905) (describing Pendleton's coverage).

⁵⁴ DAVID H. ROSENBLUM, *FEDERAL SERVICE AND THE CONSTITUTION* 64 (2d ed. 2014).

⁵⁵ Pendleton Act § 2; VAN RIPER, *supra* note 48, at 99.

⁵⁶ Pendleton Act § 2.

⁵⁷ VAN RIPER, *supra* note 48, at 52.

⁵⁸ See STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920*, at 57–58 (1982); HOOGENBOOM, *supra* note 47, at 133.

⁵⁹ See VAN RIPER, *supra* note 48, at 99. Van Riper suggests that because only the provisions of the law mandating apolitical hiring had any genuine enforcement mechanism, the best understanding of the law is that for the positions it covered, it “demanded nonpartisanship in initial selection procedures . . . but only encouraged nonpartisanship in other matters.” *Id.*

geographic and substantive reach. But there is also some evidence of active consideration of the law's constitutionality. Senator George F. Hoar referenced long-standing debates about the scope of the President's power to remove officers of the United States and noted that the new civil service law did not implicate them: "The measure . . . does not assert any disputed legislative control over the tenure of office. The great debate as to the President's power of removal . . . does not in the least become important under the skillful and admirable portions of this bill."⁶⁰

Senator Hoar's observation may have responded both to the limited coverage of the initial Act—the new competitive examination rules were to apply only to custom houses and post offices with fifty or more employees—and also to the significant authority the Act gave the President to shape the contours of the civil service.⁶¹ The law provided that "from time to time," the Treasury Secretary, Postmaster General, and any other head of department, "at the direction of the president," were to "revise any then-existing classification or arrangement of those in their respective departments and offices."⁶²

In addition, at the time of Pendleton's enactment, existing Judicial and Executive Branch authority suggested that there was little reason for concern about the constitutionality of the new law's provisions. In 1882, the Supreme Court had upheld a pre-Pendleton conviction of a Treasury Department official for violating a prohibition on levying "political assessments" on opponents.⁶³ In the course of its opinion, the Court suggested that limits on political activity by government employees were constitutionally sound.⁶⁴

President Grant's pre-Pendleton Commission sought the opinion of the Attorney General on the new Commission's authorities.⁶⁵ Attorney General Amos T. Akerman's opinion suggested in response that the Commission could set qualifications but perhaps could not totally deprive the President

⁶⁰ 14 CONG. REC. 274 (1882).

⁶¹ Pendleton Act § 6. The Act continued, directing that the Postmaster General, Treasury Secretary, and other department heads shall, "for facilitating the execution of this act, respectively revise any then existing classification or arrangement of those in their respective departments and offices, and shall, for the purposes of the examination herein provided for, include in one or more of such classes, so far as practicable, subordinate places, clerks, and officers in the public service pertaining to their respective departments not before classified for examination." *Id.* § 6; *see also* FISH, *supra* note 53, at 221.

⁶² Pendleton Act § 6.

⁶³ *Ex parte* Curtis, 106 U.S. 371, 373–75 (1882).

⁶⁴ *Id.* at 371, 373 (concluding that a statutory prohibition on giving or receiving any "thing of value for political purposes" was driven by a desire to "promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service," a purpose that is "[c]learly . . . within the just scope of legislative power"); VAN RIPER, *supra* note 48, at 90.

⁶⁵ Civ. Serv. Comm'n, 13 Op. Att'ys Gen. 516, 516 (1871).

of appointment power, although the opinion limited its analysis to constitutional “officers”:

Congress could require that officers shall be of American citizenship of a certain age, that judges should be of the legal profession, and still leave room to the appointing power for the exercise of its own judgment and will; and I am not prepared to affirm that to go further, and require that the selection be made from persons found by the examining board to be qualified . . . would impose an unconstitutional limitation on the appointing power.⁶⁶

The limited existing legal authority, then, suggested that the Pendleton Act was understood to fall squarely within constitutional limits and perhaps could have gone further than it did in imposing conditions on both appointment and removal. Congress voted overwhelmingly to enact the law,⁶⁷ and efforts to repeal it in the years immediately following attracted only limited support.⁶⁸

Since the passage of the Pendleton Act, presidents have exercised their authority to shape the civil service, with a steady trend of increasing the percentage of covered employees.⁶⁹ By the turn of the century, less than twenty years after the law’s passage, the civil service covered nearly half of federal employees.⁷⁰ President Theodore Roosevelt in particular increased its size significantly, at the same time overhauling its rules as well as publicly promoting the idea of a career civil service.⁷¹ By 1932, the percentage of covered federal employees was 80%⁷² and by the middle of the twentieth century, 90%.⁷³ Although they have exercised their authority to change the contours of the categories of employees encompassed within the civil

⁶⁶ *Id.* at 524–25; *see also* VAN RIPER, *supra* note 48, at 106; Nicholas R. Parrillo, Do Statutory Qualifications for Officers Violate Original Meaning? New Evidence on the Early Republic’s Most Numerous Federal Civilian Officials (Oct. 13, 2022) (unpublished manuscript) (on file with *Northwestern University Law Review*).

⁶⁷ VAN RIPER, *supra* note 48, at 97; *see* HOOGENBOOM, *supra* note 47, at 246, 249 (noting that the vote was 155–47 in the House and 38–12 in the Senate).

⁶⁸ HOOGENBOOM, *supra* note 47, at 261.

⁶⁹ In the early years, presidents near the end of their terms would routinely extend the coverage of the civil service, providing permanent homes for many of their political appointees—which created some short-term partisan entrenchment even as the civil service expanded. *See* Hoogenboom, *supra* note 49, at 304.

⁷⁰ VAN RIPER, *supra* note 48, at 130.

⁷¹ *See id.* at 540.

⁷² *Id.* at 543.

⁷³ DAVID E. LEWIS & JENNIFER L. SELIN, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 67 (1st ed. 2012), https://www.acus.gov/sites/default/files/Sourcebook-2012-Final_12-Dec_Online.pdf [<https://perma.cc/S4NT-6CBX>]. Since 1960, the number of political appointees has slightly increased, but the overall percentages have held basically constant. *See* David E. Lewis, *Presidential Appointments and Personnel*, 14 ANN. REV. POL. SCI. 47–50 (2011).

service, presidents have *not* sought to remove large portions of the federal workforce from the civil service,⁷⁴ nor have they asserted removal authority vis-à-vis individual civil service employees.

The Pendleton Act's initial framework has been refined a number of times. In 1912, Congress enacted the Lloyd–La Follette Act, which provided that “no person in the classified Civil Service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing.”⁷⁵ In 1966, Congress amended the law to make explicit the President's authority to make “necessary exceptions of positions from the competitive service,” but only “as conditions of good administration warrant.”⁷⁶

The most sweeping changes to the law appeared in the Civil Service Reform Act of 1978 (CSRA),⁷⁷ enacted in the same year as the Ethics in Government Act and Inspector General Act.⁷⁸ President Jimmy Carter spearheaded the reform effort that resulted in the CSRA. When introducing his proposed reforms to Congress, Carter made clear that while a key goal was to “increase the government's efficiency by placing new emphasis on the quality of performance of Federal workers,” it was also crucial to “ensure that employees and the public are protected against political abuse of the system.”⁷⁹ Consistent with those twin objectives, the law sought to loosen some of the constraints on removing members of the civil service but at the same time recommitted to the principle of nonpartisanship. According to the Senate Report, “one of the central tasks” of the CSRA was to “allow civil servants to be able to be hired and fired more easily, but for the right

⁷⁴ Until President Trump, that is. *See infra* Section II.A.

⁷⁵ Lloyd–La Follette Act of 1912, Pub. L. No. 62-336, § 6, 37 Stat. 539, 555 (1912) (codified as amended at 5 U.S.C. § 7511); *see also* Arnett v. Kennedy, 416 U.S. 134, 162–63 (1974) (upholding the Lloyd–La Follette Act's removal standard); Bush v. Lucas, 462 U.S. 367, 368, 384, 389 (1983).

⁷⁶ 5 U.S.C. § 3302.

⁷⁷ Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified as amended in scattered sections of 5 U.S.C.); *see also* S. REP. NO. 95-969, at 18 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2740 (explaining that the Act was “designed to protect career employees against improper political influences or personal favoritism”).

⁷⁸ Ethics in Government Act of 1978, Pub. L. No. 95-251, 92 Stat. 1824 (1978) (codified as amended at 5 U.S.C. §§ 13101–46); Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (1978); Walter M. Shaub Jr., *35th Anniversary of the Ethics in Government Act*, U.S. OFF. GOV'T ETHICS, <https://oge.gov/Web/oge.nsf/Resources/35th+Anniversary+of+the+Ethics+in+Government+Act> [<https://perma.cc/HPQ5-44FP>].

⁷⁹ Letter from Jimmy Carter to U.S. Cong. (Mar. 2, 1978), *reprinted by* THE AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/federal-civil-service-reform-message-the-congress> [<https://perma.cc/YC6W-YHD4>].

reasons.”⁸⁰ The Report also announced that a major goal of the civil service was to ensure political neutrality, and it emphasized a continued commitment to the notion that merit system principles were “designed to protect career employees against improper political influences.”⁸¹

The enacted text of the CSRA reflected these sentiments. The law’s statement of “merit principles” reiterated that federal hiring was to be done without regard to “political affiliation.”⁸² It emphasized that all covered employees were “protected against arbitrary action, personal favoritism, or coercion for partisan political purposes” as well as “prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election.”⁸³ In terms of concrete changes of the sort Carter had initially proposed, the law created a new federal employment category, the Senior Executive Service, whose members had fewer job protections than members of the ordinary civil service.⁸⁴ It also created the possibility of merit pay for members of the civil service, allowed for more streamlined termination for inadequate performance, and created protections for whistleblowers.⁸⁵ The CSRA also replaced the Civil Service Commission with the Office of Personnel Management, the Merit Systems Protection Board,⁸⁶ and the Office of Special Counsel.⁸⁷ Crucially, though, nothing in either these changes to the

⁸⁰ S. REP. NO. 95-969, at 4; see also Larry M. Lane, *The Office of Personnel Management: Values, Policies, and Consequences*, in *THE PROMISE AND PARADOX OF CIVIL SERVICE REFORM* 97, 104 (Patricia W. Ingraham & David H. Rosenbloom eds., 1993) (“As CSRA was enacted, there can be little doubt that the legislative intent of Congress was to guard against politicization and to affirm merit principles.”).

⁸¹ S. REP. NO. 95-969, at 18; see also 124 CONG. REC. 27537 (1978) (statement of Sen. Charles H. Percy) (“[T]he original Civil Service Act of 1883 embodies two basic principles of good government that still hold true today: first that persons be chosen for positions of responsibility in the Federal Government on the basis of individual qualifications to do the job well; and, second, that the Federal executive bureaucracy be politically neutral, insulated from the destructive effects of the partisan patronage manifested in the ‘spoils system’ prevalent at that time.”).

⁸² 5 U.S.C. § 2301(b)(2).

⁸³ *Id.* § 2301(b)(8)(A)–(B).

⁸⁴ Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 645–46 (2021); see Mark W. Huddleston, *The Carter Civil Service Reforms: Some Implications for Political Theory and Public Administration*, 96 POL. SCI. Q. 607, 617–18 (1981); Stuart E. Eizenstat, *Jimmy Carter and Civil Service Reform* 6 (Ctr. for the Study of the Admin. State, Working Paper No. 19-16, 2019), <https://administrativestate.gmu.edu/wp-content/uploads/2019/05/Eizenstat-Working-Paper-19-16.pdf> [<https://perma.cc/C3V3-VRWL>].

⁸⁵ See Eizenstat, *supra* note 84, at 6. See generally *THE FUTURE OF MERIT: TWENTY YEARS AFTER THE CIVIL SERVICE REFORM ACT* (James Pfiffner & Douglas A. Brook eds., 2000) (describing key provisions of the CSRA and assessing their effectiveness).

⁸⁶ LEWIS & SELIN, *supra* note 73, at 44.

⁸⁷ See COMPTROLLER GEN., REPORT TO THE CONGRESS OF THE UNITED STATES: CIVIL SERVICE REFORM—WHERE IT STANDS TODAY 2 (1980), <https://www.gao.gov/assets/fpcd-80-38.pdf> [<https://perma.cc/N9GQ-AFSD>].

law or the legislative debates suggests any retreat from the principle of nonpartisanship in federal employment. And, like the original Pendleton Act and other civil service laws, the law did not purport to cover the most senior government officials, who remain subject to direct presidential appointment (subject to Senate consent, in the case of principal officers) or other Appointment Clause-compliant methods of appointment.

The settlement revealed by these events, then, reflects a determination that the constitutional values advanced by requiring nonpartisanship in most federal hiring and firing outweigh any countervailing constitutional values.⁸⁸ In other words, Congress and the presidents who signed, participated in, and abided by this general scheme appear to have concluded that a system in which the President retains the power to select and control the employment of the most senior officials, but where most federal employees attain and hold office under an apolitical, merit-based selection system, best balances the constitutional values of presidential control and a well-functioning and efficient government.

The 1939 Hatch Act reflects a set of principles closely related to Pendleton: just as most federal government workers should not be selected or subject to termination on the basis of partisanship, neither should they be permitted to use their positions for partisan pursuits.⁸⁹ Although the law postdates Pendleton by half a century, it largely codified “Rule 1” issued by the Civil Service Commission in 1883, which prohibited federal employees in the classified civil service from influencing or coercing any person or interfering with an election.⁹⁰ Section 9(a) of the Hatch Act provides:

It shall be unlawful for any person employed in the executive branch of the Federal Government, or any agency or department thereof, to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. No officer or employee in the executive branch of the Federal Government, or any agency or department thereof, shall take any active part in

⁸⁸ Cf. Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2030 n.31 (2022) (defending an approach that “centers the normative significance of statutes in constituting provisional constitutional meaning”). In addition to these legislative enactments implementing nonpartisanship norms in Executive Branch employment, Congress has itself added nonpartisan offices and staff members. See Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541, 1544–45 (2020); Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L.J. 465, 519–20 (2023).

⁸⁹ Hatch Act, Pub. L. No. 76-252, 53 Stat. 1147 (1939) (codified as amended at 5 U.S.C. §§ 1501–08, 7321–26); see also An Act to Extend to Certain Officers and Employees in the Several States and the District of Columbia the Provisions of the Act Entitled “Hatch Act,” Pub. L. No. 76-753, 54 Stat. 767 (1940) (codified as amended at 5 U.S.C. §§ 118i–118n) (extending Hatch Act provisions to certain State employees). See generally 84 CONG. REC. 4191 (Senate debate over what would become the Hatch Act); *id.* at 9596 (House debate).

⁹⁰ See U.S. CIV. SERV. COMM’N, FIRST ANNUAL REPORT 8, 12, 21 (1883).

political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects.⁹¹

In 1993, a round of amendments to the Hatch Act significantly loosened some of these restrictions, so that only on-duty federal civil servants were prohibited from engaging in “political activity”;⁹² most covered employees remained able to engage in political activity, with some limitations, when off duty and off government premises.⁹³ This standard remains the law,⁹⁴ subject to a number of exceptions, although its application has been significantly complicated by the advent of “work from home” for much of the federal workforce in recent years.⁹⁵

The Hatch Act has easily withstood the few constitutional challenges that have been brought against it. In 1947, the Court rejected one such challenge, reasoning that “Congress and the President are responsible for an efficient public service. If, in their judgment, efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers, we see no constitutional objection.”⁹⁶ In ruling on a similar challenge in 1973, the Court in *United States Civil Service Commission v. National Ass’n of Letter Carriers* took the First Amendment arguments against the Act more seriously but once again affirmed the law’s constitutionality.⁹⁷ The Court explained that it was merely confirming “the judgment of history, a judgment made by this country over the last century”: that “it is in the best interest of the country, indeed essential, that federal service should depend upon meritorious performance rather than political service, and that the political influence of federal employees on others and

⁹¹ Hatch Act § 9(a).

⁹² An Act to Amend Title 5, United States Code, to Restore to Federal Civilian Employees Their Right to Participate Voluntarily, as Private Citizens, in the Political Processes of the Nation, to Protect Such Employees from Improper Political Solicitations, and for Other Purposes, Pub. L. No. 103-94, § 7324(a), 107 Stat. 1001, 1003 (codified at 5 U.S.C. § 7324(a)).

⁹³ 5 U.S.C. § 7324(b).

⁹⁴ *Am. Fed’n of Gov’t Emps. v. Off. of Special Couns.*, 1 F.4th 180, 185 (4th Cir. 2021).

⁹⁵ U.S. OFF. SPEC. COUNS., HATCH ACT ADVISORY FOR TELEWORKING EMPLOYEES (2020), <https://osc.gov/Documents/Hatch%20Act/Advisory%20Opinions/Federal/Hatch%20Act%20Advisory%20for%20Teleworking%20Employees.pdf> [<https://perma.cc/U6DQ-72CS>].

⁹⁶ *United Pub. Workers v. Mitchell*, 330 U.S. 75, 99 (1947). The Court also considered and rejected a challenge to a Hatch Act provision that reached state and local officials, providing:

No officer or employee of any State or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency shall take any active part in political management or in political campaigns.

Oklahoma v. U.S. Civ. Serv. Comm’n, 330 U.S. 127, 129 n.1, 142–43 (1947).

⁹⁷ 413 U.S. 548, 557 (1973).

on the electoral process should be limited.”⁹⁸ Although the Court has not considered the Hatch Act in many years, a number of recent lower court cases have elaborated on this basic principle.⁹⁹ And the Court itself cited *Letter Carriers in Citizens United v. FEC* as an example of the Court crediting the government’s strong interest in “allowing governmental entities to perform their functions”—which the *Citizens United* Court suggested stood in contrast to the justifications offered unsuccessfully in defense of the federal campaign finance law at issue in that case.¹⁰⁰

Like the federal civil service laws, the Hatch Act and its subsequent amendments are now a central aspect of our legal and constitutional culture.¹⁰¹ That is not to say that the principles they embody are beyond debate or contestation or that Executive Branch officials have invariably complied with their precepts.¹⁰² But there has long been general agreement around the constitutional permissibility, perhaps even the constitutional necessity, of placing some limits on the place of partisan politics in federal employment.

In addition to limiting partisanship in federal employment, Congress has mandated partisan balance in the presidentially appointed leadership of a number of federal agencies, reflecting a determination that these agencies

⁹⁸ *Id.* Even Justice William O. Douglas’s dissent agreed that “no one could object if employees were barred from using office time to engage in outside activities whether political or otherwise.” *Id.* at 597.

⁹⁹ See *Am. Fed’n of Gov’t Emps.*, 1 F.4th at 184–85; *Burrus v. Vegliante*, 336 F.3d 82, 91 (2d Cir. 2003); *James v. Tex. Collin Cnty.*, 535 F.3d 365, 379–80 (5th Cir. 2008); *Bode v. Kenner City*, No. 17-5483, 2017 WL 3189290, at *13 (E.D. La. 2017); *Guffey v. Duff*, 330 F. Supp. 3d 66, 77 (D.D.C. 2018); *Daunt v. Benson*, 999 F.3d 299, 316–17 (6th Cir. 2021).

¹⁰⁰ *Citizens United v. FEC*, 558 U.S. 310, 341 (2010). Like the federal government, every state has long imposed limits on partisanship by state employees. See generally JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 325 (2021) (discussing state constitutional structure). The Supreme Court has rejected broad challenges to the constitutionality of those state laws. See, e.g., *Broadrick v. Oklahoma*, 413 U.S. 601, 602 (1973) (rejecting a constitutional challenge to a state law analogue to the Hatch Act).

¹⁰¹ A number of opinions of the Office of Legal Counsel address the application of the Hatch Act and its amendments to different categories of federal employees. See *Permissibility of the Admin. & Use of the Fed. Payroll Allocation Sys. by Exec. Branch Emps. for Contributions to Pol. Action Comms.*, 19 Op. O.L.C. 47 (1995); *Pol. Activity by Members of the Nat’l Guard*, 40 Op. Att’y Gen. 103 (1941); *Pol. Activity, Ambassadors & Ministers*, 39 Op. Att’y Gen. 508 (1940); *Whether 18 U.S.C. § 603 Bars Civilian Exec. Branch Emps. & Officers from Making Contributions to a President’s Authorized Re-Election Campaign Comm.*, 19 Op. O.L.C. 103 (1995); *Applicability of the Hatch Act to the Chairman of the Native Hawaiians Study Comm’n*, 6 Op. O.L.C. 292 (1982); *Application of the Hatch Act to the Vice President’s Staff*, 1 Op. O.L.C. 54 (1977). And the Office of Special Counsel, the mission of which “is to safeguard the merit system by protecting federal employees and applicants from prohibited personnel practices,” has issued a number of advisory opinions on activities under the Hatch Act. See *Hatch Act Advisory Opinions*, U.S. OFF. OF SPEC. COUNS., <https://osc.gov/Services/Pages/HatchAct-AdvisoryOpinion.aspx> [<https://perma.cc/A9XF-D7S9>].

¹⁰² See *infra* Section II.A.

should not be dominated by a single partisan perspective.¹⁰³ These agencies include the FTC,¹⁰⁴ SEC,¹⁰⁵ FEC,¹⁰⁶ FCC,¹⁰⁷ and EEOC,¹⁰⁸ among others. And, although its text references viewpoint balance or diversity rather than partisan balance, the Federal Advisory Committee Act's requirement that each advisory committee's membership be "fairly balanced in terms of the points of view represented"¹⁰⁹ also reflects a principle of apolitical expertise that is closely related to the nonpartisanship principle.¹¹⁰

B. Executive Branch Law and Practice

Executive Branch law and practice have long imposed limits on partisanship in Executive Branch hiring, as well as on the ability of federal employees to engage in partisan political activity. When it comes to the civil service, it is difficult to separate Executive from Legislative Branch activity. As the preceding Section made clear, the federal civil service, beginning even before 1883, has long been the product of a patchwork of legislation, executive orders,¹¹¹ and rules and regulations of the Civil Service Commission and its successor entities.

Beyond the practice detailed above, there is some relevant additional presidential history. In 1803, President Thomas Jefferson issued an order providing in part that

[t]he right of any officer to give his vote at elections as a qualified citizen is not meant to be restrained, nor, however given, shall it have any effect to his prejudice; but it is expected that he will not attempt to influence the votes of

¹⁰³ Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 COLUM. L. REV. 9, 17–18 (2018).

¹⁰⁴ 15 U.S.C. § 41 ("Not more than three of the Commissioners shall be members of the same political party.").

¹⁰⁵ *Id.* § 78d(a) ("Not more than three of such commissioners shall be members of the same political party, and in making appointments members of different political parties shall be appointed alternately as nearly as may be practicable.").

¹⁰⁶ 52 U.S.C. § 30106(a)(1) ("No more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party.").

¹⁰⁷ 47 U.S.C. § 154(b)(5) ("The maximum number of commissioners who may be members of the same political party shall be a number equal to the least number of commissioners which constitutes a majority of the full membership of the Commission.").

¹⁰⁸ 42 U.S.C. § 2000e-4(a) ("There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party.").

¹⁰⁹ The Federal Advisory Committee Act requires each advisory committee's membership to be "fairly balanced in terms of the points of view represented." 5 U.S.C. § 1004(b)(2).

¹¹⁰ See Brian D. Feinstein, *Identity-Conscious Administrative Law: Lessons from Financial Regulators*, 90 GEO. WASH. L. REV. 1, 8, 34–35 (2022).

¹¹¹ For example, presidents by executive order have routinely contracted and expanded the number of "covered" employees. See, e.g., VAN RIPER, *supra* note 48, at 216 n.22 (collecting executive orders).

others nor take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and his duties to it.¹¹²

President William Henry Harrison used his 1841 inaugural address to “renew[] the prohibition published by Mr. Jefferson” forbidding federal officials’ “interference in elections further than giving their own votes” and promise that “[n]ever with my consent shall an officer of the people, compensated for his services out of their pockets, become the pliant instrument of Executive will.”¹¹³ In 1877, President Rutherford B. Hayes issued an executive order providing that “no officers should be required or permitted to take part in the management of political organizations, caucuses, conventions or election campaigns.”¹¹⁴ In 1907, President Teddy Roosevelt—who had himself earlier served as a Commissioner on the Civil Service Commission¹¹⁵—issued an executive order providing that

[n]o person in the Executive Civil Service shall use his official authority or influence for the purpose of interfering with an election or affecting the result thereof.

Persons who, by the provisions of these rules, are in the competitive classified service, while retaining the right to vote as they please and to express privately their opinions on all political subjects, shall take no active part in political management or in political campaigns.¹¹⁶

The Civil Service Commission subsequently enforced that prohibition.¹¹⁷

¹¹² 10 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 98 (1899). Jefferson, the first President to enter the office following a change in party control, was preoccupied with the question of the competing imperatives of stability and change. As he wrote in a letter in March 1801, considering the prospect of large-scale removals of Federalist officeholders installed by President John Adams:

[D]eprivations of office, if made on the ground of political principles alone, would revolt our new converts, and give a body to leaders who now stand alone. Some, I know, must be made. They must be as few as possible, done gradually, and bottomed on some malversation or inherent disqualification. Where we shall draw the line between retaining all & none, is not yet settled, and will not be till we get our administration together

FISH, *supra* note 53, at 52; *cf.* WILLIAM C. DEMING, APPLICATION OF THE MERIT SYSTEM IN THE UNITED STATES CIVIL SERVICE 43 (1928) (“Many assign to Thomas Jefferson the introduction of the spoils system [because] party service was reckoned as a reason for appointment to office and party dissent as a cause for removal.”).

¹¹³ DAVID CURRIE, THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS 1829–1861, at 154 (2005).

¹¹⁴ Exec. Order No. 326 (May 26, 1877), reprinted by THE AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/executive-order-336> [https://perma.cc/KJ3M-EY2T].

¹¹⁵ Roosevelt was appointed to the Commission by President Harrison in 1889. DORIS KEARNS GOODWIN, THE BULLY PULPIT 130 (2013).

¹¹⁶ Exec. Order No. 655 (June 15, 1907).

¹¹⁷ Henry Rose, *A Critical Look at the Hatch Act*, 75 HARV. L. REV. 510, 510–11 (1962).

Long-standing Executive Branch conventions of nonpartisanship, in particular in the context of law enforcement, supplement this hard law.¹¹⁸ One important such convention is an internal Justice Department policy against political interference, including by the President, in law enforcement.¹¹⁹ In the modern era, administrations of both parties have for the most part adhered to this convention.¹²⁰ As a recently released opinion authored by former Office of Legal Counsel head Ted Olson explained:

While the President and his advisers are expected to reflect and advance both policy views and partisan instincts, the Attorney General is expected to provide a degree of independence from partisanship in order to maintain not only the ability to represent the Congress and the people as well as the Executive, but also to provide an internal check within the Executive Branch on the partisan and policy impulses of the remainder of the Administration.¹²¹

The Justice Department regulations for the appointment of Special Counsels, who operate with considerable independence from political

¹¹⁸ See Katherine Shaw, *Conventions in the Trenches*, 108 CALIF. L. REV. 1955, 1974 (2020) (“An entire stratum of conventions exists inside the executive branch, perched atop the formal authority that structures, empowers, and constrains executive action.”).

¹¹⁹ See Siegel, *supra* note 8, at 199 (“It is arguably a constitutional convention in the United States that the President permits the executive officers responsible for federal criminal law enforcement a very broad range of independence and discretion.”); *id.* at 200 (positing that there is an “arguable constitutional convention that seeks to prevent the politicization of federal criminal law enforcement”); Renan, *supra* note 8, at 2207 (discussing the norm of “investigatory independence from the President”); Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1, 4 (2018) (“Prosecutorial independence has become a cornerstone of American democracy, built into the way the country is governed.”); Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121, 124 (2014) (situating the founding of the DOJ in the context of the post-Civil War “reform movement . . . focusing on professionalization and civil service (restructuring government employment by merit, competitive testing, and job security, rather than political patronage)”).

¹²⁰ As former Bush Administration official John Yoo explained in 2020—casting the practice in largely instrumental terms—

while the President is in charge constitutionally, as a matter of good policy, Presidents have kept law enforcement at arms [sic] length. Neutrality in law enforcement is important if the government is to have the credibility and integrity to convince judges and juries, who are the ones who ultimate [sic] render the verdict.

Mark Sherman, *Trump Says He’s the Nation’s Top Cop, a Debatable Claim*, AP (Feb. 19, 2020), <https://apnews.com/article/7f48f53276aa0f4070dfb34e977c10d4> [<https://perma.cc/WR6M-38EY>].

¹²¹ Memorandum from Theodore B. Olson, Assistant Att’y Gen., Off. Legal Couns., to the Att’y Gen. (Feb. 10, 1982), <https://knightcolumbia.org/documents/jwhwzdt11o> [<https://perma.cc/TM3T-RR2>]. The opinion continues: “The people will not long tolerate politics or partisanship in the administration of justice and will not respect a President who allows it to occur. The Congress and the people will swiftly and certainly punish those who tamper with or debase the integrity of this element of the American system.” *Id.* at 4.

leadership, are an important demonstration of the norm of law enforcement independence in practice.¹²²

To be sure, this norm has not invariably been observed. But where significant breaches have occurred, they have triggered serious responses from other government actors. For example, President Richard Nixon's attempt to politicize the apparatus of federal law enforcement led to his resignation in the face of near certain impeachment and removal.¹²³ During the Bush Administration, a number of U.S. Attorneys were fired, in some cases for refusing to accede to pressure to investigate political rivals. The firings led to public outcry, congressional hearings, and eventually the resignation of the Attorney General.¹²⁴

Beyond the Justice Department, for entities such as the State Department and the U.S. Agency for International Development, limits on patronage and cronyism have long been viewed as important components of anticorruption and prodemocracy efforts abroad.¹²⁵ Multiple witnesses in the first impeachment of President Trump described the work of State Department officials as promoting strong democratic ideals abroad, with nonpartisan government as one of those ideals. As State Department official George Kent testified, the President's request for investigations into then-presidential candidate Joseph Biden Jr. "went against U.S. policy" and "would've undermined the rule of law and our long-standing policy goals in Ukraine, as in other countries, in the post-Soviet space."¹²⁶

As these examples demonstrate, a nonpartisanship principle is deeply embedded within the Executive Branch, spanning official instruments such

¹²² See 28 C.F.R. § 600.1 (providing for the appointment of a Special Counsel if the Attorney General "determines that criminal investigation of a person or matter is warranted" but that investigation or prosecution through ordinary DOJ channels "would present a conflict of interest for the Department or other extraordinary circumstances"); *id.* §§ 600.4–.10 (outlining the authority, accountability, and independence of the Special Counsel). Under those regulations, recent Special Counsels have investigated both former President Trump and President Biden. See Appointment of John L. Smith as Special Counsel, Att'y Gen. Order No. 5559-2022 (Nov. 18, 2022); Appointment of Robert K. Hur as Special Counsel, Att'y Gen. Order No. 5588-2023 (Jan. 12, 2023).

¹²³ See LEON JAWORSKI, *THE RIGHT AND THE POWER: THE PROSECUTION OF WATERGATE* 2–3 (1976); U.S. HOUSE COMM. ON THE JUDICIARY, *IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES*, H.R. REP. NO. 93-1305, at 123–25 (1974).

¹²⁴ Steven Lee Myers & Philip Shenon, *Embattled Attorney General Resigns*, N.Y. TIMES (Aug. 27, 2007), <https://www.nytimes.com/2007/08/27/washington/27cnd-gonzales.html> [<https://perma.cc/D5QD-G2ZU>].

¹²⁵ See generally SUSAN ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM* 69 (1999) (discussing the "pressing issue" of civil service reform in newly democratizing countries).

¹²⁶ H.R. DOC. NO. 116-95, at 6463 (2020) (deposition of George Kent); S. DOC. NO. 116-13, at 3889–91 (deposition of Marie Yovanovitch); MARIE YOVANOVITCH, *LESSONS FROM THE EDGE: A MEMOIR* 247–72 (2022).

as executive orders and far less formal norms and practices.¹²⁷ Notably, the norm against partisanship has held—and arguably been at its strongest—in politically charged moments.

C. *Impeachment History*

The constitutional norm against using official resources for partisan purposes was a predicate for some of the most important impeachments in our history, including the only impeachment of a sitting Supreme Court Justice. Indeed, the impeachment of Justice Samuel Chase, as well as the early impeachment proceedings against President Richard Nixon, centered on the impermissibility of explicitly partisan speech and activity from a position in government. This same theme was central to both impeachments of President Donald Trump.

1. *Justice Samuel Chase*

The lessons of the only impeachment of a Supreme Court Justice sound largely in the articulation of a set of nonpartisanship norms—both for federal judges and Justices *and* for members of Congress using the power of impeachment.¹²⁸

The primary charges against Chase turned on accusations of excessively partisan speech and conduct.¹²⁹ Chase, a committed and partisan Federalist, had been nominated to the Supreme Court by President George Washington in 1796. He remained a vocal Federalist on the bench and, after the election of 1800, became an outspoken critic of the Jefferson Administration and Jefferson's Republican party.¹³⁰ In 1804, the Republican-controlled House approved eight Articles of Impeachment against Chase, all related to his conduct during several trials and grand jury proceedings.¹³¹ The first Articles

¹²⁷ For works exploring the elaboration of constitutional meaning in both the legislative and administrative context, see Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799 (2010); Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897 (2013); Karen M. Tani, *Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor*, 100 CORNELL L. REV. 825 (2015); and Katherine Shaw, *State Administrative Constitutionalism*, 69 ARK. L. REV. 527 (2016).

¹²⁸ See generally Katherine Shaw, *Impeachable Speech*, 70 EMORY L.J. 1, 5–6 (2020) (discussing historical connections between speech, including partisan speech, and impeachment).

¹²⁹ See WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* 93 (1992); GENE HEALY, *CATO INST., INDISPENSABLE REMEDY: THE BROAD SCOPE OF THE CONSTITUTION'S IMPEACHMENT POWER* 20 (2018), <https://www.cato.org/sites/cato.org/files/pubs/pdf/gene-healy-indispensable-remedy-white-paper.pdf> [<https://perma.cc/QUE9-W3HX>] (describing the “triggering offense” in the Chase impeachment as a “partisan diatribe Chase had unleashed on a Baltimore grand jury”).

¹³⁰ See REHNQUIST, *supra* note 129, at 21–22.

¹³¹ 3 ASHER C. HINDS, *HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES* §§ 2344–47 (1907).

accused Chase of displaying partisan bias at trial, citing a ruling in which Chase had barred defense counsel for a Republican defendant in a treason trial from addressing the jury, as well as highly partisan jury charges in two Sedition Act trials involving Republican defendants.¹³² The last of the Articles, which described the conduct that “served as the instigation for the entire proceeding,” was the most explicit on this score.¹³³ That Article, Article VIII, accused Chase of speech that was “highly indecent, extra-judicial, intending to prostitute the high judicial character with which he was invested, to the low purpose of an electioneering parti[s]an,” during a charge he administered to a Baltimore grand jury in 1803.¹³⁴ Among other things, his grand jury charge had registered his opposition to the repeal of the Judiciary Act of 1801 and “suggested that the authors . . . should be replaced at the next election.”¹³⁵

Chase was acquitted on all charges, but the vote on Article VIII was nineteen to fifteen in favor of conviction—less than the two-thirds required to convict but a significant majority of sitting Senators.¹³⁶ As Keith Whittington argues, notwithstanding Chase’s ultimate acquittal, “[t]he willingness of the House to impeach was sufficient to signal to the judiciary . . . that partisanship in the conduct of their official duties would not be tolerated, and federal judges rapidly and obviously moved to a more neutral position relative to ‘political’ conflicts.”¹³⁷

Not only were the charges against Chase largely about improper partisanship, the impeachment proceedings themselves were also highly partisan, pursued by a Republican House against a Federalist judge for conduct and rhetoric that were not atypical for sitting judges at the time.¹³⁸ Then-Senator John Quincy Adams recorded in his journal after the acquittal:

¹³² HEALY, *supra* note 129, at 21; see Charles D. Harris, *The Impeachment Trial of Samuel Chase*, 57 A.B.A. J. 53, 54–56 (1971).

¹³³ KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 22 (1999).

¹³⁴ REHNQUIST, *supra* note 129, at 93.

¹³⁵ WHITTINGTON, *supra* note 133, at 22.

¹³⁶ At the time, the Senate was composed of twenty-five Republicans and nine Federalists; all nineteen votes to convict came from Republicans, but six Republicans joined the nine Federalists in voting to acquit. Harris, *supra* note 132, at 57.

¹³⁷ WHITTINGTON, *supra* note 133, at 41. He elaborates: “The Republicans successfully held Chase up as an exemplar of the partisan judiciary. The impeachment provided an opportunity . . . to reconstruct the norms of judicial behavior.” *Id.* at 48. For an alternate account of the evolving relationship between Supreme Court Justices, politics, and public perceptions, see Rachel Shelden, *The Supreme Court Used to be Openly Political. It Traded Partisanship for Power*, WASH. POST (Sept. 25, 2020), https://www.washingtonpost.com/outlook/supreme-court-politics-history/2020/09/25/b9fefcee-fe7f-11ea-9ceb-061d646d9c67_story.html [https://perma.cc/GX9E-A7VR].

¹³⁸ REHNQUIST, *supra* note 129, at 96–97 (“In one sense, Chase’s charge to the Baltimore grand jury seems no more egregiously partisan than do the charges of [other sitting jurists] Iredell and Paterson.”).

“[T]his was a party prosecution It has exhibited the Senate of the United States fulfilling the most important purpose of its institution, by putting a check upon the impetuous violence of the House of Representatives.”¹³⁹ For that reason, Chase’s acquittal is often seen as an important vindication of the principle that impeachment should not be pursued for partisan ends.¹⁴⁰ Both the charges and the larger episode, then, can be read to have contributed to the development of a constitutional norm against partisanship both by sitting Supreme Court Justices and in the pursuit of impeachment.

2. *President Richard Nixon*

Although President Nixon’s August 1974 resignation ended the ongoing impeachment proceedings against him, at the time of his resignation the House Judiciary Committee had already approved three Articles of Impeachment.¹⁴¹ The first Article began by describing the break-in at the Watergate Hotel as having been committed “for the purpose of securing political intelligence.”¹⁴² The Article went on to detail President Nixon’s use of “the powers of his high office . . . in a course of conduct or plan designed to delay, impede, and obstruct the investigation of” the politically motivated illegal entry.¹⁴³ The specific acts designed to undermine the investigation into the break-in included “interfering or endeavoring to interfere with the conduct of investigations by the Department of Justice of the United States, the Federal Bureau of Investigation, the Office of Watergate Special Prosecution Force, and Congressional Committees,” as well as “endeavoring to misuse the Central Intelligence Agency, an agency of the United States.”¹⁴⁴ The second Article, the catch-all abuse of power Article, made no explicit mention of political or partisan activities but did detail a number of activities that involved the use of government resources to violate the rights of citizens, undertaken for purposes “unrelated to national security, the enforcement of laws, or any other lawful function.”¹⁴⁵ The Committee’s view was clear from

¹³⁹ *Id.* at 107.

¹⁴⁰ See LAURENCE TRIBE & JOSHUA MATZ, TO END A PRESIDENCY: THE POWER OF IMPEACHMENT 43–44 (2018) (referencing the “highly partisan (and unsuccessful) impeachment trial for Justice Samuel Chase”); FRANK O. BOWMAN III, HIGH CRIMES AND MISDEMEANORS: A HISTORY OF IMPEACHMENT IN THE AGE OF TRUMP 135 (2019) (“Chase’s acquittal is generally agreed to stand for the proposition that impeachment should not be employed as a purely partisan weapon, particularly against the judiciary.”).

¹⁴¹ Shaw, *supra* note 128, at 21.

¹⁴² U.S. HOUSE COMM. ON THE JUDICIARY, IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 93-1305, at 2 (1974).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* Although the impeachment of President Bill Clinton was less explicitly tied to partisanship, many of the congressional and other investigations into the Clinton White House involved assertions

the face of the Articles: the abuse of government resources for private political advantage constituted “high crimes and misdemeanors” under the Constitution.

3. *President Donald Trump*

President Trump’s first impeachment, which spanned from late 2019 to early 2020, was even more explicitly about the use of government resources to advance private political objectives. The key Article of Impeachment, charging Trump with abuse of power, invoked both the pursuit of personal political advantage and the abuse of political office.¹⁴⁶ It read:

Using the powers of his high office, President Trump solicited the interference of a foreign government, Ukraine, in the 2020 United States Presidential election. He did so through a scheme or course of conduct that included soliciting the Government of Ukraine to publicly announce investigations that would benefit his reelection, harm the election prospects of a political opponent, and influence the 2020 United States Presidential election to his advantage. President Trump also sought to pressure the Government of Ukraine to take these steps by conditioning official United States Government acts of significant value to Ukraine on its public announcement of the investigations. President Trump engaged in this scheme or course of conduct for corrupt purposes in pursuit of personal political benefit. In so doing, President Trump used the powers of the Presidency in a manner that compromised the national security of the United States and undermined the integrity of the United States democratic process.¹⁴⁷

As the Article makes clear, the central thrust of the impeachment case was that former President Trump had abused public office for political

of misuse of government resources for political purposes. What became known as the “travelgate” scandal included allegations that a number of career officials in the White House travel office had been fired and replaced by political appointees. U.S. GOV’T ACCOUNTABILITY OFF., GAO/IGD-94-132, WHITE HOUSE TRAVEL OFFICE OPERATIONS (1994) (describing the firings). For an account of other politically inflected scandals involving allegations of the use of official or government resources for political or partisan purposes, see Eric Pooley, *Man Behind the Mess*, TIME (June 24, 1996), <http://content.time.com/time/subscriber/article/0,33009,984729,00.html> [<http://perma.cc/4MAA-JG8U>]; 1996 *Fund-Raising Scandals Bring Stiff Penalty*, L.A. TIMES (Sept. 21, 2002), <https://www.latimes.com/archives/la-xpm-2002-sep-21-na-fec21-story.html> [<https://perma.cc/2YR6-UPA4>], and Charles Tiefer, *The Specially Investigated President*, 5 U. CHI. L. SCH. ROUNDTABLE 143 (1998). See generally Scott J. Basinger & Brandon Rottinghaus, *Skeletons in White House Closets: A Discussion of Modern Presidential Scandals*, 127 POL. SCI. Q. 213 (2012) (compiling and discussing data on presidential scandals).

¹⁴⁶ H.R. Res. 755, 116th Cong. §§ 1–2 (2019).

¹⁴⁷ *Id.*

gain.¹⁴⁸ The House investigators and impeachment managers repeatedly referenced *Federalist No. 65*, in which Alexander Hamilton described impeachment as designed to target “those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL.”¹⁴⁹ The managers argued that President Trump’s conduct vis-à-vis Ukraine “had nothing to do with the legitimate foreign policy interests of the United States and everything to do with the President’s personal political interests.”¹⁵⁰ They continued: “[T]he President pressed for the public announcement of those investigations [into the Bidens] because they were of great personal political value to him,”¹⁵¹ notwithstanding the fact that Ukraine “had been invaded by Russia and depended heavily on United States support and assistance” and that the United States “had provided such assistance on a bipartisan basis, with an overwhelming consensus in Congress and the national security community that this was vital to our own national interests.”¹⁵² As the managers’ House Report concluded, “President Trump has realized the Framers’ worst nightmare. He has abused his power in soliciting and pressuring a vulnerable foreign nation to corrupt the next United States Presidential election by sabotaging a political opponent.”¹⁵³ The managers made the same arguments in their briefs and oral presentations during the Senate trial.¹⁵⁴

¹⁴⁸ Phillip Bump, *Assessing a Key Impeachment Argument: Trump’s Desired Investigations Were Only for His Own Benefit*, WASH. POST (Jan. 23, 2020), <https://www.washingtonpost.com/politics/2020/01/23/assessing-key-impeachment-argument-trumps-desired-investigations-were-only-his-own-benefit/> [<https://perma.cc/6MBH-W65G>].

¹⁴⁹ THE FEDERALIST NO. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

¹⁵⁰ IMPEACHMENT OF DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 116-346, at 97 (2019).

¹⁵¹ *Id.* at 98.

¹⁵² *Id.* at 97. The brief continued: “To make a demand that benefits him personally, while endangering the rights of a United States citizen and political opponent is a bright red flag that supports only one conclusion—that the President was putting his own personal and political interests over the Nation’s foreign policy interests.” *Id.* at 99.

¹⁵³ *Id.* at 131.

¹⁵⁴ See, e.g., IMPEACHMENT TRIAL OF PRESIDENT DONALD JOHN TRUMP, S. DOC. NO. 116-18, at 918 (2020) (statement of Rep. Zoe Lofgren) (arguing President Trump’s goal was “getting Ukraine to announce that investigations would be held, and that would help him cheat and gain an advantage in the 2020 election,” and that “[t]hose sham investigations were to advance his personal political interests, not the national interests of America”); HOUSE IMPEACHMENT MANAGERS’ TRIAL BRIEF, S. DOC. NO. 116-12, at 21 (2020) (“Overwhelming evidence shows that President Trump solicited these two investigations in order to obtain a personal political benefit, not because the investigations served the national interest.”); *id.* at 34 (“His effort to gain a personal political benefit by encouraging a foreign government to undermine America’s democratic process strikes at the core of misconduct that the Framers designed impeachment to protect against.”).

In addition to these arguments, the extensive witness testimony in the House repeatedly suggested that requests made or steps taken by Trump and his immediate circle were impermissible, improper, or inconsistent with basic norms and practices surrounding nonpartisanship in government service. David Holmes, a staff member at the U.S. Embassy in Kyiv, testified that

[b]eginning in March 2019, the situation at the Embassy and in Ukraine changed dramatically. Specifically, our support for Ukrainian democratic resistance to Russian aggression became overshadowed by a political agenda promoted by . . . Rudy Giuliani and a cadre of officials operating with a direct channel to the White House.¹⁵⁵

Trump appointee Gordon Sondland, who served as the U.S. Ambassador to the European Union, made the same point, explaining that he eventually came to understand that “Mr. Giuliani’s agenda might have also included an effort to prompt the Ukrainians to investigate Vice President Biden or his son, or to involve Ukrainians directly or indirectly in the President’s 2020 reelection campaign.”¹⁵⁶ Ambassador Bill Taylor testified that “security assistance was so important for Ukraine as well as our own national interests, to withhold that assistance for no good reason other than help with a political campaign made no sense It was crazy.”¹⁵⁷

U.S.-based officials provided similar testimony. Mark Sandy, the Deputy Associate Director for National Security Programs at the Office of Management and Budget (OMB), testified regarding Trump’s decision to withhold security assistance to Ukraine, explaining that his duties as approver of apportionments had been taken away from him and delegated to Michael Duffey, a political appointee.¹⁵⁸ When asked, “In your career at OMB or otherwise, are you aware of any other political appointee being given the responsibility to authorize apportionments as happened here with

¹⁵⁵ H.R. DOC. NO. 116-95, at 250 (deposition of David A. Holmes).

¹⁵⁶ *Id.* at 3284 (opening statement of Gordon Sondland).

¹⁵⁷ REPORT OF THE HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE ON THE TRUMP-UKRAINE IMPEACHMENT INQUIRY REPORT, H.R. REP. NO. 116-335, at 122 (2019). Taylor expressed the same view in contemporaneous text messages with Gordon Sondland. See Rachael Bade, Anne Gearan, Karoun Demirjian & Mike DeBonis, *Trump Made Ukraine Aid Contingent on Public Pledge to Investigate Bidens and 2016 Election, U.S. Envoy Says He Was Told*, WASH. POST (Oct. 22, 2019), https://www.washingtonpost.com/powerpost/diplomat-who-raised-alarm-about-withholding-aid-to-ukraine-testifies-in-impeachment-probe/2019/10/22/086fb850-f436-11e9-8cf0-4cc99f74d127_story.html [https://perma.cc/G887-3E22].

¹⁵⁸ H.R. DOC. NO. 116-95, at 36, 62–67 (deposition of Mark Sandy). As Sandy explained in his testimony, an apportionment is “a legal document, consistent with provisions in Title XXXI of the U.S. Code, which basically sets parameters on agencies’ use of appropriated funds.” *Id.* at 14.

Mr. Duffey?,” Sandy responded, “No, I am not aware.”¹⁵⁹ Michael McKinley, an advisor to Secretary of State and Trump loyalist Mike Pompeo, even resigned over, in his words, “the utilization of our ambassadors overseas to advance domestic political objectives.”¹⁶⁰

The second Trump impeachment was even more firmly grounded in the argument that it was constitutionally impermissible to use government power for political purposes. The political purpose in the second impeachment was the President’s use of the bully pulpit to incite the mob that, as the Article charged, “unlawfully breached and vandalized the Capitol, injured and killed law enforcement personnel, menaced Members of Congress, the Vice President, and Congressional personnel, and engaged in other violent, deadly, destructive, and seditious acts,” all in an effort to “interfere with the Joint Session’s solemn constitutional duty to certify the results of the 2020 Presidential election.”¹⁶¹ The charge situated the January 6 conduct in the context of a protracted effort by President Trump to “subvert and obstruct the certification of the results of the 2020 Presidential election,” including through pressuring state officials to change election results in his favor.¹⁶²

Trump and Chase were acquitted—Trump twice—and Nixon’s resignation meant that he was never actually impeached (although there is broad consensus that he would have been impeached, convicted, and removed had he not departed office voluntarily).¹⁶³ So there is plenty of room for debate about what sort of precedent these episodes constitute.¹⁶⁴ But while these officials were acquitted or resigned, the historical record does reflect consensus around the seriousness of the misconduct represented by misuse of government resources for political advantage.¹⁶⁵ And, whatever any later

¹⁵⁹ *Id.* at 104.

¹⁶⁰ *Id.* at 3318 (deposition of P. Michael McKinley); *see also id.* at 3430 (“The beauty of the Foreign Service, the Foreign Service that I’ve known through some incredibly difficult moments for our country and in bilateral relations with different places, is I don’t know the political views of the vast majority of my colleagues. They certainly don’t know mine. And we are able to work together and project working for the administration of the day. That’s absolutely central to our work.”).

¹⁶¹ IMPEACHING DONALD JOHN TRUMP, PRESIDENT OF THE UNITED STATES, FOR HIGH CRIMES AND MISDEMEANORS, H.R. RES. NO. 24, 117th Cong. (2021).

¹⁶² *Id.*

¹⁶³ RICHARD A. POSNER, AN AFFAIR OF STATE 1 (1999) (“Richard Nixon would have been impeached and convicted had he not resigned after the House Judiciary Committee recommended his impeachment to the full House.”).

¹⁶⁴ *See Shaw, supra* note 128, at 5.

¹⁶⁵ President Trump’s second impeachment trial, for example, resulted in fifty-seven votes to convict. But of those who voted to acquit, more than twenty explained that they were doing so in part or solely because of jurisdictional concerns raised by the timing of the trial, which occurred after President Trump left office. *See* Ryan Goodman & Josh Asabor, *In Their Own Words: The 43 Republicans’ Explanations of Their Votes Not to Convict Trump in Impeachment Trial*, JUST SEC. (Feb. 15, 2021),

Congress might make of the precedential value of these impeachments, they offer another illustration of the constitutional nonpartisanship principle in operation.

D. Judicial Authority

In addition to this Legislative and Executive Branch authority, a developed body of judicial doctrine confirms the existence of a nonpartisanship principle of constitutional status. This Section walks through the Court's cases developing this principle. It begins with cases on patronage in employment, then surveys cases involving nonpartisanship in other contexts.

1. Patronage and the Constitution

First, and most famously, the Court in its political patronage cases has announced and elaborated a strong constitutional principle of nonpartisanship in government employment decisions.¹⁶⁶ The line of cases begins with the 1976 decision in *Elrod v. Burns*, in which a plurality of the Court concluded that patronage dismissals of low-level local government officials were unconstitutional under the First and Fourteenth Amendments.¹⁶⁷ The challenge in *Elrod* was brought by Republican employees of the Cook County Sheriff's Office who had been discharged by the newly elected Democratic sheriff "solely because they did not support and were not members of the Democratic Party."¹⁶⁸ In assessing the discharged employees' claims, the Court acknowledged the long historical pedigree of political patronage hiring.¹⁶⁹ It also noted that the federal government, through the Pendleton Act and successor statutes, as well as many state and local governments, had largely moved to replace patronage systems of public employment with merit systems.¹⁷⁰ But the Court emphasized that this context did not definitively answer the question of the practice's constitutionality. Turning squarely to the constitutional analysis, the Court concluded that patronage dismissals undermined the core First Amendment rights of belief and association.¹⁷¹ The Court found that the

<https://www.justsecurity.org/74725/in-their-own-words-the-43-republicans-explanations-of-their-votes-not-to-convict-trump-in-impeachment-trial> [https://perma.cc/KCC7-5JQL].

¹⁶⁶ Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351, 377 (2017) ("The best illustration of th[e] norm against government partisanship in First Amendment law is the political patronage cases.").

¹⁶⁷ 427 U.S. 347, 373 (1976) (plurality opinion).

¹⁶⁸ *Id.* at 351.

¹⁶⁹ *Id.* at 353.

¹⁷⁰ *Id.* at 354.

¹⁷¹ *Id.* at 355–57.

government interests offered in defense of such dismissals were not sufficiently compelling, nor the means sufficiently tailored, to save the practice from unconstitutionality.¹⁷² In addition to evaluating the impact on individual employees, the Court referenced the distortion of the electoral process that patronage hiring can create: “Conditioning public employment on partisan support prevents support of competing political interests Patronage . . . tips the electoral process in favor of the incumbent party, and where the practice’s scope is substantial relative to the size of the electorate, the impact on the process can be significant.”¹⁷³

Justice William J. Brennan Jr.’s *Elrod* plurality opinion was joined only by Justices Byron R. White and Thurgood Marshall. But Justices Potter Stewart and Harry A. Blackmun’s concurrence in the judgment parted ways only on the breadth of the opinion, characterizing the case as involving the narrow question of “whether a nonpolicymaking, nonconfidential government employee can be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs.”¹⁷⁴ The concurrence contended that, while the plurality opinion was correct in the answer it supplied, there was no need to consider “the broad contours of the so-called patronage system, with all its variations and permutations.”¹⁷⁵

Four years later, in *Branti v. Finkel*, a majority of the Court endorsed the position that the Constitution protected a government employee who was “satisfactorily performing his job from discharge solely because of his political beliefs.”¹⁷⁶ And while *Elrod* and *Branti* involved outright dismissals, the Court soon extended their logic to other employment-related decisions, holding that “promotion, transfer, recall, and hiring decisions involving low-level public employees” could not be “constitutionally based on party affiliation or support.”¹⁷⁷ The Court emphasized that “[t]o the victor belong only those spoils that may be constitutionally obtained.”¹⁷⁸ The Court later went further, holding that “the protections of *Elrod* and *Branti* extend to an independent contractor, who, in retaliation for refusing to comply with demands for political support, has a government contract terminated or is

¹⁷² *Id.* at 363, 369 (“[I]f conditioning the retention of public employment on the employee’s support of the in-party is to survive constitutional challenge, it must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights.”).

¹⁷³ *Id.* at 356.

¹⁷⁴ *Id.* at 375 (Stewart, J., concurring).

¹⁷⁵ *Id.* at 374.

¹⁷⁶ 445 U.S. 507, 508, 519 (1980).

¹⁷⁷ *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 65 (1990).

¹⁷⁸ *Id.* at 64.

removed from an official list of contractors authorized to perform public services.”¹⁷⁹

None of these cases condemned patronage hiring and firing in all circumstances. The *Branti* Court explained that “party affiliation may be an acceptable requirement for some types of government employment.”¹⁸⁰ And the 1990 *Rutan* case elaborated the need for a flexible standard, crediting the “government’s interest in securing employees who will loyally implement its policies” and finding that this interest “can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views.”¹⁸¹ Although the Supreme Court has provided only general guidance regarding the line dividing permissible from impermissible politically influenced hiring and firing, lower courts have developed a variety of tests for determining when a government official should be understood as a “policymaker” and thus subject to termination and other employment action for partisan reasons.¹⁸²

Justices Antonin Scalia and Clarence Thomas consistently maintained that these cases were mistaken. In *Rutan*, Justice Scalia, joined by Justices Sandra Day O’Connor and Anthony M. Kennedy, argued that

[t]he choice between patronage and the merit principle—or, to be more realistic about it, the choice between the desirable mix of merit and patronage principles in widely varying federal, state, and local political contexts—is not so clear that I would be prepared, as an original matter, to chisel a single, inflexible prescription into the Constitution.¹⁸³

In a dissent from a companion to the Court’s extension of the *Elrod–Branti* rule to the contractor context, Scalia, now joined by Justice Thomas,

¹⁷⁹ *O’Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 714–15 (1996); *Bd. of Cnty. Comm’rs v. Umbehr*, 518 U.S. 668, 686 (1996).

¹⁸⁰ 445 U.S. at 517.

¹⁸¹ 497 U.S. at 74. *See generally* Cynthia Grant Bowman, “*We Don’t Want Anybody Sent*: The Death of Patronage Hiring in Chicago”, 86 NW. U. L. REV. 57, 59 (1991) (arguing, based on Chicago’s experience, that objections to prohibitions on patronage hiring are unfounded).

¹⁸² *See, e.g., DiRuzza v. County of Tehama*, 206 F.3d 1304, 1308 (9th Cir. 2000) (asking whether “political affiliation was a ‘reasonably appropriate requirement’ for the job”); *Stott v. Haworth*, 916 F.2d 134, 140 (4th Cir. 1990) (focusing on “whether the hiring authority can demonstrate . . . party affiliation is an appropriate requirement for effective performance of the public office”); *Terry v. Cook*, 866 F.2d 373 (11th Cir. 1989) (formulating “the *Elrod–Branti* analysis” as requiring “political loyalty” to be “an appropriate requirement for employment under these circumstances”).

¹⁸³ 497 U.S. at 94 (Scalia, J., dissenting). Justice Scalia also highlighted the tension between the Court’s patronage cases and its government employee speech cases, discussed *infra* Section III.F. As he wrote: “Since the government may dismiss an employee for political *speech* ‘reasonably deemed by Congress to interfere with the efficiency of the public service’ it follows, *a fortiori*, that the government may dismiss an employee for political *affiliation* if ‘reasonably necessary to promote effective government.’” *Id.* at 100 (citations omitted) (first quoting *Pub. Workers v. Mitchell*, 330 U.S. 75, 101 (1947); and then quoting *Brown v. Glines*, 444 U.S. 348, 356 n.13 (1980)).

reiterated his opposition to the entire line of cases, writing that “rewarding one’s allies, [and] the correlative act of refusing to reward one’s opponents . . . is an American political tradition as old as the Republic.”¹⁸⁴

Likely because the limitations on patronage hiring and firing are now deeply engrained in constitutional practice and constitutional culture, the Supreme Court has had no recent cases testing the durability of this line of cases. Indeed, just last term, a majority opinion by Justice Neil Gorsuch cited *Rutan*, albeit only in passing.¹⁸⁵ Still, the changed composition of the Court and a demonstrated willingness to overturn precedents, combined with the political and doctrinal developments outlined in the Parts that follow, suggest obvious reason for concern about the future of the nonpartisanship doctrine.

2. *Nonpartisanship Beyond Patronage*

Courts have invoked the official nonpartisanship principle in a variety of other contexts, well beyond the patronage cases. Some have been general references, like *West Virginia State Board of Education v. Barnette*’s famous line: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”¹⁸⁶ Other cases have made more explicit reference to the impermissibility of official partisanship. In 1997, Justice John Paul Stevens wrote the majority opinion in a case rejecting a constitutional challenge to a set of Agriculture Department orders that required fruit growers to assist in subsidizing generic advertisements.¹⁸⁷ The opinion reasoned that the orders were permissible in part because they “do not compel the producers to endorse or to finance any political or ideological views”—a framing that suggested the answer would have been different if they had.¹⁸⁸

The litigation surrounding Indiana’s voter ID law, which eventually resulted in the Supreme Court’s opinion in *Crawford v. Marion County Election Board*, also involved discussions of the role of partisanship. Judge Terence T. Evans, who dissented from the Seventh Circuit panel opinion upholding the law, was especially direct, describing the law as “a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic.”¹⁸⁹ Although Justice David H. Souter’s dissent

¹⁸⁴ *Bd. of Cnty. Comm’rs*, 518 U.S. at 688.

¹⁸⁵ *Houston Cmty. Coll. Sys. v. Wilson*, 142 S. Ct. 1253, 1260–61 (2022).

¹⁸⁶ 319 U.S. 624, 642 (1943).

¹⁸⁷ *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 469–70 (1997).

¹⁸⁸ *Id.*

¹⁸⁹ *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 954 (2007), *aff’d*, 553 U.S. 181 (2008).

from the Supreme Court opinion upholding the law focused on the weaknesses of the State's justifications, he also noted that "the Indiana statute crosses a line when it targets the poor and the weak."¹⁹⁰ Souter cited the Court's *Anderson v. Celebrezze* case for the principle that "[i]t is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status."¹⁹¹

Justice Stevens's plurality opinion upholding the law did not dispute Justice Souter on this point, but did credit the State's articulated interest in "protecting the integrity and reliability of the electoral process" as sufficient to justify the burden the law imposed, at least on the record before the Court.¹⁹² The opinion noted that "[i]t is fair to infer that partisan considerations may have played a significant role in the decision to enact" the Indiana voter ID law. But importantly, it went on to explain that "[i]f such considerations had provided the only justification for a photo identification requirement," the law could not have survived constitutional scrutiny.¹⁹³ And a post-*Crawford* district court opinion invalidating Texas's strict voter ID law—an opinion with which the Fifth Circuit largely agreed—did so in part based on its conclusion that the impetus for the law was that "the party currently in power [was] 'facing a declining voter base'" and concluded it could "gain partisan advantage through a strict voter ID law."¹⁹⁴

In a dissent in another case, *Trump v. Vance*, Justice Samuel A. Alito Jr. emphasized the intolerability of politically driven local criminal investigations. Arguing against the permissibility of allowing the Manhattan District Attorney to obtain President Trump's financial records, Justice Alito explained that "[i]f a sitting President is intensely unpopular in a particular district—and that is a common condition—targeting the President may be an alluring and effective electoral strategy. But it is a strategy that would undermine our constitutional structure."¹⁹⁵

The Court's government speech and funding cases have also featured occasional references to the impermissibility of partisan speech (or partisan speech compulsion) by government actors. In his concurrence in *National*

¹⁹⁰ *Crawford*, 553 U.S. at 236 (Souter, J., dissenting) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983)).

¹⁹¹ *Id.*

¹⁹² *Id.* at 191 (plurality opinion).

¹⁹³ *Id.* at 203. But see Pamela S. Karlan, *The New Countermajoritarian Difficulty*, 109 CALIF. L. REV. 2323, 2348 (2021) ("Crawford gave a green light to jurisdictions to shape the electorate for partisan advantage.").

¹⁹⁴ *Veasey v. Abbott*, 830 F.3d 216, 241 (5th Cir. 2016) (en banc) (quoting *Veasey v. Perry*, 71 F. Supp. 3d 627, 654 (S.D. Tex. 2014)).

¹⁹⁵ *Trump v. Vance*, 140 S. Ct. 2412, 2447 (2020) (Alito, J., dissenting).

Endowment for the Arts v. Finley, for example, Justice Scalia observed that “it would be unconstitutional for the government to give money to an organization devoted to the promotion of candidates nominated by the Republican Party” and that it would be “just as unconstitutional for the government itself to promote candidates nominated by the Republican Party.”¹⁹⁶ Thirty years later, the Court in *Janus v. AFSCME, Council 31* held that “[s]tates and public-sector unions may no longer extract agency fees from nonconsenting employees.”¹⁹⁷ Notably, the case *Janus* overruled, *Abood v. Detroit Board of Education*, had already vindicated employees’ interest against being compelled to subsidize “the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to [a union’s] duties as collective-bargaining representative.”¹⁹⁸

Note that these cases do not go so far as to find that the Constitution imposes a duty of fair or impartial or apolitical governance, although individual Justices have suggested this in various contexts. Consider the opening to Justice Stevens’s concurring opinion in *Craig v. Boren*: “There is only one Equal Protection Clause. It requires every State to govern impartially.”¹⁹⁹ But taken together, the cases *do* suggest that the Constitution imposes significant limitations, at least as a default matter, on considerations of partisanship in government employment, funding decisions, and the regulation of voting and elections.²⁰⁰

¹⁹⁶ 524 U.S. 569, 598 n.3 (1998) (Scalia, J., concurring); *see also* Webster v. Doe, 486 U.S. 592, 608 (1988) (Scalia, J., dissenting) (referencing the “fundamental constraint” that any government decision “must be taken in order to further a public purpose rather than a purely private interest”).

¹⁹⁷ 138 S. Ct. 2448, 2486 (2018).

¹⁹⁸ *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235–36 (1977), *overruled by Janus*, 138 S. Ct. 2448; *see also* *Lathrop v. Donohue*, 367 U.S. 820, 853 (1961) (Harlan, J., concurring) (suggesting it was beyond dispute that “a State could not ‘create a fund to be used in helping certain political parties or groups favored’ by it ‘to elect their candidates or promote their controversial causes’”).

¹⁹⁹ 429 U.S. 190, 211 (1976) (Stevens, J., concurring); *see also* *Vieth v. Jubelirer*, 541 U.S. 267, 317 (2004) (Stevens, J., dissenting) (“The concept of equal justice under law requires the State to govern impartially.”).

²⁰⁰ Scholars have echoed this point. *See* Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 651–52 (2013) (arguing that “an official [government] campaign urging citizens to ‘Vote Democrat’ in the days leading up to a critical election” would “violate the Constitution, even if it consisted of only a simple statement with no regulatory consequences or funding implications”); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 444 (1996) (“[T]he Court would treat differently a law prohibiting the use of billboards for all political advertisements and a law prohibiting the use of billboards for political advertisements supporting Democrats.”); Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 187 (1996); *see also* Robert D. Kamenshine, *The First Amendment’s Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104, 1104 (1979) (“[T]he courts should read the first amendment to contain an implied prohibition against political establishment.”); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 312 (1993).

II. THE PARTISANSHIP TURN IN THE EXECUTIVE BRANCH

The background surveyed in the preceding Part reveals a strong consensus—in the Legislative, Executive, and Judicial Branches—in favor of constitutionally grounded limits on official partisanship. As this Part shows, however, that consensus is under increasing threat from political actors.

During his time in office, President Trump was singularly focused on attacking the career civil service, which he referred to as “the deep state.” He inveighed constantly—via Twitter (now known as X), on television, and in speeches and rallies—against the “shadowy cabal” he suggested was working to undermine him.²⁰¹ He also took affirmative steps, detailed below, to undermine norms of independence, nonpartisanship, and expertise inside the federal government.

Trump was by no means the first president to take aim at the civil service. Richard Nixon was explicit that “[he did not] believe that civil service [was] a good thing for the country.”²⁰² Ronald Reagan’s campaign famously insisted that “[g]overnment is not the solution to our problem Government is the problem.”²⁰³ Beyond this campaign rhetoric, during Reagan’s time in office, he moved to limit the reach of various domestic programs, installed proponents of deregulation in federal agencies, and created a centralized regulatory review process designed to limit the scope

(suggesting that the government funding doctrine should allow “aesthetic or qualitative judgments so long as they are not conspicuously based on partisan aims”).

²⁰¹ See, e.g., Donald J. Trump (@realDonaldTrump), X (Oct. 17, 2019), <https://twitter.com/realDonaldTrump/status/1185029472132698113> [<https://perma.cc/3PGA-YWYT>] (“Tonight, we forcefully condemn the blatant corruption of the Democrat Party, the Fake News Media, and the rogue bureaucrats of the Deep State. The only message these radicals will understand is a crushing defeat on November 3, 2020! #KAG2020”); see also Michael Herz & Katherine Shaw, *Transition Administration*, 106 MINN. L. REV. 607, 665 (2021); Josh Chafetz, *Constitutional Maturity, or Reading Weber in the Age of Trump*, 34 CONST. COMMENT. 17, 33–34 (2019); Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653, 1653–54 (2018); Evan Osnos, *Trump vs. the “Deep State,”* NEW YORKER (May 14, 2018), <https://www.newyorker.com/magazine/2018/05/21/trump-vs-the-deep-state> [<https://perma.cc/ZQF4-H22E>].

²⁰² Michael Konciewicz, *The GOP Appointees Who Defied the President*, ATLANTIC (Nov. 19, 2019), <https://www.theatlantic.com/ideas/archive/2019/11/the-gop-appointees-who-defied-the-president/602230/> [<https://perma.cc/X2UC-6FN9>]; see RICK PERLSTEIN, NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA 45 (2008).

²⁰³ Hedrick Smith, *Reagan’s Effort to Change the Course of Government*, N.Y. TIMES (Oct. 23, 1984), <https://www.nytimes.com/1984/10/23/us/reagan-s-effort-to-change-course-of-government.html> [<https://perma.cc/JE3X-BPEB>]; RICK PERLSTEIN, REAGANLAND: AMERICA’S RIGHT TURN 1976–1980, 914 (2020); RONALD N. JOHNSON & GARY D. LIBECAP, THE FEDERAL CIVIL SERVICE SYSTEM AND THE PROBLEM OF BUREAUCRACY 1 (1994).

and volume of federal regulation.²⁰⁴ But, significantly, none of these moves sought to jettison the civil service wholesale, and none were undertaken within a shifting doctrinal landscape in which judicial receptivity to a wholesale attack is a real possibility.

This Part identifies several recent moves by political actors, both inside and since the conclusion of the Trump Administration, to weaken or draw into question civil service protections, government nonpartisanship rules, and broader norms of nonpartisanship. It then surveys the arguments from Trump's impeachment trial regarding the constitutional permissibility of official partisanship. Finally, it examines the role of partisanship in some of the high-stakes litigation involving the Trump Administration.

A. Personnel

First, officials within the Trump Administration routinely flouted the Hatch Act's limits on partisan political activity. The Office of Special Counsel (OSC), which enforces the Hatch Act, concluded in a 2021 report that thirteen different Trump Administration officials²⁰⁵ violated the Hatch Act in conjunction with the 2020 Republican National Convention, which was held at the White House.²⁰⁶ The report explained that, under the Hatch Act, "it is illegal for an employee to support or oppose a candidate for partisan political office while acting in an official capacity" and that each of the thirteen Trump Administration officials in question "chose to use their official authority not for the legitimate functions of the government, but to promote the reelection of President Trump in violation of the law."²⁰⁷ The OSC explained that it lacked the power to address those violations because its usual tool of enforcement, prosecution before the Merit Systems Protection Board (MSPB), is not available in the case of Senate-confirmed

²⁰⁴ Andrew Rudalevige, *Beyond Structure and Process: The Early Institutionalization of Regulatory Review*, 30 J. POL'Y HIST. 577, 588–89, 594 (2018). The examples discussed above are by no means exhaustive: for example, one of the goals of President Franklin D. Roosevelt's Brownlow Commission was to reform the civil service; commissions under Presidents Herbert Hoover and Dwight D. Eisenhower announced related objectives. *Id.* For examples of other such efforts, see Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717, 747 (2010), which describes political actors' use of privatization to circumvent bureaucrats who may be "apt to disagree with the political leadership over policy goals and tactics."

²⁰⁵ This number did not include the President and Vice President, to whom the Hatch Act does not apply. 5 U.S.C. § 7322(1).

²⁰⁶ U.S. OFF. SPECIAL COUNS., INVESTIGATION OF POLITICAL ACTIVITIES BY SENIOR TRUMP ADMINISTRATION OFFICIALS DURING THE 2020 PRESIDENTIAL ELECTION 17 (2021), <https://osc.gov/Documents/Hatch%20Act/Reports/Investigation%20of%20Political%20Activities%20by%20Senior%20Trump%20Administration%20Officials%20During%20the%202020%20Presidential%20Election.pdf> [<https://perma.cc/YXM5-FWJ3>].

²⁰⁷ *Id.* at 2–3.

officials.²⁰⁸ The OSC also takes the position that it has no jurisdiction to prosecute commissioned White House officers before the MSPB. All of the officials in question were either Senate-confirmed or commissioned White House officers.²⁰⁹ Accordingly, the OSC concluded that its only remedy was to provide a report detailing the violations to the President, who of course took no steps in response.²¹⁰ The 2021 report followed two other such OSC reports and an additional and unprecedented fifteen warning letters notifying Trump Administration officials that they had violated the Act.²¹¹

The Trump Administration also relied to an unprecedented degree on acting officials—that is, officials appointed on a temporary basis pursuant to provisions of the Federal Vacancies Reform Act of 1998 and other agency statutes, outside of the Constitution’s Appointments Clause.²¹² To be sure, Trump was not the first president to designate acting officials; “actings” are now a fixture of the administrative state, and every modern President has relied on them to some degree.²¹³ But Trump used acting officials far more extensively than any previous president, in particular at the highest levels of government, including the Cabinet.²¹⁴

This increased reliance on acting officials interacts in at least two ways with the erosion of nonpartisanship. First, the designation of acting officials to positions that would otherwise require Senate confirmation, such as Cabinet-level positions, allows the President to bypass the public and Senate scrutiny that might otherwise temper purely partisan selections.²¹⁵ Second, designating acting officials from within the ranks of existing civil servants, as happened on a number of occasions during the Trump Administration, may involve inquiries into the partisan affiliation and views of members of

²⁰⁸ *Id.* at 2.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 11 (“[F]or such employees, OSC submits a report describing the violation to the president for appropriate disciplinary action in accordance with 5 U.S.C. § 1215(b).”).

²¹¹ *Id.* at 4.

²¹² Anne Joseph O’Connell, *Actings*, 120 COLUM. L. REV. 613, 617–18, 623, 636 (2020).

²¹³ *Id.* at 643.

²¹⁴ *Id.* at 623 (“President Trump’s use of such temporary leaders has been far more extensive and controversial than his predecessors’.”).

²¹⁵ Consider here Trump’s designation of Matthew Whitaker as Acting Attorney General. Whitaker had been the Chief of Staff to Attorney General Jeff Sessions but otherwise possessed none of the experience typical of an Attorney General, and it is virtually unthinkable that he would have been confirmed by the Senate had he been nominated. Instead, his key qualification seems to have been political loyalty. Miles Parks, *Who Is Acting Attorney General Matthew Whitaker?*, NPR (Nov. 8, 2018), <https://www.npr.org/2018/11/08/665832951/who-is-acting-attorney-general-matthew-whitaker> [<https://perma.cc/7NM8-7KUN>] (referencing Whitaker’s “long history of involvement in Republican politics”); Stephen I. Vladeck, *Whitaker May Be a Bad Choice, But He’s a Legal One*, N.Y. TIMES (Nov. 9, 2018), <https://www.nytimes.com/2018/11/09/opinion/trump-attorney-general-constitutional.html> [<https://perma.cc/FDQ6-YAPP>].

the civil service in ways that are fundamentally incompatible with the notion of a nonpartisan civil service.²¹⁶

Late in his term in office, President Trump went beyond simply criticizing the civil service or flouting nonpartisanship rules and norms. He issued Executive Order 13,957, an order that had no precedent in previous presidential activity involving the civil service. The executive order purported to create a new federal employment status, “Schedule F,” which it defined as employees with “[p]ositions of a confidential, policy-determining, policy-making, or policy-advocating character not normally subject to change as a result of a Presidential transition.”²¹⁷ The order would have enabled agency heads to reclassify positions as falling within this new excepted service, which would have entailed exception from both competitive selection procedures and the existing procedural requirements for adverse employment action.²¹⁸ In other words, the executive order appears to have been intended to give politically appointed agency heads the power to unilaterally remove much of the federal workforce from the civil service, placing them in a new excepted employment status without any of the protections of the civil service.²¹⁹

Because the order was issued so late in the Trump Administration, the Office of Personnel Management never issued implementing regulations, and only a few agencies ever performed internal reviews to determine how many and which employees would fall within the new status.²²⁰ But the Government Accountability Office (GAO) produced a short report on steps toward implementation, and its contents are striking. The OMB estimated that a full 68% of its workforce would be reclassified as Schedule F

²¹⁶ See Amanda Becker, *Trump Says Acting Cabinet Members Give Him ‘More Flexibility,’* REUTERS (Jan. 6, 2019), <https://www.reuters.com/article/us-usa-trump-cabinet/trump-says-acting-cabinet-members-give-him-more-flexibility-idUSKCN1P00IG> [https://perma.cc/XS8S-B86N]; Osnos, *supra* note 201. Such inquiries are also at least in tension with the Court’s political patronage cases. See *supra* Section I.D.

²¹⁷ Exec. Order No. 13,957, 85 Fed. Reg. 67,631, 67,633 (Oct. 21, 2020).

²¹⁸ *Id.*; Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 646 (2021); see Kathryn E. Kovacs, *From Presidential Administration to Bureaucratic Dictatorship*, 135 HARV. L. REV. F. 104, 111 (2021) (emphasizing that the order would have enabled the politicization of federal employees in policymaking positions).

²¹⁹ Jim Eisenmann, *Trump’s Plan to Gut the Civil Service*, LAWFARE (Dec. 8, 2020), <https://www.lawfareblog.com/trumps-plan-gut-civil-service> [https://perma.cc/DN7A-TT26]; see Donald P. Moynihan, *Public Management for Populists: Trump’s Schedule F Executive Order and the Future of the Civil Service*, 82 PUB. ADMIN. REV. 174, 174 (2022); see Bridget C.E. Dooling, *Benefits of a Rowdy Bureaucracy*, YALE J. ON REG. (Oct. 26, 2021), <https://www.yalejreg.com/nc/symposium-by-executive-order-03> [https://perma.cc/ED9R-LPXF].

²²⁰ U.S. GOV’T ACCOUNTABILITY OFF., GAO-22-105504, CIVIL SERVICE: AGENCY RESPONSES AND PERSPECTIVES ON FORMER EXECUTIVE ORDER TO CREATE A NEW SCHEDULE F CATEGORY OF FEDERAL POSITIONS 19 (2022).

employees.²²¹ President Biden rescinded the executive order on his second day in office, so it never took effect.²²² But Trump and his allies are reportedly considering reimposing the order, or something similar, if Trump is elected again.²²³

Since his presidency, Trump's rhetoric has escalated still further, suggesting that he is contemplating a wholesale attack on the civil service if he returns to power. During a speech in March 2022, Trump said, to thunderous applause: "We will pass critical reforms making *every* executive branch employee fireable by the President of the United States. The deep state must and will be brought to heel."²²⁴ Trump is not alone in striking this note. Then-Senate candidate (now Senator) J.D. Vance echoed this view in an April 2022 campaign trail interview, in which he said:

I think Trump is going to run again in 2024 . . . I think what Trump should do, if I was giving him one piece of advice: Fire every single midlevel bureaucrat, every civil servant in the administrative state, replace them with our people. And when the courts stop you, . . . stand before the country, and say . . . "the chief justice has made his ruling. Now let him enforce it."²²⁵

And former presidential candidate Vivek Ramaswamy deployed similar rhetoric, pledging that if elected he would fire significant portions of the federal workforce and entirely disband major federal agencies.²²⁶

B. Impeachment Defenses

As detailed in Part I, the first charge in President Trump's first impeachment centered on the improper use of government resources to harm a political rival. Trump's trial brief disputed the premise of this charge. He wrote that the

House Democrats' theory raises particular dangers because it makes 'personal political benefit' one of the 'forbidden reasons' for taking government action.

²²¹ *Id.* at 14.

²²² Exec. Order No. 14,003, 86 Fed. Reg. 7231, 7231 (Jan. 22, 2021).

²²³ Jonathan Swan, *A Radical Plan for Trump's Second Term*, AXIOS (July 22, 2022), <http://www.axios.com/2022/07/22/trump-2025-radical-plan-second-term> [<http://perma.cc/N4QA-9EJY>]; see also Kevin D. Roberts, *Foreword* to MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 1, 9 (Paul Dans & Steven Groves eds., 2023) (identifying "executive tools a courageous conservative President can use to handcuff the bureaucracy").

²²⁴ *Former President Trump in Florence, South Carolina*, *supra* note 20.

²²⁵ James Pogue, *Inside the New Right, Where Peter Thiel Is Placing His Biggest Bets*, VANITY FAIR (Apr. 20, 2022), <https://www.vanityfair.com/news/2022/04/inside-the-new-right-where-peter-thiel-is-placing-his-biggest-bets> [<https://perma.cc/X7YZ-XS7Q>].

²²⁶ Chris Cameron & Charlie Savage, *Ramaswamy Says He Would Fire Most of the Federal Work Force if Elected*, N.Y. TIMES (Sept. 13, 2023), <https://www.nytimes.com/2023/09/13/us/politics/vivek-ramaswamy-dismantle-government.htm> [<https://perma.cc/6EFW-Y2F4>].

Under that standard, a President could potentially be impeached and removed from office for taking any action with his political interests in view. In a representative democracy, however, elected officials almost always consider the effect that their conduct might have on the next election. And there is nothing wrong with that.²²⁷

Trump surrogates echoed that position outside the halls of Congress; the most famous encapsulation of the view came when then-Trump Chief of Staff Mick Mulvaney responded to impeachment-related inquiries by telling the press: “Get over it . . . There’s going to be political influence in foreign policy.”²²⁸

There was an element of undeniable truth to Mulvaney’s claim: foreign policy, like domestic policy, is informed by and informs politics. But there was no real precedent for the claim in its entirety, which seemed to be that a purely partisan political motive could drive an important foreign policy decision like one involving aid to a critical and vulnerable ally. Further, nothing in the logic limited its application to impeachment. Rather, Trump and Mulvaney seemed to stake out the broad position that it was perfectly permissible for the President and his allies to use government resources for purely private political gain.

C. Litigation

In contrast to the moves described above, in most high-stakes litigation during the Trump Administration, lawyers defending the Administration cast their arguments in decidedly apolitical terms.²²⁹ This was an important

²²⁷ PROCEEDINGS OF THE UNITED STATES SENATE IN THE IMPEACHMENT TRIAL OF DONALD JOHN TRUMP, PART III, S. DOC. NO. 116-12, at 175 (2020) (emphasis omitted).

²²⁸ Katie Rogers, ‘Get Over It’? Why Political Influence in Foreign Policy Matters, N.Y. TIMES (Nov. 1, 2019), <https://www.nytimes.com/2019/10/21/us/politics/trump-inquiry-foreign-meddling.html> [https://perma.cc/DP8F-3X5E]. Earlier in the exchange, Mulvaney had been asked: “But to be clear, what you just described is a quid pro quo. It is, funding will not flow unless the investigation into the Democratic server happened as well.” Mulvaney replied: “[W]e do that all the time with foreign policy.” *Mulvaney’s Conflicting Statements on Quid Pro Quo*, N.Y. TIMES (Oct. 24, 2019), <https://www.nytimes.com/2019/10/17/us/politics/mulvaney-transcript-quid-pro-quo.html> [https://perma.cc/A4FN-RZAF].

²²⁹ In some litigation, Trump made (and continues to make) the instrumental argument that courts must protect the norm of nonpartisanship, at least when it comes to protecting *Trump* from investigations that he argues are impermissibly political. As he argued in a recent filing in a case in which he sought to assert executive privilege to prevent the disclosure of White House records:

The disagreement between an incumbent President and his predecessor from a rival political party is both novel and highlights the importance of executive privilege and the ability of Presidents and their advisers to reliably make and receive full and frank advice, without concern that communications will be publicly released to meet a political objective.

Emergency Application for a Stay of Mandate Pending Disposition of Pet. for Cert. & Injunction Pending Rev. at 9, *Trump v. Thompson*, 142 S. Ct. 680 (2022) (No. 21A272).

illustration of the strength of the nonpartisanship norm in operation. But it was likely attributable to the identities of the attorneys involved; lawyers at the DOJ responsible for defending presidential enactments in court are for the most part steeped in a constitutional culture that has accepted the illegitimacy of partisanship by government officials. This may stand in contrast to the private lawyers (and perhaps lawyers in the Office of White House Counsel) involved in impeachment defense.

Take first *Department of Commerce v. New York*, the case involving the Trump Administration's efforts to add a citizenship question to the Census.²³⁰ In March 2018, Commerce Secretary Wilbur Ross issued a memorandum directing the addition of a question about citizenship to the 2020 Census.²³¹ In the memorandum, as well as subsequent congressional testimony, Ross explained that he was making the change in response to a request from the DOJ to include the question to assist the DOJ in its efforts to enforce the Voting Rights Act.²³²

This decision was quickly challenged under the Census Act, the Administrative Procedure Act, and the Constitution.²³³ The Supreme Court ultimately affirmed the district court judgment setting aside the action under the Administrative Procedure Act.²³⁴ In the critical passage, writing for a 5–4 Court that included Justices Ruth Bader Ginsburg, Stephen G. Breyer, Sonia Sotomayor, and Elena Kagan, Chief Justice John G. Roberts Jr. explained:

[T]he evidence tells a story that does not match the explanation the Secretary gave for his decision [U]nlike a typical case in which an agency may have both stated and unstated reasons for a decision, here the VRA enforcement rationale—the sole stated reason—seems to have been contrived The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public [The explanation] provided here was more of a distraction.²³⁵

In both the passage above and the rest of the opinion, Roberts refrained from speculating about the real motive for the attempt to add the citizenship

²³⁰ 139 S. Ct. 2551, 2561 (2019).

²³¹ Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire, Memorandum from Wilbur Ross, Sec'y, Dep't of Com., to Karen Dunn Kelley, Under Sec'y for Econ. Affs. (Mar. 26, 2018), https://www.commerce.gov/sites/default/files/2018-03-26_2.pdf [<https://perma.cc/T9ET-HR7N>].

²³² Shaw, *supra* note 118, at 1958; Z. Payvand Ahdout, *Enforcement Lawmaking and Judicial Review*, 135 HARV. L. REV. 937, 961 (2022).

²³³ *Dep't of Com.*, 139 S. Ct. at 2551, 2561, 2563.

²³⁴ *Id.* at 2576.

²³⁵ *Id.* at 2575–76.

question.²³⁶ But developments while the case was pending before the Court, and after the Court's decision, seemed to provide confirmation of what had been widely surmised but never made explicit in the case itself: the addition of the question was driven by a desire to depress Census response rates in communities with high immigrant populations in order to improve the electoral prospects of the Republican Party, including in the context of redistricting.²³⁷

Evidence that emerged after the Supreme Court heard oral arguments in the case supported this account of the Trump Administration's motives. In May 2019, the plaintiffs filed a letter brief calling the Court's attention to newly surfaced files in the possession of deceased Republican operative Thomas Hofeller.²³⁸ Those files suggested quite explicitly that the addition of the citizenship question was driven by a desire to create an electoral advantage for, in Hofeller's words, "Republicans and Non-Hispanic Whites."²³⁹ The Court did not cite this filing in its opinion in the case.²⁴⁰ But the Court had received and presumably reviewed it.²⁴¹

Once the Court had blocked the addition of the citizenship question, the Trump Administration abandoned the subterfuge. Weeks after the decision, Trump issued Executive Order 13,880, instructing agencies to provide the Commerce Secretary with the maximum assistance possible to determine the

²³⁶ See *id.* at 2560–76; Justin Levitt, *Citizenship and the Census*, 119 COLUM. L. REV. 1355, 1387–97 (2019) (identifying four potential purposes for the addition of the citizenship question).

²³⁷ New York Immigration Coalition Plaintiffs' Motion for an Order to Show Cause at 1, *New York v. Dep't of Com.*, 461 F. Supp. 3d 80 (S.D.N.Y. 2020) (No. 18-CV-2921).

²³⁸ *Id.*

²³⁹ See *id.*; see also *Dep't of Com.*, 461 F. Supp. 3d at 86 (discussing Hofeller files in order granting in part and denying in part a motion for sanctions); Richard L. Hasen, *The Supreme Court's Pro-Partisanship Turn*, 109 GEO. L.J. ONLINE 50, 68–69 (2020) ("Ross's intent was to hurt minority voting rights. The citizenship question could have led to an undercount of Latino voters, some of whom would be afraid to answer citizenship questions, and it could have given states the ability to draw citizen-only districts which would decrease the voting power of Latinos and Democrats.").

²⁴⁰ See *Dep't of Com.*, 139 S. Ct. at 2575–76 (concluding that the Commerce Secretary's explanation for the addition of a citizenship question was pretextual and that the agency action was therefore invalid under the Administrative Procedure Act).

²⁴¹ In Professor Rick Hasen's blunt formulation: "Although neither the district court nor the Supreme Court made findings as to Secretary Ross's actual purpose, his real purpose, gleaned from documents released from a deceased Republican redistricting guru's hard drive by his estranged daughter, appeared to have been . . . to hurt minority voting rights." Hasen, *supra* note 239, at 68–69; see also Investigation of Census Citizenship Question, Memorandum from Carolyn B. Maloney, Chair, U.S. House Comm. on Oversight & Reform, to Members of the U.S. House Comm. on Oversight and Reform 1 (July 20, 2022), <https://oversightdemocrats.house.gov/sites/democrats.oversight.house.gov/files/2022.07.20%20COR%20Census%20Memorandum.pdf> [<https://perma.cc/S9TU-PRMM>] ("[T]op Administration officials were secretly exploring what appears to have been their true reason for adding the citizenship question: to exclude noncitizens from congressional apportionment counts . . .").

number of citizens and noncitizens in the country.²⁴² Here there was no pretense regarding the Voting Rights Act or anything else. It was clear from the face of the order that its goal was to ascertain citizen and noncitizen populations to facilitate congressional apportionment that, for the first time, would be based on citizen population. This was made still more explicit the following year, when Trump issued a presidential memo titled *Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census*.²⁴³ The memorandum announced that “it is the policy of the United States to exclude from the apportionment base aliens who are not in a lawful immigration status” and directed the Secretary to “provide information” to the President to permit him to carry out that policy.²⁴⁴

Many of these same dynamics—an apolitical public-facing explanation and a skeptical Court—were present in the Supreme Court’s invalidation, also on the grounds of a lack of reasoned explanation, of the Trump Administration’s efforts to rescind the agency order creating the Deferred Action for Childhood Arrivals (DACA) program. In *Department of Homeland Security v. Regents of the University of California*, the Court invalidated the rescission as “arbitrary and capricious” under the Administrative Procedure Act.²⁴⁵ As they had in the Census case, lawyers defending the Administration’s DACA rescission pointed to reasons that were wholly outside of politics, and, initially, purely legalistic: the fact that the Attorney General had concluded that the policy was unlawful, together with concern about the policy’s legality and litigation risk.²⁴⁶ After a lower court invalidated the rescission, the agency offered new, more policy-inflected reasons: the desire to have Congress, rather than the Executive Branch, make class-wide immigration decisions, and the deterrent effect of a more-restrictive immigration policy.²⁴⁷

²⁴² Executive Order 13,880 instructed agencies to provide the Secretary “the maximum assistance permissible, consistent with law, in determining the number of citizens and noncitizens in the country, including by providing any access that the Department may request to administrative records that may be useful in accomplishing that objective.” 84 Fed. Reg. 33,821, 33,821 (July 11, 2019).

²⁴³ *Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census*, 85 Fed. Reg. 44,679 (July 23, 2020).

²⁴⁴ *Id.* at 44,680. A three-judge district court found the memorandum unlawful, and in December 2020, after Biden’s victory, the Supreme Court dismissed the case on both standing and ripeness grounds. *Trump v. New York*, 141 S. Ct. 530, 534, 536–37 (2020) (per curiam).

²⁴⁵ 140 S. Ct. 1891, 1912–15 (2020).

²⁴⁶ *Nat’l Ass’n for the Advancement of Colored People v. Trump*, 298 F. Supp. 3d 209, 237–41 (D.D.C. 2018).

²⁴⁷ *Regents of the Univ. of Cal.*, 140 S. Ct. at 1903–05; Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1754–55 (2021) (“[T]aking . . . *Regents* and *Department of Commerce* on their own terms, they seem less about keeping the Court out of

In both cases, the decision not to advance politically inflected arguments was a striking one. Even before many of the doctrinal developments outlined in the next Part, there have been calls for agencies to explain their actions in terms that acknowledge political forces. In his partial concurrence in *Motor Vehicles Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, then-Justice William H. Rehnquist speculated that the agency approach to car safety being challenged appeared to be “related to the election of a new President,” which, he explained, was “a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations.”²⁴⁸ More recently, Justice Scalia in his majority opinion in *FCC v. Fox Television Stations* suggested that an FCC policy change was not suspect merely because it was “spurred by significant political pressure from Congress.”²⁴⁹ And Chief Judge Patricia Wald’s influential opinion for the D.C. Circuit in *Sierra Club v. Costle* rejected an argument that an EPA rule should be set aside on the grounds that the rulemaking had been tainted by improper political involvement; she explained that “we do not believe that Congress intended that the courts convert informal rulemaking into a rarified technocratic process, unaffected by political considerations or the presence of Presidential power.”²⁵⁰ She wrote, in addition, that it was perfectly appropriate “for Congressional representatives vigorously to represent the interests of their constituents before administrative agencies engaged in informal, general policy rulemaking.”²⁵¹ In addition to these judicial opinions, a number of scholars have echoed the call for agencies to acknowledge, and for courts to credit as legitimate, the role of politics in agency rulemaking and other policymaking.²⁵²

But it is worth pressing on what these opinions (and scholars) mean when they reference “a role for politics” or “political involvement” in agency actions. All appear to contemplate involvement by political actors or appointees but *not* action taken to advance partisan political interests. And in both the Census citizenship question and DACA rescission cases, it may

the political thicket and more about pushing the Trump Administration into it. They reflect a vision of courts as political ombudsmen—one might even say umpires—who will rarely second-guess the executive branch’s policy judgments themselves, but who will police the reason-giving process to ensure that the public has a fair opportunity to evaluate and respond to those same decisions.”).

²⁴⁸ 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring); see also Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 6 (2009).

²⁴⁹ 556 U.S. 502, 523 (2009).

²⁵⁰ 657 F.2d 298, 408 (1981).

²⁵¹ *Id.* at 409.

²⁵² See, e.g., Watts, *supra* note 248, at 7–8 (arguing that a degree of political influence is appropriate in agency decision-making); Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1146 (2010).

not have been possible for government lawyers to disclose political involvement—again, involvement by political leadership—that was not inextricably connected to partisan political objectives. The failure to offer those arguments reveals the continuing power of the nonpartisanship principle among government lawyers, even as it is under sustained attack elsewhere.

III. THE PARTISANSHIP TURN IN JUDICIAL DOCTRINE

The preceding Parts have argued that a nonpartisanship principle is a long-standing and generally accepted feature of our constitutional order, and that recent developments suggest an interest by some political actors in challenging that settlement. This Part turns to the courts, canvassing developments across a number of areas of law: presidential control, the law of democracy, public corruption, and public employee speech. Together, they reveal a degree of instability in the doctrinal foundations of the nonpartisanship principle.

A. *Presidential Control*

Recent cases regarding presidential control over Executive Branch actors—in particular, in the context of the President’s removal power—call into question long-settled features of our constitutional order. One such feature is the assumption that most of the federal workforce is composed of career rather than political appointees and that, as a matter of constitutional law and practice, political actors are limited in their ability to control the composition of the government workforce, at least on partisan terms. Crucially, these assumptions are the backdrop for virtually all of today’s most important debates in federal administrative and structural constitutional law—about the optimal balance of political accountability and expertise in agencies,²⁵³ about how much directive authority presidents should exercise

²⁵³ See, e.g., DESMOND KING, JOHN A. DEARBORN & STEPHEN SKOWRONEK, *PHANTOMS OF A BELEAGUERED REPUBLIC: THE DEEP STATE AND THE UNITARY EXECUTIVE* 6–11 (2021); George A. Krause & Anne Joseph O’Connell, *Loyalty-Competence Tradeoffs for Top U.S. Federal Bureaucratic Leaders in the Administrative Presidency Era*, 49 *PRESIDENTIAL STUD. Q.* 527, 530 (2019); Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 *IOWA L. REV.* 139, 221 (2018); David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 *GEO. WASH. L. REV.* 1095, 1096 (2008); Cary Coglianese, *Presidential Control of Administrative Agencies: A Debate over Law or Politics?*, 12 *J. CONST. L.* 637, 639 (2010); Brian D. Feinstein & Abby K. Wood, *Divided Agencies*, 95 *S. CAL. L. REV.* 731, 735 (2022); Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 *YALE L.J.* 1, 8–13 (2022). Of course, just because these are today’s most important debates does not mean that they are in any way new. As Paul Van Riper opened his 1958 *History of the United States Civil Service*, “[i]n the United States it has long been popular first to denounce ‘bureaucracy’ and then to augment it. Our inability

over the bureaucracy,²⁵⁴ about how much and what kinds of power Congress can permissibly delegate to administrative agencies,²⁵⁵ and about how, broadly speaking, to reconcile administrative power with democracy.²⁵⁶

Although debates surrounding the scope of the President's removal power date back to the first Congress²⁵⁷ and were at the heart of the first presidential impeachment of Andrew Johnson in 1868,²⁵⁸ it was not until the early twentieth century that the Supreme Court first grappled directly with presidential authority to remove Executive Branch officers.²⁵⁹ In that case, *Myers v. United States*, the Court struck down a statute that required the President to obtain Senate consent before removing a postmaster.²⁶⁰ The Court held that, at least as to the officer in question, the President's removal power was complete and unfettered.²⁶¹ Former President and Chief Justice William Howard Taft wrote:

[T]he President . . . must place in each member of his official family, and his chief executive subordinates, implicit faith. The moment that he loses

to live entirely happily either with or without a complex administrative arm of the national state is only a modern reaction to an ancient dilemma." VAN RIPER, *supra* note 48, at 1.

²⁵⁴ See, e.g., Bowie & Renan, *supra* note 88; Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration*, 122 COLUM. L. REV. 1 (2022); Cristina M. Rodríguez, *Foreword: Regime Change*, 135 HARV. L. REV. 1, 119 (2021); Cary Coglianese, *The Emptiness of Decisional Limits: Reconceiving Presidential Control of the Administrative State*, 69 ADMIN. L. REV. 43 (2017); Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539 (2005); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 702 (2007); SAIKRISHNA BANGALORE PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE* (2015); STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008).

²⁵⁵ See, e.g., Julian D. Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 280 (2021) (discussing the lack of historical support for the nondelegation doctrine); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1494 (2021) (arguing that "the Founding generation adhered to a nondelegation doctrine"); Aditya Bamzai, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164 (2019) (discussing recent nondelegation cases in the Supreme Court).

²⁵⁶ See, e.g., EDWARD H. STIGLITZ, *THE REASONING STATE* (2022); Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600, 1607–08 (2023); Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 712–14 (2001).

²⁵⁷ Jed H. Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. PA. L. REV. 753, 759 (2023); Ganesh Sitaraman, *The Political Economy of the Removal Power*, 134 HARV. L. REV. 352, 376 (2020).

²⁵⁸ BRENDA WINEAPPLE, *THE IMPEACHERS: THE TRIAL OF ANDREW JOHNSON AND THE DREAM OF A JUST NATION* (2019); MICHAEL LES BENEDICT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* 211–19 (1973).

²⁵⁹ In an earlier case, the Court had allowed a removal limitation on an inferior officer who challenged his removal by the Secretary of the Navy. But that case involved removal by a principal officer, rather than by the President personally. *United States v. Perkins*, 116 U.S. 483, 483, 485 (1886).

²⁶⁰ 272 U.S. 52, 176 (1926).

²⁶¹ *Id.* at 108.

confidence in the intelligence, ability, judgment or loyalty of any one of them, he must have the power to remove him without delay. To require him to file charges and submit them to the consideration of the Senate might make impossible that unity and co-ordination in executive administration essential to effective action.²⁶²

Myers took an extremely broad view of the President's removal power, and a correspondingly narrow view of Congress's ability to limit that power. But for a time, post-*Myers* decisions painted a decidedly more modest picture of the President's removal power. In 1935, the Court in *Humphrey's Executor v. United States* upheld for-cause removal protections for Commissioners of the FTC, describing *Myers* as a case involving a "purely executive" officer and finding it inapplicable to FTC Commissioners, who acted "in part quasi-legislatively and in part quasi-judicially" and could therefore be constitutionally insulated from unfettered presidential removal authority through a for-cause removal limitation.²⁶³ In the 1988 case *Morrison v. Olson*, the Court upheld another good-cause removal limitation, this time involving an independent counsel appointed by a three-judge court under the now-lapsed Independent Counsel Act.²⁶⁴ Although there was no plausible basis for concluding that the independent counsel was "quasi-legislative" or "quasi-judicial," the Court explained that the executive nature of the position did not resolve the permissibility of the removal limitation, announcing that the proper question was instead whether the removal restrictions "impede[d] the President's ability to perform his constitutional duty" and finding that here they did not.²⁶⁵

Humphrey's Executor and *Morrison* approved a degree of congressional latitude to limit presidential removal authority. In recent cases out of the Roberts Court, however, the logic and language of *Myers* have returned with a vengeance, as the Court has repeatedly invalidated even modest statutory removal protections that, in the Court's view, represent intolerable encroachments on presidential authority.

First, in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, the Court held unconstitutional a scheme that conferred for-cause removal protections on members of the Public Company Accounting Oversight Board, where those members were appointed and could be removed only for good cause by Commissioners of the SEC, who were *also* insulated from presidential removal.²⁶⁶ The Court concluded that what it

²⁶² *Id.* at 134; *see also* Bowie & Renan, *supra* note 88, at 2028.

²⁶³ 295 U.S. 602, 628, 632 (1935).

²⁶⁴ 487 U.S. 654, 661 & n.3, 696–97 (1988).

²⁶⁵ *Id.* at 691.

²⁶⁶ 561 U.S. 477, 486–87, 513–14 (2010).

termed “dual for-cause” removal limitations were incompatible with the separation of powers, explaining that “[t]he Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so. That power includes, as a general matter, the authority to remove those who assist him in carrying out his duties.”²⁶⁷

Next, the Court in *Seila Law LLC v. Consumer Financial Protection Bureau* found that the Consumer Financial Protection Bureau head’s for-cause removal protections violated the separation of powers.²⁶⁸ Describing *Humphrey’s Executor* and *Morrison v. Olson* as “exceptions” to a background norm of “unrestricted” presidential removal power, the Court held that “an independent agency that wields significant executive power and is run by a single individual who cannot be removed by the President unless certain statutory criteria are met” lacked a “foundation in historical practice” and also “clash[ed] with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control.”²⁶⁹ The Court’s discussion invoked a plebiscitary President; as it described the constitutional scheme, the overall strategy was to “divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections.”²⁷⁰

Collins v. Yellen next extended the logic of *Free Enterprise Fund* and *Seila Law* to the for-cause removal limitations for the director of the Federal Housing Finance Agency. The Court reiterated:

The President must be able to remove not just officers who disobey his commands but also those he finds “negligent and inefficient,” those who exercise their discretion in a way that is not “intelligent or wise,” those who have “different views of policy,” those who come “from a competing political party who is dead set against the President’s agenda,” and those in whom he has simply lost confidence²⁷¹

In a footnote, the Court highlighted concerns raised by the invited amicus that the case implicated other aspects of the federal government, including the civil service; in response, the Court noted only that “the constitutionality of [those] removal restriction[s]” was not before it.²⁷² And

²⁶⁷ *Id.* at 492, 513–14.

²⁶⁸ 140 S. Ct. 2183, 2197 (2020).

²⁶⁹ *Id.* at 2192.

²⁷⁰ *Id.* at 2203; cf. Daphna Renan, *The President’s Two Bodies*, 120 COLUM. L. REV. 1119, 1149 (2020) (“The constitutional legitimacy of the administrative state is increasingly framed in terms of the incumbent [president] and his singular connection to the people.”).

²⁷¹ *Collins v. Yellen*, 141 S. Ct. 1761, 1787 (2021) (first quoting *Myers v. United States*, 272 U.S., 52, 131, 135 (1926); and then quoting *Seila Law*, 140 S. Ct. at 2204).

²⁷² *Collins*, 141 S. Ct. at 1787 n.21.

the Court in *United States v. Arthrex* held that Administrative Patent Judges (APJs) who sat on the Patent Trial and Appeal Board (PTAB) were not subject to sufficient presidential control.²⁷³ The Court explained that “the President can neither oversee the PTAB himself nor ‘attribute the Board’s failings to those whom he *can* oversee,’” which meant that APJs “exercise power that conflicts with the design of the Appointments Clause ‘to preserve political accountability.’”²⁷⁴

The possible implications of these controversial cases²⁷⁵ for the civil service has begun to attract scholarly attention. Among the scholars sounding the alarm, Professor Paul Verkuil recently warned of the constitutional threat the removal cases pose to the civil service.²⁷⁶ In a recent working paper, Philip Howard made the explicit argument that “[i]t seems impossible to square the circle of Article II jurisprudence regarding accountability of ‘Officers of the United States’ with the CSRA.”²⁷⁷

²⁷³ 141 S. Ct. 1970, 1988 (2021).

²⁷⁴ *Id.* at 1982 (first quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 496 (2010); and then quoting *Edmond v. United States*, 520 U.S. 651, 663 (1997)); *see also* *Jarkesy v. SEC*, 34 F.4th 446, 463 (5th Cir. 2022) (striking down statutory removal restrictions on SEC administrative law judges), *cert. granted sub nom. SEC v. Jarkesy*, 143 S. Ct. 2688 (2023), and *cert. denied sub nom. Jarkesy v. SEC*, 143 S. Ct. 2690 (2023).

²⁷⁵ For critiques of these cases, *see*, for example, Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 STAN. L. REV. 175, 182 (2021), which argues that “there is no evidence to support the assertion that the removal of executive officers was . . . an inherent attribute of the ‘executive power’ as it was understood in England”; Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 5 (2021), which provides that “[s]ince before the Founding, offices held for a term of years . . . Short of impeachment, their holders could not be removed before the end of their terms”; Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, 96 NOTRE DAME L. REV. 1, 7 (2020), which argues that independent agencies have an “impeccable originalist provenance”; Jerry L. Mashaw, *Of Angels, Pins, and For-Cause Removal: A Requiem for the Passive Virtues*, U. CHI. L. REV. ONLINE (Aug. 27, 2020), <https://lawreviewblog.uchicago.edu/2020/08/27/seila-mashaw> [<https://perma.cc/D758-CCSF>], which calls the historical analysis in *Seila Law* “questionable”; Shugerman, *supra* note 257, at 756, which calls many of the historical claims underlying the Supreme Court’s removal cases a “myth”; Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 42–43 (2017), which notes that “there is an unfortunate selectivity to anti-administrativist originalism”; and Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court’s Political Theory*, 73 HASTINGS L.J. 371, 413 (2022), which argues that cases such as *Seila Law* neglect democratic interests undergirding Congress’s attempts to restrict presidential control over agencies.

²⁷⁶ Paul R. Verkuil, *Presidential Administration, the Appointment of ALJs, and the Future of For Cause Protection*, 72 ADMIN. L. REV. 461, 471 (2020) (“New questions are being raised concerning whether civil service tenure protections are themselves unconstitutional, as they deprive the President of his constitutional power to hold the bureaucracy accountable.”).

²⁷⁷ Philip K. Howard, *Restoring Accountability to the Executive Branch* 19 (Ctr. for the Study of the Admin. State, Working Paper No. 20-02, 2020), <https://administrativestate.gmu.edu/wp-content/uploads/2020/02/Howard-Restoring-Accountability-to-the-Executive-Branch.pdf> [<https://perma.cc/9R8H-DT6R>].

Relatedly—although on the appointment rather than removal side—Professor Jennifer Mascott has argued that the term “officers of the United States” has a significantly broader meaning than has previously been appreciated. According to Mascott, the category “Officers of the United States” should be understood to include “many employees of the modern administrative state currently considered to hold nonofficer positions,” including “officials overseeing federal disaster relief preparations; tax collectors; officials authorizing federal benefits payments; contract specialists; federal law enforcement officers; officials responsible for government investigations, audits, or cleanup; and ALJs.”²⁷⁸ Professor Mascott argues that a reclassification that would conform federal government employment to the original public meaning of the appointments clause would likely “require a significant portion of civil service employees to undergo Article II officer appointment.”²⁷⁹ But Mascott maintains that such a change would not necessarily be “destructive to the civil service structure”²⁸⁰ because appointment procedures could be devised to bring these appointments into compliance with Article II, which requires appointment by the President with Senate confirmation, or, in the case of inferior officers, by the President alone, the heads of departments, or the courts of law.²⁸¹ Mascott seeks to further allay concerns about her proposal by suggesting that even if adopting this understanding would substantially undermine the current overarching practices of nonpartisanship in federal employment, the Framers’ view was that “transparency in the appointment process would be an effective safeguard against patronage.”²⁸² Justice Thomas has registered his agreement that the term “officers of the United States” requires a broad reading. As he wrote in 2018, joined by Justice Gorsuch: “The Founders likely understood the term ‘Officers of the United States’ to encompass all federal civil officials who perform an ongoing, statutory duty—no matter how important or significant the duty.”²⁸³

B. Partisan Gerrymandering

The Roberts Court’s opinion in *Rucho v. Common Cause* represents the clearest retreat from the constitutional nonpartisanship principle. On its face, *Rucho* merely held that challenges to partisan gerrymanders were

²⁷⁸ Jennifer L. Mascott, *Who Are “Officers of the United States”?*, 70 STAN. L. REV. 443, 454 (2018) (internal numbering omitted).

²⁷⁹ *Id.* at 546.

²⁸⁰ *Id.* at 443.

²⁸¹ U.S. CONST. art. II, § 2, cl. 2.

²⁸² Mascott, *supra* note 278, at 559.

²⁸³ *Lucia v. SEC*, 138 S. Ct. 2044, 2056 (2018).

nonjusticiable, not that on the merits such gerrymanders survived constitutional scrutiny.²⁸⁴ But the language and logic of the opinion suggest that its reach may not be limited, either to gerrymandering or to justiciability.

Rucho involved a challenge to a congressional map that North Carolina officials had deliberately drawn to maximize Republican advantage.²⁸⁵ The Republican state legislators managing the redistricting effort were candid about their goals. Although the State of North Carolina consisted of roughly equal numbers of Republican and Democratic voters, the state officials managing the map-drawing aimed to create a map that would produce a congressional delegation of ten Republicans and three Democrats.²⁸⁶ The cochair of the legislative redistricting committee explained the ten to three plan by noting that “he did ‘not believe it [would be] possible to draw a map with 11 Republicans and 2 Democrats.’”²⁸⁷ *Rucho*’s companion case, *Benisek v. Lamone*, involved a Democratically drawn Maryland map and featured equally explicit official acknowledgements that the goal was to advantage Democrats and disadvantage Republicans,²⁸⁸ with the governor testifying that “his aim was to ‘use the redistricting process to change the overall composition of Maryland’s congressional delegation to 7 Democrats and 1 Republican by flipping’ one district.”²⁸⁹

In the years leading up to *Rucho*, the Court had broadcast serious concerns about the constitutionality of excessive partisan gerrymanders. But it had also equivocated about whether federal courts were capable of distinguishing permissible from impermissible gerrymanders. In 1973, the Court noted in passing that “[a] districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are employed ‘to minimize or cancel out the voting strength of racial or political elements of the voting population.’”²⁹⁰ In 1986, a majority of the Court held that challenges to partisan gerrymanders were justiciable, but without a majority opinion on

²⁸⁴ 139 S. Ct. 2484, 2507–08 (2019).

²⁸⁵ *Id.* at 2491.

²⁸⁶ *Id.*

²⁸⁷ *Id.* (“I think electing Republicans is better than electing Democrats. So, I drew this map to help foster what I think is better for the country.”).

²⁸⁸ *Benisek v. Lamone*, 266 F. Supp. 3d 799, 816–17 (D. Md. 2017) (Niemyer, J., dissenting) (quoting Maryland Governor Martin O’Malley’s explanation of the district lines at issue in *Benisek* as designed to “‘put more Democrats and Independents into the Sixth District’ and ensure ‘the election of another Democrat’”), *aff’d*, 138 S. Ct. 1942 (2018).

²⁸⁹ *Rucho*, 139 S. Ct. at 2493.

²⁹⁰ *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973).

how courts should resolve such challenges.²⁹¹ In 2004's *Vieth v. Jubelirer*, all nine Justices agreed that there might well be a constitutional problem with excessive gerrymanders.²⁹² In that case, and again in 2006's *League of United Latin American Citizens v. Perry*, a majority of the Court either took the position that such cases were justiciable, or maintained that the Court should leave open the possibility, but again without any consensus on how to craft a manageable standard for policing the practice.²⁹³

In *Rucho*, however, the Court resolved the long-open question. It held that while excessive partisan gerrymanders are clearly undemocratic²⁹⁴—while they lead to “results that reasonably seem unjust”²⁹⁵ and in fact are “incompatible with democratic principles”²⁹⁶—federal courts are nevertheless powerless to stop them.²⁹⁷ And yet it refused to provide a remedy for that violation. The majority grounded its holding in the political question doctrine, so that by its terms the decision was about justiciability, not merits.²⁹⁸ That is, as the majority reiterated, its decision did not “condone excessive partisan gerrymandering” but merely took the position that the solution to excessive partisan gerrymanders did not “lie[] with the federal judiciary.”²⁹⁹ But the opinion also contained passages suggesting that

²⁹¹ *Davis v. Bandemer*, 478 U.S. 109, 143, 185 n.25 (Powell, J., concurring in part and dissenting in part) (noting that there was “no ‘Court’ for a standard that properly should be applied in determining whether a challenged redistricting plan is an unconstitutional partisan political gerrymander”).

²⁹² 541 U.S. 267, 293; Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 811 (2005) (“[A]ll members of the *Vieth* Court acknowledged that pursuit of partisan aims in redistricting violates the Constitution under some circumstances.”).

²⁹³ See 548 U.S. 399, 414 (declining to revisit the issue of justiciability); *id.* at 493 (Roberts, J., concurring) (“[W]hether a challenge to a political gerrymander [is] justiciable . . . has not been argued in [this] case[.]”); *Vieth*, 541 U.S. at 306, 309 (Kennedy, J., concurring) (noting that the Court was right to refrain from “ordering the correction of all election district lines drawn for partisan reasons” and referencing “weighty arguments for holding cases like these to be nonjusticiable,” but maintaining that “the arguments are not so compelling that they require us now to bar all future claims of injury from a partisan gerrymander”).

²⁹⁴ As Jamal Greene puts it, “the practice is plainly undemocratic.” Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 129 (2018).

²⁹⁵ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019).

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 2506–07.

²⁹⁸ *Id.* (“[P]artisan gerrymandering claims present political questions beyond the reach of the federal courts.”).

²⁹⁹ *Id.* The Court went on to suggest that nothing in its opinion foreclosed other constitutional actors, such as Congress or states through the creation of independent redistricting commissions, from acting to curb partisan gerrymandering. But the Court’s recent Equal Protection, anticommandeering, and First Amendment precedents could prove obstacles to meaningful congressional action. And there is every reason to believe that notwithstanding the rhetoric in *Rucho*, the current Supreme Court might reach a different conclusion about the constitutionality of independent redistricting commissions, which it came within one vote of invalidating in *Arizona State Legislature v. Arizona Independent Redistricting*

partisanship in redistricting was not merely unfit for judicial policing, but affirmatively constitutionally permissible, as when the Court explained that “[a] permissible intent—securing partisan advantage—does not become constitutionally impermissible, like racial discrimination, when that permissible intent ‘predominates.’”³⁰⁰

However one reads the opinion, one thing is clear: post-*Rucho*, partisan officials understand that they are free to draw maps in ways that maximize partisan advantage and undermine core democratic values of representation, majoritarianism, responsiveness, and participation.³⁰¹ *Rucho* represented a significant retreat from, in John Hart Ely’s influential formulation, “a participation-oriented, representation-reinforcing approach to judicial review.”³⁰² It disavowed any judicial role in enforcing a constitutional principle that would place limits on the manipulation of the democratic process for partisan advantage or entrenchment.³⁰³

C. Regulating Elections

The *Rucho* Court suggested that the nature of partisan gerrymandering rendered the issue uniquely unfit for judicial oversight. And the Court has not yet embraced—or even directly faced—the argument that partisan motives are permissible in the context of government action that undermines or impedes access to voting.³⁰⁴ But, as Professor Richard Hasen has explained in detail, the analytical moves on display in *Rucho*, combined with several other recent cases, suggest that *Rucho*’s pro-partisanship turn may not in fact be limited to redistricting. In Hasen’s characterization, there is every reason to believe that in the future the Court may reject challenges to restrictive voting laws by “classify[ing] discrimination in these cases as

Commission. 576 U.S. 787, 826 (Roberts, J., dissenting) (2015); see Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111, 150–53.

³⁰⁰ *Rucho*, 139 S. Ct. at 2503.

³⁰¹ See Stephanopoulos, *supra* note 299, at 126–28.

³⁰² JOHN HART ELY, *DEMOCRACY AND DISTRUST* 87 (1980); see also *id.* at 103 (describing judicial intervention as especially warranted where “the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out”). For a recent critique of Ely, see Ryan D. Doerfler & Samuel Moyn, *The Ghost of John Hart Ely*, 75 VAND. L. REV. 769, 773 (2022).

³⁰³ See Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 716 (1998) (arguing that the Constitution should be read to contain “an indispensable commitment to the preservation of an appropriately competitive political order”); cf. Travis Crum, *Reconstructing Racially Polarized Voting*, 70 DUKE L.J. 261, 263 (2020) (arguing that gerrymanders can exploit racially polarized voting to reduce or eliminate minority political power).

³⁰⁴ So-called “vote denial” cases, involving laws like that at issue in *Brnovich*, have long been treated differently from “vote dilution,” also known as redistricting, cases. Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566, 1575–76 (2019).

political and not racial” and proceeding to “give the green light to political discrimination.”³⁰⁵

There were hints of this deferential attitude in the Court’s recent Voting Rights Act decision *Brnovich v. Democratic National Committee*. *Brnovich* involved a challenge to two Arizona laws, one prohibiting out-of-precinct voting and one prohibiting third-party ballot collecting.³⁰⁶ During the oral argument, Justice Amy Coney Barrett pressed the attorney for the Republican National Committee (RNC)—which had intervened in the case brought by the DNC against the Arizona officials responsible for enforcing the laws—to explain his clients’ presence in the case. She asked: “What’s the interest of the Arizona RNC here in keeping, say, the out-of-precinct voter ballot disqualification rules on the books?”³⁰⁷ Michael Carvin, the RNC’s attorney, answered bluntly: “Because it puts us at a competitive disadvantage relative to Democrats. Politics is a zero sum game, and every extra vote they get through unlawful interpretations of Section 2 hurts us. It’s the difference between winning an election 50 to 49 and losing [one].”³⁰⁸ Justice Barrett moved on quickly, but the moment was revealing.

Justice Alito’s opinion upholding the Arizona laws did not reference this exchange. But the opinion did seem in passing to approve the general permissibility of partisan motives, noting that “[t]he spark for the debate . . . may well have been provided by one Senator’s enflamed partisanship, but partisan motives are not the same as racial motives.”³⁰⁹ The suggestion here seems to be that partisan motives might be a permissible basis on which to enact restrictive voting laws—a proposition the Court has never previously endorsed and which could make it exponentially more difficult to successfully challenge laws that undermine or limit the right to vote.

D. Public Corruption

Next, the Court’s recent cases involving public corruption raise further questions about the current status of the nonpartisanship principle. Take, first, *McDonnell v. United States*, in which the Supreme Court reversed the federal bribery conviction of former Virginia Governor Bob McDonnell.³¹⁰ A jury had convicted McDonnell on bribery charges after hearing evidence that McDonnell had arranged official meetings for, and otherwise facilitated

³⁰⁵ Hasen, *supra* note 239, at 70.

³⁰⁶ 141 S. Ct. 2321, 2343–44 (2021).

³⁰⁷ Transcript of Oral Argument at 37, *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021) (No. 19-1257).

³⁰⁸ *Id.* at 37–38.

³⁰⁹ *Brnovich*, 141 S. Ct. at 2349.

³¹⁰ 579 U.S. 550, 555, 581 (2016).

the business prospects of, a Virginia businessman who had given McDonnell and his wife over \$175,000 in gifts, loans, and other benefits.³¹¹ In reversing McDonnell’s conviction, the Supreme Court acknowledged that “[t]here is no doubt that this case is distasteful; it may be worse than that.”³¹² But the Court concluded that McDonnell’s actions had not constituted “official acts” in exchange for loans or gifts and accordingly could not support a conviction for violation of the federal bribery statute, which criminalizes public officials’ receipt of “anything of value” in return for “being influenced in the performance of any official act.”³¹³

Permeating the opinion, as well as the oral argument in the case, was a transactional vision of politics in which the very nature of representation entails a give and take between politicians and constituents, as in this excerpt:

[T]he Government’s expansive interpretation of “official act” would raise significant constitutional concerns. Section 201 prohibits *quid pro quo* corruption—the exchange of a thing of value for an “official act.” In the Government’s view, nearly anything a public official accepts—from a campaign contribution to lunch—counts as a *quid*; and nearly anything a public official does—from arranging a meeting to inviting a guest to an event—counts as a *quo*. But conscientious public officials arrange meetings for constituents, contact other officials on their behalf, and include them in events all the time.³¹⁴

The Court worried further that “[t]he Government’s position could cast a pall of potential prosecution over these relationships”—so that the union official who had “given a campaign contribution in the past” might hesitate before contacting a representative about a plant closure, while a previous invitation to an official to join a group of homeowners “on their annual outing to the ballgame” might chill later, presumably innocent, discussions of the pace of homeowner power restoration after a storm.³¹⁵ On the Court’s characterization, “[o]fficials might wonder whether they could respond to even the most commonplace requests for assistance, and citizens with legitimate concerns might shrink from participating in democratic discourse”³¹⁶ if the specter of possible criminality hung over all such interactions.

On its face, *McDonnell* did nothing to disturb long-standing limits on permissible government partisanship. And indeed, the facts of the case

³¹¹ *Id.* at 555.

³¹² *Id.* at 580.

³¹³ 18 U.S.C. § 201; *McDonnell*, 579 U.S. at 579–81.

³¹⁴ *McDonnell*, 579 U.S. at 574–75.

³¹⁵ *Id.* at 575.

³¹⁶ *Id.*

suggested that personal *financial* need, rather than pursuit of personal political motive, drove McDonnell to provide official access and other assistance to his businessman benefactor.³¹⁷ But the logic of the opinion created a significantly higher bar for criminal prosecutions of government officials who misuse their office for private purposes—whether personal enrichment or political advantage.³¹⁸

Four years later, the Court in *Kelly v. United States* again reversed a political corruption conviction, using logic that inched still closer to explicitly acknowledging the permissibility of government officials using government resources for political ends.³¹⁹ The facts of *Kelly* involved the so-called Bridgegate scandal, in which underlings of New Jersey Governor Chris Christie conspired to create gridlock in Fort Lee, New Jersey by limiting residents' access to the George Washington Bridge.³²⁰ In the Court's own description of the case's facts, "[f]or no reason other than political payback, [the officials in question] used deception to reduce Fort Lee's access lanes to the George Washington Bridge—and thereby jeopardized the safety of the town's residents."³²¹

The Court acknowledged that the action was taken for a "political reason"—that is, "to punish the mayor of Fort Lee for refusing to support the New Jersey Governor's reelection bid."³²² But the Court proceeded to reverse the convictions of the government officials, noting that "not every corrupt act by state or local officials is a federal crime."³²³ The Court further explained that the federal fraud and wire fraud statutes under which the officials had been convicted required that the scheme in question be designed to "obtain money or property," which the bridge scheme, however distasteful and dangerous or politically motivated, had not been designed to do.³²⁴ As the Court explained, where it had once been the case that "courts of appeals often construed the federal fraud laws to 'proscribe[] schemes to defraud citizens of their intangible rights to honest and impartial government,'" the

³¹⁷ *Id.* at 558.

³¹⁸ Take, for example, the post-*McDonnell* prosecution of New Jersey Senator Robert Menendez for bribery and honest services fraud. After the jury deadlocked, the judge dismissed several charges, citing *McDonnell*, and the DOJ subsequently filed to dismiss the remaining charges. See *United States v. Menendez*, 291 F. Supp. 3d 606, 623–30 (D.N.J. 2018); Elaine Godfrey, *Bob Menendez Is Off the Hook*, ATLANTIC (Jan. 30, 2018), <https://www.theatlantic.com/politics/archive/2018/01/bob-menendez-is-off-the-hook/552032> [<https://perma.cc/AW2D-QLJF>].

³¹⁹ See 140 S. Ct. 1565, 1574 (2020).

³²⁰ *Id.* at 1568–69.

³²¹ *Id.*

³²² *Id.* at 1568.

³²³ *Id.* at 1574.

³²⁴ *Id.*

Court had limited the reach of those statutes, in addition to limiting the federal “honest services” statute.³²⁵ Thus, only schemes involving bribes and kickbacks should be understood to violate federal law.³²⁶

Like *McDonnell*, *Kelly* involved the construction of a statute, not the announcement of any constitutional rule. And the *Kelly* Court stopped short of holding that the Constitution would not have permitted a prosecution under a differently drawn statute—that is, the Court did not conclude that this sort of politically motivated activity by public officials was itself constitutionally protected. But the effect of *McDonnell* and *Kelly*, combined with the earlier cases limiting the reach of the federal “honest services” statute, seems to be that political self-dealing by government officials will at the very least be difficult to reach using federal criminal laws.³²⁷

E. Campaign Finance

The law of campaign finance presents something of a challenge for considering the limits on permissible partisan activity by government officials. In our system, virtually all elected officials must engage in some forms of fundraising to remain in office, and fundraising is definitionally done in service of personal political objectives. So, it cannot be that the nonpartisanship principle prohibits such activities when engaged in by incumbents.

Still, even within this framework, statutes, agency guidance, and judicial doctrine have long sought to draw lines that acknowledge the permissibility and even necessity of fundraising while placing limits on the ability of public officials to use government resources to engage in it. The Hatch Act seeks to balance these competing realities in the context of senior presidential appointees, like Cabinet officials. The Act allows that unlike most federal government officials, senior presidential appointees may engage in political activities even when “on duty,” so long as the federal government is not required to pay for associated activities, such as travel.³²⁸

³²⁵ *Id.* at 1571; see *McNally v. United States*, 483 U.S. 350, 360 (1987); *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 414 (1999); *Cleveland v. United States*, 531 U.S. 12, 18–19 (2000).

³²⁶ See *Kelly*, 140 S. Ct. at 1571; *Skilling v. United States*, 561 U.S. 358, 368 (2010); *Percoco v. United States*, 143 S. Ct. 1130, 1137–38 (2023); *United States v. Ciminelli*, 143 S. Ct. 1121, 1126 (2023).

³²⁷ Although these cases are at least in part about vagueness, vagueness often operates in tandem with other principles. As Mila Sohoni has shown, many pre-New Deal cases primarily associated with other rules or doctrines—the nondelegation doctrine, economic due process, and a limited view of the reach of Congress’s Commerce Clause powers—were also, and significantly, cases about vagueness. See Mila Sohoni, *Notice and the New Deal*, 62 DUKE L.J. 1169, 1182 (2013) (“Considerations of vagueness formed a component or a backstop to many of the pre-New Deal Court’s most notorious holdings.”).

³²⁸ 5 U.S.C. § 7324(b)(1).

Similarly, one provision of the 2002 campaign finance reform statute, the Bipartisan Campaign Reform Act, prohibits members of Congress from making fundraising calls from their congressional offices but permits such calls from other locations.³²⁹ And until recent years, the Court implemented congressional (and state legislative) choices that sought to balance the desire to limit the potential for corruption against candidate freedom to engage in politics and fundraising activities.³³⁰ Of course, campaign finance limits apply not only to incumbent officials but also to outside candidates for office, who are frequently nongovernmental actors. But the point is that lawmakers have long sought to limit even what they themselves could do in the realm of campaign finance activity.

The Court's current and narrowed conception of permissible limits on campaign finance, however, appears to leave little room for regulation seeking to limit the amount of partisan activity in which government actors can engage.³³¹ In striking down long-standing limits on corporate spending in federal elections, the *Citizens United* Court explained that "[f]avoritism and influence are not . . . avoidable in representative politics."³³² The Court further limited government efforts to advance anticorruption and related interests in the context of elections in *McCutcheon v. FEC* and *FEC v. Cruz*.³³³ And while to date the Court has not applied the logic of those cases to, for example, limits on the size of contributions candidates themselves may solicit and accept, it may only be a matter of time until the Court crosses that line.

F. Public Employee Speech

From the perspective of this Article, the Court's public employee speech cases are complex, containing interests related to politics and partisanship on both employer and employee side. The Court's early cases were relatively protective of employees' First Amendment interests, invoking the political-autonomy rationale of the political patronage cases to identify limits on public employers' ability to discipline employees based on

³²⁹ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 302, 116 Stat. 81, 96 (2002); Ciara Torres-Spelliscy, *Time Suck: How the Fundraising Treadmill Diminishes Effective Governance*, 42 SETON HALL LEGIS. J. 271, 273, 293 (2018).

³³⁰ See *Buckley v. Valeo*, 424 U.S. 1, 29 (1976); *McConnell v. FEC*, 540 U.S. 93, 104 (2003).

³³¹ See Jennifer A. Heerwig & Katherine Shaw, *Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, 102 GEO. L.J. 1443, 1462 (2014); Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385, 1400–01 (2013); Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 121–23, 142 (2010).

³³² *Citizens United v. FEC*, 558 U.S. 310, 359 (2010) (quoting *McConnell*, 540 U.S. at 297).

³³³ *McCutcheon v. FEC*, 572 U.S. 185, 227 (2014); *FEC v. Cruz*, 596 U.S. 289, 313 (2022).

speech or expression. But the Court has largely retreated from that principle, and its later cases more narrowly construe public employee speech rights.

In a pair of cases, first in 1968 and then in 1980, the Court held that public employees cannot be “compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest.”³³⁴ The 1980 case, *Connick v. Myers*, involved an assistant district attorney who, after learning she was to be transferred to another section of the office, circulated an employee questionnaire and was subsequently terminated.³³⁵ The Court found that one of the questions on the questionnaire, which asked whether employees “ever feel pressured to work in political campaigns on behalf of office-supported candidates,” *did* constitute a matter of public concern.³³⁶ As the Court explained, “the issue of whether assistant district attorneys are pressured to work in political campaigns is a matter of interest to the community upon which it is essential that public employees be able to speak out freely without fear of retaliatory dismissal.”³³⁷ The Court cited the political patronage case *Branti v. Finkel* for the principle that “official pressure upon employees to work for political candidates not of the worker’s own choice constitutes a coercion of belief in violation of fundamental constitutional rights.”³³⁸ The Court found, however, that given the timing and circumstances surrounding the questionnaire, the government’s interest “in the effective and efficient fulfillment of its responsibilities to the public” outweighed the employee’s First Amendment interests.³³⁹

In 2006, the Court in *Garcetti v. Ceballos* refashioned the *Connick–Pickering* test to ask not only whether the employee speech was on a matter of public concern but also whether it was made “pursuant to the employee’s official duties.”³⁴⁰ The Court explained that employee speech made pursuant to official duties is, in the words of Professor Helen Norton, “speech for which the government has paid a salary, and thus speech that the government

³³⁴ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *see also Connick v. Myers*, 461 U.S. 138, 146–49 (1983) (acknowledging the need for public employees to be able to speak freely on certain matters of public interest).

³³⁵ 461 U.S. at 141–42.

³³⁶ *Id.* at 149.

³³⁷ *Id.*

³³⁸ *Id.* (citing *Branti v. Finkel*, 445 U.S. 507, 515–16 (1976)). These cases, together with the Court’s public employment due process cases like *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sinderman*, 408 U.S. 593 (1972), marked a break from an era in which the Court largely took the view articulated by Justice Oliver Wendell Holmes for the Massachusetts Supreme Judicial Court in *McAuliffe v. Mayor of New Bedford*: “[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” 29 N.E. 517, 517 (1892).

³³⁹ *Connick*, 461 U.S. at 154.

³⁴⁰ 547 U.S. 410, 413 (2006).

may restrain and punish without running afoul of the First Amendment.”³⁴¹ The speech in question involved a prosecutor’s allegation that an affidavit in support of a search warrant in one of the office’s cases contained serious misrepresentations.³⁴² The prosecutor alleged that after he alerted his superiors to the likely misstatements, he was subjected to a series of retaliatory actions.³⁴³ The Court concluded that because the prosecutor’s allegation was made in a memo written pursuant to his official duties, his First Amendment retaliation claim could not proceed.³⁴⁴

Because the content of the speech in *Garcetti* was not political, it is difficult to assess how its test would have impacted a claim like the one in *Connick*, in which some of the speech in question explicitly pertained to impermissible employer-side political pressure. But *Garcetti* certainly appears to raise the bar for successful employee First Amendment claims across the board—including where the speech alleges impermissible political activity.³⁴⁵ *Garcetti*, then, is in some ways of a piece with other cases discussed in this Part that undermine long-standing precepts of government nonpartisanship.

Interestingly, though, *Garcetti*’s explicit crediting of the importance of government management and provision of public service also seems to support the continuing vitality of many long-standing federal statutory regimes, such as the civil service laws and the Hatch Act, explicitly designed to promote policies of good government.³⁴⁶ In that sense, there are strains in the government-employee cases that could be quite supportive of the nonpartisanship principle.

* * *

The developments canvassed in this Part, spanning a number of different bodies of law, suggest that partisanship is receiving an increasingly receptive audience at the contemporary Supreme Court. These cases are not always in explicit dialogue. *McDonnell* does not cite *Citizens United*, for

³⁴¹ HELEN NORTON, *THE GOVERNMENT’S SPEECH AND THE CONSTITUTION* 61 (2019).

³⁴² *Garcetti*, 547 U.S. at 414–15.

³⁴³ *Id.*

³⁴⁴ *Id.* at 426.

³⁴⁵ See Heidi Kitrosser, *The Special Value of Public Employee Speech*, 2015 SUP. CT. REV. 301, 302 (noting that under *Garcetti* “speech conducted pursuant to one’s public employment is unprotected”).

³⁴⁶ *Garcetti*, 547 U.S. at 422–23 (“Our holding likewise is supported by the emphasis of our precedents on affording government employers sufficient discretion to manage their operations. . . . Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees’ official communications are accurate, demonstrate sound judgment, and promote the employer’s mission.”).

example, although McDonnell’s lawyers relied on the case in their briefs.³⁴⁷ *Kelly* does not cite *McDonnell*, though it does rely heavily on the Court’s honest services cases.³⁴⁸ The more recent government speech cases do not, for the most part, cite the political patronage cases (although Scalia’s dissent in *Board of Commissioners v. Umbehr* and *O’Hare Truck Service, Inc. v. City of Northlake* linked the two quite explicitly).³⁴⁹ But the cumulative effect of these decisions is hard to mistake: the Court is increasingly skeptical of laws that would seek to limit official partisanship.³⁵⁰

IV. IMPLICATIONS AND POTENTIAL RESPONSES

The preceding Parts have suggested that both political and doctrinal developments give reason to question the future of the nonpartisanship principle. As the rhetoric and actions of political branch actors have worked to undermine this long-standing constitutional settlement, its doctrinal foundations have been quietly weakened, suggesting that any frontal attack on the nonpartisanship principle may meet a receptive audience in the courts.

Unraveling the nonpartisanship principle could happen through legislation, executive action, judicial decision, or some combination thereof. But however it occurs, an abandonment of the nonpartisanship principle, and a resulting substantial change to the political and career balance inside the federal government, would transform what has become a fundamental feature of our system—an aspect, and indeed a core component, of the separation of powers and even the rule of law.³⁵¹ This is by no means to suggest that the *particulars* of the balance are in any way settled—they are,

³⁴⁷ Brief for the Petitioner at 25, *McDonnell v. United States*, 579 U.S. 550 (2016) (No. 15-474), 2016 WL 1358962, at *25.

³⁴⁸ *Kelly v. United States*, 140 S. Ct. 1565, 1571–72 (2020).

³⁴⁹ *Bd. of Cnty. Comm’rs v. Umbehr*, 518 U.S. 668, 686–711 (1996) (Scalia, J., dissenting) (identifying tension between the Court’s patronage and government speech cases). Scalia’s *Umbehr* dissent was also his *O’Hare* dissent. *See id.* at 686 n.*.

³⁵⁰ Cf. Leah Litman, *Remedial Convergence and Collapse*, 106 CALIF. L. REV. 1477 (2018) (identifying, in the context of remedies, mechanisms by which separate bodies of doctrine can converge).

³⁵¹ See Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 429 (2009) (citing “the civil service and its prohibitions on politically-motivated employment decisions” as one of the mechanisms that serves an “internal Executive Branch checking function”); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 547 (2015) (highlighting the role of civil servants and the “effective, if imperfect, role these tenured government workers play in constraining and guiding administrative action” and therefore safeguarding the separation of powers); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2317 (2006) (“A critical mechanism to promote internal separation of powers is bureaucracy.”); HAROLD H. BRUFF, *BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE* 408 (2006) (“[Civil servants] seek legal authority for their actions . . . [and thus] constitute an often unappreciated bulwark to the rule of law in its everyday application to the citizen.”).

rather, subject to vigorous contestation and debate.³⁵² But despite this ongoing process of negotiation, the existence of some balance between political and career employees has been a core feature of constitutional law and constitutional culture since the Progressive Era.

Perhaps because the nonpartisanship principle has stood for so long as a feature of our constitutional order, there has been little need to mount any sustained defense of it. In addition, when the Supreme Court announced the rule limiting partisanship in local government employment—the most important judicial elaboration of the nonpartisanship principle—it justified the rule mostly in reference to the First Amendment interests of individual government employees, referencing only in passing the larger values at stake in limiting the permissible role of partisanship in government employment.³⁵³ The First Amendment is a component of American liberal democracy, of course, but the Court mostly failed to connect the nonpartisanship principle to broader interests like well-functioning administration or meaningful self-governance.³⁵⁴

Mounting a durable defense of nonpartisanship rules may require a thicker account of the constitutional values that require organizing government power in ways that limit the role of partisanship. Professor Neil Siegel makes a version of this argument when he describes the creation of a “reasonably well-functioning federal government” as one of the “basic purposes of the Constitution.”³⁵⁵ We tend to take for granted that values such as resilience and capacity will be furthered by limiting partisanship and centering expertise.³⁵⁶ But all of that may require further elaboration in the context not just of scholarly debates, but also constitutional doctrine.

So what should such arguments look like? To start, foundational constitutional principles, grounded in history, provide strong support for a

³⁵² See Walters, *supra* note 253, at 12–14 (seeking to ground the administrative state in agonistic democratic theory, which accepts and even embraces conflict); Francis Fukuyama, *Why We Need a New Pendleton Act*, AM. INTEREST (Nov. 3, 2013), <https://www.the-american-interest.com/2013/11/03/why-we-need-a-new-pendleton-act> [<https://perma.cc/DD45-PW8K>]; cf. Daphna Renan, “*Institutional Settlement*” in *A Provisional Constitutional Order*, 108 CALIF. L. REV. 1995, 1999 (2020) (“[T]he separation of powers . . . is a process of inescapable, ongoing contestation.”).

³⁵³ See *Elrod v. Burns*, 427 U.S. 347, 372 (1976) (plurality opinion).

³⁵⁴ *Id.*

³⁵⁵ Neil S. Siegel, *After the Trump Era: A Constitutional Role Morality for Presidents and Members of Congress*, 107 GEO. L.J. 109, 126 (2018); Matthew C. Stephenson, *The Qualities of Public Servants Determine the Quality of Public Service*, 2019 MICH. ST. L. REV. 1177, 1179 (“[O]ur legal, institutional, or political choices influence the sorts of public servants we get, and thereby influence how well or poorly our government operates.”).

³⁵⁶ See, e.g., David E. Lewis, *Testing Pendleton’s Premise: Do Political Appointees Make Worse Bureaucrats?*, 69 J. POL. 1073, 1086 (2007) (noting that political “appointees get systematically lower performance grades than careerists”).

nonpartisanship principle. The Constitution's Framers were deeply skeptical of political parties,³⁵⁷ even if they failed to anticipate how central a role they would quickly come to play.³⁵⁸ For that reason, even if the early Supreme Court cases establishing the nonpartisanship principle mostly failed to engage with arguments from constitutional history and structure, if those cases are subject to reconsideration, both the structure and original meaning of the Constitution when taken seriously counsel in favor of retaining the settled rule. To be sure, the Constitution's actual drafting history does not reflect explicit engagement with a nonpartisanship principle, for the simple reason that parties and partisanship did not emerge as potent forces until after the Constitution's drafting and ratification.³⁵⁹ But one concept that did surface again and again during the drafting was the idea of the Constitution as a "system."³⁶⁰ This, more than any other term, was the one that delegates at the Constitutional Convention reached for, and one that today seems naturally to carry with it notions of apolitical and technical expertise in government.³⁶¹ Moreover, nonpartisanship's core values can be understood as related to notions of civic republicanism that were of central import to the Constitution's drafters.³⁶²

Beyond Founding Era history, the post-Founding practice detailed in the preceding Parts warrants serious consideration in determining the content of any constitutional rules surrounding nonpartisanship. This "historical gloss" method of constitutional interpretation, closely associated with Justice Felix Frankfurter's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, holds that long-standing governmental practices are entitled to

³⁵⁷ See, e.g., THE FEDERALIST NO. 10, *supra* note 148, at 77 (James Madison) ("Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction.").

³⁵⁸ See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2313 (2006) (describing "an institution the Framers could imagine only dimly but nevertheless despised: political parties").

³⁵⁹ See Lee Drutman, *America Is Now the Divided Republic the Framers Feared*, ATLANTIC (Jan. 2, 2020), <https://www.theatlantic.com/ideas/archive/2020/01/two-party-system-broke-constitution/604213/> [<https://perma.cc/6MPX-EUML>]; Hasen, *supra* note 239, at 56 & n.38.

³⁶⁰ JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA* 62 (2018).

³⁶¹ *Id.* ("While few . . . delegates invoked astronomical metaphors, most did reduce the task before them to constructing a 'system.' The term was by far the most common noun used to describe both the existent and proposed constitutions.").

³⁶² See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 467 (1998) (noting that the federal Constitution was partly a reaction to "corruption and mutability of the [state] Legislative Councils"); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 544 (1986) (describing the "communitarian and virtue-based framework" of civic republicanism).

significant weight in constitutional interpretation.³⁶³ The Supreme Court has explicitly credited the importance of settled practice in a number of important recent cases, including *NLRB v. Noel Canning*,³⁶⁴ *Zivotofsky v. Kerry*,³⁶⁵ *Chiafalo v. Washington*,³⁶⁶ and most recently *Houston Community College System v. Wilson*.³⁶⁷ Beyond these cases, constitutional interpretation by nonjudicial actors, such as Executive Branch lawyers within the Office of Legal Counsel, has long credited the importance of practice.³⁶⁸ Taking this history seriously would seem to require retaining the settlement in which Congress and the President may change the contours of the civil service, but where neither Presidents nor courts entertain any serious arguments in favor of the wholesale unconstitutionality of the civil service. Here, both Congress and the President, with a backdrop of Supreme Court approval, have long acquiesced in the constitutional permissibility of a nonpartisan civil service. This history should figure prominently in any Judicial, Legislative, or Executive Branch consideration of the Constitution and nonpartisanship principles.

In addition, one straightforward rule of law grounded argument for limiting partisanship in federal employment is that doing so is a reasonable, perhaps even indispensable, way to facilitate the provision of government services on a fair and evenhanded basis. Surely, one of the basic obligations of government is to treat members of the polity as possessing equal worth

³⁶³ 343 U.S. 579, 610 (1952) (“It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.”); see Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 257 (2017) [hereinafter Bradley & Siegel, *Judicial Separation of Powers*]; Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 VA. L. REV. 1, 17–31 (2020); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 417–30 (2012). But see Stephen M. Griffin, *Against Historical Practice: Facing Up to the Challenge of Informal Constitutional Change*, 35 CONST. COMMENT. 79, 80 (2020) (offering objections to practice-based accounts of constitutional law).

³⁶⁴ 573 U.S. 513, 533 (2014).

³⁶⁵ 576 U.S. 1, 23 (2015).

³⁶⁶ 140 S. Ct. 2316, 2326 (2020).

³⁶⁷ 142 S. Ct. 1253, 1259 (2022) (“When faced with a dispute about the Constitution’s meaning or application, ‘[l]ong settled and established practice is a consideration of great weight.’”); see also *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2567 (2019) (“We look . . . to Congress’s broad authority over the census, as informed by long and consistent historical practice. All three branches of Government have understood the Constitution to allow Congress, and by extension the Secretary, to use the census for more than simply counting the population.”).

³⁶⁸ See Memorandum from Caroline D. Krass, Principal Deputy Asst. Att’y Gen., to the Att’y Gen. 7 (Apr. 1, 2011), <http://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya.pdf> [https://perma.cc/V5LW-WJKV]; Bradley & Siegel, *Judicial Separation of Powers*, *supra* note 363, at 261 (“Reliance on historical practice is even more common in legal reasoning within the Executive Branch than it is in the courts.”).

and dignity; a broad, merit-based selection process for choosing government workers best advances that goal.³⁶⁹ And a corollary of that argument is that a nonpartisan government workforce is not only of instrumental value in providing government services on an evenhanded basis: it is, rather, inextricably linked to that goal. Put differently, a constitutional challenge to the civil service should arguably be understood as a challenge to the broader idea of evenhanded government: a government that is unconstrained in its ability to hire and fire on the basis of partisanship would likely also be able to dole out government benefits and burdens on a partisan basis. A related argument is that not only is the bureaucracy itself essential to the provision of services and resources on a fair and evenhanded basis but also that the civil service itself is “a vehicle for mobility and political representation of groups that might otherwise be shut out of politics.”³⁷⁰

Resisting attacks on the nonpartisanship principle may also require engaging with arguments that posit affirmative benefits of partisanship schemes and identify costs of a constitutional scheme that contains a nonpartisanship principle.³⁷¹ Some political science literature suggests that machine politics and patronage systems were actually effective—that they were more responsive to constituents than post-machine politics,³⁷² or that they produced other sorts of benefits.³⁷³ Justices in dissent in the patronage cases began making such arguments decades ago: in *Branti v. Finkel*, Justice Lewis F. Powell Jr. argued that the Court’s decision limiting patronage would “decrease the accountability and denigrate the role of our national political parties” with adverse impacts on the “quality of political debate, and indeed the capacity of government to function in the national interest.”³⁷⁴ In addition, some legal scholarship suggests that our current democratic dysfunction is linked to the weakness of today’s political parties and the

³⁶⁹ See generally STIGLITZ, *supra* note 256 (arguing that expertise and providing credible reasoning increases the public’s trust in the administrative state).

³⁷⁰ Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 129 (2018).

³⁷¹ Cf. Eloise Pasachoff, *Executive Branch Control of Federal Grants: Pork, Policy, and Punishment*, 83 OHIO ST. L.J. 1113, 1117–18 (2022) (defending Executive Branch control of federal grants).

³⁷² See, e.g., Vivek S. Sharma, *Give Corruption a Chance*, 128 NAT’L INT. 38, 42 (2013) (arguing that “systems of patrons and clients” running through state actors are “the grease that keeps the gears of the system running”); Jonathan Rauch, *The Case for Corruption*, ATLANTIC (Mar. 2014), <https://www.theatlantic.com/magazine/archive/2014/03/the-case-for-corruption/357568> [<https://perma.cc/8VKV-J2HQ>] (“[H]onest graft helps knit together a patronage network that ensures leaders can lead and followers will follow.”).

³⁷³ NANCY L. ROSENBLUM, ON THE SIDE OF THE ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP 7–8 (2008).

³⁷⁴ 445 U.S. 507, 531–32 (1980).

outsized power exercised by organized private interests.³⁷⁵ Although such scholars tend to focus on campaign finance regulation and other sorts of political reforms, rather than identifying the nonpartisanship principle as a core problem, this literature could be marshaled in service of arguments for the affirmative benefits of recentring partisanship.

Whatever the abstract merits of these arguments, in a moment of intense partisan polarization,³⁷⁶ the prospect of restoring some version of a patronage system in federal employment could have genuinely cataclysmic consequences. The recent breakdown of many of the norms of forbearance and mutual accommodation suggests that the party in power would pursue a maximalist agenda in federal personnel, potentially removing significant portions of the federal workforce and installing political loyalists in their places. This could include positions involving everything from intelligence and covert operations, to nuclear waste storage and disposal, to pandemic response, public health, and climate. It could also encompass both the criminal law apparatus and election administration. This could enable loyalists to manipulate elections in favor of their preferred parties or candidates, undermining, perhaps fatally, the prospects for genuine democratic competition.³⁷⁷

The implications of the partisanship turn are not limited to the federal system. Given the largely local nature of election administration in this country, the concerns are heightened in the context of state and local government. Many of the threats around the 2020 election, and those well underway with respect to 2024, hinge on the politicization of corners of state and local government that have long operated as nonpartisan entities. Consider here the efforts to install partisan officials on local election boards or efforts to convince state legislators to ignore state returns and appoint presidential electors that align with the partisan affiliation of a majority of the state legislature.³⁷⁸ The threat such developments pose to a healthy and well-functioning democracy illustrate the stakes involved.

³⁷⁵ Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 325–26 (2011).

³⁷⁶ *Id.* at 275 (“American democracy over the last generation has had one defining attribute: the rise of extreme partisan polarization.”). See generally EZRA KLEIN, *WHY WE’RE POLARIZED* (2020) (identifying the origins of extreme partisan polarization).

³⁷⁷ Dawn Brancati, *Democratic Authoritarianism: Origins and Effects*, 17 ANN. REV. POL. SCI. 313, 317 (2014); see FRANCIS FUKUYAMA, *POLITICAL ORDER AND POLITICAL DECAY: FROM THE INDUSTRIAL REVOLUTION TO THE GLOBALIZATION OF DEMOCRACY* 455–548 (2014).

³⁷⁸ Leah M. Litman & Katherine Shaw, *Textualism, Judicial Supremacy, and the Independent State Legislature Theory*, 2022 WIS. L. REV. 1235, 1237–38.

CONCLUSION

This Article has sought to identify a set of incipient and largely unnoticed shifts in both political practice and constitutional doctrine—shifts that could have significant implications for the future of American constitutional governance.

Nonpartisanship in government as we currently know it is the result of a web of practices—constitutional, statutory, and norm based—that together have created a legal and political order long understood to balance the important and sometimes competing imperatives of democratic responsiveness, expertise, and governmental capacity. This long-standing settlement is now facing serious challenges from both political and doctrinal forces—an important component of broader attacks on the administrative state.³⁷⁹

Writing about the road to authoritarianism, Harvard political scientists Steven Levitsky and Daniel Ziblatt argue that, when working from the autocrats' playbook, "elected autocrats subvert democracy . . . rewriting the rules of politics to tilt the playing field against opponents. The tragic paradox of the electoral route to authoritarianism is that democracy's assassins use the very institutions of democracy—gradually, subtly, and even legally—to kill it."³⁸⁰ And, as Professor Kim Lane Scheppele argues, "[t]o maintain liberal, democratic constitutionalism . . . a constitutional system must be able to separate the rules of the game from the game, so constitutional structures themselves must be protected outside the playing field of normal politics."³⁸¹ A well-settled rule of nonpartisanship that once seemed a bulwark against the prospects of democratic collapse now appears under threat. At a moment of democratic vulnerability, these developments more than warrant our attention.

³⁷⁹ Jack M. Beermann, *The Never-Ending Assault on the Administrative State*, 93 NOTRE DAME L. REV. 1599, 1599–1600 (2018).

³⁸⁰ LEVITSKY & ZIBLATT, *supra* note 37, at 8.

³⁸¹ Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 563 (2018).

