

# CONGRESS AND THE SHIFTING SANDS IN ADMINISTRATIVE LAW

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## ABSTRACT

*In recent years, we have seen an anti-administrativist turn in the federal judiciary, with the Supreme Court limiting agency power in important respects. These shifting sands in administrative law seem to be motivated, at least in part, by the Court's perception of the rise of presidential administration and decline in legislative activity. As part of the Widener Commonwealth Law Review Judging in Administrative Law Symposium, this Essay assesses how the Court has responded to concerns about over-presidentialism and then sketches out several ways Congress can respond to reassert itself in federal lawmaking.*

## TABLE OF CONTENTS

Abstract.....	187
Introduction.....	188
I. How The Supreme Court Has Responded .....	192
A. “Harder” Look Review .....	193
B. The New Major Questions Doctrine .....	196
C. Elimination of <i>Chevron</i> Deference .....	198
D. Revival of Nondelegation Doctrine .....	200
II. How Congress Can Respond .....	201

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A. Congressional Oversight Powers .....	202
B. Increased Attention to Appropriations.....	204
C. Legislative Fast-Track for Major Questions .....	206
D. Regular Reauthorization .....	208
E. Congress's Anti-Removal Power.....	210
Conclusion .....	213

## INTRODUCTION

Even a casual observer of the Supreme Court knows that the sands are shifting in administrative law. Among other things, this Term marked the end of an era for judicial deference to federal agencies, with the Court eliminating *Chevron* deference to agency statutory interpretations.<sup>1</sup> The Court also cut back on federal agencies' authority to adjudicate disputes in-house, shifting power to impose civil penalties from the Securities and Exchange Commission to civil juries and Article III courts.<sup>2</sup> Gillian Metzger's warning in her *Harvard Law Review* "Supreme Court 2016 Term Foreword" that the administrative state is under siege from "anti-administrativists" looks even more prescient today.<sup>3</sup>

How did we get here?

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<sup>1</sup> *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024) ("Chevron is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires."); *see also* Christopher J. Walker, *What Loper Bright Enterprises v. Raimondo Means for the Future of Chevron Deference*, YALE J. ON REGUL. (June 28, 2024), <https://www.yalejreg.com/nc/what-loper-bright-enterprises-v-raimondo-means-for-the-future-of-chevron-deference/> ("Loper Bright [indeed] marks the end of an era in administrative law.").

<sup>2</sup> *SEC v. Jarkesy*, 144 S. Ct. 2117, 2139 (2024) ("A defendant facing a fraud suit has the right to be tried by a jury of his peers before a neutral adjudicator. Rather than recognize that right, the dissent would permit Congress to concentrate the roles of prosecutor, judge, and jury in the hands of the Executive Branch."); *see also* Christopher J. Walker, *What SEC v. Jarkesy Means for the Future of Agency Adjudication*, YALE J. ON REGUL. (June 28, 2024), <https://www.yalejreg.com/nc/what-sec-v-jarkesy-means-for-the-future-of-agency-adjudication/>.

<sup>3</sup> Gillian E. Metzger, *The Supreme Court 2016 Term: Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 2 (2017).

One potential answer could focus on the rise of presidentialism and the decline of Congress. To be sure, this story may well be overly idealistic—in either direction. On the one hand, Beau Baumann might call it administrative law Americana, envisioning a previously vibrant Congress that never truly existed.<sup>4</sup> Philip Hamburger, on the other, might decry it as administrative law Pollyanna, ignoring how dangerous administrative overreach has become to liberty and the rule of law.<sup>5</sup> However, my guess is that the story is at least somewhat accurate. Regardless of its accuracy, this narrative seems to have motivated the Supreme Court’s recent “anti-administrativist” turn in administrative law.

Here’s the story: We live in an era of presidential administration—indeed, of *over*-presidentialism.<sup>6</sup> Legislative output from Congress, by contrast, seems to have plummeted in recent decades.<sup>7</sup> In its place, we have seen a rise in federal lawmaking through regulation.<sup>8</sup> In more recent years, this trend has accelerated, and major policymaking seems centralized in the White House. Immigration is a classic example. From granting deferred action for noncitizens to building a border wall without congressional authorization, policymaking initiatives on questions of significant social and political importance have come from the Oval Office, not Capitol Hill.<sup>9</sup>

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<sup>4</sup> See Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L.J. 465, 474 (2023) (defining “Americana administrative law” as “[u]nsubstantiated claims of congressional decline [that] are increasingly deployed in the literature to defend judicial supremacy”).

<sup>5</sup> See generally PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014).

<sup>6</sup> See, e.g., Ashraf Ahmed et al., Lev Menand & Noah Rosenblum, *The Making of Presidential Administration*, 137 HARV. L. REV. 2131, 2132 (2024).

<sup>7</sup> *Statistics and Historical Comparison*, GOVTRACK, <https://www.govtrack.us/congress/bills/statistics> (recording a fifty-two percent decline in enacted legislation from the 93rd Congress in 1973-75 to the 117th Congress in 2021-23).

<sup>8</sup> As of the end of 2021, the Code of Federal Regulations stood at 188,346 pages, bound into 243 volumes. See CLYDE WAYNE CREWS JR., COMP. ENTER. INST., TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE 40 fig.15 (2023 ed.), [https://cei.org/wp-content/uploads/2023/11/10K\\_Commandments.pdf](https://cei.org/wp-content/uploads/2023/11/10K_Commandments.pdf).

<sup>9</sup> Memorandum from Janet Napolitano, Sec. of Homeland Sec., to David V. Aguilar, Acting Comm’r of U.S. Customs and Border Prot. (June 15, 2012)

In other words, when faced with a Congress that does not want to cooperate or compromise to legislate, presidents decide to proceed alone. And the plot thickens. Now, when presidents do not know where they can get the power to pursue their policy agenda, they do not turn to Congress. Instead, they simply issue an executive order, hold a press conference, or send a tweet instructing federal agencies to find some old statute and use it to do something novel and ambitious that they believe they were elected to pursue.<sup>10</sup> Congress's sclerosis encourages federal agencies to interpret their statutes "aggressively" to achieve policy goals that are not reachable in any other way.<sup>11</sup>

This approach seems to define twenty-first-century presidential administration. We saw this occur with President Biden's student loan cancellation program, where the Department of Education relied on the Heroes Act, which was passed by a unanimous Republican Senate in the aftermath of 9/11, to attempt to realize a progressive policy agenda of widespread student loan relief.<sup>12</sup> The same seems true of a number of COVID responses, such as the nationwide vaccine mandate for large employers and the nationwide eviction moratorium.<sup>13</sup> President Trump's attempt to build a border wall by declaring a national emergency may have been another instance.<sup>14</sup> As Jonathan Adler and I detail elsewhere, we see a similar phenomenon regarding the Federal Communications Commission's flip-flopping on net neutrality and

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(establishing the "deferred action" program); *Trump v. Sierra Club*, 140 U.S. 1 (2019) (granting an application for stay of injunction against the Trump administration's shifting of defense funding to building a wall on the Mexican border).

<sup>10</sup> See Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1936-37 (2020); cf. Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 7 (2014).

<sup>11</sup> Christopher J. Walker, *Inside Agency Statutory Interpretations*, 67 STAN. L. REV. 999, 1048-65 (2015).

<sup>12</sup> See *Biden v. Nebraska*, 600 U.S. 477, 482-86 (2023).

<sup>13</sup> See Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 595 U.S. 109, 113-15 (2022) (enjoining OSHA's COVID-19 test-or-vaccine mandate for large employers); *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 594 U.S. 758, 759 (2021) (enjoining the CDC's COVID-19 nationwide eviction moratorium).

<sup>14</sup> See *Sierra Club v. Trump*, 929 F.3d 670, 676 (9th Cir. 2019).

the Environmental Protection Agency's attempts to regulate climate change.<sup>15</sup>

What we have seen is not stability in administration. Instead, we see a Congress that has lost its ambition.<sup>16</sup> In that power vacuum, presidents have stepped in to pursue their ambitious policy agendas on their own through regulation and other executive actions. While perhaps oversimplified, this story seems to have a ring of truth to it. More importantly, it is a narrative embraced by the Supreme Court. For instance, in overruling *Chevron* deference last Term, the Court expressed concerns about how agency statutory interpretations are inconsistent from presidential administration to administration, “foster[ing] unwarranted instability in the law [and] leaving those attempting to plan around agency action in an eternal fog of uncertainty.”<sup>17</sup>

In Part I of this Symposium Essay, I discuss the Supreme Court’s recent efforts to begin the process of reining in presidential excesses and trying to reinvigorate Congress. The likely impact of the Court’s responses on law and government will be mixed, and these judicial reforms, without more, will not restore Congress to the vibrant actor that the Court seems to think is necessary. As a result, these judicial reforms will not shift the power balance from the President and the administrative state back to Congress. Instead, at least in the interim, much of that power balance will shift to the federal judiciary or lead to a deregulatory power void.

That does not need to be the case, however. Congress can and should respond to these judicial reforms and reassert itself in federal governance. In Part II, I sketch out five ways Congress can do so. No one proposal is likely to be sufficient; some combination will no doubt be required. Indeed, some may require a political movement to pressure Congress to act. If a committed constituency forms, these proposals offer a path toward regaining

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<sup>15</sup> See Adler & Walker, *supra* note 10, at 1938-45.

<sup>16</sup> To be fair, this is an oversimplification; Congress does legislate. The Biden Administration, for instance, has had a pretty successful four years on the legislative front. See, e.g., Li Zhou, *Joe Biden Has Been Pretty Productive as President. That Doesn't Mean He's Popular*, VOX (Apr. 25, 2023), <https://www.vox.com/politics/23697855/joe-biden-popularity-legislative-record>.

<sup>17</sup> Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2272 (2024).

the values of democratic legitimacy, stability, and empowerment provided by an ambitious first branch of government.

### I. HOW THE SUPREME COURT HAS RESPONDED

In this Essay, I focus on four ways the Roberts Court has sought to rein in the President and the administrative state: (1) "harder" look review of agency policymaking, (2) the new major questions doctrine to limit agency regulatory authority, (3) the elimination of *Chevron* deference to administrative interpretations of law, and (4) increased interest in a more robust nondelegation doctrine to prohibit Congress from delegating broad authority to federal agencies in the first place. Each will be addressed in turn.

At the outset, however, it is worth observing the apparent tension between these moves to cut back on presidential (and administrative) power and the rise of unitary executive theory at the Supreme Court.<sup>18</sup> After all, it may seem inconsistent for the same Court to argue that the President should be able to control all (or at least more) regulatory power and personnel in the administrative state while also severely cabining the scope of regulatory power.<sup>19</sup> As Dan Farber observes in the context of the major questions doctrine, the Court's reform strategy is "not so much as a way of preventing Congress from giving away too much power as a way to prevent Presidents from snatching powers they were not given."<sup>20</sup>

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<sup>18</sup> See, e.g., *Seila Law v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 202-205 (2020) (holding that presidents have plenary removal power over singular directors of agencies); *Collins v. Yellen*, 594 U.S. 220, 226 (2021) (extending *Seila Law*); *United States ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 442 (2023) (Kavanaugh, J., concurring) (joining Justice Thomas, along with Justice Barrett, in questioning the validity of *qui tam* suits as violations of Article II's unitary grant to the president of litigation authority on behalf of the United States).

<sup>19</sup> See, e.g., Jodi L. Short & Jed H. Shugerman, *Major Questions About Presidentialism: Untangling the "Chain of Dependence" Across Administrative Law*, 65 B.C. L. Rev. 511, 568 (Feb. 2024) (exploring this tension).

<sup>20</sup> Daniel Farber, *The Major Question Doctrine, Nondelegation, and Presidential Power*, YALE J. ON REGUL. (Nov. 22, 2022), <https://www.yalejreg.com/nc/synposium-shane-democracy-chief-executive-07/>.

Yet, from a closer view, these judicial moves are consistent and work in tandem. In the unitary executive turn, the Court seeks to ensure administrative power is more greatly controlled by the President, as opposed to political leadership and career civil servants at federal agencies.<sup>21</sup> Through the judicial moves explored in this Essay, the Court seeks to ensure that the administrative state, and thus the President, only act in ways consistent with congressional (and constitutional) commands.<sup>22</sup> The key with these judicial reforms, discussed below, is that they purport to limit the President from exceeding statutory authority to regulate—but do not limit the President’s ability to control the administrative state.

#### *A. “Harder” Look Review*

In the 1970s, the D.C. Circuit adopted a “hard look” approach to reviewing agency actions in a series of cases.<sup>23</sup> The D.C. Circuit argued that such judicial review was required “in furtherance of the public interest.”<sup>24</sup> The Supreme Court ultimately adopted some version of this “hard look” review standard in *State Farm*, tying this requirement to the “arbitrary and capricious” language in Section 706(2)(A) of the Administrative Procedure Act (APA).<sup>25</sup> This requires agencies to “explain the evidence which is available, and [to] offer a ‘rational connection between the facts found and the choice made.’”<sup>26</sup>

In more recent years, the Supreme Court seems to have embraced a “harder” look review under the APA. Two cases from the Trump Administration come immediately to mind.

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<sup>21</sup> See cases cited, *supra* note 18.

<sup>22</sup> See *infra* Part I.A-D.

<sup>23</sup> See, e.g., *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850-52 (D.C. Cir. 1970); *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973); *Int’l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 641 (D.C. Cir. 1973).

<sup>24</sup> *Int’l Harvester*, 478 F.2d at 647.

<sup>25</sup> *Motor Veh. Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46, 48 (1983).

<sup>26</sup> *Id.* at 52 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

First, consider the census citizenship question litigation. The Trump Administration sought to insert a question on citizenship into the 2020 decennial census, purportedly to generate census block-level data to use in Voting Rights Act (VRA) enforcement at the request of the Department of Justice.<sup>27</sup> Wilbur Ross, the Secretary of Commerce responsible for the census, concluded that adding a census question was necessary because reconstructing citizenship data from existing administrative records would be insufficient.<sup>28</sup> This is a facially reasonable justification in line with his statutory authority. But that was not the full story.

The district court had ordered discovery, which produced substantial evidence that the VRA rationale was pretextual, and Secretary Ross had decided to reinstate the question “‘well before’ receiving DOJ’s request.”<sup>29</sup> Normally, where the government provides a facially valid explanation on the record, one would not expect the courts to inquire further.<sup>30</sup> But if we publicly know that an agency is lying about why it is adding a citizenship question, must courts accept the agency’s pretextual reasoning? The Supreme Court said no. Casting aside Secretary Ross’s proffered reasons as a mere façade, Chief Justice Roberts, writing for the Court, concluded that “[a]ccepting contrived reasons would defeat the purpose of the enterprise.”<sup>31</sup> Accordingly, the Court concluded that the APA’s “reasoned explanation requirement of administrative law . . . is meant to ensure that agencies offer

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<sup>27</sup> Dep’t of Com. v. New York, 588 U.S. 752, 752 (2019).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 782-83; *see also id.* at 785 (“We are presented, in other words, with an explanation for agency action that is incongruent with what the record reveals about the agency’s priorities and decisionmaking process. . . . [W]e cannot ignore the disconnect between the decision made and the explanation given.”).

<sup>30</sup> *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415, 420 (1971) (holding that “[R]eview is to be based on the full administrative record that was before the Secretary at the time he made his decision” and “the Secretary’s decision is entitled to a presumption of regularity.”); *New York*, 588 U.S. at 786 (Thomas, J., concurring in part and dissenting in part) (“For the first time ever, the Court invalidates an agency action solely because it questions the sincerity of the agency’s otherwise adequate rationale.”).

<sup>31</sup> *New York*, 588 U.S. at 785.

genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public.”<sup>32</sup>

Second, there is the Court’s treatment of the Trump Administration’s attempt to unwind the Obama Administration’s Deferred Action for Childhood Arrivals (DACA) immigration relief program. In *Department of Homeland Security v. Regents of the University of California*,<sup>33</sup> the Trump Administration argued as its primary justification for rescission that the program was unlawful both as to deportation deferral and benefits eligibility.<sup>34</sup> However, there was one problem: DACA was not necessarily unlawful as to deferral.<sup>35</sup> The Trump Administration did not explain why it chose to depart from the Obama Administration’s policy regarding deferral and failed to consider retaining deferral alone as an alternative to revoking both.<sup>36</sup> The Secretary of Homeland Security’s finding that the entire program was unlawful did not suffice for the “reasoned analysis” required under *State Farm*.<sup>37</sup> In particular, the Court held that arbitrary and capricious review under the APA requires the agency, when changing an existing agency policy, to consider reasonable regulatory alternatives and to demonstrate that it has adequately considered the reliance interests at stake in changing the regulatory baseline.<sup>38</sup>

Finally, last Term, in *Ohio v. EPA*, the Court granted a stay against an EPA regulatory action because the EPA’s action was arbitrary and capricious.<sup>39</sup> In particular, the Court faulted the EPA because it provided “no reasoned response” to concerns raised during the notice-and-comment period.<sup>40</sup> As Dan Deacon has observed, the lower courts had long recognized that the APA

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<sup>32</sup> *Id.*

<sup>33</sup> Dep’t of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1 (2020).

<sup>34</sup> *See id.* at 12.

<sup>35</sup> *See id.* at 27-29.

<sup>36</sup> *Id.* at 30.

<sup>37</sup> *Id.* (quoting *Motor Veh. Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42, (1983)); *id.* at 60 (Thomas, J., concurring in the judgment in part and dissenting in part).

<sup>38</sup> *See id.* at 28-29.

<sup>39</sup> *Ohio v. EPA*, 144 S. Ct. 2040, 2053-54 (2024).

<sup>40</sup> *Id.* at 2054.

requires federal agencies to respond to substantial comments raised during the public comment period.<sup>41</sup> But the Court in *Ohio v. EPA* expressly embraces the requirement. Indeed, Professor Deacon argues, “Gorsuch’s opinion seems to bend over backwards to extend grace to the objecting commenters while holding the government to a higher standard of clarity.”<sup>42</sup> A harder look, indeed.<sup>43</sup>

### B. *The New Major Questions Doctrine*

In October Term 2021, the Supreme Court issued a series of cases that refashioned or reinvented the major questions doctrine when it comes to interpreting congressional delegations of regulatory authority to federal agencies.<sup>44</sup> Writing for the majority in *West Virginia v. EPA*, Chief Justice John Roberts perhaps best captures this new canon of statutory interpretation:

We presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies. Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us reluctant to read into ambiguous statutory text the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary.

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<sup>41</sup> Daniel Deacon, *Ohio v. EPA and the Future of APA Arbitrariness Review*, YALE J. ON REGUL. (June 27, 2024), <https://www.yalejreg.com/nc/ohio-v-epa-and-the-future-of-apa-arbitrariness-review/>.

<sup>42</sup> *Id.*

<sup>43</sup> See *Ohio*, 144 S. Ct. at 2068 (Barrett, J., dissenting) (quoting *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 548 (1978)) (arguing that the Court requires too much explanation from the EPA in a way that “risks the ‘sort of unwarranted judicial examination of perceived procedural shortcomings’ that might ‘seriously interfere with that process prescribed by Congress.’”).

<sup>44</sup> *West Virginia v. EPA*, 597 U.S. 697, 735 (2022) (invalidating the Obama EPA’s Clean Power Plan); *Nat’l Fed’n of Indep. Bus. v. Dep’t of Labor*, 595 U.S. 109, 113 (2022) (enjoining OSHA’s COVID-19 test-or-vaccine mandate for large employers); *Alabama Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 594 U.S. 758, 759-60 (2021) (enjoining the CDC’s COVID-19 nationwide eviction moratorium).

The agency instead must point to clear congressional authorization for the power it claims.<sup>45</sup>

Then, when striking down the Biden administration's student loan forgiveness program in 2023, the Court re-emphasized that "clear congressional authorization" would be needed for the executive branch to make decisions requiring "basic and consequential tradeoffs."<sup>46</sup>

Whether a substantive canon,<sup>47</sup> a clear statement rule,<sup>48</sup> or a semantic and contextual canon,<sup>49</sup> the doctrine seeks to limit the President and the administrative state from making major policies without Congress. If it is apparent from the statutory text, structure, and context that the enacting Congress would not have anticipated the agency using regulatory authority to address a new or different major policy problem, the reviewing court now invokes the major questions doctrine to cabin the agency's regulatory authority. The doctrine, in turn, requires Congress to more expressly declare that it has delegated power to the agency to address the major policy question at issue.

As Jonathan Adler and I have explored elsewhere, there is an often-overlooked temporal problem with congressional delegation.<sup>50</sup> Textually broad statutory delegations of regulatory authority can become a source of authority for agencies to regulate at a later time. This later action could be wholly unanticipated by the enacting Congress and may not receive support in the current Congress. The major questions doctrine is one way to address this issue of congressional delegation and time. It is a way to push

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<sup>45</sup> *West Virginia*, 597 U.S. at 723 (quotations and citations omitted).

<sup>46</sup> *Biden v. Nebraska*, 600 U.S. 477, 506 (quoting *West Virginia*, 597 U.S. at 723, 730).

<sup>47</sup> See *West Virginia*, 597 U.S. at 735 (Gorsuch, J., concurring) (locating the major questions doctrine in constitutional avoidance applied to nondelegation concerns).

<sup>48</sup> See, e.g., Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1012 (2023) (arguing that "the 'new' major questions doctrine operates as a clear statement rule").

<sup>49</sup> See *Biden*, 600 U.S. at 508 (2023) (Barrett, J., concurring) (grounding the major questions doctrine in common sense intuitions about the language people use to delegate authority).

<sup>50</sup> Adler & Walker, *supra* note 10, at 1936-37.

back against the rise of over-presidentialism and the decline of legislative involvement in major policymaking.

### C. *Elimination of Chevron Deference*

The major questions doctrine may now be overshadowed by a development from the Court last Term: the elimination of *Chevron* deference. Under the *Chevron* framework, courts had deferred to agencies' reasonable interpretations of ambiguous statutes they administered.<sup>51</sup> This granted agencies flexibility or discretion to carry out the tasks Congress assigned to them. Such judicial deference was grounded in comparative agency expertise and political accountability, as well as the need for predictability and uniformity in federal law.<sup>52</sup>

In *Loper Bright Enterprises v. Raimondo*, Chief Justice Roberts, writing for the Court, once again signaled that a new era of judicial supervision of executive-congressional relations has arrived.<sup>53</sup> The APA had been seen as incorporating the then-existing federal common law's regime of deference to administrative agencies.<sup>54</sup> But the Court in *Loper Bright* reinterpreted the history of judicial deference to administrative views and concluded that *Chevron* is inconsistent with the APA's plain text and structure.<sup>55</sup> "Chevron," Chief Justice Roberts wrote, "is overruled."<sup>56</sup> The Court also rejected *Chevron*'s presumption that when Congress speaks ambiguously in statutes, it intends to delegate interpretive authority to the relevant agency.<sup>57</sup>

What the Court replaced *Chevron* with is not yet clear and, as a result, will need to be worked out by courts in the coming years. Chief Justice Roberts made some indications that deference's place

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<sup>51</sup> *Chevron U.S.A. Inc., v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984), *overruled by Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024).

<sup>52</sup> See, e.g., Kent Barnett, Christina L. Bord & Christopher J. Walker, *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463, 1475-82 (2018) (detailing the policy rationales for *Chevron* deference).

<sup>53</sup> See *Loper Bright*, 144 S. Ct. at 2272-73.

<sup>54</sup> See Kent Barnett & Christopher J. Walker, *Chevron and Stare Decisis*, 31 GEO. MASON L. REV. 475, 478 (2024).

<sup>55</sup> *Loper Bright*, 144 S. Ct. at 2270-73.

<sup>56</sup> *Id.* at 2273.

<sup>57</sup> *Id.* at 2268-69.

is now taken by *de novo* review, where “[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority.”<sup>58</sup> However, the opinion also contains hints of *Skidmore*-like respect being given to the agency’s views.<sup>59</sup> Under *Skidmore*, courts review the agency’s interpretation with special weight—though not deference to textually plausible but second-best interpretations provided by the agency—based on the “factors which give it power to persuade.”<sup>60</sup> Also left for future judicial resolution is how broadly or narrowly courts will interpret what constitutes policy questions left up to the politically accountable agencies, as opposed to legal questions now reserved for the courts. The line between law and policy is not always easy to draw.

Regardless of the interpretive regime that replaces *Chevron*, there is no doubt that this marks an end of an era in administrative law. By revoking the deference once paid to the comparative expertise and political accountability of federal agencies in resolving ambiguities in their governing statutes, *Loper Bright* restricts the range of tools available to the executive branch. Before, the President or the agency head could declare a policy intention, and agency staff could then strain the provisions of broadly worded statutes to permit the necessary actions. As long as the result was within the realm of textual plausibility, the judiciary would defer. Now, the Court is calling on Congress (and courts) to play a more active role. The advent of *de novo* or *Skidmore* review of agency actions will require Congress to legislate with more specificity what powers it intends to delegate to agencies. Further, Congress will have to stay engaged to update statutes as new needs arise. In the absence of congressional intervention, the President and the administrative state will likely have far less policymaking space.

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<sup>58</sup> *Id.* at 2273.

<sup>59</sup> See *id.* (“Careful attention to the judgment of the Executive Branch may help inform that inquiry.”); *see also id.* at 2267 (“The better presumption is therefore that Congress expects courts to do their ordinary job of interpreting statutes, with due respect for the views of the Executive Branch.”).

<sup>60</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

*D. Revival of Nondelegation Doctrine*

Chief Justice Roberts ended his opinion for the Court in *Loper Bright* with a nod to another potential judicial move aimed at limiting the power of the President and the administrative state: “[W]hen a particular statute delegates authority to an agency *consistent with constitutional limits*, courts must respect the delegation.”<sup>61</sup> That constitutional limit is the nondelegation doctrine.

The Supreme Court has only twice found violations of the nondelegation doctrine, both in 1935.<sup>62</sup> After over six decades of inactivity, the doctrine was definitively buried by none other than Justice Scalia.<sup>63</sup> But there are now strong signals that a majority of the court may well support departing from this permissive approach. In *Gundy v. United States*, Justice Gorsuch proffered an originalist vision of the nondelegation doctrine,<sup>64</sup> which would limit Congress’s power to delegate to three types of situations.<sup>65</sup> Both Chief Justice Roberts and Justice Thomas joined that dissent in full. Justice Alito, concurring in the judgment, noted that in the future, “[i]f a majority of [the] Court were willing to reconsider the approach [it] ha[s] taken for the past 84 years, [he]would support

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<sup>61</sup> *Loper Bright*, 144 S. Ct. at 2273 (emphasis added).

<sup>62</sup> See *Pan. Refin. Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); see also Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) (“We might say that the conventional [nondelegation] doctrine has had one good year, and 211 bad ones (and counting.”).

<sup>63</sup> *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474 (2001).

<sup>64</sup> But see Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 282 (2021) (“Our conclusion is straightforward. The nondelegation doctrine has nothing to do with the Constitution as it was originally understood. You can be an originalist or you can be committed to the nondelegation doctrine. But you can’t be both.”).

<sup>65</sup> See *Gundy v. United States*, 588 U.S. 128, 157-59 (2019) (Gorsuch, J., dissenting) (enumerating three “important guiding principles” for determining “whether Congress has unconstitutionally divested itself of its legislative responsibilities[:]” filling in the details of a statutory plan that already resolves policy decisions regulating private conduct, making the application of rules contingent “on executive fact-finding,” and assigning the “executive and judicial branches certain non-legislative responsibilities”).

that effort.”<sup>66</sup> Justice Kavanaugh, who recused in *Gundy*, later praised “Justice Gorsuch’s thoughtful *Gundy* opinion” because it “raised important points that may warrant further consideration in future cases.”<sup>67</sup> And, while Justice Barrett has not yet addressed the nondelegation doctrine from the bench, her scholarly work has previously indicated sympathy for departing from *Whitman*’s “intelligible principle” test.<sup>68</sup>

With at least some hints from six Justices supporting a more exacting nondelegation doctrine, this may become another powerful tool for curbing over-presidentialism. Justice Gorsuch’s approach would limit the ability of Congress to hand off policymaking on significant issues.<sup>69</sup> This, in turn, would create pressure for Congress—rather than just the President and the administrative state—to address the demand for legislative solutions to new problems. But what this would entail—and at what cost it would come—remains unclear. What is clear is that it is only a matter of time before the Court will have to confront the nondelegation doctrine again.<sup>70</sup>

## II. HOW CONGRESS CAN RESPOND

Despite the Supreme Court’s suggestions that its administrative law reforms, discussed in Part I, shift power from the President and the administrative state back to Congress, these reforms will not force Congress to find its ambition in the near term. There are deeper problems with Congress. Eliminating *Chevron* deference, adding the major questions doctrine, conducting a harder look review, or even reinvigorating the

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<sup>66</sup> *Id.* at 148-49 (Alito, J., concurring in the judgment).

<sup>67</sup> *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J., respecting the denial of certiorari).

<sup>68</sup> See Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 318 (2014).

<sup>69</sup> See *Gundy*, 588 U.S. at 158 (Gorsuch, J., dissenting).

<sup>70</sup> See, e.g., *Consumers’ Rsch. v. FCC*, 109 F.4th 743, 767 (5th Cir. 2024) (en banc) (“We therefore have grave concerns about [47 U.S.C.] § 254’s constitutionality under the Supreme Court’s nondelegation precedents. . . . Nevertheless, we need not hold the agency action before us unconstitutional on that ground alone because the unprecedented nature of the delegation combined with other factors is enough to hold it unlawful.”).

nondelegation doctrine will not get Congress to work the way the Court envisions is necessary. Instead, the immediate effect is to shift power to federal courts. In many instances, this will result in a deregulatory turn toward a much more limited federal government.

That said, there are a number of realistic ways Congress can and should respond to these judicial reforms and reassert itself in federal governance. In this Part, I discuss five: (1) implementation of Congress's constitutional oversight powers, (2) increased use of appropriations, (3) introduction of fast-track legislative processes, (4) regular reauthorization, and (5) further use of Congress's anti-removal power. To be sure, Congress already uses many of these tools to some degree. None, standing alone, will be sufficient to counteract the Court's moves. But collectively, they can make a difference. Each will be addressed in turn.

#### *A. Congressional Oversight Powers*

Congressional oversight is not uncharted terrain. However, it will play an important role in responding to the shifting sands in administrative law and in continuing to steer agency actions pursuant to delegated authority.<sup>71</sup>

In *Congress's Constitution*, Josh Chafetz does a masterful job of assembling and articulating these powers, grouping Congress's tools into six categories.<sup>72</sup> Congress wields the hard powers of control over the purse, personnel power, and contempt power.<sup>73</sup> But these well-known arrows in Congress's quiver are backed up by important soft powers: the freedom of speech or debate provided by Article I, control over internal discipline, and the ability of each house to set its own rules of proceedings, known as

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<sup>71</sup> See Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 254 (1987).

<sup>72</sup> See Josh CHAFETZ, *CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND SEPARATION OF POWERS* (2017).

<sup>73</sup> *Id.* at 45, 78, 152.

“cameral rules.”<sup>74</sup> A summary table of this congressional toolbox is reproduced below.<sup>75</sup>

So, Congress has these tools. But it can do so much more than it currently does with them. As I have explored elsewhere, it can use these soft and hard powers to further influence agency decision-making and tether executive actions to the purposes of the delegations that undergird them.<sup>76</sup> For example, three trends have undermined Congress’s power of the purse in recent decades. “Mandatory” spending has skyrocketed in relation to “discretionary” spending, thereby shifting the bulk of the federal budget out of the annual appropriations process.<sup>77</sup> Congress has ceded “legislative dominance” in the budgeting process to the administrative state and to the executive branch.<sup>78</sup> Lastly, fee-setting authority allows some agencies to escape the scrutiny of annual appropriations altogether.<sup>79</sup> Moreover, Congress’s contempt authority—a key tool for overseeing the administrative state<sup>80</sup>—has atrophied in the wake of Watergate.<sup>81</sup> If Congress restored the full weight of this threat, it could better serve as a powerful weapon to spur federal agencies to produce information, testify in hearings, and cooperate with congressional priorities.<sup>82</sup>

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<sup>74</sup> *Id.* at 201, 232, 267.

<sup>75</sup> This table is reproduced from, Christopher J. Walker, *Restoring Congress’s Role in the Modern Administrative State*, 116 MICH. L. REV. 1101, 1107 tbl.1 (2018) (reviewing CHAFETZ, *supra* note 72).

<sup>76</sup> See *id.* at 1115-20.

<sup>77</sup> CHAFETZ, *supra* note 72, at 62.

<sup>78</sup> *Id.* at 62-63.

<sup>79</sup> See Walker, *supra* note 75, at 1108.

<sup>80</sup> *Id.* at 1112.

<sup>81</sup> CHAFETZ, *supra* note 72, at 189.

<sup>82</sup> *Id.* at 198; see also Walker, *supra* note 75, at 1112.

Congress's Toolbox for Constraining the Regulatory State		
	Tool	Description
Hard Powers	The Power of the Purse (pp. 45-77)	Appropriations laws, spending authority, and annual budget process for federal agencies
	The Personnel Power (pp. 78-151)	Various appointment powers over agency officials, limits on acting and recess appointments, ability to affect removal, and impeachment powers
	Contempt of Congress (pp. 152-198)	Constitutional and statutory authority to hold agency officials in contempt of Congress
Soft Powers	The Freedom of Speech or Debate (pp. 201-231)	Congressional immunity when criticizing agency officials and regulatory actions, including sharing nonpublic information about agency activities
	Internal Discipline (pp. 232-266)	Ability to internally discipline members of Congress for, <i>inter alia</i> , improperly influencing federal agencies
	Camerall Rules (pp. 267-301)	Ability to structure congressional rules to allow for, <i>inter alia</i> , committee hearings, investigations, document and testimony subpoenas, and other oversight tools

Nonetheless, greater attention to congressional oversight using these six tools alone is not enough. As I have argued elsewhere, they can only reach the full potential envisioned in the Constitution's architecture if Congress returns to actively legislating in response to its oversight activities.<sup>83</sup> Without a credible threat of legislation backing up and enforcing these tools, they will not be as effective and may well lose their legitimacy.<sup>84</sup>

### *B. Increased Attention to Appropriations*

While Professor Chafetz recounted the modern deficiencies of Congress's control over appropriations, Gillian Metzger reminds us of what we can do to take appropriations seriously.<sup>85</sup> Her work reminds us that Congress can use the power of the purse to rein in agency action, empower them to do something more, and exert additional oversight in ways that fall short of traditional legislation. Despite its centrality to our system of government built on the separation of powers, modern public law has "marginalized"

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<sup>83</sup> Walker, *supra* note 75, at 1120.

<sup>84</sup> *Id.*

<sup>85</sup> Gillian E. Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075 (2021).

appropriations.<sup>86</sup> This occurs through “appropriations exceptionalism [that] pull[s] appropriations out from governing legal frameworks and employ[s] sometimes arcane appropriations-specific rules” or, conversely, through “appropriations silence” that ignores them.<sup>87</sup>

Courts should, therefore, take appropriations seriously to safeguard Congress’s power of the purse and ensure that it advances accountability.<sup>88</sup> This requires courts to recognize the importance of appropriations and explicitly incorporate them into their analysis.<sup>89</sup> This involves giving particular attention to the separation of powers questions raised by appropriations. Promoting congressional power through appropriations calls for courts to employ interpretive doctrines that favor Congress’s power of the purse over executive interference.<sup>90</sup> For example, this could include rules of interpretation specific to appropriations, such as narrowly construing unilateral authority over appropriations granted to the executive branch.<sup>91</sup>

Professor Metzger advances a more dramatic proposal to expand the court’s jurisdiction to review appropriations challenges.<sup>92</sup> One possible solution would be for the Supreme Court to reconsider its opinion in *Lincoln v. Vigil*, which held that allocating funds from lump-sum appropriations by Congress is an “administrative decision traditionally regarded as committed to agency discretion.”<sup>93</sup> The Court could replace this with a simple *presumption* of nonreviewability.<sup>94</sup> Professor Metzger, however, prefers to expand standing doctrine in this area by opening the

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<sup>86</sup> *Id.* at 1103.

<sup>87</sup> *Id.* at 1080, 1104 (alteration in original).

<sup>88</sup> *Id.* at 1085, 1156.

<sup>89</sup> *Id.* at 1155-57.

<sup>90</sup> *Id.* at 1161.

<sup>91</sup> *Id.* (“Under such a rule, ambiguities in statutory provisions authorizing transfers of appropriated funds or delays in expenditures would be read to narrow executive authority.”).

<sup>92</sup> *Id.* at 1163-64, 1167.

<sup>93</sup> *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993).

<sup>94</sup> Metzger, *supra* note 85, at 1163-64; *see also* Matthew B. Lawrence, *Second-Class Administrative Law*, 101 WASH. U. L. REV. 1029, 1034 (2024) (arguing that “[T]he *Vigil* presumption should be erased from the administrative law canon.”).

door to “limited congressional standing in the appropriations context.”<sup>95</sup> She recommends that courts recognize the harm to Congress’s power of the purse stemming from executive violations of appropriations provisions as a cognizable injury.<sup>96</sup>

In sum, Congress’s power of the purse creates opportunities for further control over and empowerment of the administrative state, and further attention to this tool has much promise in responding to the shifting sands throughout administrative law.

### C. *Legislative Fast-Track for Major Questions*

As discussed in Part I.B., the Court has expanded or invented the major questions doctrine in recent years to ensure that the President does not answer those types of questions for Congress. But we can do more than make them harder for presidents to answer. When it comes to major questions, we should make it easier for Congress to answer those major questions. Drawing on several historical precedents in other areas,<sup>97</sup> I have proposed creating a fast-track legislative procedure for the major questions doctrine modeled on the Congressional Review Act.<sup>98</sup>

When a court declares something a major question, it says the agency cannot regulate. In those circumstances, we should fast-track an up-down vote on whether this current Congress thinks the agency should have that authority.<sup>99</sup> Once the regulation is judicially invalidated, Congress could have a window of time during which it could introduce a joint resolution. When it comes to the legislative process, Congress could require fast-track procedures similar to those in the CRA. These could “include a committee discharge mechanism, a limitation on amendments and

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<sup>95</sup> Metzger, *supra* note 85, at 1163-64.

<sup>96</sup> *Id.*; see generally Matthew B. Lawrence, *Subordination and Separation of Powers*, 131 YALE L.J. 78 (2021) (expressing some hesitation about the way appropriations currently operate as a check on agencies and suggesting some alternatives).

<sup>97</sup> Christopher J. Walker, *A Congressional Review Act for the Major Questions Doctrine*, HARV. J.L. & PUB. POL’Y 774, 778 (2022) (discussing the budget reconciliation bypass of Senate filibuster rules created by the Congressional Budget Act of 1974).

<sup>98</sup> *Id.* at 779.

<sup>99</sup> *Id.* at 792.

delay motions, and a simple majority up-down vote in the Senate after a set period for debate.”<sup>100</sup>

If the resolution makes it through the House, the Senate, and the President, the substantive effect would be to amend the relevant statute in two limited ways.

First, this amended statute would provide clear authorization for the regulatory power the agency had claimed in the invalidated rule. Second, it would authorize additional regulatory power that is “substantially the same” as the authority the reviewing court had precluded on major questions doctrine grounds. In so doing, the current Congress would provide the “clear statement” required by the major questions doctrine, along with some regulatory flexibility for the agency to modify its approach as needed based on changed circumstances.<sup>101</sup>

These procedures would kick in whenever a federal court finds that an agency’s claim to authority under a statute is textually plausible but lacks clear support sufficient to answer the major question at issue.<sup>102</sup> As a result, the major question doctrine’s effort to combat executive usurpation of legislative prerogatives would be combined with a catalyst for congressional action.<sup>103</sup> Under the current doctrine, finding that an issue is a major question functionally walls off political resolution because the court will deny the agency authority to regulate, and Congress is rarely capable of taking prompt action on controversial issues. That creates a somewhat perverse result because the agency’s attempt to regulate demonstrates a present need for governmental action. This fast-track procedure would promote Congress’s ability to make the final decision as intended under our separation of powers

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<sup>100</sup> *Id.* at 781.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 789.

<sup>103</sup> *Id.* at 792.

and, therefore, advance democratic legitimacy and accountability.<sup>104</sup>

#### *D. Regular Reauthorization*

Another way to encourage more regular legislative engagement is to revisit existing statutory frameworks on a more regular basis through the use of “temporary” legislation.”<sup>105</sup> “Legislation that ‘sunsets,’ expires, or otherwise requires regular reauthorization could induce Congress to revisit, reassess, and recalibrate existing programs” in light of changes in the world, including those imposed by the courts.<sup>106</sup>

This idea is not new. “Temporary legislation,” Jacob Gersen has observed, “is a staple of legislatures, both old and modern.”<sup>107</sup> In the modern era, interest in sunset provisions for administrative agencies peaked in the 1970s, largely in reaction to widespread mistrust of government institutions.<sup>108</sup> Inspired by Theodore Lowi, the watchdog group Common Cause pushed for the adoption of

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<sup>104</sup> Others have argued that this fast-track legislative provision should apply more broadly to whenever the Supreme Court interprets a statute. *See* Supreme Court Review Act, S. 4681, § 2, 117th Cong. (2022) (creating a fast-track legislative process for Congress to pass substantive legislation to respond to any Supreme Court decision that interprets a federal statute in any way or “interprets or reinterprets the Constitution of the United States in a manner that diminishes an individual right or privilege that is or was previously protected by the Constitution of the United States.”); Ganesh Sitaraman, *How to Rein In an All-Too-Powerful Supreme Court*, THE ATLANTIC (Nov. 16. 2019), <https://www.theatlantic.com/ideas/archive/2019/11/congressional-review-act-court/601924/> (“Congress could pass a Congressional Review Act for the Supreme Court, which would enable it to overturn Court decisions on legislative matters with greater speed and ease.”). Elsewhere, I argue why my narrower proposal is better, in part because it is more politically realistic. *See* Walker, *supra* note 97, at 789-93.

<sup>105</sup> This Part draws substantially from Adler & Walker, *supra* note 10; Jonathan H. Adler & Christopher J. Walker, *Nondelegation for the Delegators*, 43 REGUL. 17 (2020).

<sup>106</sup> *Id.*

<sup>107</sup> Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247, 298 (2007).

<sup>108</sup> *See* Mark B. Bickle, *The National Sunset Movement*, 9 SETON HALL LEGIS. J. 209, 210-11 (1985). *See generally* THAD HALL, *AUTHORIZING POLICY* (2004) (providing a comprehensive look at short-term authorizations).

“sunset” clauses at the state level. Within five years, sunset statutes of one sort or another were adopted in thirty-six states.<sup>109</sup> Although Congress rarely takes steps to incentivize (let alone require) reauthorization of major regulatory statutes, it does utilize temporary legislation to induce periodic reengagement or reauthorization of potentially controversial or problematic programs across a range of policy areas. Some examples include the Farm Bill, the Federal Aviation Administration reauthorization, and the Food and Drug Administration’s user-fee programs.<sup>110</sup>

In terms of implementation, at one extreme, Congress could consider enacting a universal sunset statute that would require the reauthorization of any federal agency or program within a certain number of years. Many state sunset laws, for instance, were designed to apply across the board. The failure to reauthorize would lead the sun to set on an entire agency or program, thus barring any subsequent appropriation.

This one-size-fits-all approach would be bold yet foolish. Statutes vary, and action-forcing reforms may not be appropriate for all regulatory contexts. For some federal programs and perhaps some entire federal agencies, it might make sense to incorporate express sunset provisions. Such a blanket sun-setting threat would force Congress to take a fresh look at the agency’s regulatory activities and whether the program or agency continues to effectively fulfill the purpose for which Congress created it. Yet Congress should seek to use mandatory reauthorization provisions, sunsets, and other forms of temporary legislation to induce more regular legislative action and provide opportunities to update statutes in light of changed circumstances, including changes imposed by courts.

Congress does not face a binary choice between a complete sunset of an agency or program and permanent legislation. It may choose to incorporate statutory defaults to which the agency or program resets if not reauthorized within a set time period. Likewise, in some regulatory contexts, it might be advantageous to

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<sup>109</sup> See Richard C. Kearney, *Sunset: A Survey and Analysis of the State Experience*, 50 PUB. ADMIN. REV. 49, 49-50 (1990).

<sup>110</sup> See Adler & Walker, *supra* note 10, at 1964-74 (detailing federal reauthorization efforts today).

set the sunset default as something that would force Congress to revisit and reauthorize the agency or program. In the case of regulatory agencies, the lack of authorization could mean that an agency lacks the ability to act with the force of law. In effect, without a valid authorization, it could not be said that the agency has been delegated such authority.

Consider, for instance, the Clean Air Act. Under this hypothetical proposal, the EPA would now lack the ability to promulgate new regulations, issue new permits to regulated facilities, and, perhaps, even initiate new enforcement actions unless and until the act was reauthorized. The expired authorization would not affect the validity of regulations already promulgated, nor would it prevent state-level enforcement under previously approved state implementation plans or the filing of citizen suits against facilities for violating existing permits, regulations, or statutory provisions. Nonetheless, the consequences of allowing the authorization to expire would provide ample incentive for environmental groups and regulated firms to come to the table, as each would find the default baseline undesirable. That, in turn, would provide Congress with the opportunity and need to revisit and reconsider particularly obsolete or ineffective provisions in the law.

In sum, regulator reauthorization of statutes governing federal agencies would force Congress to come to the table to update statutes to deal with new problems. It would address the same issue of the executive discovering new powers in old, broad statutes to address novel problems that the major questions doctrine, harder look review, and nondelegation seek to remedy. Most importantly, for the purposes of this Essay, regular reauthorization would also provide Congress with the ability to regularly review judicial decisions that have limited agencies' ability to regulate. In so doing, the current Congress can decide for itself whether it wishes to authorize the challenged agency action.

#### *E. Congress's Anti-Removal Power*

A final way that Congress can reassert its primary role in federal lawmaking is through reinvigorating its influence over the

federal bureaucracy by creating a greater level of decisional independence between federal agencies and the President.<sup>111</sup> As noted at the outset of Part I, the Supreme Court has also been engaged in a unitary executive project to ensure that the President can more freely hire and fire agency leaders.<sup>112</sup> That does not mean, however, that Congress does not have other tools—what Aaron Nielson and I dub Congress’s “anti-removal power”—to discourage the President from firing agency leaders.<sup>113</sup>

The Constitution is designed to provide Congress significantly more leverage than it currently wields to dissuade firings by the President and to sway officials’ choices.<sup>114</sup> Congress retains substantial abilities to limit the removal of lower-level, inferior officers.<sup>115</sup> Article II’s Appointments Clause explicitly empowers the Senate to withhold its consent for the confirmation of the President’s nominees.<sup>116</sup> By threatening to use this plenary veto power to refuse to confirm the President’s desired replacement, the Senate can convince the President not to bother with firing the existing officeholder to begin.<sup>117</sup>

Senate confirmation of the replacement is just one tool in Congress’s anti-removal toolkit. Congress can impose reason-giving requirements, mandate congressional hearings on removals, raise the cloture threshold for confirmations, or curtail the President’s evasion of the Appointments Clause, such as through acting officials or delegating an office’s duties.<sup>118</sup> Elsewhere, Professor Nielson and I have assembled this toolkit and divided the tools between hard, soft, and anti-evasion tools—a table of which is reproduced below.<sup>119</sup>

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<sup>111</sup> This Part draws substantially from, Aaron L. Nielson & Christopher J. Walker, *Congress’s Anti-Removal Power*, 76 VAND. L. REV. 1 (2022).

<sup>112</sup> See *id.* at 21-26.

<sup>113</sup> See *id.* at 39-41.

<sup>114</sup> *Id.* at 28-32.

<sup>115</sup> *Id.* at 74.

<sup>116</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>117</sup> Nielson & Walker, *supra* note 111, at 27.

<sup>118</sup> *Id.* at 34-39, 53-54, 55-57, 62.

<sup>119</sup> *Id.* at 68 tbl.1.

Congress's Toolkit for Strengthening Its Anti-Removal Power		
	Tool	Description
Soft Tools	Impose Removal Reason-Giving Requirement	This requires the president to report a reason (any reason or a specific good-cause reason) to Congress for the firing.
	Enact Statutory Signals of Agency Independence	These include labeling the agency as "independent," setting a term of years for the office, and enacting legislative findings that reinforce independence.
	Require Congressional Hearings on Removal	A hearing with the fired official and other witnesses could be required whenever removed or for failure to comply with reason giving requirements.
Hard Tools	Heighten Senate Cloture Vote Threshold on Replacement Nominee	Senate cloture vote could be increased above a simple majority for removal, or more narrowly when the president does not provide adequate reasons.
	Slow Down Senate Confirmation Process on Replacement Nominee	Procedures for hearing, debate, and consideration of subsequent nominee could be drawn out if removal was not for good reasons.
	Impeach the President (or Threaten Impeachment)	Congress could signal in enacted legislative findings that presidential impeachment is on the table for improper removal, with impeachment being the ultimate hard tool.
Anti-Evasion Tools	Prevent Recess Appointments	The Senate can ensure it is never in a recess long enough to allow the president to make a recess appointment replacement.
	Reform the Vacancies Act for Use of Acting Officials	Congress could reform the Federal Vacancies Reform Act to increase removal costs by limiting the president's options for acting or temporary leaders.
	Limit Subdelegations and Acting Officials Authority	Congress can narrow the authority of an agency under an acting leader or otherwise prohibit the subdelegation of agency authority within the agency.

Even procedures enacted not as commands but rather as congressional expectations, which the President could theoretically ignore, could have significant impacts in practice. History suggests that such methods crystalize norms against contrary presidential action while simultaneously raising its political cost.<sup>120</sup> Using these methods, Congress can ensure a measure of decisional independence in a way that does not run up against the Court's unitary executive turn. Members of Congress can send a message to the executive branch that it wants science, impartiality, and independence to some degree within federal agencies.<sup>121</sup>

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<sup>120</sup> *Id.* at 52.

<sup>121</sup> See Aaron L. Nielson et al., *Saving Agency Adjudication*, 103 TEX. L. REV. (forthcoming 2024) (working draft at 50-55) (available at SSRN).

## CONCLUSION

When I first delivered a version of these remarks at the Federalist Society’s annual student symposium at Harvard Law School in March 2024, I recognized that some—perhaps many—conservatives and libertarians are quite content with the Court’s “anti-administrativist” moves. They do not really want Congress to reassert itself in federal governance. Indeed, some may like that the federal government will not be able to do much. Deregulation is the ultimate end.

Not all conservatives and libertarians, however, share that vision. Some of us view these shifting sands in administrative law through the lens of separation of powers and the primacy of Congress in federal lawmaking. As Article I of the Constitution envisions, we want a vibrant Congress that makes the major value judgments at the federal level. To restore Congress’s place, we have to reinvigorate Congress’s ambition, not to mention increase its capacity.

The measures discussed in this Essay begin to chart a path forward to prevent Congress from becoming a place where we elect people who are just going to sit there and then run for reelection. To be sure, for any of this to happen, the concern for Congress’s diminished role needs to translate into political will. We have to build a political constituency for the Article I project. If we do not, we may well end up with a federal government that does not work for the people—or perhaps does not work at all.