U.S. Constitutional Law I(D)

SPRING 2026

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SUPPLEMENTARY MATERIALS, PARTS I, II & III: TABLE OF CONTENTS

Daryl J. Levinson & Richard H. Pildes, Separation of Parties, Not Powers, 119 Harv. L. Rev. 2311 (2006)

Introduction

Describing a set of "wholly new discoveries" in the "science of politics" that might enable democratic self-government to succeed in the American republic, Alexander Hamilton listed first the "balances and checks" that distinctively characterize the American system of separation of powers. In Madison's ingenious scheme of separated powers, "the interior structure of the government" would be "so contriv[ed]" "as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places." By institutionalizing a differentiation between executive and legislative powers (as well as by dividing the legislature into two chambers), the separation of powers would harness political competition into a system of government that would effectively organize, check, balance, and diffuse power. What is more, the system would be self-enforcing, relying on interbranch competition to police institutional boundaries and prevent tyrannical collusion. In the Framers' Newtonian vision, the separation of powers was to be "a machine that would go of itself."

To this day, the idea of self-sustaining political competition built into the structure of government is frequently portrayed as the unique genius of the U.S. Constitution, the very basis for the success of American democracy. Yet the truth is closer to the opposite. The success of American democracy overwhelmed the Madisonian conception of separation of powers almost from the outset, preempting the political dynamics that were supposed to provide each branch with a "will of its own" that would propel departmental "[a]mbition . . . to counteract ambition." The Framers had not anticipated the nature of the democratic competition that would emerge in government and in the electorate. Political competition and cooperation along relatively stable lines of policy and ideological disagreement quickly came to be channeled not through the branches of government, but rather through an institution the Framers could imagine only dimly but nevertheless despised: political parties. As competition between the legislative and executive branches was displaced by competition between two major parties, the machine that was supposed to go of itself stopped running.

Few aspects of the founding generation's political theory are now more clearly anachronistic than their vision of legislative-executive separation of powers. Nevertheless, few of the Framers' ideas continue to be taken as literally or sanctified as deeply by courts and constitutional scholars as the passages about interbranch relations in Madison's Federalist 51. To this day, Madison's account of rivalrous, self-interested branches is embraced as an accurate depiction of political reality and a firm foundation for the constitutional law of separation of powers. In the Madisonian simulacrum of democratic politics embraced by constitutional doctrine and theory, the branches of government are personified as political actors with interests and wills of their own, entirely disconnected from the interests and wills of the officials who populate them or the citizens who elect those officials. Acting on these interests, the branches purportedly are locked in a perpetual struggle to aggrandize their own power and encroach upon their rivals. The kinds of partisan political competition that structure real-world democracy and dominate political discourse, however, are almost entirely missing from this picture.

As this Article describes, the invisibility of political parties has left constitutional discourse about separation of powers with no conceptual resources to understand basic features of the

American political system. It has also generated judicial decisions and theoretical rationalizations that float entirely free of any functional justification grounded in the actual workings of separation of powers. Ignoring the reality of parties and fixating on the paper partitions between the branches, the law and theory of separation of powers is a perfect fit for the government the Framers designed. Unfortunately, they miss much of the government we actually have.

Ironically, one of the few places in constitutional law where parties do appear is in the most celebrated judicial opinion of the separation-of-powers canon, Justice Jackson's concurrence in the Youngstown case. After laying out his now-familiar tripartite categorization of executive action, Justice Jackson went on to emphasize that modern separation-of-powers analysis must understand the powers and motivations of the branches of government in light of their relation to political parties:

> [The] rise of the party system has made a significant extraconstitutional supplement to real executive power. No appraisal of his necessities is realistic which overlooks that he heads a political system as well as a legal system. Party loyalties and interests, sometimes more binding than law, extend his effective control into branches of government other than his own and he often may win, as a political leader, what he cannot command under the Constitution.

Justice Jackson astutely recognized that the separation of powers no longer works as originally envisioned because interbranch dynamics have changed with the rise of political parties, which in Youngstown had diminished the incentives of Congress to monitor and check the President. Yet this part of Justice Jackson's opinion has been ignored entirely. Even after decades of dissecting Justice Jackson's Youngstown opinion, neither the Supreme Court nor any other federal court has ever quoted this critical insight, nor has it received much notice by legal scholars. Justice Jackson's sophisticated realism about the workings of government is widely admired by constitutional lawyers, but his most penetrating realist insight--recognizing party competition as a central mechanism driving the institutional behavior that separation-of-powers law aims to regulate--has been missed.

This Article seeks to recover and build upon Justice Jackson's insight, reenvisioning the law and theory of separation of powers by viewing it through the lens of party competition. We emphasize that the degree and kind of competition between the legislative and executive branches vary significantly, and may all but disappear, depending on whether the House, Senate, and presidency are divided or unified by political party. The practical distinction between party-divided and party-unified government rivals in significance, and often dominates, the constitutional distinction between the branches in predicting and explaining interbranch political dynamics. Recognizing that these dynamics shift from competitive when government is divided to cooperative when it is unified calls into question many of the foundational assumptions of separation-of-powers law and theory. It also allows us to see numerous aspects of legal doctrine, constitutional structure, comparative constitutionalism, and institutional design in a new and more realistic light.

I. From Branches to Parties

A. Madison and the Mechanisms of Political Competition

Madison's vision of competitive branches balancing and checking one another has dominated constitutional thought about the separation of powers through the present. Yet it has never been clear exactly how the Madisonian machine was supposed to operate. Particularly puzzling is Madison's personification of political institutions, his hope that each branch

might come to possess "a will of its own." If branches of government pursued their own interests, and if these interests were similar to the power-mongering interests that the Framers attributed to individual political actors, then branches might indeed compete with one another for power. But of course, government institutions do not have wills or interests of their own; their behavior is a product of the wills or interests that motivate the individual officials who compose them.

The founding generation's assumptions about the workings of representative democracy may help account for Madison's optimism. First, elections were not then conceived as the competitive contests they soon became. Instead, they were understood and practiced largely as matters of acclamation, focusing on personal qualities more than issues and interests and primarily serving to ratify existing social and political hierarchies. George Washington's assumption of the presidency is a paradigmatic example. Second, to the extent political issues were discussed, it was in the civic republican vocabulary of disinterested concern for the common good, shunning explicit appeals to interest. With large election districts for the House and indirect election of the Senate and President providing further insulation from the self-interested demands of constituents, it was possible to envision officeholders who would "refine and enlarge the public views" and whose "wisdom [might] best discern the true interest of their country." In this kind of political, or apolitical, world, it was possible to imagine that, once elected, officeholders would not be tempted by constituent pressures and competing ideological or policy goals to sacrifice the constitutionally assigned duties and powers of their branches--simply because constituent pressures and divergent interests were kept to a minimum.

Less optimistically, the founding generation also had good reason to doubt whether representative democracy would work at all and, consequently, good reason to fear that government officials would pursue interests entirely disconnected not just from those of their nominal constituents, but from the public good as well. In the worst-case scenario, better to be ruled by several warring tyrants than a single omnipotent one. For the Federalist Framers, however, this kind of figurative and literal interbranch warfare was meant only as an "auxiliary precaution[]." The "primary control on the government" would be its "dependence on the people," which would link the political self-interest of legislators to the interests of the voters who determined their professional fates. If representative democracy worked as the Framers hoped, in other words, competition for power among the branches would be replaced by competition for power among politicians and groups of constituents.

In fact, this is just what happened: Madison's design was eclipsed almost from the outset by the emergence of robust democratic political competition. Rather than tying their ambitions to the constitutional duties or power base of their departments, officials responded to the material incentives of democratic politics in ways that now seem natural and inevitable: by forming incipient organizations that took sides on contested policy and ideological issues and by competing to marshal support for their agendas. These efforts led inexorably, though haltingly, to the organization of enduring parties that would facilitate alliances among groups of like-minded elected officials and politically mobilized citizens on a national scale.

The idea of political parties, representing institutionalized divisions of interest, was famously anathema to the Framers, as it had long been in Western political thought. Equating parties with nefarious "factions," the Framers had attempted to design a "Constitution Against Parties." But the futility of this effort quickly became apparent. By the end of the first Congress, it had become clear that political competition organized around issues and programs

had the potential to divide coalitions of officeholders and cut through the constitutional boundaries between the branches.

At the very least, the rise of partisan politics worked a revolution in the American system of separation of powers, radically realigning the incentives of politicians and officeholders. As an initial example, consider the role of parties in transforming the presidency into a genuinely independent counterweight to Congress. During the country's first forty years or so, a chasm emerged between the predicted and actual effects of the constitutional design on the President's capacity to stand apart from Congress. The Framers had specifically rejected congressional appointment of the President on the ground that making the President reliant on congressional support would deny him the requisite independence. Yet after Washington's presidency, party caucuses in Congress quickly became the mechanism for identifying and selecting credible presidential candidates. The rise of legislative parties as gatekeepers for the presidency, together with the expectation that elections would often be decided in the House of Representatives (as they were in two of the four open-seat presidential elections from 1800 to 1824), meant that Congress played a major role in selecting the President. As a result, the American government effectively operated for much of its first forty years with a congressionally dominated fusion of legislative and executive powers. So much for Madison's prediction that separated powers would create checks and balances by joining "the interest of the man" with "the constitutional rights of the place."

Not until the presidency of Andrew Jackson did American government begin to resemble in practice the Madisonian system of separation of powers that existed on paper. Jackson was the first President to circumvent Congress by appealing directly to the people, claiming that his office embodied the American people as a whole. His revolutionary use of the veto backed up this claim. As a leading historian of the presidency puts it, for the first time the presidency "was thrust forward as one of three equal departments of government, and to each and every of its powers was imparted new scope, new vitality."

The inauguration of the independent presidency under Jackson was made possible by two institutional changes, both emerging from the invention of political parties. First, Martin Van Buren's creation of the mass-scale political party generated pressure for popular control over presidential nominations, leading to the replacement of the congressional caucus system by national nominating conventions as of 1832. Second, the Democratic Party's novel practice of running presidential electors pledged in advance to vote for particular candidates undermined the electoral college by turning it into a mere tabulating device, one likely to yield a majority winner; this all but eliminated the role of the House of Representatives in resolving presidential elections. Taken together, these two institutional changes wrested control of the presidency away from Congress by forging an independent, popular electoral base for the President.

For present purposes, however, it is enough to see that from the outset of government under the Constitution, practical politics undermined the Madisonian vision of rivalrous branches pitted against one another in a competition for power. The emergence of a robust system of democratic politics tied the power and political fortunes of government officials to issues and elections. This, in turn, created a set of incentives that rendered these officials largely indifferent to the powers and interests of the branches per se. In Madison's terms, "the interests of the man" have become quite disconnected from the interests of "the place." Instead, the electoral and policy interests of politicians have become intimately connected to political parties.

B. Presidential, Parliamentary, and Party Government

For admirers of the British system, the Madisonian design was critically flawed in its inception. The parliamentarian critique of the American separation of powers dates back at least to the early Woodrow Wilson, who, writing in the late nineteenth century, saw the Framers' decision to divide powers between Congress and the Executive as a "grievous mistake." Wilson argued that Madisonian government was dramatically ineffective and vulnerable to paralysis and stalemate because significant policy-making could not be accomplished without somehow inducing cooperation between the inherently competitive political branches. He also argued that, because voters had no single government institution on which to focus political credit or blame, the constitutional separation of powers sacrificed democratic accountability. Wilson judged the parliamentary system's unification of authority and responsibility in the prime minister and his cabinet to be clearly superior along both of these dimensions.

Wilson's parliamentarian critique of presidential government became the conventional wisdom of the field he founded and has been reiterated and elaborated by political scientists through the present. But political scientists have also appreciated the ironic possibility that political parties could redeem American government from its inherently flawed constitutional structure. As the standard argument goes, "the institutions that the framers had so deliberately separated had to be brought together in some degree of unity for the government to function--and the instrument for that purpose was the political party." The hope is that, by uniting the interests of government officials across branch lines, parties might defeat the Framers' design and, in practice, fuse the formally separated legislature and Executive into a second-best approximation of Westminster. This view, which has both descriptive and normative components, has been known as the doctrine of "(responsible) party government."

But another necessary condition for successful party government, of course, is that the same party control both the legislative and executive branches. When control is divided between parties, we should expect party competition to be channeled through the branches, resulting in interbranch political competition resembling the Madisonian dynamic of rivalrous branches (perhaps even fueling more extreme competition than the Framers envisioned). True, the underlying mechanism would be entirely different: branches would continue to lack wills of their own, and politicians would continue to lack any interest in the power of branches qua branches. The branches would simply serve a politically contingent role as vehicles for party competition.

C. Conclusion: Separation of Parties

Whether it is party unification or party division of government that is cause for the most concern, any understanding of the American system of separation of powers should start from the recognition that it encompasses both. Contrary to the foundational assumption of constitutional law and theory since Madison, the United States has not one system of separation of powers but (at least) two. When government is divided, party lines track branch lines, and we should expect to see party competition channeled through the branches. The resulting interbranch political competition will look, for better or worse, something like the Madisonian dynamic of rivalrous branches. On the other hand, when government is unified and the engine of party competition is removed from the internal structure of government, we should expect interbranch competition to dissipate. Intra-party cooperation (as a strategy of interparty competition) smoothes over branch boundaries and suppresses the central dynamic assumed in the Madisonian model.

The functional differences between these two systems of separation of powers--party separated and party unseparated--are described in more detail in the next Part, but the challenge

to the constitutional law and theory of separation of powers should already be clear. The Madisonian model of inherently competitive branches checking and balancing one another, around which the constitutional law of separation of powers has been designed, has existed only in a few passages of Federalist 51 and the imagination of courts and constitutional theorists ever since. To the extent constitutional law is concerned with the real as opposed to the parchment government, it would do well to shift focus from the static existence of separate branches to the dynamic interactions of the political parties that animate those branches.

II. Party Unification and Division of Government

A. The Past, Present, and Future of Unified and Divided Government

1. *Unified and Divided Governments*.--If the de facto Madisonianism of divided party government had prevailed for all or most of American history, the constitutional law and theory of separation of powers might have been right for the wrong reasons. (One is tempted to say, close enough for government work.) But it has not. Since 1832, government has more often been unified.

From 1832 to 1952, an incoming President assumed office with his party also in control of both the House and Senate in all but three elections. Periods of divided government cropped up mostly during the turbulent years leading up to the Civil War (1840-1860) and during the period of fractious politics in the aftermath of Reconstruction (1874-1896). Then, during the first half of the twentieth century, divided government all but disappeared. In only four midterm elections from 1900 until 1952, two of them at the end of wars, did the President's party temporarily lose control of one house of Congress (1910, 1918, 1930, 1946), and in each case unified party control was restored in the next set of elections. During that period, twenty-two out of twenty-six national elections (85%) produced unified party control, with the Republicans dominating in the first quarter of the century (with an interlude during the Wilson Administration) and the Democrats in the second quarter.

Sustained periods of divided government are a relatively recent phenomenon. When Eisenhower assumed office for his second term and was confronted by a Democratic House and Senate, it was the first time since Grover Cleveland's election seventy-two years earlier that a President took office with either chamber controlled by the opposite party. After an interregnum of strongly unified Democratic governments under Presidents Kennedy and Johnson, divided government solidified as the norm for the second half of the twentieth century. From 1955 through 2000, government was divided for thirty-two of the forty-six years; and from 1969 to 2000, government was divided for twenty-six of thirty-two years, or 81% of the time (all but Carter's presidency and the first two years of Clinton's).

2. *Fragmented and Cohesive Parties*.--Historically, party government has entailed functional unity on certain central policy issues but fragmentation on others. For example, the Democratic Party was fractured between Northerners and Southerners on certain critical issues for much of the twentieth century, until the last generation or so. The New Deal Democratic Party from 1933 through 1938 was united on New Deal economic legislation, and with respect to that agenda, government during the transformative FDR era was functionally as well as nominally unified. Even then, however, latent conflicts between Democrats from the South and other regions surfaced any time legislation substantially intersected with racial issues. Consequently, despite unified government, the Democratic Congress had to structure legislation to minimize benefits to African Americans in order to hold the party together. The Fair Labor Standards Act of 1938, for instance, benefited factory workers but excluded domestic and agricultural workers, who constituted much of the black labor force.

Once civil rights legislation was forced onto the national policymaking agenda after World War II, Democratic unified governments under Kennedy and Johnson functioned without strong party coherence on issues involving race. Much of the major legislation of this period required bipartisan support from majorities of Republicans and Northern Democrats to defeat a "conservative coalition" dominated by Southern Democrats. Even the push for Alaskan and Hawaiian statehood (1958 and 1959) required bipartisan coalitions to overcome the opposition of Southern Democrats who feared the new states would elect pro-civil rights representatives.

Shared party affiliation, then, does not necessarily mean shared policy preferences. In some historical periods, and on certain issues in every historical period, intraparty cleavages have rivaled interparty ones. But American political parties today are both more internally ideologically coherent and more sharply polarized than at any time since the turn of the twentieth century.

The revival of strong, unified parties has dramatic implications for presidential power and executive-legislative relations. [U]nderstanding the causes of this revival and whether they are likely to endure becomes essential. The most important of these causes is a deep, structural one likely to last. The fragmented, New Deal version of the Democratic Party was an artificial creation stemming from the Party's monopoly on the South. This monopoly was created and sustained by the elaborate system of electoral laws and representative institutions designed, at the end of Reconstruction, to drastically disenfranchise a substantial portion of the electorate (as much as one-half in some states), with the aim of eliminating partisan competition. From the 1890s on, this system of Southern disenfranchisement artificially cemented one-party Democratic control. Only national intervention, in the form of the 1965 Voting Rights Act and the constitutional decisions of the Warren Court, began to dismantle this collusive regime. As access to the vote was made widely available and fair ground rules for political competition became legally enshrined, a normal system of two-party competition began to emerge in Southern states. Owing to the partisan inertia of candidates and voters and the time it takes for partisan realignments to affect national parties and elections, a strong Republican alternative emerged only in the 1980s. Robust two-party competition, for the first time in the twentieth century, finally became widespread throughout the South in the 1990s. As conservative Southerners shifted to the Republican Party, a much smaller residual Democratic Party in the South, purified of these voters, came into ideological alignment with Democratic voters in the rest of the country through a mutually reinforcing feedback process. This is likely to be the normal, steady state of American two-party political competition for the foreseeable future.

A number of more localized and perhaps contingent factors have exacerbated the ideological divide between the parties. One is the recent rise of gerrymandered "safe" election districts created by incumbents of both parties who agree to stock districts with large majorities of either Republicans or Democrats in order to make general elections noncompetitive. A by-product of these safe districts is the election of more partisan and more polarized officeholders. The absence of a general election threat enables party activists, who turn out in disproportionate numbers in primary elections and whose views typically reflect the extremes of the party's support, to select more partisan primary winners. Although Senate seats cannot be gerrymandered by party, the career trajectory of politicians frequently moves them from lower to higher office; indeed, a greater number of former House members now sit in the Senate than at any time in American history. House members elected from safe districts who forge their political identity as strong partisans might carry that identity with them to the Senate.

For these and other reasons, partisan officeholders in recent decades have converged on relatively homogenous preferences correlating with their party affiliations. But parties are not just correlates of policy agreement; they are also, to some extent, causes. As long as politicians rely on parties to win elections and exercise meaningful power while in office, parties will be able to exercise some degree of discipline over officeholders, inducing them to vote the party line even when their individual policy preferences are different. There is some evidence that party discipline, as well, has increased in recent decades, on account of parties' greater efficacy in electoral politics and greater control over the internal structure of the House and Senate.

The "decline of parties" story is a familiar one. From the Jacksonian era until perhaps the mid-twentieth century, political parties had almost complete control over the labor and resources needed to run effective electoral campaigns. As a result, "[f]or ambitious politicians, a political career was a party-centered one rather than an individual, office-centered career as in today's incumbency-oriented Congress." Progressive and then New Deal reforms eviscerated the power of state and local party organizations by substituting primary elections for party selection of candidates and by undermining the patronage system that allowed party officials to mobilize electoral support. The emergence of the candidate-centered campaign, enabled primarily by television and other nationalized media, as well as high-speed travel and communication, gave candidates independent access to capital and labor outside of parties. By the 1970s, many observers were declaring the parties, in their capacity as organizations with the ability to control the behavior of politicians, all but dead. But predictions of parties' demise turned out to be greatly exaggerated. Party organizations not only survived, but over the past couple decades also have managed to recreate an increasingly important role for themselves by providing campaign consulting and capital to their preferred candidates. Few candidates can now afford to turn down the fundraising, advertising, and polling assistance of parties, though accepting assistance means sacrificing some political independence.

Recent changes in the internal rules and practices of the House and Senate also may have reinforced the partisan incentives of members of Congress (MCs). Under Democratic control in the 1970s and, even more aggressively, under Republican control in the 1990s, major reforms in the internal structure of the House reduced the powers of committee chairs to deviate from the median preferences of party members and increased the ability of party leaders to control legislative outcomes. Parties also have taken advantage of modern campaign fundraising techniques, specifically leadership political action committees, to leverage financial assistance to candidates into greater control over their behavior in office. As the political fates of both senior and junior members have become more dependent on their adherence to the party line, we have seen a renaissance of party discipline.

In sum, the rise of a mature system of two-party competition nationwide, gerrymandered "safe" election districts, and more powerful party organizations, among other factors, has led to the resurgence of more internally unified, ideologically coherent, and polarized parties than we have seen in many decades. And there is reason to expect that the parties will remain internally cohesive and ideologically distant for the foreseeable future.

B. The Functional Differences Parties Make

1. *Legislative Efficacy*.-- As party government theorists have long emphasized, divided party government tends to increase the likelihood of interbranch "confrontation, indecision and deadlock." To the extent things do get done, ineffectual compromises tend to take the place of programmatic, ideologically coherent initiatives. Under unified party control, the risk is the

inverse: government may become too efficacious and ideologically aggressive. There is reason to fear that unified governments will do too much too quickly, too extremely, and with too little deliberation or compromise. Each of these vices, of course, can be recast as a virtue.

[D]ivided governments have sometimes accomplished a great deal and not every unified government has produced the equivalent of the New Deal. [But] studies find that unified governments do produce more of it than divided ones. Raising the bar still higher, political historians speculate that unified government may offer the prevailing party an opportunity to build an enduring political consensus or movement of the sort that generates historically dramatic change. Empirical studies confirm, for instance, that presidential vetoes all but disappear during periods of unified government.

This is especially so during periods, like the present, of relatively high intraparty unity and interparty polarization. With the cross-partisan coalitions of previous decades no longer available and bipartisan compromise increasingly difficult, divided governments will be more prone to gridlock. And when one of these ideologically polarized parties manages to win unified control over the government after a long period of frustrating stalemate and partisan conflict, we should not expect moderation or restraint. Updating his research, Professor Mayhew finds that post-1990 lawmaking has become more partisan than in any period since World War II, with virtually all significant enactments during periods of unified Democratic or Republican control passing by narrow, party-line votes. This is consistent with qualitative assessments of recent Washington politics.

We should expect Congress to be considerably less willing to delegate policymaking discretion to the executive branch when the policy preferences of the two branches diverge. Empirical studies confirm that Congress not only delegates significantly less authority to the executive branch during periods of divided government, but also further limits the discretion of executive agencies by binding them with more restrictive procedural constraints.

2. *Executive Accountability*.--As we have seen, parliamentary critics of the American system of separation of powers point to the unhealthy diffusion of political accountability. They emphasize that the executive and legislative branches will jockey to claim credit and shift blame, leaving the voters with no clear target for retribution or reward. Moreover, voters have no hope of apportioning responsibility for major national decisions among the hundreds of MCs, each of whom stands for reelection based largely on what she accomplished for her district and disclaims personal blame for broader government failures. In practice, this has left virtually all responsibility for important issues-- and therefore motivation to do something about them--on the President, who in the face of congressional abdication has, many believe, become increasingly imperial and omnipotent over the course of the twentieth century. Arguably, then, the Madisonian system presents the antidemocratic dilemma of rule by an unaccountable legislature or monarchical president.

The existence of checks and balances between rivalrous branches, each with an incentive to monitor and prevent the other's misbehavior, might be regarded as a systemic form of accountability in its own right. In particular, in the modern system of American government, in which the greatest fears of unchecked exercises of power center on the imperial presidency, a crucial part of Congress's job is keeping the Executive accountable. Thus, the electoral accountability of the Westminster system might be contrasted with a Madisonian, intragovernmental form of accountability that operates during the intervals between elections and allows government officials not just to report each other's bad behavior to the electorate, but also to preempt it through the exercise of constitutional powers.

Conceived in this way, intragovernmental accountability would encompass congressional resistance to a President's legislative initiatives in the ordinary lawmaking process. More commonly, though, discussions of interbranch accountability focus on congressional monitoring and control of the executive branch through means other than resisting its legislative initiatives. So: Congress investigates misbehavior in the executive branch and in extreme cases impeaches the President. Congress also oversees the exercise of presidential powers in foreign affairs by exercising control over the scope of executive authority through (limited) authorizations of the use of force and budgetary allocations. The Senate advises on and consents (or not) to the President's appointments. And Congress limits the discretion of administrative agencies by narrowing the scope of its delegations and by monitoring and overseeing administrative policymaking. All of these forms of monitoring and checking supplement, and to some extent substitute for, the electoral form of accountability. Neither a second-term President nor a high-level bureaucrat will ever stand for reelection, but both can be thwarted by a Congress that has reason to be vigilant.

Moreover, and more to the point, we should expect these forms of intragovernmental accountability to be at their most effective precisely when electoral accountability is at its least: when party control of government is divided. Especially during periods of ideologically polarized, internally cohesive parties, divided government should create the kind of conflict between the branches that motivates aggressive monitoring and checking. During periods of unified government, in contrast, single party control of the legislative and executive branches may well give voters good reason to hold the dominant party accountable for the government's overall performance. It will not, however, give them reason to rely on the kind of checks and balances driven by political "ambition . . . counteract[ing] ambition."

In this context as well, it is important to recognize that party affiliation does not explain all political behavior. The post-World War II political equilibrium in certain contexts, especially foreign affairs, has been for Congress to abdicate responsibility to Presidents regardless of party. These patterns yield some level of constancy in interbranch accountability, diminishing the differences between unified and divided governments.

Nevertheless, especially as the parties have become more cohesive and polarized, divisive electoral and policy competition should translate into greater congressional scrutiny and institutionalized resistance to executive actions during periods of divided government. This prediction will resonate with observers of relatively recent Washington history. The Watergate investigations of President Nixon were, of course, carried out by an opposition-controlled Congress. So was the impeachment of President Clinton, which, like that of his historical predecessor Andrew Johnson, proceeded strictly along party lines and would have been unimaginable but for divided government. Conflicts between Congress and the President over "executive privilege" also track divided party control. Indeed, the first official use of the term "executive privilege" was made by the Eisenhower Administration, just as divided government emerged to become the late-twentieth-century norm. The Eisenhower presidency "ushered in the greatest orgy of executive denial in American history"; the executive branch refused more congressional requests for information in five years than in the first century of American government.

Similarly, the War Powers Resolution, Congress's most significant post-World War II attempt to stand up for itself in the foreign affairs context, was passed by a Democratic Congress over President Nixon's veto. The three Supreme Court nominees who have been voted down by the Senate since World War II were nominated by Republican Presidents and defeated by Democratic Senates. And the divided

Nixon and Ford Administrations saw a marked rise in visible efforts by Congress to assert greater control over administrative agencies by writing more detailed statutes, including legislative veto provisions, spending more time on oversight hearings, and the like.

If divided and unified governments do, in fact, generate significantly different levels of interbranch accountability, that should affect our thinking about separation-of-powers law and theory across a range of issues. For example, deep disagreement exists about the Senate's proper role in the judicial appointments context (or the meaning of the constitutional authority to advise and consent); Congress's proper role in authorizing and overseeing the use of military force (or the scope of Article II executive power); and Congress's proper role in delegating discretion to agencies and exercising ongoing control over their decisionmaking (or whether Article I limits the delegation of legislative power or the use of such devices as the legislative veto). In these and other contexts, what some see as beneficial or constitutionally mandated checks and balances will be viewed by others as detrimental or unconstitutional congressional "micromanagement" or "harassment" of the Executive, or "usurpations" of executive power. Viewing separation of powers in light of political parties obviously cannot resolve these normative and interpretive controversies. It can, however, identify the political conditions under which we should expect to find higher and lower levels of congressional skepticism of, and opposition to, executive actions.

III. Reenvisioning, and Reforming, the Separation of Powers

Reorienting separation of powers around parties might lead constitutional law and theory in a number of different directions. Most obviously, the doctrinal rules and theoretical underpinnings of separation-of-powers law look very different in light of a party-based understanding of separation of powers.

A. Separation-of-Powers Law

1. Rights and Executive Powers During War and Crisis.--Recently, the Supreme Court has applied the Youngstown framework in deciding critical post-9/11 cases concerning the war on terror. Consistent with constitutional history, the Court has leaned heavily on the constitutional requirement of congressional agreement with assertions of executive power. In the most significant decision so far, for example, the Court upheld executive detention of American citizens who had been engaged in armed conflict against the United States in Afghanistan. But the Court refrained from concluding that unilateral executive detention was constitutional. Instead, the decision rested on the conclusion, under the Youngstown framework, that Congress had authorized executive detention in such circumstances in the 2001 Authorization for Use of Military Force (AUMF). Thus the Court largely avoided resolving constitutional claims of inherent executive authority or of expansive individual rights.

But the Youngstown framework assumes that Congress will be actively involved in making the difficult policy decisions required during wartime and will provide the oversight of Executive-initiated action that courts feel ill-suited to offer through first-order rights adjudication. Youngstown thus embraces the Madisonian expectation that Congress will compete aggressively with the President for power and vigilantly monitor and check presidential decisionmaking. Here again, however, the Madisonian vision founders on the realities of partisan political competition. Especially when government is unified by party, we should not expect Congress to resist executive power in the way that courts and commentators take for granted.

A closer look at Congress's role in the battle against terrorism illustrates the point. This drama might be divided, to date, into three acts. In the immediate wake of 9/11, Congress took two decisive steps, first enacting the AUMF

and then the initial Patriot Act. But then, for the remainder of President Bush's first term, Congress became largely dormant. Silently ceding the terrain to a President implementing a series of novel and controversial measures to fight terrorism--executive detention of citizens deemed "enemy combatants," use of military tribunals to try foreigners captured overseas, closed deportation hearings, and the like--Congress neither adopted measures to affirm these executive branch actions nor attempted to define the boundaries of executive powers.

Congress's remarkable passivity during much of the war on terror brings us back to a closer reading of Justice Jackson's celebrated opinion. Essential to Justice Jackson's realist assessment was the claim that "[s]ubtle shifts take place in the centers of real power that do not show on the face of the Constitution," including the "rise of the party system," which has made a "significant extraconstitutional supplement to real executive power." Justice Jackson's opinion emerged just at the end of the longest stretch of essentially unified party control of government in American history. Perhaps Justice Jackson was especially attuned to the risk of "totalitarian" power and "dictatorship" in the presidency not just because of recent European events, but also in light of an American system of government in which the President could leverage party loyalties to fight an undeclared war with minimal congressional opposition. Justice Jackson was concerned about the "concentration [of political power] in a single head," who, by leveraging party loyalty and policy agreement, could "extend his effective control into branches of government other than his own."

Justice Jackson obviously intended his tripartite categorization of presidential-congressional relations to serve as a check on executive unilateralism, but as applied by subsequent courts, his framework has turned out to be elusive. The problem has been that placing an executive action in the correct, outcome-determinative Jacksonian box requires confident judicial judgments about when congressional statutes clearly endorse or prohibit specific presidential actions in novel areas of policy--areas in which the (many) conceivably relevant statutes tend to be ambiguous, contradictory, or not designed with the particular issue in mind. In many cases, the candid answer is that Congress simply did not address the question. This leaves courts in Justice Jackson's purgatorial "zone of twilight," guided by "the imperatives of events and contemporary imponderables rather than . . . abstract theories of law." Understandably reluctant to take responsibility for making crucial and controversial decisions unguided by either specific law or knowledge of the likely consequences when the stakes are so high (also the reason courts are reluctant to make first-order rights decisions in these contexts), judges frequently attribute to vague legislation a "clear" congressional endorsement (or sometimes, a "clear" congressional prohibition) of the executive action at issue.

But perhaps Justice Jackson's linkage between constitutional analysis and the realities of modern party competition offers courts more guidance than has been recognized. In the Youngstown context, Justice Jackson appears to have believed that President Truman could have pressed a responsive Congress to grant him power to seize the steel mills and would have readily received permission if his claims of necessity had any real warrant. Requiring President Truman to seek explicit congressional permission might at least have led to the release of more information about the actual risk of a steel shortage that would have hindered the war effort and to greater public deliberation about the merits of seizing the mills. When Presidents face partisan opposition in Congress, however, the risks of delay, political squabbling, and stalemate may outweigh the benefits of deliberation and bipartisanship. Thus, the flipside of the Jacksonian default rule might be that courts should more generously construe statutes as

supporting executive authority when government is divided.

At least for the heirs of Jacksonian realism, the best approach to executive power must depend on the actual political dynamics between the legislative and executive branches. As Justice Jackson once tried to tell us, these dynamics, in turn, depend centrally on political parties.

2. *The Administrative State.*--The overarching goal of the constitutional separation of powers as applied to the administrative state is "to protect the citizens from the emergence of tyrannical government by establishing multiple heads of authority in government, which are then pitted one against another in a continuous struggle." Thus, when courts adjudicate disputes between the legislative and executive branches related to their control over agencies, they see their job as guarding against the "encroachment" or "aggrandizement" of one branch at the expense of its rival. At the same time, however, many courts and theorists see the emergence of the post-New Deal administrative state as the greatest threat to the balance of powers between the branches since the time of the Founding. There is some tension, to put it mildly, between the assumption that Congress is perpetually engaged in cutthroat competition for power with the Executive and the reality of massive congressional delegations of authority to the executive branch.

To the extent that Congress does care about policy outcomes, it will be much more willing to delegate policymaking authority to an executive branch actor who shares, or can be kept in line with, its policy preferences. This leads to the prediction that Congress will delegate more authority to the executive branch when government is unified than when it is divided. Empirical studies confirm this prediction.

We should also predict that when Congress does choose to delegate, it will choose the agent most likely to share its policy preferences. Epstein and O'Halloran find that when government is divided, congressional delegations move away from the Executive Office of the President and executive agencies and toward independent agencies and commissions. When Congress confronts a President who disagrees with its policy objectives, in other words, it directs its delegations to the executive branch actors most insulated from presidential control, and perhaps also most susceptible to congressional control.

Consider the famously underenforced nondelegation doctrine, which frowns upon excessively broad grants of discretion to the executive branch and nominally requires Congress to supply at least an "intelligible principle" to guide the exercise of delegated authority. Advocates of a robust nondelegation doctrine argue that overly broad delegations not only violate the Constitution by passing legislative power to the executive branch, but also diminish accountability by allowing Congress to duck difficult policy decisions or dupe different constituencies about the decisions it has made.

Recognizing the difference between Congress's delegation strategies during unified and divided government might lead to a somewhat less alarmist view. For one thing, to the extent the concern is simply with sweeping delegations, if opposite-party delegations are generally restrained and well-supervised, we should worry much less when government is divided than when it is unified. This might suggest that any reinvigoration of the nondelegation doctrine should be partial, premised on a distinction (doctrinally explicit or sub rosa) between delegations under divided and unified government, with only the latter subject to serious scrutiny. But from this perspective, even same-party delegations might seem less worrisome. To the extent that broad delegations reflect policy agreement between the branches, we should expect the same general policy thrust regardless of the immediate institutional decisionmaker. It is hard to see how legislative accountability is sacrificed in any meaningful way if Congress is in fact making the same

basic policy judgments in its decision to delegate that it would have made had it written a more specific statute. If the animating ideal of the nondelegation principle is to "ensure [] . . . that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will," perhaps we should rest assured that Congress will adequately police itself.

The discussion thus far has proceeded on the conventional assumption that the primary concern about delegation is the preservation of Congress's lawmaking role. A different approach to separation of powers in administration, increasingly prominent in the scholarly literature, is to accept, if not celebrate, the inevitability of broad executive discretion, but to push for greater presidential control over the executive branch. Here, too, the distinction between unified and divided party control, and the different political dynamics that result, can be illuminating.

Consider Dean Elena Kagan's recent description and defense of "presidential administration." As Dean Kagan emphasizes, the assertion of greater presidential policy control over the regulatory activity of executive branch agencies--in other words, the rise of presidential administration--under Presidents Reagan and, even more so, Clinton was motivated in large part by divided government. Facing a cohesive and hostile Republican majority in Congress that prevented him from pursuing his policy agenda through legislation, Clinton turned to unilateral action, using directive orders to effect policy change through administrative action. Dean Kagan convincingly shows that, in an era of cohesive and polarized parties, divided government tends to displace policymaking from the legislative to the administrative process.

The unifying theme of these observations is that a Madisonian, turf-war understanding of the relationship between Congress and the President fails to capture what is at stake in separation-of-powers controversies over administration. The interests of the branches are not intrinsic or stable but rather contingent on shifting patterns of party control, coming in and out of alignment over time. Understanding that party more than branch competition structures the administrative state is a necessary first step in making sense of the politics that separation-of-powers and administrative law seek to govern.

3. *Judicial Review*.--For many decades, debates over judicial review centered on what Alexander Bickel denominated the "countermajoritarian difficulty," the moral and political problem posed by the power of courts to invalidate legislation supported by democratic majorities (or at least legislative ones). In recent years, however, the pendulum has swung in the other direction: it has now become commonplace for scholars to assert that the countermajoritarian difficulty is an academic illusion, one based on an insufficiently realist understanding of the relationships between courts, political institutions, and public opinion. In this revisionist view, reflected in work by political scientists, constitutional historians, and constitutional scholars influenced by positive political theory, judicial review is severely constrained by the political branches. As a result, judicial decisions cannot stray far or for long from the policy preferences of national majorities. The conclusion is that constitutional theory should stop worrying so much about the countermajoritarian difficulty because judicial review has not been and cannot be very countermajoritarian.

The ability of national majorities to constrain the Court is typically supported by historical evidence from two of the most dramatic eras in which the Court clashed with the political branches and then backed down: the New Deal and Reconstruction. In the New Deal era, resistance to progressive state legislation, such as wage and hours laws, followed by invalidation of New Deal programs, dissolved in the wake

of President Franklin D. Roosevelt's overwhelming second-term electoral triumph in the 1936 elections. During the campaign and after, Roosevelt leveraged his political mandate to attack the Court's resistance to the New Deal, culminating in his infamous Court-packing plan. Although the plan was not enacted, the threat it posed, along with Roosevelt's attacks and electoral mandate (the largest electoral victory in the history of two-party competition), were considered central causes of what scholars for many years viewed as a dramatic "switch in time" by the Court. After 1937, the Court consistently upheld New Deal legislation and reversed inconsistent precedents--a transformation aided by five appointments that Roosevelt made to the Court in the two and a half years after the plan's defeat. The precise causal role the Court-packing plan played is debated by historians, but most agree that the Court's jurisprudence changed after 1936 to reflect the preferences behind the New Deal.

Somewhat similarly, in the Reconstruction era, when a dramatic initial Court decision, Ex parte Milligan, appeared to threaten Congress's fundamental Reconstruction policies, Congress enacted a law (over a presidential veto) that withdrew the Court's jurisdiction over a case that had already been argued before the Court but had not yet been decided. At the same time, Congress began impeachment proceedings against President Andrew Johnson. When the Court finally confronted the constitutionality of Congress's attempt to close its doors, it upheld Congress's power to do so in the famous Ex parte McCardle decision. This dramatic reversal, too, is thought by many to demonstrate that a Court confronting majoritarian political opposition will back down.

Not sufficiently appreciated, however, is the fact that the New Deal and Reconstruction eras were historically distinctive, characterized by some of the most sustained concentrations of national partisan political power in American history. From 1935 until 1939, Democrats outnumbered Republicans in the Senate 69-25 and 76-16, respectively; in the House, 322-103 and 334-88. Similarly, in 1865 and 1869, Republicans outnumbered Democrats in the Senate 39-11 and 57-9; in the House, 136-38 and 173-47. When one party controls the presidency and both chambers with margins of 73-82% over four years (the New Deal) or controls both chambers with veto-proof majorities of 78-86% over four years (Reconstruction) even with a President of the opposite party, the political branches are able to amass a level of power reached only during exceptional moments in American political history.

Reconstruction and the New Deal do suggest that in eras of extraordinarily unified partisan domination of the political branches, a Court that threatens core partisan agenda items can be effectively disciplined politically. Judicial review, then, is indeed constrained by the presence of sustained, cohesive partisan majorities. But to generalize about the practice of judicial review and political constraints based on periods of strongly unified government is a mistake. In periods of divided government (and even unified government, if the majority party is fragmented and lacks the enormous majorities of the New Deal and Reconstruction eras), courts will have much greater latitude to operate free of effective political discipline.

C. Political Parties and the Law of Democracy

If the unified-parties/unified-government complex poses the greatest threat to the Madisonian constitutional order, institutional and regulatory modifications might target either the causes or the effects of that complex. As Madison himself cautioned with respect to factions, curing strongly unified government by attacking parties might be worse than the disease. Even as they threaten to erode the system of separation of powers, unified and polarized parties might be healthy for democracy along other dimensions. Recall that proponents of responsible party government have emphasized a

number of benefits of strong and sharply differentiated parties. Some of these benefits, such as enhanced government accountability (of a sort), come in the same currency as those promised by separation of powers. Others relate to different democratic values. Some have argued, for instance, that strong parties with coherent ideologies are the primary means by which the government can marshal enough independent policy commitment to minimize being carved up by powerful, rent-seeking economic interests. Strong parties may also encourage citizen participation and voter turnout. Even those most committed to restoring the original Madisonian vision of separation of powers need to ask whether weakening parties comes at too high a price.

With that caveat, we identify several strategies for preventing strongly unified party government from taking hold. We earlier described the confluence of causes that has generated the current party structure. Of course, the long overdue emergence of normal two-party competition in the South, which in turn catalyzed the purification of the national two-party system, cannot be undone through legal reforms, nor would it be desirable to attempt to reimpose a one-party monopoly. Other contributing factors, however, are more susceptible to legal reforms.

1. *Safe Districting*.--The least defensible contributing factor to the rise of unified parties, and the most easily corrected (in principle, if not in political reality), is the corruption of electoral politics reflected in the recent blossoming of "sweetheart" safe election districts throughout the country. As noted earlier, such districts are intentionally designed to be at least 60% Democratic or Republican, in terms of likely voter behavior on general election day. In addition to undermining competitive elections, safe districting undermines centrists, who could win competitive general elections but not primaries in what are essentially one-party districts. Safe districting therefore contributes to greater ideological polarization and removes a moderating force from unified governments.

2. *Primary Election Structures*.--Primary election structures might also be modified to make it easier for voters to generate internal party heterogeneity among those elected to office. State-mandated primary elections can be closed, open, or something in between. Closed primaries (used in twelve states) permit only previously registered party members to vote; open primaries (used in about half the states in some form) permit at least some non-party members, such as independents, to participate as well. Because party activists dominate closed primaries, the winners are more likely to reflect the extreme ideological views of the median party activist. Closed primaries therefore also contribute, like safe districts but to a lesser extent, to more polarized partisan officeholders and hence to unified government operating in its "purest" form.

3. *Internal Legislative Rules*.--A more recent and contingent contributing cause to ideologically unified legislative-executive policy agendas, as noted earlier, is change in the way legislative bodies are organized. These shifts in formal rules and informal practices have enabled party leaders to discipline more effectively the voting behavior of lower-ranking party members. In unified government, this power is used to ensure united partisan legislative support (and united partisan opposition, on the other side) for the President's policy agenda. If the unified-parties/unified-government complex is troubling, as from the Madisonian perspective it is, another focal point for change could be these internal legislative practices (assuming existing legislative leaders could somehow be made to relinquish the power these practices provide).

In earlier eras, one response to dramatic concentration of partisan national political power was precisely to fragment power within Congress. Thus, in the aftermath of Reconstruction,

Congress was restructured to weaken the ability of party leaders to assert unified control; the self-conscious purpose of these changes was to recapture the Framers' vision that political power should be diffused, not concentrated. Measures included the seniority system, which insulated promotion (particularly to committee chairs) from the control of party leaders, and redistribution of power among a larger number of more independent congressional committees. If making unified legislative-executive relations more competitive today is an overriding aim, one focus could be on similar efforts to roll back some of the internal legislative changes of the last forty years that have enabled party leaders to marshal united partisan political power in Congress.

Conclusion

From nearly the start of the American republic, the separation of powers as the Framers understood it, and as contemporary constitutional law continues to understand it, had ceased to exist. The enduring institutional form of democratic political competition has turned out to be not branches but political parties. Absorbing that insight is essential, not just for descriptive and historical analyses of the practice of democracy in America, but also for normative thought about constitutional law and the design of democratic institutions today. If interbranch checks and balances remain a vital aspiration, the failure of the Framers' understanding of political competition raises the risk of a mismatch between constitutional structures and constitutional aims. Recognizing that failure and replacing it with an understanding of the actual mechanisms of political competition suggests new approaches to constitutional law and institutional design that would more effectively realize the aims of the separation of powers.

Such a project is all the more urgent as we come to terms with an emerging equilibrium of ideologically coherent and polarized political parties. Strong parties will accentuate the differences between unified and divided government, making constitutional law's conceptualization of a singular, static system of separation of powers all the more problematic. And when strong parties combine with extended periods of unified government, the challenge to the Madisonian picture of separation of powers, and to the values it is meant to protect, is stark. If the goal is a system of separation of powers that resembles the one Madison and subsequent generations of constitutional theorists imagined, it will have to be built not around branches but around the institutions through which political competition is in fact organized in modern democracies: political parties.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Vinson, C.J., dissenting) (excerpts)

Mr. Chief Justice VINSON, with whom Mr. Justice REED and Mr. Justice MINTON join, dissenting.

Because we cannot agree that affirmance is proper on any ground, and because of the transcending importance of the questions presented not only in this critical litigation but also to the powers the President and of future Presidents to act in time of crisis, we are compelled to register this dissent.

I.

In passing upon the question of Presidential powers in this case, we must first consider the context in which those powers were exercised.

Those who suggest that this is a case involving extraordinary powers should be mindful that these are extraordinary times. A world not yet recovered from the devastation of World War II has been forced to face the threat of another and more terrifying global conflict.

In 1950, when the United Nations called upon member nations 'to render every assistance' to repel aggression in Korea, the United States furnished its vigorous support. For almost two full years, our armed forces have been fighting in Korea, suffering casualties of over 108,000 men. Hostilities have not abated. The "determination of the United Nations to continue its action in Korea to meet the aggression" has been reaffirmend. Congressional support of the action in Korea has been manifested by provisions for increased military manpower and equipment and for economic stabilization.

Efforts to protect the free world from aggression are found in the congressional enactments of the Truman Plan for assistance to Greece and Turkey and the Marshall Plan for economic aid needed to build up the strength of our friends in Western Europe. In 1949, the Senate approved the North Atlantic Treaty under which each member nation agrees that an armed attack against one is an armed attack against all.

Even this brief review of our responsibilities in the world community discloses the enormity of our undertaking. Success of these measures may, as has often been observed, dramatically influence the lives of many generations of the world's peoples yet unborn. Alert to our responsibilities, which coincide with our own self preservation through mutual security, Congress has enacted a large body of implementing legislation. As an illustration of the magnitude of the over-all program, Congress has appropriated $130 billion for our own defense and for military assistance to our allies since the June, 1950, attack in Korea.

Congress also directed the President to build up our own defenses. Congress, recognizing the "grim fact * * * that the United States is now engaged in a struggle for survival" and that "it is imperative that we now take those necessary steps to make our strength equal to the peril of the hour," granted authority to draft men into the armed forces. As a result, we now have over 3,500,000 men in our armed forces.

Congress recognized the impact of these defense programs upon the economy. Following the attack in Korea, the President asked for authority to requisition property and to allocate and fix priorities for scarce goods. In the Defense Production Act of 1950, Congress granted the powers requested and, in addition, granted power to stabilize prices and wages and to provide for settlement of labor disputes arising in the defense program. The Defense Production Act was extended in 1951, a Senate Committee noting that in the dislocation caused by the programs for purchase of military equipment "lies the seed of an economic disaster that might well destroy the military might we are straining to build." Significantly, the Committee examined the problem "in terms of just one

commodity, steel," and found "a graphic picture of the over-all inflationary danger growing out of reduced civilian supplies and rising incomes." Even before Korea, steel production at levels above theoretical 100% capacity was not capable of supplying civilian needs alone. Since Korea, the tremendous military demand for steel has far exceeded the increases in productive capacity. This Committee emphasized that the shortage of steel, even with the mills operating at full capacity, coupled with increased civilian purchasing power, presented grave danger of disastrous inflation.

One is not here called upon even to consider the possibility of executive seizure of a farm, a corner grocery store or even a single industrial plant. Such considerations arise only when one ignores the central fact of this case—that the Nation's entire basic steel production would have shut down completely if there had been no Government seizure. Even ignoring for the moment whatever confidential information the President may possess as "the Nation's organ for foreign affairs," the uncontroverted affidavits in this record amply support the finding that "a work stoppage would immediately jeopardize and imperil our national defense."

Plaintiffs do not remotely suggest any basis for rejecting the President's finding that any stoppage of steel production would immediately place the Nation in peril. Accordingly, if the President has any power under the Constitution to meet a critical situation in the absence of express statutory authorization, there is no basis whatever for criticizing the exercise of such power in this case.

The steel mills were seized for a public use. The power of eminent domain, invoked in that case, is an essential attribute of sovereignty and has long been recognized as a power of the Federal Government. Admitting that the Government could seize the mills, plaintiffs claim that the implied power of eminent domain can be exercised only under an Act of Congress. Under this view, the President is left powerless at the very moment when the need for action may be most pressing and when no one, other than he, is immediately capable of action. Under this view, he is left powerless because a power not expressly given to Congress is nevertheless found to rest exclusively with Congress.

Consideration of this view of executive impotence calls for further examination of the nature of the separation of powers under our tripartite system of Government.

The Constitution provides:

> **Art. II,**
> Section 1. "The executive Power shall be vested in a President of the United States of America. * * *."
> Section 2. "The President shall be Commander in Chief of the Army and Navy of the United States, * * *"
> "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; * * *."
> Section 3. "He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; * * * he shall take Care that the Laws be faithfully executed, * * *.'

The whole of the 'executive Power' is vested in the President. Before entering office, the President swears that he "will faithfully execute the Office of President of the United States, and will to the best of (his) Ability, preserve, protect and defend the Constitution of the United States." Art. II, s 1.

This comprehensive grant of the executive power to a single person was bestowed soon after the country had thrown the yoke of monarchy. Only by instilling initiative and vigor in all of the three departments of Government, declared Madison, could tyranny in any from be avoided.[26] Hamilton added: "Energy in the Executive is a leading character in the definition

of good government. It is essential to the protection of the community against foreign attack; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and highhanded combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy." It is thus apparent that the Presidency was deliberately fashioned as an office of power and independence. Of course, the Framers created no autocrat capable of arrogating any power unto himself at any time. But neither did they create an automaton impotent to exercise the powers of Government at a time when the survival of the Republic itself may be at stake.

In passing upon the grave constitutional question presented in this case, we must never forget, as Chief Justice Marshall admonished, that the Constitution is "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs," and that "(i)ts means are adequate to its ends." Cases do arise presenting questions which could not have been foreseen by the Framers. In such cases, the Constitution has been treated as a living document adaptable to new situations. But we are not called upon today to expand the Constitution to meet a new situation. For, in this case, we need only look to history and time-honored principles of constitutional law—principles that have been applied consistently by all branches of the Government throughout our history. It is those who assert the invalidity of the Executive Order who seek to amend the Constitution in this case.

III.

A review of executive action demonstrates that our Presidents have on many occasions exhibited the leadership contemplated by the Framers when they made the President Commander in Chief, and imposed upon him the trust to "take Care that the Laws be faithfully executed." With or without explicit statutory authorization, Presidents have at such times dealt with national emergencies by acting promptly and resolutely to enforce legislative programs, at least to save those programs until Congress could act. Congress and the courts have responded to such executive initiative with consistent approval.

Much of the argument in this case has been directed at straw men. We do not now have before us the case of a President acting solely on the basis of his own notions of the public welfare. Nor is there any question of unlimited executive power in this case. The President himself closed the door to any such claim when he sent his Message to Congress stating his purpose to abide by any action of Congress, whether approving or disapproving his seizure action. Here, the President immediately made sure that Congress was fully informed of the temporary action he had taken only to preserve the legislative programs from destruction until Congress could act.

The absence of a specific statute authorizing seizure of the steel mills as a mode of executing the laws—both the military procurement program and the anti-inflation program—has not until today been thought to prevent the President from executing the laws. Unlike an administrative commission confined to the enforcement of the statute under which it was created, or the head to a department when administering a particular statute, the President is a constitutional officer charged with taking care that a 'mass of legislation' be executed. Flexibility as to mode of execution to meet critical situations is a matter of practical necessity. This practical construction of the 'Take Care' clause, advocated by John Marshall, was adopted by this Court in In re Neagle, In re Debs and other cases. See also Ex parte Quirin, 1942, 317 U.S. 1, 26. Although more restrictive views of executive power, advocated in dissenting opinions of Justices Holmes, McReynolds and Brandeis, were emphatically rejected by this Court in Myers v. United States, supra, members of today's majority treat these dissenting views as authoritative.

There is no statute prohibiting seizure as a method of enforcing legislative programs. Where Congress authorizes seizure in instances not necessarily crucial to the defense program, it can hardly be said to have disclosed an intention to prohibit seizures where essential to the execution of that legislative program.

Whatever the extent of Presidential power on more tranquil occasions, and whatever the right of the President to execute legislative programs as he sees fit without reporting the mode of execution to Congress, the single Presidential purpose disclosed on this record is to faithfully execute the laws by acting in an emergency to maintain the status quo, thereby preventing collapse of the legislative programs until Congress could act. The President's action served the same purposes as a judicial stay entered to maintain the status quo in order to preserve the jurisdiction of a court. In his Message to Congress immediately following the seizure, the President explained the necessity of his action in executing the military procurement and anti-inflation legislative programs and expressed his desire to cooperate with any legislative proposals approving, regulating or rejecting the seizure of the steel mills. Consequently, there is no evidence whatever of any Presidential purpose to defy Congress or act in any way inconsistent with the legislative will.

When the President acted on April 8, he had exhausted the procedures for settlement available to him. Taft-Hartley was a route parallel to, not connected with, the WSB procedure. Plaintiffs' property was taken and placed in the possession of the Secretary of Commerce to prevent any interruption in steel production. It made no difference whether the stoppage was caused by a union-management dispute over terms and conditions of employment, a union-Government dispute over wage stabilization or a management-Government dispute over price stabilization. The President's action has thus far been effective, not in settling the dispute, but in saving the various legislative programs at stake from destruction until Congress could act in the matter.

VI.

The diversity of views expressed in the six opinions of the majority, the lack of reference to authoritative precedent, the repeated reliance upon prior dissenting opinions, the complete disregard of the uncontroverted facts showing the gravity of the emergency and the temporary nature of the taking all serve to demonstrate how far afield one must go to affirm the order of the District Court.

The broad executive power granted by Article II to an officer on duty 365 days a year cannot, it is said, be invoked to avert disaster. Instead, the President must confine himself to sending a message to Congress recommending action. Under this messenger-boy concept of the Office, the President cannot even act to preserve legislative programs from destruction so that Congress will have something left to act upon. There is no judicial finding that the executive action was unwarranted because there was in fact no basis for the President's finding of the existence of an emergency[95] for, under this view, the gravity of the emergency and the immediacy of the threatened disaster are considered irrelevant as a matter of law.

Judicial, legislative and executive precedents throughout our history demonstrate that in this case the President acted in full conformity with his duties under the Constitution. Accordingly, we would reverse the order of the District Court.

§ 1541. Purpose and policy

(a) Congressional declaration. It is the purpose of this joint resolution [50 USCS §§ 1541 et seq.] to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

(b) Congressional legislative power under necessary and proper clause. Under article I, section 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.

(c) Presidential executive power as Commander-in-Chief; limitation. The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

§ 1542. Consultation; initial and regular consultations

The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

§ 1543. Reporting requirement

(a) Written report; time of submission; circumstances necessitating submission; information reported. In the absence of a declaration of war, in any case in which United States Armed Forces are introduced--

(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;

(2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or

(3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation;

the President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth--

(A) the circumstances necessitating the introduction of United States Armed Forces;

(B) the constitutional and legislative authority under which such introduction took place; and

(C) the estimated scope and duration of the hostilities or involvement.

(b) Other information reported. The President shall provide such other information as the Congress may request in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad.

(c) Periodic reports; semiannual requirement. Whenever United States Armed Forces are introduced into hostilities or into any situation described in subsection (a) of this section, the President shall, so long as such armed forces continue to be engaged in such hostilities or situation, report to the Congress periodically on the status of such hostilities or situation as well as on the scope and duration of such hostilities or situation, but in no event shall he report to the Congress less often than once every six months.

§ 1544. Congressional action

(a) Transmittal of report and referral to Congressional Committees; joint request for convening Congress. Each report submitted pursuant to section 4(a)(1) [50 USCS § 1543(a)(1)] shall be transmitted to the Speaker of the House of Representatives and to the President pro tempore of the Senate on the same calendar day. Each report so transmitted shall be referred to the Committee on Foreign Affairs of the House of Representatives and to the Committee on Foreign Relations of the Senate for appropriate action. If, when the report is transmitted, the Congress has adjourned sine die or has adjourned for any period in excess of three calendar days, the Speaker of the House of Representatives and the President pro tempore of the Senate, if they deem it advisable (or if petitioned by at least 30 percent of the membership of their respective Houses) shall jointly request the President to convene Congress in order that it may consider the report and take appropriate action pursuant to this section.

(b) Termination of use of United States Armed Forces; exceptions; extension period. Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1) [50 USCS § 1543(a)(1)], whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

(c) Concurrent resolution for removal by President of United States Armed Forces. Notwithstanding subsection (b), at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possession and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

§ 1545. Congressional priority procedures for joint resolution or bill

(a) Time requirement; referral to Congressional committee; single report. Any joint resolution or bill introduced pursuant to section 5(b) [50 USCS § 1544(b)] at least thirty calendar days before the expiration of the sixty-day period specified in such section shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on Foreign Relations of the

Senate, as the case may be, and such committee shall report one such joint resolution or bill, together with its recommendations, not later than twenty-four calendar days before the expiration of the sixty-day period specified in such section, unless such House shall otherwise determine by the yeas and nays.

(b) Pending business; vote. Any joint resolution or bill so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents), and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Referral to other House committee. Such a joint resolution or bill passed by one House shall be referred to the committee of the other House named in subsection (a) and shall be reported out not later than fourteen calendar days before the expiration of the sixty-day period specified in section 5(b) [50 USCS § 1544(b)]. The joint resolution or bill so reported shall become the pending business of the House in question and shall be voted on within three calendar days after it has been reported, unless such House shall otherwise determine by yeas and nays.

(d) Disagreement between Houses. In the case of any disagreement between the two Houses of Congress with respect to a joint resolution or bill passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such resolution or bill not later than four calendar days before the expiration of the sixty-day period specified in section 5(b) [50 USCS § 1544(b)]. In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than the expiration of such sixty-day period.

§ 1546. Congressional priority procedures for concurrent resolution

(a) Referral to Congressional committee; single report. Any concurrent resolution introduced pursuant to section 5(c) [50 USCS § 1544(c)] shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may be, and one such concurrent resolution shall be reported out by such committee together with its recommendations within fifteen calendar days, unless such House shall otherwise determine by the yeas and nays.

(b) Pending business; vote. Any concurrent resolution so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents) and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Referral to other House committee. Such a concurrent resolution passed by one House shall be referred to the committee of the other House named in subsection (a) and shall be reported out by such committee together with its recommendations within fifteen calendar days and shall thereupon become the pending business of such House and shall be voted upon within three calendar days, unless such House shall otherwise determine by yeas and nays.

(d) Disagreement between Houses. In the case of any disagreement between the two Houses of Congress with respect to a concurrent resolution passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such concurrent resolution within six calendar days after the legislation is referred to the committee

of conference. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than six calendar days after the conference report is filed. In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement.

§ 1546a. Expedited procedures for certain joint resolutions and bills

Any joint resolution or bill introduced in either House which requires the removal of United States Armed Forces engaged in hostilities outside the territory of the United States, its possessions and territories, without a declaration of war or specific statutory authorization shall be considered in accordance with the procedures of section 601(b) of the International Security Assistance and Arms Export Control Act of 1976 [unclassified], except that any such resolution or bill shall be amendable. If such a joint resolution or bill should be vetoed by the President, the time for debate in consideration of the veto message on such measure shall be limited to twenty hours in the Senate and in the House shall be determined in accordance with the Rules of the House.

§ 1547. Interpretation of joint resolution

(a) Inferences from any law or treaty. Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred--

(1) from any provision of law (whether or not in effect before the date of the enactment of this joint resolution [enacted Nov. 7, 1973]), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this joint resolution; or

(2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.

(b) Joint headquarters operations of high-level military commands. Nothing in this joint resolution [50 USCS §§ 1541 et seq.] shall be construed to require any further specific statutory authorization to permit members of United States Armed Forces to participate jointly with members of the armed forces of one or more foreign countries in the headquarters operations of high-level military commands which were established prior to the date of enactment of this joint resolution [enacted Nov. 7, 1973] and pursuant to the United Nations Charter or any treaty ratified by the United States prior to such date.

(c) Introduction of United States Armed Forces. For purposes of this joint resolution [50 USCS §§ 1541 et seq.], the term "introduction of United States Armed Forces" includes the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities.

(d) Constitutional authorities or existing treaties unaffected; construction against grant of Presidential authority respecting use of United States Armed Forces. Nothing in this joint resolution [50 USCS §§ 1541 et seq.]--

(1) is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties; or

(2) shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution.

§ 1548. Separability of provisions

If any provision of this joint resolution [50 USCS §§ 1541 et seq.] or the application thereof to any person or circumstance is held invalid, the remainder of the joint resolution and the application of such provision to any other person or circumstance shall not be affected thereby.

To prohibit the conduct of a first-use nuclear strike absent a declaration of war by Congress, H. R. 669, 115th Cong., 1st Sess.

IN THE HOUSE OF REPRESENTATIVES

January 24, 2017

Mr. Ted Lieu of California (for himself, Mr. McGovern, Mr. Garamendi, Ms. Clarke of New York, Mr. Blumenauer, Mr. Grijalva, Mr. Pocan, Ms. Lee, and Mr. Welch) introduced the following bill; which was referred to the Committee on Foreign Affairs

A BILL

To prohibit the conduct of a first-use nuclear strike absent a declaration of war by Congress.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Restricting First Use of Nuclear Weapons Act of 2017".

SEC. 2. FINDINGS AND DECLARATION OF POLICY.

(a) Findings.--Congress finds the following:

(1) The Constitution gives Congress the sole power to declare war.

(2) The framers of the Constitution understood that the monumental decision to go to war, which can result in massive death and the destruction of civilized society, must be made by the representatives of the people and not by a single person.

(3) As stated by section 2(c) of the War Powers Resolution (Public Law 93-148; 50 U.S.C. 1541), "the constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or

(3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces".

(4) Nuclear weapons are uniquely powerful weapons that have the capability to instantly kill millions of people, create long-term health and environmental consequences throughout the world, directly undermine global peace, and put the United States at existential risk from retaliatory nuclear strikes.

(5) By any definition of war, a first-use nuclear strike from the United States would constitute a major act of war.

(6) A first-use nuclear strike conducted absent a declaration of war by Congress would violate the Constitution.

(b) Declaration of Policy.--It is the policy of the United States that no first-use nuclear strike should be conducted absent a declaration of war by Congress.

SEC. 3. PROHIBITION ON CONDUCT OF FIRST-USE NUCLEAR STRIKES.

(a) Prohibition.--Notwithstanding any other provision of law, the President may not use the Armed Forces of the United States to conduct a first-use nuclear strike unless such strike is conducted pursuant to a declaration of war by Congress that expressly authorizes such strike.

(b) First-Use Nuclear Strike Defined.--In this section, the term “first-use nuclear strike” means an attack using nuclear weapons against an enemy that is conducted without the President determining that the enemy has first launched a nuclear strike against the United States or an ally of the United States.

Opinion of the Court (457 U.S. at 748 n.27): [W]e need not address directly the immunity question as it would arise if Congress expressly had created a damages action against the President of the United States. This approach accords with this Court's settled policy of avoiding unnecessary decision of constitutional issues. … Consequently, our holding today need only be that the President is absolutely immune from civil damages liability for his official acts in the absence of explicit affirmative action by Congress. We decide only this constitutional issue, which is necessary to disposition of the case before us.

Chief Justice Burger, concurring. (457 U.S. at 760-761): Absolute immunity for a President for acts within the official duties of the Chief Executive is either to be found in the constitutional separation of powers or it does not exist. The Court today holds that the Constitution mandates such immunity, and I agree.

The essential purpose of the separation of powers is to allow for independent functioning of each coequal branch of government within its assigned sphere of responsibility, free from risk of control, interference, or intimidation by other branches.

JUSTICE WHITE, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting. I do not agree that, if the Office of President is to operate effectively, the holder of that Office must be permitted, without fear of liability and regardless of the function he is performing, deliberately to inflict injury on others by conduct that he knows violates the law. Attaching absolute immunity to the Office of the President, rather than to particular activities that the President might perform, places the President above the law. It is a reversion to the old notion that the King can do no wrong.

Taken at face value, the Court's position that, as a matter of constitutional law, the President is absolutely immune should mean that he is immune not only from damages actions but also from suits for injunctive relief, criminal prosecutions and, indeed, from any kind of judicial process. But there is no contention that the President is immune from criminal prosecution in the courts under the criminal laws enacted by Congress, or by the States, for that matter. Nor would such a claim be credible. The Constitution itself provides that impeachment shall not bar "Indictment, Trial, Judgment and Punishment, according to Law." Art. I, § 3, cl. 7. Similarly, our cases indicate that immunity from damages actions carries no protection from criminal prosecution.

The opinion suffers from serious ambiguity even with respect to the most fundamental point: How broad is the immunity granted the President? The opinion suggests that its scope is limited by the fact that under none of the asserted causes of action "has Congress taken express legislative action to subject the President to civil liability for his official acts." *Ante*, at 2701. We are never told, however, how or why congressional action could make a difference. It is not apparent that any of the propositions relied upon by the majority to immunize the President would not apply equally to such a statutory cause of action; nor does the majority indicate what new principles would operate to undercut those propositions.

Justice BLACKMUN, with whom Justice BRENNAN and Justice MARSHALL join, dissenting. I join Justice WHITE's dissent. Nor can I understand the Court's holding that the absolute immunity of the President is compelled by separation-of-powers concerns, when the Court at the same time expressly leaves open, the possibility that the President nevertheless may be fully subject to congressionally created forms of liability. These two concepts, it seems to me, cannot coexist.

STEVEN D. MERRYDAY, UNITED STATES DISTRICT JUDGE.

As every member of the bar of every federal court knows (or is presumed to know), Rule 8(a), Federal Rules of Civil Procedure, requires that a complaint include "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8(e)(1) helpfully adds that "[e]ach averment of a pleading shall be simple, concise, and direct." Some pleadings are necessarily longer than others. The difference likely depends on the number of parties and claims, the complexity of the governing facts, and the duration and scope of pertinent events. But both a shorter pleading and a longer pleading must comprise "simple, concise, and direct" allegations that offer a "short and plain statement of the claim." Rule 8 governs every pleading in a federal court, regardless of the amount in controversy, the identity of the parties, the skill or reputation of the counsel, the urgency or importance (real or imagined) of the dispute, or any public interest at issue in the dispute.

In this action, a prominent American citizen (perhaps the most prominent American citizen) alleges defamation by a prominent American newspaper publisher (perhaps the most prominent American newspaper publisher) and by several other corporate and natural persons. Alleging only two simple counts of defamation, the complaint consumes eighty-five pages. Count I appears on page eighty, and Count II appears on page eighty-three. Pages one through seventy-nine, plus part of page eighty, present allegations common to both counts and to all defendants. Each count alleges a claim against each defendant and, apparently, each claim seeks the same remedy against each defendant.

Even under the most generous and lenient application of Rule 8, the complaint is decidedly improper and impermissible. The pleader initially alleges an electoral victory by President Trump "in historic fashion" — by "trouncing" the opponent — and alludes to "persistent election interference from the legacy media, led most notoriously by the New York Times." The pleader alludes to "the halcyon days" of the newspaper but complains that the newspaper has become a "full-throated mouthpiece of the Democrat party," which allegedly resulted in the "deranged endorsement" of President Trump's principal opponent in the most recent presidential election. The reader of the complaint must labor through allegations, such as "a new journalistic low for the hopelessly compromised and tarnished 'Gray Lady.' " The reader must endure an allegation of "the desperate need to defame with a partisan spear rather than report with an authentic looking glass" and an allegation that "the false narrative about 'The Apprentice' was just the tip of Defendants' melting iceberg of falsehoods." Similarly, in one of many, often repetitive, and laudatory (toward President Trump) but superfluous allegations, the pleader states, " 'The Apprentice' represented the cultural magnitude of President Trump's singular brilliance, which captured the [*Z*]*eitgeist* of our time."

The complaint continues with allegations in defense of President Trump's father and the acquisition of the Trumps' wealth; with a protracted list of the many properties owned, developed, or managed by The Trump Organization and a list of President Trump's many books; with a long account of the history of "The Apprentice"; with an extensive list of President Trump's "media appearances"; with a detailed account of other legal actions both by and against President Trump, including an account of the "Russia Collusion Hoax" and incidents of alleged "lawfare" against President Trump; and with much more, persistently alleged in abundant, florid, and enervating detail.

Even assuming that each allegation in the complaint is true (of course, that is for a jury to de-

cide and is not pertinent here; this order suggests nothing about the truth of the allegations or the validity of the claims but addresses only the manner of the presentation of the allegations in the complaint); even assuming that at trial the plaintiff offers evidence supporting every allegation in the complaint and that the evidence is accepted by the jury as fact; and even assuming that after finally "melting" the defendants' alleged "iceberg of falsehoods" the plaintiff prevails for each reason alleged in the complaint — even assuming all of that — a complaint remains an improper and impermissible place for the tedious and burdensome aggregation of prospective evidence, for the rehearsal of tendentious arguments, or for the protracted recitation and explanation of legal authority putatively supporting the pleader's claim for relief. As every lawyer knows (or is presumed to know), a complaint is not a public forum for vituperation and invective — not a protected platform to rage against an adversary. A complaint is not a megaphone for public relations or a podium for a passionate oration at a political rally or the functional equivalent of the Hyde Park Speakers' Corner.

A complaint is a mechanism to fairly, precisely, directly, soberly, and economically inform the defendants — in a professionally constrained manner consistent with the dignity of the adversarial process in an Article III court of the United States — of the nature and content of the claims. A complaint is a short, plain, direct statement of allegations of fact sufficient to create a facially plausible claim for relief and sufficient to permit the formulation of an informed response. Although lawyers receive a modicum of expressive latitude in pleading the claim of a client, the complaint in this action extends far beyond the outer bound of that latitude.

This complaint stands unmistakably and inexcusably athwart the requirements of Rule 8. This action will begin, will continue, and will end in accord with the rules of procedure and in a professional and dignified manner. The complaint is **STRUCK** with leave to amend within twenty-eight days. The amended complaint must not exceed forty pages, excluding only the caption, the signature, and any attachment.

ORDERED in Tampa, Florida, on September 19, 2025.

Michael M. Grynbaum, Trump Refiles His $15 Billion Defamation Lawsuit Against The New York Times, N.Y. Times, Oct. 17, 2025

President Trump on Thursday refiled his defamation lawsuit against The New York Times and several of its reporters, again accusing the news organization of seeking to undermine his 2024 candidacy and disparage his reputation as a businessman.

Last month, Judge Steven D. Merryday, of the U.S. District Court for the Middle District of Florida, threw out the president's original 85-page complaint, saying it was unnecessarily discursive, was laden with "florid and enervating" prose and took too long to lodge formal allegations of defamation.

"A complaint is not a public forum for vituperation and invective," Judge Merryday wrote at the time. He gave the president's lawyers 28 days to refile an amended complaint.

Mr. Trump's revised legal filing on Thursday evening was 40 pages, less than half the length of the original. One of the defendants in the original suit, the Times reporter Michael S. Schmidt, is no longer cited as a defendant. Many of the original complaint's lengthy tributes to Mr. Trump, like a sentence that described his 2024 election victory as "the greatest personal and political achievement in American history," are no longer present. Like the original filing, the amended complaint asks for $15 billion in damages.

Mr. Trump's lawsuit against The Times is the latest in a series of actions against major news outlets. Both CBS News and ABC News agreed to pay $16 million each to settle lawsuits that Mr. Trump brought against the networks. The ABC late-night star Jimmy Kimmel was temporarily pulled off the air last month after Mr. Trump's top communications regulator assailed his program and suggested that he might take regulatory action against the broadcaster.

Mr. Trump's complaint against The Times claims that a pair of articles published in The Times sought to undermine Mr. Trump's reputation as a successful businessman and television star of the reality show "The Apprentice." One of the articles was written by Susanne Craig and Russ Buettner, and the other by Peter Baker.

Like the original version of the complaint, the new filing also names as a defendant Penguin Random House, which published a book about Mr. Trump written by Ms. Craig and Mr. Buettner.

A spokeswoman for The Times said on Thursday night: "As we said when this was first filed and again after the judge's ruling to strike it: This lawsuit has no merit. Nothing has changed today. This is merely an attempt to stifle independent reporting and generate P.R. attention, but The New York Times will not be deterred by intimidation tactics."

A spokeswoman for Penguin Random House said: "With a second attempt, this lawsuit remains meritless. Penguin Random House will continue to stand by the book and its authors just as we will continue to stand for the important fundamental principles of the First Amendment."

A spokesman for Mr. Trump's legal team said in a statement on Thursday: "President Trump is continuing to hold the Fake News responsible through this powerhouse lawsuit against The New York Times, its reporters and Penguin Random House."

Judge Merryday is an appointee of President George H.W. Bush. He had said Mr. Trump's original lawsuit ran afoul of legal requirements that a complaint be "a short and plain statement of the claim."

Mr. Trump also sued The Times in 2021, over an article that examined his financial history; that suit was dismissed, and Mr. Trump was instructed to pay The Times's legal expenses. Mr. Trump's re-election campaign also sued the newspaper for libel in 2020 over an Opinion essay; that lawsuit was also dismissed.

Erik Larson, Trump's Power to Sue US Challenged in $10 Billion IRS Case, Bloomberg Law, 2/19/26

President Donald Trump has been given a deadline of next week to respond to claims that his $10 billion lawsuit against the Internal Revenue Service poses a glaring conflict of interest, setting up an early flash point in the historic case.

The president's lawyers can respond by Feb. 25 to a group of former government officials who say that the lawsuit seeking damages for the illegal leak of his tax information sets up Trump to unfairly control both sides of the case. They note that as president, he has authority over the IRS as well as the US Justice Department, which defends the government in lawsuits.

Neither Trump nor the Justice Department has offered a detailed explanation of how the apparent conflict of interest could be addressed. That means a filing by the president — or the DOJ — could be the first look at how the government will respond to claims that the case is potentially "collusive."

Earlier this month, the former government officials asked a judge to consider appointing them — or some other independent third party — to participate in the case to provide balance, and to weigh putting the case on hold until Trump leaves office. They're also seeking to strike Trump's demand for $10 billion from the court record, saying it's completely unjustified.

Since his return to office, Trump has pushed the limits of executive authority, from imposing tariffs and withholding federal funds to calling on the Justice Department to prosecute his perceived political enemies. Yet the IRS suit, which also named the US Treasury as a defendant, stands out in Trump's use of presidential power in court — positioning himself on both sides of a legal fight with $10 billion in taxpayer money on the line.

'Obvious' Conflict

"Unlike many of his lawsuits, this one actually has a core of merit," said Eric Freedman, a constitutional law professor at Hofstra University, referring to the IRS leak. Yet the conflict of interest is "obvious," he said, because Trump could "just order the IRS to cut a check."

When asked about the potential conflicts posed by the suit, the Justice Department issued a statement: "In any circumstance, all officials at the Department of Justice follow the guidance of career ethics officials." The DOJ's formal response to Trump's lawsuit in court could come any time in the next two months.

The White House didn't respond to requests for comment on the case, which Trump filed in a Florida federal court Jan. 29.

The president has also filed other suits against financial firms and media companies that altogether are seeking tens of billions of dollars in damages.

The IRS data leak at the center of the case was a significant blow to the agency. A former IRS contractor, Charles Littlejohn, pleaded guilty in 2023 to stealing tax records for thousands of wealthy Americans, including Trump, Ken Griffin, Elon Musk and Jeff Bezos, and leaking them to news organizations. Littlejohn was sentenced to five years in prison.

Using the leaked data, the New York Times published a report on Trump's tax returns weeks before the 2020 presidential election, which he lost to Joe Biden. The paper reported Trump paid $750 in federal income taxes in 2016 and 2017, and no taxes in 10 of the previous 15 years, because of large losses that offset any profits.

"It's an extraordinary case because of the scope of the leak by Littlejohn," said Nina E. Olson, who served as the independent national taxpayer advocate at the IRS from 2001 to 2019. "It was a gross violation of taxpayer rights."

Trump's lawsuit cited the Privacy Act to justify

his claim for $10 billion, demanding payment for each disclosure by third parties, including the Times, ProPublica and "many additional print, broadcast, cable, social media and other platforms." He's also seeking damages under a separate tax law.

'Settlement With Myself'

The president has already acknowledged he's in a unique position to win a payout because he is the head of the government. "I'm supposed to work out a settlement with myself," Trump told reporters when asked about the case Jan. 31 on Air Force One, according to a video posted on the White House's YouTube page. The president said he'd donate any money he gets to charity, though taxpayers would foot the bill.

In a Feb. 5 court filing, a group of former IRS officials and tax experts said Trump's "collusive litigation threatens the integrity of the judicial process by risking the court's entanglement in an illegitimate proceeding."

The group, which includes ex-IRS Commissioner John Koskinen and former Assistant Attorney General for the Tax Division Kathryn Keneally, argued the suit should be put on hold until Trump leaves office in January 2029, to ensure fairness and avoid any question about the US failing to "zealously defend" the public interest.

Proving Harm

That's not the only potential problem. They claim Trump filed his suit after a two-year statute of limitations for such cases and that he can't prove he or his family suffered any quantifiable harm from the tax-records leak to justify his $10 billion damage claim.

"It didn't do him any political damage," said Frank Agostino, an attorney at the tax law firm Kostelanetz LLP who isn't involved in the case. "His net worth has gone up, not down. Can he articulate any business deal that he lost as a result of the disclosure?"

In a separate filing, the nonprofit Citizens for Responsibility and Ethics in Washington argued that any payment of public funds to Trump through a "nakedly collusive award" would violate what's known as the "emoluments clause" of the Constitution. The clause bars the president from receiving public funds beyond their salary and was intended to limit the risk of official corruption.

"President Trump is asking his own administration to award him a massive windfall payment of taxpayer funds to settle legally and factually dubious claims, contrary to how the government has defended similar suits," CREW said in the Feb. 12 filing.

Griffin Settled

Under Biden, the Justice Department argued against a suit filed in 2022 by Griffin over private tax data leaked by Littlejohn to ProPublica, which used the information on stories about how wealthy people avoid taxes.

A judge ruled the billionaire Citadel founder had failed to sufficiently allege the damages element of his claim, but allowed Griffin to pursue his claim that the IRS unlawfully disclosed his tax information. Griffin settled the case two months later. The IRS apologized but paid no money. The agency also agreed to create more safeguards.

Under Trump, the Justice Department has continued to vigorously fight claims for damages over the IRS leak. The government is seeking dismissal of a class action suit filed by multiple companies impacted by the leak, saying in court filings last year that the US isn't liable for the actions of a contractor.

That argument is now diametrically opposed to Trump's arguments in his lawsuit, which says the IRS is liable for Littlejohn's actions. Critics of Trump's lawsuit say any change of position by the Justice Department now would be a clear sign of improper influence from the president.

Tax attorney Michael Burke of DarrowEverett

LLP said the Justice Department won't necessarily roll over and take Trump's position right away. He said a judge would look at any settlement "very carefully" to see if it is fair.

"I certainly don't see the IRS handing over exactly what he asked for 30 days into the case," Burke said.

The case is Trump v. Internal Revenue Service, 26-cv-20609, US District Court, District of Southern Florida (Miami).

Charlie Savage, *Can the President Be Indicted? A Long-Hidden Legal Memo Says Yes,* N.Y. TIMES, July 22, 2017

WASHINGTON — A newfound memo from Kenneth W. Starr's independent counsel investigation into President Bill Clinton sheds fresh light on a constitutional puzzle that is taking on mounting significance amid the Trump-Russia inquiry: Can a sitting president be indicted?

The 56-page memo, locked in the National Archives for nearly two decades and obtained by The New York Times under the Freedom of Information Act, amounts to the most thorough government-commissioned analysis rejecting a generally held view that presidents are immune from prosecution while in office.

"It is proper, constitutional, and legal for a federal grand jury to indict a sitting president for serious criminal acts that are not part of, and are contrary to, the president's official duties," the Starr office memo concludes. "In this country, no one, even President Clinton, is above the law."

Mr. Starr assigned Ronald Rotunda, a prominent conservative professor of constitutional law and ethics whom Mr. Starr hired as a consultant on his legal team, to write the memo in spring 1998 after deputies advised him that they had gathered enough evidence to ask a grand jury to indict Mr. Clinton, the memo shows.

Other prosecutors working for Mr. Starr developed a draft indictment of Mr. Clinton, which The Times has also requested be made public. The National Archives has not processed that file to determine whether it is exempt from disclosure under grand-jury secrecy rules.

In 1974, the Watergate special counsel, Leon Jaworski, had also received a memo from his staff saying he could indict the president, in that instance Richard M. Nixon, while he was in office, and later made that case in a court brief. Those documents, however, explore the topic significantly less extensively than the Starr office memo.

In the end, both Mr. Jaworski and Mr. Starr let congressional impeachment proceedings play out and did not try to indict the presidents while they remained in office. Mr. Starr, who had decided he could indict Mr. Clinton, said in a recent interview that he had concluded the more prudent and appropriate course was simply referring the matter to Congress for potential impeachment.

As Robert S. Mueller III, the special counsel in the latest inquiry, investigates the Trump campaign's dealings with Russia and whether President Trump obstructed justice, the newly unearthed Starr office memo raises the possibility that Mr. Mueller may have more options than most commentators have assumed. Here is an explanation of the debate and what the Starr office memo has to say.

Why do some argue presidents are immune?

Nothing in the Constitution or federal statutes says that sitting presidents are immune from prosecution, and no court has ruled that they have any such shield. But proponents of the theory that Mr. Trump is nevertheless immune for now from indictment cited the Constitution's "structural principles," in the words of a memo written in September 1973 by Robert G. Dixon Jr., then the head of the Justice Department's Office of Legal Counsel.

This argument boils down to practicalities of governance: The stigma of being indicted and the burden of a trial would unduly interfere with a president's ability to carry out his duties, preventing the executive branch "from accomplishing its constitutional functions" in a way that cannot "be justified by an overriding need," Mr. Dixon wrote.

In October 1973, Mr. Nixon's solicitor general, Robert H. Bork, submitted a court

brief that similarly argued for an "inference" that the Constitution makes sitting presidents immune from indictment and trial. And in 2000, Randolph D. Moss, the head of the Office of Legal Counsel under Mr. Clinton, reviewed the Justice Department's 1973 opinions and reaffirmed their conclusion.

What was the Starr office's stance?

In laying out his case, Mr. Rotunda played down arguments that permitting a president to be indicted would cripple the executive branch. Instead, he placed greater emphasis on immunity issues that the Nixon — and, later, Clinton — legal teams dismissed.

Among them, he noted that the Constitution's speech-or-debate clause explicitly grants limited immunity to lawmakers for certain actions. "If the framers of our Constitution wanted to create a special immunity for the president," he argued, "they could have written the relevant clause."

He also wrote that the 25th Amendment, which allows for temporary replacement of a president who has become unable to carry out the duties of the office, created a mechanism that would keep the executive branch from becoming incapacitated if the president was on trial.

And he noted that if indictments had to wait until a president's term was up, some crimes would become untriable — such as those where the statute of limitations had run out. That could happen for crimes that do not rise to an impeachable offense, he wrote, citing the example of a president who punches an irritating heckler.

"No one would suggest that the president should be removed from office simply because of that assault," he wrote. "Yet the president has no right to assault hecklers. If there is no recourse against the president, if he cannot be prosecuted for violating the criminal laws, he will be above the law."

What has the Supreme Court said?

The Supreme Court has never addressed the question of whether a sitting president can be indicted and tried. But in a landmark 1997 ruling, Clinton v. Jones, it permitted a lawsuit against Mr. Clinton for unofficial actions — accusations of misconduct before he became president — to proceed while he was in office.

In his 2000 memo, Mr. Moss dismissed this ruling, emphasizing that the burdens of being a criminal defendant were greater than the burdens of being sued by a private litigant. But in the Starr office memo, Mr. Rotunda deemed the ruling far more significant for the criminal question.

"If public policy and the Constitution allow a private litigant to sue a sitting president for acts that are not part of the president's official duties (and are outside the outer perimeter of those duties), and that is what Clinton v. Jones squarely held," he wrote, "then one would think that an indictment is constitutional because the public interest in criminal cases is greater."

Could Mueller go where no prosecutor has before?

Even if Mr. Mueller were to uncover sufficient evidence to indict Mr. Trump, decide that the legal arguments in the Starr office memo were correct and conclude that he wanted to ask a grand jury for an indictment while Mr. Trump is president — all big ifs — yet another uncertainty would loom: whether he must accept the Office of Legal Counsel's analysis, even if he disagreed with it.

The Justice Department's regulations give Mr. Mueller, as a special counsel, greater autonomy than an ordinary prosecutor, but still say he must follow its "rules, regulations, procedures, practices and policies." They also permit Deputy Attorney General Rod J. Rosenstein to overrule Mr. Mueller if he tries to take a step that Mr. Rosenstein deems contrary to such practices.

There is no guiding precedent about whether Office of Legal Counsel memos would fall into that category, or if a special counsel is free to reach his own legal judgments. But as Mr. Mueller's office investigates, the ambiguity about the rules could influence calculations in the Trump camp about how much to cooperate and how much to fight, said Renato Mariotti, a former federal prosecutor turned defense lawyer.

"I would be surprised if Mueller indicted the president for the same prudential reasons that swayed Starr," Mr. Mariotti said. "But the specter that he might do that could have an impact on things. If I were on the president's team, I would say, 'I don't think it's likely that he would, but it's possible,' depending on what the facts are."

ROBERTS, C. J., delivered the opinion of the Court, in which THOMAS, ALITO, GORSUCH, and KAVANAUGH, JJ., joined in full, and in which BARRETT, J., joined except as to Part III–C. THOMAS, J., filed a concurring opinion. BARRETT, J., filed an opinion concurring in part. SOTOMAYOR, J., filed a dissenting opinion, in which KAGAN and JACKSON, JJ., joined. JACKSON, J., filed a dissenting opinion.

I

From January 2017 until January 2021, Donald J. Trump served as President of the United States. On August 1, 2023, a federal grand jury indicted him on four counts for conduct that occurred during his Presidency following the November 2020 election. The indictment alleged that after losing that election, Trump conspired to overturn it by spreading knowingly false claims of election fraud to obstruct the collecting, counting, and certifying of the election results.

According to the indictment, Trump advanced his goal through five primary means. First, he and his co-conspirators "used knowingly false claims of election fraud to get state legislators and election officials to ... change electoral votes for [Trump's] opponent, Joseph R. Biden, Jr., to electoral votes for [Trump]." Second, Trump and his co-conspirators "organized fraudulent slates of electors in seven targeted states" and "caused these fraudulent electors to transmit their false certificates to the Vice President and other government officials to be counted at the certification proceeding on January 6." Third, Trump and his co-conspirators attempted to use the Justice Department "to conduct sham election crime investigations and to send a letter to the targeted states that falsely claimed that the Justice Department had identified significant concerns that may have impacted the election outcome." Fourth, Trump and his co-conspirators attempted to persuade "the Vice President to use his ceremonial role at the January 6 certification proceeding to fraudulently alter the election results." And when that failed, on the morning of January 6, they "repeated knowingly false claims of election fraud to gathered supporters, falsely told them that the Vice President had the authority to and might alter the election results, and directed them to the Capitol to obstruct the certification proceeding." Fifth, when "a large and angry crowd ... violently attacked the Capitol and halted the proceeding," Trump and his co-conspirators "exploited the disruption by redoubling efforts to levy false claims of election fraud and convince Members of Congress to further delay the certification."

Based on this alleged conduct, the indictment charged Trump with (1) conspiracy to defraud the United States in violation of 18 U.S.C. § 371, (2) conspiracy to obstruct an official proceeding in violation of § 1512(k), (3) obstruction of and attempt to obstruct an official proceeding in violation of § 1512(c)(2), § 2, and (4) conspiracy against rights in violation of § 241.

Trump moved to dismiss the indictment based on Presidential immunity.

We granted certiorari to consider the following question: "Whether and if so to what extent does a former President enjoy presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office."

II

This case is the first criminal prosecution in our Nation's history of a former President for actions taken during his Presidency. We are called upon to consider whether and under what circumstances such a prosecution may proceed. Doing so requires careful assessment of the scope of Presidential power under the Constitution. We undertake that responsibility conscious that we must not confuse "the issue

of a power's validity with the cause it is invoked to promote," but must instead focus on the "enduring consequences upon the balanced power structure of our Republic." *Youngstown* (Jackson, J., concurring).

The parties before us do not dispute that a former President can be subject to criminal prosecution for unofficial acts committed while in office. They also agree that some of the conduct described in the indictment includes actions taken by Trump in his unofficial capacity.

They disagree, however, about whether a former President can be prosecuted for his official actions.

We conclude that under our constitutional structure of separated powers, the nature of Presidential power requires that a former President have some immunity from criminal prosecution for official acts during his tenure in office. At least with respect to the President's exercise of his core constitutional powers, this immunity must be absolute. As for his remaining official actions, he is also entitled to immunity. At the current stage of proceedings in this case, however, we need not and do not decide whether that immunity must be absolute, or instead whether a presumptive immunity is sufficient.

A

Article II of the Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America." § 1, cl. 1. The President's duties are of "unrivaled gravity and breadth." They include, for instance, commanding the Armed Forces of the United States; granting reprieves and pardons for offenses against the United States; and appointing public ministers and consuls, the Justices of this Court, and Officers of the United States. See § 2. He also has important foreign relations responsibilities: making treaties, appointing ambassadors, recognizing foreign governments, meeting foreign leaders, overseeing international diplomacy and intelligence gathering, and managing matters related to terrorism, trade, and immigration. See §§ 2, 3. Domestically, he must "take Care that the Laws be faithfully executed," § 3, and he bears responsibility for the actions of the many departments and agencies within the Executive Branch. He also plays a role in lawmaking by recommending to Congress the measures he thinks wise and signing or vetoing the bills Congress passes. See Art. I, § 7, cl. 2; Art. II, § 3.

No matter the context, the President's authority to act necessarily "stem[s] either from an act of Congress or from the Constitution itself." *Youngstown*. In the latter case, the President's authority is sometimes "conclusive and preclusive." *Id.* (Jackson, J., concurring). When the President exercises such authority, he may act even when the measures he takes are "incompatible with the expressed or implied will of Congress." *Id*. The exclusive constitutional authority of the President "disabl[es] the Congress from acting upon the subject." *Id.* And the courts have "no power to control [the President's] discretion" when he acts pursuant to the powers invested exclusively in him by the Constitution. *Marbury*.

If the President claims authority to act but in fact exercises mere "individual will" and "authority without law," the courts may say so. *Youngstown* (Jackson, J., concurring). In *Youngstown*, for instance, we held that President Truman exceeded his constitutional authority when he seized most of the Nation's steel mills. But once it is determined that the President acted within the scope of his exclusive authority, his discretion in exercising such authority cannot be subject to further judicial examination.

The Constitution, for example, vests the "Power to Grant Reprieves and Pardons for Offences against the United States" in the President. Art. II, § 2, cl. 1. During and after the Civil War, President Lincoln offered a full pardon, with restoration of property rights, to anyone who had "engaged in the rebellion" but

agreed to take an oath of allegiance to the Union. *Klein*. But in 1870, Congress enacted a provision that prohibited using the President's pardon as evidence of restoration of property rights. Chief Justice Chase held the provision unconstitutional because it "impair[ed] the effect of a pardon, and thus infring[ed] the constitutional power of the Executive." "To the executive alone is intrusted the power of pardon," and the "legislature cannot change the effect of such a pardon any more than the executive can change a law." The President's authority to pardon, in other words, is "conclusive and preclusive," "disabling the Congress from acting upon the subject." *Youngstown* (Jackson, J., concurring).

Some of the President's other constitutional powers also fit that description. "The President's power to remove—and thus supervise—those who wield executive power on his behalf," for instance, "follows from the text of Article II." *Seila Law*. We have thus held that Congress lacks authority to control the President's "unrestricted power of removal" with respect to "executive officers of the United States whom he has appointed." *Myers v. United States.* The power "to control recognition determinations" of foreign countries is likewise an "exclusive power of the President." *Zivotofsky.* Congressional commands contrary to the President's recognition determinations are thus invalid.

Congress cannot act on, and courts cannot examine, the President's actions on subjects within his "conclusive and preclusive" constitutional authority. It follows that an Act of Congress—either a specific one targeted at the President or a generally applicable one—may not criminalize the President's actions within his exclusive constitutional power. Neither may the courts adjudicate a criminal prosecution that examines such Presidential actions. We thus conclude that the President is absolutely immune from criminal prosecution for conduct within his exclusive sphere of constitutional authority.

B

[O]f course not all of the President's official acts fall within his "conclusive and preclusive" authority. As Justice Robert Jackson recognized in *Youngstown*, the President sometimes "acts pursuant to an express or implied authorization of Congress," or in a "zone of twilight" where "he and Congress may have concurrent authority." The reasons that justify the President's absolute immunity from criminal prosecution for acts within the scope of his exclusive authority therefore do not extend to conduct in areas where his authority is shared with Congress.

We recognize that only a limited number of our prior decisions guide determination of the President's immunity in this context. That is because proceedings directly involving a President have been uncommon in our Nation, and "decisions of the Court in this area" have accordingly been "rare" and "episodic." *Dames & Moore v. Regan.* To resolve the matter, therefore, we look primarily to the Framers' design of the Presidency within the separation of powers, our precedent on Presidential immunity in the civil context, and our criminal cases where a President resisted prosecutorial demands for documents.

1

The President "occupies a unique position in the constitutional scheme," *Fitzgerald*, as "the only person who alone composes a branch of government," *Trump v. Mazars USA.* The Framers "sought to encourage energetic, vigorous, decisive, and speedy execution of the laws by placing in the hands of a single, constitutionally indispensable, individual the ultimate authority that, in respect to the other branches, the Constitution divides among many." *Clinton v. Jones.* They "deemed an energetic executive essential to 'the protection of the community against foreign attacks,' 'the steady administration of the laws,' 'the protection of property,' and 'the security of liberty.'" *Seila Law*. The

purpose of a "vigorous" and "energetic" Executive, they thought, was to ensure "good government," for a "feeble executive implies a feeble execution of the government

The Framers accordingly vested the President with "supervisory and policy responsibilities of utmost discretion and sensitivity." *Fitzgerald*. He must make "the most sensitive and far-reaching decisions entrusted to any official under our constitutional system." There accordingly "exists the greatest public interest" in providing the President with "'the maximum ability to deal fearlessly and impartially with' the duties of his office." Appreciating the "unique risks to the effective functioning of government" that arise when the President's energies are diverted by proceedings that might render him "unduly cautious in the discharge of his official duties," we have recognized Presidential immunities and privileges "rooted in the constitutional tradition of the separation of powers and supported by our history."

In *Nixon* v. *Fitzgerald*, for instance, we recognized that as "a functionally mandated incident of [his] unique office," a former President "is entitled to absolute immunity from damages liability predicated on his official acts."

By contrast, when prosecutors have sought evidence from the President, we have consistently rejected Presidential claims of absolute immunity. For instance, during the treason trial of former Vice President Aaron Burr, Chief Justice Marshall rejected President Thomas Jefferson's claim that the President could not be subjected to a subpoena. Marshall reasoned that "the law does not discriminate between the president and a private citizen." Because a President does not "stand exempt from the general provisions of the constitution," including the Sixth Amendment's guarantee that those accused shall have compulsory process for obtaining witnesses for their defense, a subpoena could issue. Marshall acknowledged, however, the existence of a "privilege" to withhold certain "official paper[s]" that "ought not on light ground to be forced into public view."

Similarly, when a subpoena issued to President Nixon to produce certain tape recordings and documents relating to his conversations with aides and advisers, this Court rejected his claim of "absolute privilege," given the "constitutional duty of the Judicial Branch to do justice in criminal prosecutions." *United States v. Nixon.* But we simultaneously recognized "the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision making," as well as the need to protect "communications between high Government officials and those who advise and assist them in the performance of their manifold duties." Because the President's "need for complete candor and objectivity from advisers calls for great deference from the courts," we held that a "presumptive privilege" protects Presidential communications. That privilege, we explained, "relates to the effective discharge of a President's powers." We thus deemed it "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution."

2

Criminally prosecuting a President for official conduct undoubtedly poses a far greater threat of intrusion on the authority and functions of the Executive Branch than simply seeking evidence in his possession, as in *Burr* and *Nixon*. The danger is akin to, indeed greater than, what led us to recognize absolute Presidential immunity from civil damages liability—that the President would be chilled from taking the "bold and unhesitating action" required of an independent Executive. Although the President might be exposed to fewer criminal prosecutions than the range of civil damages suits that might be brought by various plaintiffs, the threat of trial, judgment, and imprisonment is a far greater deterrent. Potential criminal liability, and the peculiar public opprobrium that attaches to criminal proceedings, are plainly more likely to distort Presidential decision

making than the potential payment of civil damages.

The hesitation to execute the duties of his office fearlessly and fairly that might result when a President is making decisions under "a pall of potential prosecution" raises "unique risks to the effective functioning of government," *Fitzgerald.* A President inclined to take one course of action based on the public interest may instead opt for another, apprehensive that criminal penalties may befall him upon his departure from office. And if a former President's official acts are routinely subjected to scrutiny in criminal prosecutions, "the independence of the Executive Branch" may be significantly undermined. The Framers' design of the Presidency did not envision such counterproductive burdens on the "vigor[ ]" and "energy" of the Executive.

We must, however, "recognize[ ] the countervailing interests at stake." Federal criminal laws seek to redress "a wrong to the public" as a whole, not just "a wrong to the individual." There is therefore a compelling "public interest in fair and effective law enforcement." The President, charged with enforcing federal criminal laws, is not above them.

Chief Justice Marshall's decisions in *Burr* and our decision in *Nixon* recognized the distinct interests present in criminal prosecutions. Although *Burr* acknowledged that the President's official papers may be privileged and publicly unavailable, it did not grant him an absolute exemption from responding to subpoenas. *Nixon* likewise recognized a strong protection for the President's confidential communications—a "presumptive privilege"—but it did not entirely exempt him from providing evidence in criminal proceedings.

Taking into account these competing considerations, we conclude that the separation of powers principles explicated in our precedent necessitate at least a *presumptive* immunity from criminal prosecution for a President's acts within the outer perimeter of his official responsibility. Such an immunity is required to safeguard the independence and effective functioning of the Executive Branch, and to enable the President to carry out his constitutional duties without undue caution. Indeed, if presumptive protection for the President is necessary to enable the "effective discharge" of his powers when a prosecutor merely seeks evidence of his official papers and communications, it is certainly necessary when the prosecutor seeks to charge, try, and imprison the President himself for his official actions. At a minimum, the President must therefore be immune from prosecution for an official act unless the Government can show that applying a criminal prohibition to that act would pose no "dangers of intrusion on the authority and functions of the Executive Branch."

But as we explain below, the current stage of the proceedings in this case does not require us to decide whether this immunity is presumptive or absolute.

C

As for a President's unofficial acts, there is no immunity. The principles we set out in *Clinton* v. *Jones* confirm as much. Although Presidential immunity is required for *official* actions to ensure that the President's decision making is not distorted by the threat of future litigation stemming from those actions, that concern does not support immunity for *unofficial* conduct. The "'justifying purposes'" of the immunity we recognized in *Fitzgerald*, and the one we recognize today, are not that the President must be immune because he is the President; rather, they are to ensure that the President can undertake his constitutionally designated functions effectively, free from undue pressures or distortions.

III

A

Distinguishing the President's official actions from his unofficial ones can be difficult. When

the President acts pursuant to "constitutional and statutory authority," he takes official action to perform the functions of his office. *Fitzgerald*, 457 U.S., at 757, 102 S.Ct. 2690. Determining whether an action is covered by immunity thus begins with assessing the President's authority to take that action.

But the breadth of the President's "discretionary responsibilities" under the Constitution and laws of the United States "in a broad variety of areas, many of them highly sensitive," frequently makes it "difficult to determine which of [his] innumerable 'functions' encompassed a particular action." And some Presidential conduct—for example, speaking to and on behalf of the American people—certainly can qualify as official even when not obviously connected to a particular constitutional or statutory provision. For those reasons, the immunity we have recognized extends to the "outer perimeter" of the President's official responsibilities, covering actions so long as they are "not manifestly or palpably beyond [his] authority."

In dividing official from unofficial conduct, courts may not inquire into the President's motives. Such an inquiry would risk exposing even the most obvious instances of official conduct to judicial examination on the mere allegation of improper purpose, thereby intruding on the Article II interests that immunity seeks to protect. Indeed, "[i]t would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government" if "[i]n exercising the functions of his office," the President was "under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry."

Nor may courts deem an action unofficial merely because it allegedly violates a generally applicable law. Otherwise, Presidents would be subject to trial on "every allegation that an action was unlawful," depriving immunity of its intended effect.

B

With these principles in mind, we turn to the conduct alleged in the indictment.

1

The indictment broadly alleges that Trump and his co-conspirators conspired to obstruct the January 6 congressional proceeding at which electoral votes are counted and certified, and the winner of the election is certified as President-elect. As part of this conspiracy, Trump and his co-conspirators allegedly attempted to leverage the Justice Department's power and authority to convince certain States to replace their legitimate electors with Trump's fraudulent slates of electors. According to the indictment, Trump met with the Acting Attorney General and other senior Justice Department and White House officials to discuss investigating purported election fraud and sending a letter from the Department to those States regarding such fraud. The indictment further alleges that after the Acting Attorney General resisted Trump's requests, Trump repeatedly threatened to replace him.

The Government does not dispute that the indictment's allegations regarding the Justice Department involve Trump's "use of official power." The allegations in fact plainly implicate Trump's "conclusive and preclusive" authority. "[I]nvestigation and prosecution of crimes is a quintessentially executive function." And the Executive Branch has "exclusive authority and absolute discretion" to decide which crimes to investigate and prosecute, including with respect to allegations of election crime. *Nixon.*, The President may discuss potential investigations and prosecutions with his Attorney General and other Justice Department officials to carry out his constitutional duty to "take Care that the Laws be faithfully executed." Art. II, § 3. And the Attorney General, as head of the Justice Department, acts as the President's "chief law enforcement officer" who "provides vital assistance to [him] in the performance of [his] constitutional duty to

'preserve, protect, and defend the Constitution.'".

Investigative and prosecutorial decision making is "the special province of the Executive Branch," and the Constitution vests the entirety of the executive power in the President, Art. II, § 1. For that reason, Trump's threatened removal of the Acting Attorney General likewise implicates "conclusive and preclusive" Presidential authority. As we have explained, the President's power to remove "executive officers of the United States whom he has appointed" may not be regulated by Congress or reviewed by the courts.

The indictment's allegations that the requested investigations were "sham[s]" or proposed for an improper purpose do not divest the President of exclusive authority over the investigative and prosecutorial functions of the Justice Department and its officials. And the President cannot be prosecuted for conduct within his exclusive constitutional authority. Trump is therefore absolutely immune from prosecution for the alleged conduct involving his discussions with Justice Department officials.

2

The indictment next alleges that Trump and his co-conspirators "attempted to enlist the Vice President to use his ceremonial role at the January 6 certification proceeding to fraudulently alter the election results." In particular, the indictment alleges several conversations in which Trump pressured the Vice President to reject States' legitimate electoral votes or send them back to state legislatures for review.

[O]ur constitutional system anticipates that the President and Vice President will remain in close contact regarding their official duties over the course of the President's term in office. These two officials are the only ones "elected by the entire Nation." The Constitution provides that "the Vice President shall become President" in the case of "the removal of the President from office or of his death or resignation." Amdt. 25, § 1. It also "empowers the Vice President, together with a majority of the 'principal officers of the executive departments,' to declare the President 'unable to discharge the powers and duties of his office.'" And Article I of course names the Vice President as President of the Senate and gives him a tiebreaking vote. § 3, cl. 4. It is thus important for the President to discuss official matters with the Vice President to ensure continuity within the Executive Branch and to advance the President's agenda in Congress and beyond.

The Vice President may in practice also serve as one of the President's closest advisers. The Office of Legal Counsel has explained that within the Executive Branch, the Vice President's "sole function [is] advising and assisting the President." Indeed, the "Twelfth Amendment was brought about" to avoid the "manifestly intolerable" situation that occurred "[d]uring the John Adams administration," when "we had a President and Vice-President of different parties."

As the President's second in command, the Vice President has historically performed important functions "at the will and as the representative of the President." During President Franklin Roosevelt's administration, the Vice President "became a regular participant in cabinet deliberations—a practice that was continued by each succeeding president."

Whenever the President and Vice President discuss their official responsibilities, they engage in official conduct. Presiding over the January 6 certification proceeding at which Members of Congress count the electoral votes is a constitutional and statutory duty of the Vice President. Art. II, § 1, cl. 3; Amdt. 12; 3 U.S.C. § 15. The indictment's allegations that Trump attempted to pressure the Vice President to take particular acts in connection with his role at the certification proceeding thus involve official conduct, and Trump is at least presumptively immune from prosecution for such conduct.

The question then becomes whether that presumption of immunity is rebutted under the circumstances. When the Vice President presides over the January 6 certification proceeding, he does so in his capacity as President of the Senate. Despite the Vice President's expansive role of advising and assisting the President within the Executive Branch, the Vice President's Article I responsibility of "presiding over the Senate" is "not an 'executive branch' function." With respect to the certification proceeding in particular, Congress has legislated extensively to define the Vice President's role in the counting of the electoral votes, and the President plays no direct constitutional or statutory role in that process. So the Government may argue that consideration of the President's communications with the Vice President concerning the certification proceeding does not pose "dangers of intrusion on the authority and functions of the Executive Branch."

At the same time, however, the President may frequently rely on the Vice President in his capacity as President of the Senate to advance the President's agenda in Congress. When the Senate is closely divided, for instance, the Vice President's tiebreaking vote may be crucial for confirming the President's nominees and passing laws that align with the President's policies. Applying a criminal prohibition to the President's conversations discussing such matters with the Vice President—even though they concern his role as President of the Senate—may well hinder the President's ability to perform his constitutional functions.

It is ultimately the Government's burden to rebut the presumption of immunity. We therefore remand to the District Court to assess in the first instance, with appropriate input from the parties, whether a prosecution involving Trump's alleged attempts to influence the Vice President's oversight of the certification proceeding in his capacity as President of the Senate would pose any dangers of intrusion on the authority and functions of the Executive Branch.

3

The indictment's remaining allegations cover a broad range of conduct arising out of communications that Trump and his co-conspirators initiated with state legislators and election officials in Arizona, Georgia, Michigan, Pennsylvania, and Wisconsin regarding those States' certification of electors.

Specifically, the indictment alleges that Trump and his co-conspirators attempted to convince those officials that election fraud had tainted the popular vote count in their States, and thus electoral votes for Trump's opponent needed to be changed to electoral votes for Trump. After Trump failed to convince those officials to alter their state processes, he and his co-conspirators allegedly developed a plan "to marshal individuals who would have served as [Trump's] electors, had he won the popular vote" in Arizona, Georgia, Michigan, Nevada, New Mexico, Pennsylvania, and Wisconsin, "and cause those individuals to make and send to the Vice President and Congress false certifications that they were legitimate electors." If the plan worked, "the submission of these fraudulent slates" would position the Vice President to "open and count the fraudulent votes" at the certification proceeding and set up "a fake controversy that would derail the proper certification of Biden as president-elect."

At oral argument, Trump appeared to concede that at least some of these acts—those involving "private actors" who "helped implement a plan to submit fraudulent slates of presidential electors to obstruct the certification proceeding" at the direction of Trump and a co-conspirator—entail "private" conduct. He later asserted, however, that . . . it is "[a]bsolutely an official act for the president to communicate with state officials on ... the integrity of a federal election." The Government disagreed, contending that this alleged conduct does not qualify as "official conduct" but as "campaign conduct." On Trump's view, the alleged conduct qualifies as official because it was undertaken

to ensure the integrity and proper administration of the federal election.

As the Government sees it, however, Trump can point to no plausible source of authority enabling the President to not only organize alternate slates of electors but also cause those electors—unapproved by any state official—to transmit votes to the President of the Senate for counting at the certification proceeding, thus interfering with the votes of States' properly appointed electors. Indeed, the Constitution commits to the States the power to "appoint" Presidential electors "in such Manner as the Legislature thereof may direct." Art. II, § 1, cl. 2 "By contrast, the Federal Government's role in appointing electors is limited. Congress may prescribe when the state-appointed electors shall meet, and it counts and certifies their votes. Art. II, § 1, cls. 3, 4. The President, meanwhile, plays no direct role in the process, nor does he have authority to control the state officials who do. And the Framers, wary of "cabal, intrigue and corruption," specifically excluded from service as electors "all those who from situation might be suspected of too great devotion to the president in office."

Determining whose characterization may be correct, and with respect to which conduct, requires a close analysis of the indictment's extensive and interrelated allegations. Unlike Trump's alleged interactions with the Justice Department, this alleged conduct cannot be neatly categorized as falling within a particular Presidential function. The necessary analysis is instead fact specific, requiring assessment of numerous alleged interactions with a wide variety of state officials and private persons. We accordingly remand to the District Court to determine in the first instance—with the benefit of briefing we lack—whether Trump's conduct in this area qualifies as official or unofficial.

4

Finally, the indictment contains various allegations regarding Trump's conduct in connection with the events of January 6 itself. It alleges that leading up to the January 6 certification proceeding, Trump issued a series of Tweets (to his nearly 89 million followers) encouraging his supporters to travel to Washington, D. C., on that day. Trump and his co-conspirators addressed the gathered public that morning, asserting that certain States wanted to recertify their electoral votes and that the Vice President had the power to send those States' ballots back for recertification. Trump then allegedly "directed the crowd in front of him to go to the Capitol" to pressure the Vice President to do so at the certification proceeding. When it became public that the Vice President would not use his role at the certification proceeding to determine which electoral votes should be counted, the crowd gathered at the Capitol "broke through barriers cordoning off the Capitol grounds" and eventually "broke into the building."

The alleged conduct largely consists of Trump's communications in the form of Tweets and a public address. The President possesses "extraordinary power to speak to his fellow citizens and on their behalf." As the sole person charged by the Constitution with executing the laws of the United States, the President oversees—and thus will frequently speak publicly about—a vast array of activities that touch on nearly every aspect of American life. Indeed, a long-recognized aspect of Presidential power is using the office's "bully pulpit" to persuade Americans, including by speaking forcefully or critically, in ways that the President believes would advance the public interest. He is even expected to comment on those matters of public concern that may not directly implicate the activities of the Federal Government—for instance, to comfort the Nation in the wake of an emergency or tragedy. For these reasons, most of a President's public communications are likely to fall comfortably within the outer perimeter of his official responsibilities.

There may, however, be contexts in which the President, notwithstanding the prominence of

his position, speaks in an unofficial capacity—perhaps as a candidate for office or party leader. To the extent that may be the case, objective analysis of "content, form, and context" will necessarily inform the inquiry. But "there is not always a clear line between [the President's] personal and official affairs." The analysis therefore must be fact specific and may prove to be challenging.

The indictment reflects these challenges. It includes only select Tweets and brief snippets of the speech Trump delivered on the morning of January 6, omitting its full text or context. Whether the Tweets, that speech, and Trump's other communications on January 6 involve official conduct may depend on the content and context of each. Knowing, for instance, what else was said contemporaneous to the excerpted communications, or who was involved in transmitting the electronic communications and in organizing the rally, could be relevant to the classification of each communication. This necessarily fact bound analysis is best performed initially by the District Court. We therefore remand to the District Court to determine in the first instance whether this alleged conduct is official or unofficial.

C

The Government does not dispute that if Trump is entitled to immunity for certain official acts, he may not "be held criminally liable" based on those acts. But it nevertheless contends that a jury could "consider" evidence concerning the President's official acts "for limited and specified purposes," and that such evidence would "be admissible to prove, for example, [Trump's] knowledge or notice of the falsity of his election-fraud claims."

If official conduct for which the President is immune may be scrutinized to help secure his conviction, even on charges that purport to be based only on his unofficial conduct, the "intended effect" of immunity would be defeated. The President's immune conduct would be subject to examination by a jury on the basis of generally applicable criminal laws. Use of evidence about such conduct, even when an indictment alleges only unofficial conduct, would thereby heighten the prospect that the President's official decision making will be distorted.

The Government asserts that these weighty concerns can be managed by the District Court through the use of "evidentiary rulings" and "jury instructions." But such tools are unlikely to protect adequately the President's constitutional prerogatives. Presidential acts frequently deal with "matters likely to 'arouse the most intense feelings.'" Allowing prosecutors to ask or suggest that the jury probe official acts for which the President is immune would thus raise a unique risk that the jurors' deliberations will be prejudiced by their views of the President's policies and performance while in office. The prosaic tools on which the Government would have courts rely are an inadequate safeguard against the peculiar constitutional concerns implicated in the prosecution of a former President. Although such tools may suffice to protect the constitutional rights of individual criminal defendants, the interests that underlie Presidential immunity seek to protect not the President himself, but the institution of the Presidency.[1]

[1] Justice BARRETT disagrees, arguing that in a bribery prosecution, for instance, excluding "any mention" of the official act associated with the bribe "would hamstring the prosecution." But of course the prosecutor may point to the public record to show the fact that the President performed the official act. And the prosecutor may admit evidence of what the President allegedly demanded, received, accepted, or agreed to receive or accept in return for being influenced in the performance of the act. See 18 U.S.C. § 201(b)(2). What the prosecutor may not do, however, is admit testimony or private records of the President or his advisers probing the official act itself. Allowing that sort of evidence would invite the jury to inspect the President's motivations for his official actions and to second-guess their propriety. As we have explained, such inspection would be "highly intrusive" and would "'seriously cripple'" the President's exercise of his official duties. And such second-guessing would

IV

A

Trump asserts a far broader immunity than the limited one we have recognized. He contends that the indictment must be dismissed because the Impeachment Judgment Clause requires that impeachment and Senate conviction precede a President's criminal prosecution.

The text of the Clause provides little support for such an absolute immunity. It states that an impeachment judgment "shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States." Art. I, § 3, cl. 7. It then specifies that "the Party convicted shall *nevertheless* be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." (emphasis added). The Clause both limits the consequences of an impeachment judgment and clarifies that notwithstanding such judgment, subsequent prosecution may proceed. By its own terms, the Clause does not address whether and on what conduct a President may be prosecuted if he was never impeached and convicted.

The implication of Trump's theory is that a President who evades impeachment for one reason or another during his term in office can never be held accountable for his criminal acts in the ordinary course of law. So if a President manages to conceal certain crimes throughout his Presidency, or if Congress is unable to muster the political will to impeach the President for his crimes, then they must forever remain impervious to prosecution.

Impeachment is a political process by which Congress can remove a President who has committed "Treason, Bribery, or other high Crimes and Misdemeanors." Art. II, § 4. Transforming that political process into a necessary step in the enforcement of criminal law finds little support in the text of the Constitution or the structure of our Government.

B

The Government broadly agrees that the President's official acts are entitled to some degree of constitutional protection. And with respect to the allegations in the indictment before us, the Government agrees that at least some of the alleged conduct involves official acts.

Yet the Government contends that the President should not be considered immune from prosecution for those official acts. On the Government's view, as-applied challenges in the course of the trial suffice to protect Article II interests, and review of a district court's decisions on such challenges should be deferred until after trial. If the President is instead immune from prosecution, a district court's denial of immunity would be appealable before trial.

The Government asserts that the "[r]obust safeguards" available in typical criminal proceedings alleviate the need for pretrial review. These safeguards, though important, do not alleviate the need for pretrial review. They fail to address the fact that under our system of separated powers, criminal prohibitions cannot apply to certain Presidential conduct to begin with. As we have explained, when the President acts pursuant to his exclusive constitutional powers, Congress cannot—as a structural matter—regulate such actions, and courts cannot review them. And he is at least presumptively immune from prosecution for his other official actions.

Questions about whether the President may be held liable for particular actions, consistent with the separation of powers, must be addressed at the outset of a proceeding. Even if the President were ultimately not found liable for certain official actions, the possibility of an extended proceeding alone may render him "unduly cautious in the discharge of his official

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"threaten the independence or effectiveness of the Executive." *Trump v. Vance.*

duties." *Fitzgerald.* Vulnerability "'to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute.'" The Constitution does not tolerate such impediments to "the effective functioning of government." *Fitzgerald.*

As for the Government's assurances that prosecutors and grand juries will not permit political or baseless prosecutions from advancing in the first place, those assurances are available to every criminal defendant and fail to account for the President's "unique position in the constitutional scheme." We do not ordinarily decline to decide significant constitutional questions based on the Government's promises of good faith. Nor do we do so today.

C

As for the dissents, they strike a tone of chilling doom that is wholly disproportionate to what the Court actually does today—conclude that immunity extends to official discussions between the President and his Attorney General, and then remand to the lower courts to determine "in the first instance" whether and to what extent Trump's remaining alleged conduct is entitled to immunity.

The principal dissent's starting premise—that unlike Speech and Debate Clause immunity, no constitutional text supports Presidential immunity—is one that the Court rejected decades ago as "unpersuasive."

The principal dissent then cites the Impeachment Judgment Clause, arguing that it "clearly contemplates that a former President may be subject to criminal prosecution." But that Clause does not indicate whether a former President may, consistent with the separation of powers, be prosecuted for his *official* conduct in particular. And the assortment of historical sources the principal dissent cites are unhelpful for the same reason. Conspicuously absent is mention of the fact that since the founding, no President has ever faced criminal charges—let alone for his conduct in office. And accordingly no court has ever been faced with the question of a President's immunity from prosecution. All that our Nation's practice establishes on the subject is silence.

Coming up short on reasoning, the dissents repeatedly level variations of the accusation that the Court has rendered the President "above the law." As before, that "rhetorically chilling" contention is "wholly unjustified." Like everyone else, the President is subject to prosecution in his unofficial capacity. But unlike anyone else, the President is a branch of government, and the Constitution vests in him sweeping powers and duties. Accounting for that reality—and ensuring that the President may exercise those powers forcefully, as the Framers anticipated he would—does not place him above the law; it preserves the basic structure of the Constitution from which that law derives.

The dissents' positions in the end boil down to ignoring the Constitution's separation of powers and the Court's precedent and instead fear mongering on the basis of extreme hypotheticals about a future where the President "feels empowered to violate federal criminal law." The dissents overlook the more likely prospect of an Executive Branch that cannibalizes itself, with each successive President free to prosecute his predecessors, yet unable to boldly and fearlessly carry out his duties for fear that he may be next. For instance, Section 371—which has been charged in this case—is a broadly worded criminal statute that can cover "'any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government.'" Virtually every President is criticized for insufficiently enforcing some aspect of federal law (such as drug, gun, immigration, or environmental laws). An enterprising prosecutor in a new administration may assert that a previous President violated that broad statute. Without immunity, such types of prosecutions of ex-Presidents could quickly become routine. The enfeebling of the Presidency and our Government that would result from such a cycle of factional

strife is exactly what the Framers intended to avoid. Ignoring those risks, the dissents are instead content to leave the preservation of our system of separated powers up to the good faith of prosecutors.

Finally, the principal dissent finds it "troubling" that the Court does not "designate any course of conduct alleged in the indictment as private." Our dissenting colleagues exude an impressive infallibility. While their confidence may be inspiring, the Court adheres to time-tested practices instead—deciding what is required to dispose of this case and remanding after "revers[ing] on a threshold question," *Zivotofsky.*

V

This case poses a question of lasting significance: When may a former President be prosecuted for official acts taken during his Presidency? Our Nation has never before needed an answer. But in addressing that question today, unlike the political branches and the public at large, we cannot afford to fixate exclusively, or even primarily, on present exigencies. In a case like this one, focusing on "transient results" may have profound consequences for the separation of powers and for the future of our Republic. *Youngstown.* Our perspective must be more farsighted, for "[t]he peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional." (citing Chief Justice John Marshall).

Our first President had such a perspective. In his Farewell Address, George Washington reminded the Nation that "a Government of as much vigour as is consistent with the perfect security of Liberty is indispensable." A government "too feeble to withstand the enterprises of faction," he warned, could lead to the "frightful despotism" of "alternate domination of one faction over another, sharpened by the spirit of revenge." And the way to avoid that cycle, he explained, was to ensure that government powers remained "properly distributed and adjusted."

It is these enduring principles that guide our decision in this case. The President enjoys no immunity for his unofficial acts, and not everything the President does is official. The President is not above the law. But Congress may not criminalize the President's conduct in carrying out the responsibilities of the Executive Branch under the Constitution. And the system of separated powers designed by the Framers has always demanded an energetic, independent Executive. The President therefore may not be prosecuted for exercising his core constitutional powers, and he is entitled, at a minimum, to a presumptive immunity from prosecution for all his official acts. That immunity applies equally to all occupants of the Oval Office, regardless of politics, policy, or party.

The judgment of the Court of Appeals for the D. C. Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice BARRETT, concurring in part.

For reasons I explain below, I do not join Part III–C of the Court's opinion. The remainder of the opinion is consistent with my view that the Constitution prohibits Congress from criminalizing a President's exercise of core Article II powers and closely related conduct. That said, I would have framed the underlying legal issues differently. The Court describes the President's constitutional protection from certain prosecutions as an "immunity." As I see it, that term is shorthand for two propositions: The President can challenge the constitutionality of a criminal statute as applied to official acts alleged in the indictment, and he can obtain interlocutory review of the trial court's ruling.

Properly conceived, the President's constitutional protection from prosecution is narrow. Though I agree that a President cannot be held criminally liable for conduct within his "conclusive and preclusive" authority and closely related acts, the Constitution does not vest

every exercise of executive power in the President's sole discretion, *Youngstown*.[2] Congress has concurrent authority over many Government functions, and it may sometimes use that authority to regulate the President's official conduct, including by criminal statute. Article II poses no barrier to prosecution in such cases.

I would thus assess the validity of criminal charges predicated on most official acts—*i.e.*, those falling outside of the President's core executive power—in two steps. The first question is whether the relevant criminal statute reaches the President's official conduct. Not every broadly worded statute does. For example, § 956 covers conspiracy to murder in a foreign country and does not expressly exclude the President's decision to, say, order a hostage rescue mission abroad. The underlying murder statute, however, covers only "unlawful" killings. The Office of Legal Counsel has interpreted that phrase to reflect a public-authority exception for official acts involving the military and law enforcement. I express no view about the merits of that interpretation, but it shows that the threshold question of statutory interpretation is a nontrivial step.

If the statute covers the alleged official conduct, the prosecution may proceed only if applying it in the circumstances poses no "'dange[r] of intrusion on the authority and functions of the Executive Branch.'" On remand, the lower courts will have to apply that standard to various allegations involving the President's official conduct.[3] For example, the indictment alleges that the President "asked the Arizona House Speaker to call the legislature into session to hold a hearing" about election fraud claims. The President has no authority over state legislatures or their leadership, so it is hard to see how prosecuting him for crimes committed when dealing with the Arizona House Speaker would unconstitutionally intrude on executive power.

I understand most of the Court's opinion to be consistent with these views. I do not join Part III–C, however, which holds that the Constitution limits the introduction of protected conduct as *evidence* in a criminal prosecution of a President, beyond the limits afforded by executive privilege. I disagree with that holding; on this score, I agree with the dissent. The Constitution does not require blinding juries to the circumstances surrounding conduct for which Presidents *can* be held liable. Consider a bribery prosecution—a charge not at issue here but one that provides a useful example. The federal bribery statute forbids any public official to seek or accept a thing of value "for or because of any official act." The Constitution, of course, does not authorize a President to seek or accept bribes, so the Government may prosecute him if he does so. See Art. II, § 4 (listing "Bribery" as an impeachable offense) Yet excluding from trial any mention of the official act connected to the bribe would hamstring the prosecution. To make sense of charges alleging a *quid pro quo*, the jury must be allowed to hear about both the *quid* and the *quo*, even if the *quo*, standing alone, could not be a basis for the President's criminal liability.

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[2] Consistent with our separation of powers precedent, I agree with the Court that the supervision and removal of appointed, high ranking Justice Department officials falls within the President's core executive power. See *Seila Law.* I do not understand the Court to hold that all exercises of the Take Care power fall within the core executive power. I agree with the dissent that the Constitution does not justify such an expansive view.

[3] This analysis is unnecessary for allegations involving the President's private conduct because the Constitution offers no protection from prosecution of acts taken in a private capacity. Sorting private from official conduct sometimes will be difficult—but not always. Take the President's alleged attempt to organize alternative slates of electors. In my view, that conduct is private and therefore not entitled to protection. The Constitution vests power to appoint Presidential electors in the States. Art. II, § 1, cl. 2. And while Congress has a limited role in that process, see Art. II, § 1, cls. 3–4, the President has none. In short, a President has no legal authority—and thus no official capacity—to influence how the States appoint their electors. I see no plausible argument for barring prosecution of that alleged conduct.

I appreciate the Court's concern that allowing into evidence official acts for which the President cannot be held criminally liable may prejudice the jury. But the rules of evidence are equipped to handle that concern on a case-by-case basis.

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The Constitution does not insulate Presidents from criminal liability for official acts. But *any* statute regulating the exercise of executive power is subject to a constitutional challenge. A criminal statute is no exception. Thus, a President facing prosecution may challenge the constitutionality of a criminal statute as applied to official acts alleged in the indictment. If that challenge fails, however, he must stand trial.

Justice SOTOMAYOR, with whom Justice KAGAN and Justice JACKSON join, dissenting.

Today's decision to grant former Presidents criminal immunity reshapes the institution of the Presidency. It makes a mockery of the principle, foundational to our Constitution and system of Government, that no man is above the law. Relying on little more than its own misguided wisdom about the need for "bold and unhesitating action" by the President, the Court gives former President Trump all the immunity he asked for and more. Because our Constitution does not shield a former President from answering for criminal and treasonous acts, I dissent.

I

The indictment paints a stark portrait of a President desperate to stay in power.

In the weeks leading up to January 6, 2021, then-President Trump allegedly "spread lies that there had been outcome-determinative fraud in the election and that he had actually won," despite being "notified repeatedly" by his closest advisers "that his claims were untrue."

When dozens of courts swiftly rejected these claims, Trump allegedly "pushed officials in certain states to ignore the popular vote; disenfranchise millions of voters; dismiss legitimate electors; and ultimately, cause the ascertainment of and voting by illegitimate electors" in his favor. It is alleged that he went so far as to threaten one state election official with criminal prosecution if the official did not "'find' 11,780 votes" Trump needed to change the election result in that state. When state officials repeatedly declined to act outside their legal authority and alter their state election processes, Trump and his co-conspirators purportedly developed a plan to disrupt and displace the legitimate election certification process by organizing fraudulent slates of electors.

As the date of the certification proceeding neared, Trump allegedly also sought to "use the power and authority of the Justice Department" to bolster his knowingly false claims of election fraud by initiating "sham election crime investigations" and sending official letters "falsely claim[ing] that the Justice Department had identified significant concerns that may have impacted the election outcome" while "falsely present[ing] the fraudulent electors as a valid alternative to the legitimate electors." When the Department refused to do as he asked, Trump turned to the Vice President. Initially, he sought to persuade the Vice President "to use his ceremonial role at the January 6 certification proceeding to fraudulently alter the election results." When persuasion failed, he purportedly "attempted to use a crowd of supporters that he had gathered in Washington, D. C., to pressure the Vice President to fraudulently alter the election results."

Speaking to that crowd on January 6, Trump "falsely claimed that, based on fraud, the Vice President could alter the outcome of the election results." When this crowd then "violently attacked the Capitol and halted the proceeding," Trump allegedly delayed in taking any step to rein in the chaos he had unleashed. Instead, in a last desperate ploy to hold onto power, he allegedly "attempted to exploit the

violence and chaos at the Capitol" by pressuring lawmakers to delay the certification of the election and ultimately declare him the winner. That is the backdrop against which this case comes to the Court.

II

The Court now confronts a question it has never had to answer in the Nation's history: Whether a former President enjoys immunity from federal criminal prosecution. The majority thinks he should, and so it invents an atextual, ahistorical, and unjustifiable immunity that puts the President above the law.

The majority makes three moves that, in effect, completely insulate Presidents from criminal liability. First, the majority creates absolute immunity for the President's exercise of "core constitutional powers." This holding is unnecessary on the facts of the indictment, and the majority's attempt to apply it to the facts expands the concept of core powers beyond any recognizable bounds. In any event, it is quickly eclipsed by the second move, which is to create expansive immunity for all "official act[s]." Whether described as presumptive or absolute, under the majority's rule, a President's use of any official power for any purpose, even the most corrupt, is immune from prosecution. That is just as bad as it sounds, and it is baseless. Finally, the majority declares that evidence concerning acts for which the President is immune can play no role in any criminal prosecution against him. That holding, which will prevent the Government from using a President's official acts to prove knowledge or intent in prosecuting private offenses, is nonsensical.

III

The main takeaway of today's decision is that all of a President's official acts, defined without regard to motive or intent, are entitled to immunity that is "at least ... *presumptive*," and quite possibly "absolute." This official-acts immunity has "no firm grounding in constitutional text, history, or precedent." Indeed, those "standard grounds for constitutional decision making," all point in the opposite direction. No matter how you look at it, the majority's official-acts immunity is utterly indefensible.

A

The majority calls for a "careful assessment of the scope of Presidential power under the Constitution." For the majority, that "careful assessment" does not involve the Constitution's text. I would start there.

The Constitution's text contains no provision for immunity from criminal prosecution for former Presidents. Of course, "the silence of the Constitution on this score is not dispositive." *United States v. Nixon.* Insofar as the majority rails against the notion that a "'specific textual basis'" is required, it is attacking an argument that has not been made here. The omission in the text of the Constitution is worth noting, however, for at least three reasons.

First, the Framers clearly knew how to provide for immunity from prosecution. They did provide a narrow immunity for legislators in the Speech or Debate Clause. See Art. I, § 6, cl. 1 ("Senators and Representatives ... shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place"). They did not extend the same or similar immunity to Presidents.

Second, "some state constitutions at the time of the Framing specifically provided 'express criminal immunities' to sitting governors." The Framers chose not to include similar language in the Constitution to immunize the President. If the Framers "had wanted to create some constitutional privilege to shield the President ... from criminal indictment," they could have done so. They did not.

Third, insofar as the Constitution does speak to this question, it actually contemplates some form of criminal liability for former Presidents. The majority correctly rejects Trump's argument that a former President cannot be prosecuted unless he has been impeached by the House and convicted by the Senate for the same conduct. The majority ignores, however, that the Impeachment Judgment Clause cuts against its own position. That Clause presumes the availability of criminal process as a backstop by establishing that an official impeached and convicted by the Senate "shall *nevertheless* be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." Art. I, § 3, cl. 7 (emphasis added). That Clause clearly contemplates that a former President may be subject to criminal prosecution for the same conduct that resulted (or could have resulted) in an impeachment judgment—including conduct such as "Bribery," Art. II, § 4, which implicates official acts almost by definition.[4]

B

Aware of its lack of textual support, the majority points out that this Court has "recognized Presidential immunities and privileges 'rooted in the constitutional tradition of the separation of powers and supported by our history.'" That is true, as far as it goes. Nothing in our history, however, supports the majority's entirely novel immunity from criminal prosecution for official acts.

The historical evidence that exists on Presidential immunity from criminal prosecution cuts decisively against it. For instance, Alexander Hamilton wrote that former Presidents would be "liable to prosecution and punishment in the ordinary course of law." For Hamilton, that was an important distinction between "the king of Great Britain," who was "sacred and inviolable," and the "President of the United States," who "would be amenable to personal punishment and disgrace." In contrast to the king, the President should be subject to "personal responsibility" for his actions, "stand[ing] upon no better ground than a governor of New York, and upon worse ground than the governors of Maryland and Delaware," whose State Constitutions gave them some immunity.

At the Constitutional Convention, James Madison, who was aware that some state constitutions provided governors immunity, proposed that the Convention "conside[r] what privileges ought to be allowed to the Executive." There is no record of any such discussion. Delegate Charles Pinckney later explained that "[t]he Convention which formed the Constitution well knew" that "no subject had been more abused than privilege," and so it "determined to ... limi[t] privilege to what was necessary, and no more." "No privilege ... was intended for [the] Executive."[5]

Other commentators around the time of the Founding observed that federal officials had no immunity from prosecution, drawing no exception for the President. James Wilson recognized that federal officers who use their official powers to commit crimes "may be tried by their country; and if their criminality is established, the law will punish. A grand jury may present, a petty jury may convict, and the judges will pronounce the punishment." A few decades later, Justice Story evinced the same understanding. He explained that, when a federal of-

[4] Article II, § 4, provides: "The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

[5] To note, as the majority does, that this Court has recognized civil immunities arguably inconsistent with this view is not to say that Pinckney was wrong about what the Framers had "intended." Indeed, Pinckney's contemporaries shared the same view during the ratification debates. See, *e.g.*, 4 Debates on the Constitution 109 (J. Elliot ed. 1836) (J. Iredell) ("If the President does a single act by which the people are prejudiced, he is punishable himself.... If he commits any crime, he is punishable by the laws of his country").

ficial commits a crime in office, "it is indispensable, that provision should be made, that the common tribunals of justice should be at liberty to entertain jurisdiction of the offence, for the purpose of inflicting, the common punishment applicable to unofficial offenders." Without a criminal trial, he explained, "the grossest official offenders might escape without any substantial punishment, even for crimes, which would subject their fellow citizens to capital punishment."

This historical evidence reinforces that, from the very beginning, the presumption in this Nation has always been that no man is free to flout the criminal law. The majority fails to recognize or grapple with the lack of historical evidence for its new immunity. With nothing on its side of the ledger, the most the majority can do is claim that the historical evidence is a wash. Moreover, far from dismissing that evidence as irrelevant, the *Fitzgerald* Court was careful to note that "[t]he best historical evidence clearly support[ed]" the immunity from damages liability that it recognized, and it relied in part on that historical evidence to overcome the lack of any textual basis for its immunity. The majority ignores this reliance. It seems history matters to this Court only when it is convenient. See, *e.g.*, *Bruen*.

C

Our country's history also points to an established understanding, shared by both Presidents and the Justice Department, that former Presidents are answerable to the criminal law for their official acts. Consider Watergate, for example. After the Watergate tapes revealed President Nixon's misuse of official power to obstruct the Federal Bureau of Investigation's investigation of the Watergate burglary, President Ford pardoned Nixon. Both Ford's pardon and Nixon's acceptance of the pardon necessarily "rested on the understanding that the former President faced potential criminal liability."

Subsequent special counsel and independent counsel investigations have also operated on the assumption that the Government can criminally prosecute former Presidents for their official acts, where they violate the criminal law.

Indeed, Trump's own lawyers during his second impeachment trial assured Senators that declining to impeach Trump for his conduct related to January 6 would not leave him "in any way above the law." Now that Trump is facing criminal charges for those acts, though, the tune has changed. Being treated "like any other citizen" no longer seems so appealing.

In sum, the majority today endorses an expansive vision of Presidential immunity that was never recognized by the Founders, any sitting President, the Executive Branch, or even President Trump's lawyers, until now. Settled understandings of the Constitution are of little use to the majority in this case, and so it ignores them.

IV

A

Setting aside this evidence, the majority announces that former Presidents are "absolute[ly]," or "at least ... presumptive[ly]," immune from criminal prosecution for all of their official acts. The majority purports to keep us in suspense as to whether this immunity is absolute or presumptive, but it quickly gives up the game. It explains that, "[a]t a minimum, the President must ... be immune from prosecution for an official act unless the Government can show that applying a criminal prohibition to that act would pose *no 'dangers of intrusion* on the authority and functions of the Executive Branch.'" (emphasis added). No dangers, none at all. It is hard to imagine a criminal prosecution for a President's official acts that would pose no dangers of intrusion on Presidential authority in the majority's eyes.

Nor should that be the standard. Surely some intrusions on the Executive may be "justified by an overriding need to promote objectives

within the constitutional authority of Congress." Other intrusions may be justified by the "primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions." *United States v. Nixon.* According to the majority, however, any incursion on Executive power is too much. When presumptive immunity is this conclusive, the majority's indecision as to "whether [official-acts] immunity must be absolute" or whether, instead, "presumptive immunity is sufficient," hardly matters.

Maybe some future opinion of this Court will decide that presumptive immunity is "sufficient," and replace the majority's ironclad presumption with one that makes the difference between presumptive and absolute immunity meaningful. Today's Court, however, has replaced a presumption of equality before the law with a presumption that the President is above the law for all of his official acts.

Quick on the heels of announcing this astonishingly broad official-acts immunity, the majority assures us that a former President can still be prosecuted for "unofficial acts." Of course he can. No one has questioned the ability to prosecute a former President for unofficial (otherwise known as private) acts. Even Trump did not claim immunity for such acts and, as the majority acknowledges, such an immunity would be impossible to square with *Clinton v. Jones*. This unremarkable proposition is no real limit on today's decision. It does not hide the majority's embrace of the most far-reaching view of Presidential immunity on offer.

In fact, the majority's dividing line between "official" and "unofficial" conduct narrows the conduct considered "unofficial" almost to a nullity. It says that whenever the President acts in a way that is "'not manifestly or palpably beyond [his] authority,'" he is taking official action. It then goes a step further: "In dividing official from unofficial conduct, courts may not inquire into the President's motives." It is one thing to say that motive is irrelevant to questions regarding the scope of civil liability, but it is quite another to make it irrelevant to questions regarding criminal liability. Under that rule, any use of official power for any purpose, even the most corrupt purpose indicated by objective evidence of the most corrupt motives and intent, remains official and immune. Under the majority's test, if it can be called a test, the category of Presidential action that can be deemed "unofficial" is destined to be vanishingly small.

Ultimately, the majority pays lip service to the idea that "[t]he President, charged with enforcing federal criminal laws, is not above them," but it then proceeds to place former Presidents beyond the reach of the federal criminal laws for any abuse of official power.

B

So how does the majority get to its rule? With text, history, and established understanding all weighing against it, the majority claims just one arrow in its quiver: the balancing test in *Fitzgerald*. Yet even that test cuts against it. The majority concludes that official-acts immunity "is required to safeguard the independence and effective functioning of the Executive Branch," by rejecting that Branch's own protestations that such immunity is not at all required and would in fact be harmful, In doing so, it decontextualizes *Fitzgerald*'s language, ignores important qualifications, and reaches a result that the *Fitzgerald* Court never would have countenanced.

1

The majority relies almost entirely on its view of the danger of intrusion on the Executive Branch, to the exclusion of the other side of the balancing test. Its analysis rests on a questionable conception of the President as incapable of navigating the difficult decisions his job requires while staying within the bounds of the law. It also ignores the fact that he receives robust legal advice on the lawfulness of his actions.

The majority says that the danger "of intrusion

on the authority and functions of the Executive Branch" posed by criminally prosecuting a former President for official conduct "is akin to, indeed greater than, what led us to recognize absolute Presidential immunity from civil damages liability—that the President would be chilled from taking the 'bold and unhesitating action' required of an independent Executive." It is of course important that the President be able to "' "deal fearlessly and impartially with" the duties of his office.'" If every action the President takes exposes him personally to vexatious private litigation, the possibility of hamstringing Presidential decision making is very real. Yet there are many facets of criminal liability, which the majority discounts, that make it less likely to chill Presidential action than the threat of civil litigation.

First, in terms of probability, the threat of criminal liability is much smaller. In *Fitzgerald*, the threat of vexatious civil litigation loomed large. The Court observed that, given the "visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages." Although "'the effect of [the President's] actions on countless people' could result in untold numbers of private plaintiffs suing for damages based on any number of Presidential acts" in the civil context, the risk in the criminal context is "only that a former President may face one federal prosecution, in one jurisdiction, for each criminal offense allegedly committed while in office." The majority's bare assertion that the burden of exposure to federal criminal prosecution is more limiting to a President than the burden of exposure to civil suits does not make it true, and it is not persuasive.

Second, federal criminal prosecutions require "robust procedural safeguards" not found in civil suits. The criminal justice system has layers of protections that "filter out insubstantial legal claims," whereas civil litigation lacks "analogous checks." To start, Justice Department policy requires scrupulous and impartial prosecution, founded on both the facts and the law. The grand jury provides an additional check on felony prosecutions, acting as a "buffer or referee between the Government and the people," to ensure that the charges are well-founded.

If the prosecution makes it past the grand jury, then the former President still has all the protections our system provides to criminal defendants. If the former President has an argument that a particular statute is unconstitutional as applied to him, then he can move to dismiss the charges on that ground. Indeed, a former President is likely to have legal arguments that would be unavailable to the average criminal defendant. For example, he may be able to rely on a public-authority exception from particular criminal laws, or an advice-of-the-Attorney-General defense.

If the case nonetheless makes it to trial, the Government will bear the burden of proving every element of the alleged crime beyond a reasonable doubt to a unanimous jury of the former President's fellow citizens. If the Government manages to overcome even that significant hurdle, then the former President can appeal his conviction, and the appellate review of his claims will be "'particularly meticulous.'" *Trump v. Vance.* He can ultimately seek this Court's review, and if past practice (including in this case) is any indication, he will receive it.

In light of these considerable protections, the majority's fear that "'bare allegations of malice,'" would expose former Presidents to trial and conviction is unfounded. Bare allegations of malice would not make it out of the starting gate. Although a private civil action may be brought based on little more than "'intense feelings,'"a federal criminal prosecution is made of firmer stuff. Certainly there has been, on occasion, great feelings of animosity between incoming and outgoing Presidents over the course of our country's history. Yet it took allegations as grave as those at the center of this

case to have the first federal criminal prosecution of a former President. That restraint is telling.

Third, because of longstanding interpretations by the Executive Branch, every sitting President has so far believed himself under the threat of criminal liability after his term in office and nevertheless boldly fulfilled the duties of his office. The majority insists that the threat of criminal sanctions is "more likely to distort Presidential decision making than the potential payment of civil damages." If that is right, then that distortion has been shaping Presidential decision making since the earliest days of the Republic. Although it makes sense to avoid "diversion of the President's attention during the decision making process" with "needless worry," *Clinton*, one wonders why requiring some small amount of his attention (or his legal advisers' attention) to go towards complying with federal criminal law is such a great burden. If the President follows the law that he must "take Care" to execute, Art. II, § 3, he has not been rendered "'unduly cautious.'". Some amount of caution is necessary, after all. It is a far greater danger if the President feels empowered to violate federal criminal law, buoyed by the knowledge of future immunity. I am deeply troubled by the idea, inherent in the majority's opinion, that our Nation loses something valuable when the President is forced to operate within the confines of federal criminal law.

So what exactly is the majority worried about deterring when it expresses great concern for the "deterrent" effect that "the threat of trial, judgment, and imprisonment" would pose? It cannot possibly be the deterrence of acts that are truly criminal. Nor does it make sense for the majority to wring its hands over the possibility that Presidents might stop and think carefully before taking action that borders on criminal. Instead, the majority's main concern could be that Presidents will be deterred from taking necessary and lawful action by the fear that their successors might pin them with a baseless criminal prosecution—a prosecution that would almost certainly be doomed to fail, if it even made it out of the starting gate. The Court should not have so little faith in this Nation's Presidents. As this Court has said before in the context of criminal proceedings, "'[t]he chance that now and then there may be found some timid soul who will take counsel of his fears and give way to their repressive power is too remote and shadowy to shape the course of justice.'" *Nixon.* The concern that countless (and baseless) civil suits would hamper the Executive may have been justified in *Fitzgerald*, but a well-founded federal criminal prosecution poses no comparable danger to the functioning of the Executive Branch.

2

At the same time, the public interest in a federal criminal prosecution of a former President is vastly greater than the public interest in a private individual's civil suit. All nine Justices in *Fitzgerald* explicitly recognized that distinction. The five-Justice majority noted that there was a greater public interest "in criminal prosecutions" than in "actions for civil damages." Chief Justice Burger's concurrence accordingly emphasized that the majority's immunity was "limited to civil damages claims," rather than "*criminal* prosecution." The four dissenting Justices agreed that a "contention that the President is immune from criminal prosecution in the courts," if ever made, would not "be credible." At the very least, the *Fitzgerald* Court did not expect that its balancing test would lead to the same outcome in the criminal context.

The public's interest in prosecution is transparent: a federal prosecutor herself acts on behalf of the United States. Even the majority acknowledges that the "[f]ederal criminal laws seek to redress 'a wrong to the public' as a whole, not just 'a wrong to the individual.'" Indeed, "our historic commitment to the rule of law" is "nowhere more profoundly manifest than in our view that ... 'guilt shall not escape or innocence suffer.'" *Nixon.*

The public interest in criminal prosecution is particularly strong with regard to officials who are granted some degree of civil immunity because of their duties. It is in those cases where the public can see that officials exercising power under public trust remain on equal footing with their fellow citizens under the criminal law.

The public interest in the federal criminal prosecution of a former President alleged to have used the powers of his office to commit crimes may be greater still. "[T]he President ... represent[s] all the voters in the Nation," and his powers are given by the people under our Constitution. When Presidents use the powers of their office for personal gain or as part of a criminal scheme, every person in the country has an interest in that criminal prosecution. The majority overlooks that paramount interest entirely.

Finally, the question of federal criminal immunity for a former President "involves a countervailing Article II consideration absent in *Fitzgerald*": recognizing such an immunity "would frustrate the Executive Branch's enforcement of the criminal law." The President is, of course, entrusted with "'supervisory and policy responsibilities of utmost discretion and sensitivity.'" One of the most important is "enforcement of federal law," as "it is the President who is charged constitutionally to 'take Care that the Laws be faithfully executed.'" The majority seems to think that allowing former Presidents to escape accountability for breaking the law while disabling the current Executive from prosecuting such violations somehow respects the independence of the Executive. It does not. Rather, it diminishes that independence, exalting occupants of the office over the office itself. There is a twisted irony in saying, as the majority does, that the person charged with "tak[ing] Care that the Laws be faithfully executed" can break them with impunity.

In the case before us, the public interest and countervailing Article II interest are particularly stark. The public interest in this criminal prosecution implicates both "[t]he Executive Branch's interest in upholding Presidential elections and vesting power in a new President under the Constitution" as well as "the voters' interest in democratically selecting their President." It also, of course, implicates Congress's own interest in regulating conduct through the criminal law. It is, in fact, the majority's position that "boil[s] down to ignoring the Constitution's separation of powers."

C

Finally, in an attempt to put some distance between its official-acts immunity and Trump's requested immunity, the majority insists that "Trump asserts a far broader immunity than the limited one [the majority has] recognized." If anything, the opposite is true. The only part of Trump's immunity argument that the majority rejects is the idea that "the Impeachment Judgment Clause requires that impeachment and Senate conviction precede a President's criminal prosecution." That argument is obviously wrong. Rejecting it, however, does not make the majority's immunity narrower than Trump's. Inherent in Trump's Impeachment Judgment Clause argument is the idea that a former President who was impeached in the House and convicted in the Senate for crimes involving his official acts could then be prosecuted in court for those acts. By extinguishing that path to overcoming immunity, however nonsensical it might be, the majority arrives at an official-acts immunity even more expansive than the one Trump argued for. On the majority's view (but not Trump's), a former President whose abuse of power was so egregious and so offensive even to members of his own party that he was impeached in the House and convicted in the Senate still would be entitled to "at least presumptive" criminal immunity for those acts.

V

Separate from its official-acts immunity, the

majority recognizes absolute immunity for "conduct within [the President's] exclusive sphere of constitutional authority." Feel free to skip over those pages of the majority's opinion. With broad official-acts immunity covering the field, this ostensibly narrower immunity serves little purpose. In any event, this case simply does not turn on conduct within the President's "exclusive sphere of constitutional authority," and the majority's attempt to apply a core immunity of its own making expands the concept of "core constitutional powers," beyond any recognizable bounds.

The idea of a narrow core immunity might have some intuitive appeal, in a case that actually presented the issue. If the President's power is "conclusive and preclusive" on a given subject, then Congress should not be able to "ac[t] upon the subject." *Youngstown* (Jackson, J., concurring). In his *Youngstown* concurrence, Justice Robert Jackson posited that the President's "power of removal in executive agencies" seemed to fall within this narrow category. Other decisions of this Court indicate that the pardon power also falls in this category, see *United States v. Klein*.

In this case, however, the question whether a former President enjoys a narrow immunity for the "exercise of his core constitutional powers," has never been at issue, and for good reason: Trump was not criminally indicted for taking actions that the Constitution places in the unassailable core of Executive power. He was not charged, for example, with illegally wielding the Presidency's pardon power or veto power or appointment power or even removal power. Instead, Trump was charged with a conspiracy to commit fraud to subvert the Presidential election. It is true that the detailed indictment in this case alleges that Trump threatened to remove an Acting Attorney General who would not carry out his scheme. Yet it is equally clear that the Government does not seek to "impose criminal liability on the [P]resident for exercising or talking about exercising the appointment and removal power." If that were the majority's concern, it could simply have said that the Government cannot charge a President's threatened use of the removal power as an overt act in the conspiracy. It says much more.

The core immunity that the majority creates will insulate a considerably larger sphere of conduct than the narrow core of "conclusive and preclusive" powers that the Court previously has recognized. The first indication comes when the majority includes the President's broad duty to "'take Care that the Laws be faithfully executed'" among the core functions for which a former President supposedly enjoys absolute immunity. That expansive view of core power will effectively insulate all sorts of noncore conduct from criminal prosecution. Were there any question, consider how the majority applies its newly minted core immunity to the allegations in this case. It concludes that "Trump is ... absolutely immune from prosecution for" any "conduct involving his discussions with Justice Department officials." That conception of core immunity expands the "conclusive and preclusive" category beyond recognition, foreclosing the possibility of prosecution for broad swaths of conduct. Under that view of core powers, even fabricating evidence and insisting the Department use it in a criminal case could be covered. The majority's conception of "core" immunity sweeps far more broadly than its logic, borrowed from *Youngstown*, should allow.

The majority tries to assuage any concerns about its made-up core immunity by suggesting that the Government agrees with it. That suggestion will surprise the Government. To say, as the Government did, that a "small core of exclusive official acts" such as "the pardon power, the power to recognize foreign nations, the power to veto legislation, [and] the power to make appointments" cannot be regulated by Congress, does not suggest that the Government agrees with immunizing any and all conduct conceivably related to the majority's broad array of supposedly "core" powers. The

Government in fact advised this Court to "leav[e] potentially more difficult questions" about the scope of any immunity "that might arise on different facts for decision if they are ever presented." That would have made sense. The indictment here does not pose any threat of impermissibly criminalizing acts within the President's "conclusive and preclusive" authority. Perhaps for this reason, even Trump discouraged consideration of "a narrower scope of immunity," claiming that such an immunity "would be nearly impossible to fashion, and would certainly involve impractical line-drawing problems in every application."

When forced to wade into thorny separation-of-powers disputes, this Court's usual practice is to "confine the opinion only to the very questions necessary to decision of the case." *Dames & Moore v. Regan.* There is plenty of peril and little value in crafting a core immunity doctrine that Trump did not seek and that rightly has no application to this case.

VI

Not content simply to invent an expansive criminal immunity for former Presidents, the majority goes a dramatic and unprecedented step further. It says that acts for which the President is immune must be redacted from the narrative of even wholly private crimes committed while in office. They must play no role in proceedings regarding private criminal acts.

Even though the majority's immunity analysis purports to leave unofficial acts open to prosecution, its draconian approach to official-acts evidence deprives these prosecutions of any teeth. If the former President cannot be held criminally liable for his official acts, those acts should still be admissible to prove knowledge or intent in criminal prosecutions of unofficial acts. For instance, the majority struggles with classifying whether a President's speech is in his capacity as President (official act) or as a candidate (unofficial act). Imagine a President states in an official speech that he intends to stop a political rival from passing legislation that he opposes, no matter what it takes to do so (official act). He then hires a private hitman to murder that political rival (unofficial act). Under the majority's rule, the murder indictment could include no allegation of the President's public admission of premeditated intent to support the *mens rea* of murder. That is a strange result, to say the least.

The majority's extraordinary rule has no basis in law. Consider the First Amendment context. Although the First Amendment prohibits criminalizing most speech, it "does not prohibit the evidentiary use of speech," including its use "to prove motive or intent." Evidentiary rulings and limiting instructions can ensure that evidence concerning official acts is "considered only for the proper purpose for which it was admitted." The majority has no coherent explanation as to why these protections that are sufficient in every other context would be insufficient here.

VII

Today's decision to grant former Presidents immunity for their official acts is deeply wrong. As troubling as this criminal immunity doctrine is in theory, the majority's application of the doctrine to the indictment in this case is perhaps even more troubling. In the hands of the majority, this new official-acts immunity operates as a one-way ratchet.

First, the majority declares all of the conduct involving the Justice Department and the Vice President to be official conduct, yet it refuses to designate any course of conduct alleged in the indictment as private, despite concessions from Trump's counsel. [W]hen asked about allegations that "[t]hree private actors ... helped implement a plan to submit fraudulent slates of presidential electors to obstruct the certification proceeding, and [Trump] and a co-conspirator attorney directed that effort," Trump's counsel conceded the alleged conduct was "private." Only the majority thinks that organizing fraudulent slates of electors might qualify as an official act of the President, or at least an act so

"interrelated" with other allegedly official acts that it might warrant protection.

Second, the majority designates certain conduct immune while refusing to recognize anything as prosecutable. It shields large swaths of conduct involving the Justice Department with immunity, but it does not give an inch in the other direction. The majority admits that the Vice President's responsibility "'presiding over the Senate'" is "'not an "executive branch" function,'" and it further admits that the President "plays no direct constitutional or statutory role" in the counting of electoral votes. Yet the majority refuses to conclude that Trump lacks immunity for his alleged attempts to "enlist the Vice President to use his ceremonial role at the January 6 certification proceeding to fraudulently alter the election results."

Looking beyond the fate of this particular prosecution, the long-term consequences of today's decision are stark. The Court effectively creates a law-free zone around the President, upsetting the status quo that has existed since the Founding. This new official-acts immunity now "lies about like a loaded weapon" for any President that wishes to place his own interests, his own political survival, or his own financial gain, above the interests of the Nation.

**

The majority's single-minded fixation on the President's need for boldness and dispatch ignores the countervailing need for accountability and restraint. The Framers were not so single-minded. In the Federalist Papers, after "endeavor[ing] to show" that the Executive designed by the Constitution "combines ... all the requisites to energy," Alexander Hamilton asked a separate, equally important question: "Does it also combine the requisites to safety, in a republican sense, a due dependence on the people, a due responsibility?" The answer then was yes, based in part upon the President's vulnerability to "prosecution in the common course of law." The answer after today is no.

Never in the history of our Republic has a President had reason to believe that he would be immune from criminal prosecution if he used the trappings of his office to violate the criminal law. Moving forward, however, all former Presidents will be cloaked in such immunity. If the occupant of that office misuses official power for personal gain, the criminal law that the rest of us must abide will not provide a backstop.

With fear for our democracy, I dissent.

Justice JACKSON, dissenting.

In its purest form, the concept of immunity boils down to a maxim—"'[t]he King can do no wrong'"—a notion that was firmly "rejected at the birth of [our] Republic." To say that someone is immune from criminal prosecution is to say that, like a King, he "is not under the coercive power of the law," which "will not suppose him capable of committing a folly, much less a crime." Thus, being immune is not like having a defense *under* the law. Rather, it means that the law does not apply to the immunized person in the first place. Conferring immunity therefore "create[s] a privileged class free from liability for wrongs inflicted or injuries threatened."

It is indisputable that immunity from liability for wrongdoing is the exception rather than the rule in the American criminal justice system. That is entirely unsurprising, for the very idea of immunity stands in tension with foundational principles of our system of Government. It is a core tenet of our democracy that the People are the sovereign, and the Rule of Law is our first and final security. "[F]rom their own experience and their deep reading in history, the Founders knew that Law alone saves a society from being rent by internecine strife or ruled by mere brute power however disguised." *United States v. Mine Workers*, (Frankfurter, J., concurring in judgment).

A corollary to that principle sets the terms for this case: "No man in this country is so high

that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." We have long lived with the collective understanding that "[d]ecency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen," for "[i]n a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously."

These foundational presuppositions are reflected in a procedural paradigm of rules and accountability that operates in the realm of criminal law—what I would call an individual accountability model.

The basic contours of that model are familiar, because they manifest in every criminal case. Criminal law starts with an act of the legislature, which holds the power "to define a crime, and ordain its punishment."

When the Federal Government believes that someone has run afoul of a criminal statute and decides to exercise its prosecutorial discretion to pursue punishment for that violation, it persuades a grand jury that there is probable cause to indict. U. S. Const., Amdt. 5. Then, the Government marshals evidence to prove beyond a reasonable doubt that the defendant engaged in the prohibited conduct and possessed the requisite state of mind.

For his part, the defendant "stands accused but is presumed innocent until conviction upon trial or guilty plea." Notably, criminal defendants have various constitutionally protected rights during the criminal-liability process, including the rights to a speedy and public trial, the right to have a jury decide guilt or innocence, the right to the assistance of counsel, and the right to confront the witnesses against him.

The defendant may also raise, and attempt to prove, affirmative defenses that "excuse conduct that would otherwise be punishable." Importantly, a defense is *not* an immunity, even though a defense can likewise result in a person charged with a crime avoiding liability for his criminal conduct. One such defense is the special privilege that Government officials sometimes invoke when carrying out their official duties.

All of this is to say that our Government has long functioned under an accountability paradigm in which no one is above the law; an accused person is innocent until proven guilty; and criminal defendants may raise defenses, both legal and factual, tailored to their particular circumstances, whether they be Government officials or ordinary citizens. For over two centuries, our Nation has survived with these principles intact.

The majority's multilayered, multifaceted threshold parsing of the character of a President's criminal conduct differs from the individual accountability model in several crucial respects.

[E]ven a hypothetical President who admits to having ordered the assassinations of his political rivals or critics, or one who indisputably instigates an unsuccessful coup, has a fair shot at getting immunity under the majority's new Presidential accountability model. That is because whether a President's conduct will subject him to criminal liability turns on the court's evaluation of a variety of factors related to the character of that particular act—specifically, those characteristics that imbue an act with the status of "official" or "unofficial" conduct (minus motive). In the end, then, under the majority's new paradigm, whether the President will be exempt from legal liability for murder, assault, theft, fraud, or any other reprehensible and outlawed criminal act will turn on whether he committed that act in his official capacity, such that the answer to the immunity question will always and inevitably be: It depends.

Under the individual accountability paradigm, the accountability analysis is markedly less

convoluted, and leads to a more certain outcome. None of the same complications or consequences arise, because, as I have explained, there are no exemptions from the criminal law for any person, but every defendant can assert whatever legal arguments and defenses might be applicable under governing law. Since no one is above the law, everyone can focus on what the law demands and permits, and on what the defendant did or did not do; no one has to worry about characterizing any criminal conduct as official or unofficial in order to assess the applicability of an immunity at the outset.

The majority's new Presidential accountability model is also distinct insofar as it accepts as a basic starting premise that generally applicable criminal laws do *not* apply to everyone in our society. In the majority's view, while all other citizens of the United States must do their jobs and live their lives within the confines of criminal prohibitions, the President cannot be made to do so; he must sometimes be exempt from the law's dictates depending on the character of his conduct. Indeed, the majority holds that the President, unlike anyone else in our country, is comparatively free to engage in criminal acts in furtherance of his official duties.[6]

[R]ecall that under the individual accountability model, an indicted former President can raise an affirmative defense just like any other criminal defendant. This means that the President remains answerable to the law, insofar as he must show that he was justified in committing a criminal act while in office under the given circumstances. In other words, while the President might indeed be privileged to commit a crime in the course of his official duties, any such privilege exists only when the People (acting either through their elected representatives or as members of a jury) determine that the former President's conduct was in fact justified, notwithstanding the general criminal prohibition.

Under the majority's immunity regime, by contrast, the President can commit crimes in the course of his job even under circumstances *in which no one thinks he has any excuse*; the law simply does not apply to him. Unlike a defendant who invokes an affirmative defense and relies on a legal determination that there was a good reason for his otherwise unlawful conduct, a former President invoking immunity relies on the premise that he can do whatever he wants, however he wants, so long as he uses his "'official power'" in doing so. In the former paradigm, the President remains subject to law; in the latter, he is above it.

Consider the structural implications of today's decision from the standpoint of the separation of powers. [W]hatever additional power the majority's new Presidential accountability model gives to the Presidency, it gives doubly to the Court itself, for the majority provides no meaningful guidance about how to apply this new paradigm or how to categorize a President's conduct. For instance, its opinion lists some examples of the "core" constitutional powers with respect to which the President is now entitled to absolute immunity—a list that apparently includes the removal power, the power to recognize foreign nations, and the pardon power. However, the majority does not—and likely cannot—supply any useful or administrable definition of the scope of that "core." For what it's worth, the Constitution's text is no help either; Article II does not contain a Core Powers Clause. So the actual metes and bounds of the "core" Presidential powers are

[6] [Relocated footnote]: [C]onsider what the majority says is one of the President's "conclusive and preclusive" prerogatives: "'[t]he President's power to remove ... those who wield executive power on his behalf.'" While the President may have the authority to decide to remove the Attorney General, for example, the question here is whether the President has the option to remove the Attorney General by, say, poisoning him to death. Put another way, the issue here is not whether the President has exclusive removal power, but whether a generally applicable criminal law prohibiting murder can restrict *how* the President exercises that authority.

really anyone's guess.

Perhaps even more troubling, while Congress (the branch of our Government most accountable to the People) is the entity our Constitution tasks with deciding, as a general matter, what conduct is on or off limits, the Court has now arrogated that power unto itself when that question pertains to the President.

Ironically, then, while purportedly seeking to transcend politics, the Court today displaces the independent judgments of the political branches about the circumstances under which the criminal law should apply. Effectively, the Court elbows out of the way both Congress and prosecutorial authorities within the Executive Branch, making itself the indispensable player in all future attempts to hold former Presidents accountable to generally applicable criminal laws. "The Framers, however, did not make the judiciary the overseer of our government." *Youngstown* (Frankfurter, J., concurring). To be sure, this Court may sometimes "have to intervene in determining where authority lies as between the democratic forces in our scheme of government." But it has long been understood that "we should be wary and humble" when doing so. The majority displays no such caution or humility now. Instead, the Court today transfers from the political branches to itself the power to decide when the President can be held accountable. What is left in its wake is a greatly weakened Congress [and] a greatly empowered Court.

But the majority … tells us not to worry, because "[l]ike everyone else, the President is subject to prosecution in his *unofficial* capacity." [T]here is *still* manifest inequity: Presidents alone are now free to commit crimes when they are on the job, while all other Americans must follow the law in all aspects of their lives, whether personal or professional. From this day forward, Presidents of tomorrow will be free to exercise the Commander-in-Chief powers, the foreign-affairs powers, and all the vast law enforcement powers enshrined in Article II however they please—including in ways that Congress has deemed criminal and that have potentially grave consequences for the rights and liberties of Americans.

Stated simply: The Court has now declared for the first time in history that the most powerful official in the United States can (under circumstances yet to be fully determined) become a law unto himself. As we enter this uncharted territory, the People, in their wisdom, will need to remain ever attentive, consistently fulfilling their established role in our constitutional democracy, and thus collectively serving as the ultimate safeguard against any chaos spawned by this Court's decision. For, like our democracy, our Constitution is "the creature of their will, and lives only by their will."

Once self-regulating, the Rule of Law now becomes the rule of judges, with courts pronouncing which crimes committed by a President have to be let go and which can be redressed as impermissible.

The majority of my colleagues seems to have put their trust in our Court's ability to prevent Presidents from becoming Kings through case-by-case application of the indeterminate standards of their new Presidential accountability paradigm. I fear that they are wrong. But, for all our sakes, I hope that they are right. In the meantime, because the risks (and power) the Court has now assumed are intolerable, unwarranted, and plainly antithetical to bedrock constitutional norms, I dissent.

The Government has applied for a stay of orders from the District Court for the District of Columbia enjoining the President's removal of a member of the National Labor Relations Board (NLRB) and a member of the Merit Systems Protection Board (MSPB), respectively. The President is prohibited by statute from removing these officers except for cause, and no qualifying cause was given. See 29 U. S. C. § 153(a); 5 U. S. C. § 1202(d).

The application for stay presented to THE CHIEF JUSTICE and by him referred to the Court is granted. Because the Constitution vests the executive power in the President, see Art. II, § 1, cl. 1, he may remove without cause executive officers who exercise that power on his behalf, subject to narrow exceptions recognized by our precedents, see *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. 197, 215−218 (2020). The stay reflects our judgment that the Government is likely to show that both the NLRB and MSPB exercise considerable executive power. But we do not ultimately decide in this posture whether the NLRB or MSPB falls within such a recognized exception; that question is better left for resolution after full briefing and argument. The stay also reflects our judgment that the Government faces greater risk of harm from an order allowing a removed officer to continue exercising the executive power than a wrongfully removed officer faces from being unable to perform her statutory duty. See *Trump v. International Refugee Assistance Project*, 582 U.S. 571, 580 (2017) (*per curiam*) ("The purpose of ... interim equitable relief is not to conclusively determine the rights of the parties, but to balance the equities as the litigation moves forward." (citation omitted)). A stay is appropriate to avoid the disruptive effect of the repeated removal and reinstatement of officers during the pendency of this litigation.

Finally, respondents Gwynne Wilcox and Cathy Harris contend that arguments in this case necessarily implicate the constitutionality of for-cause removal protections for members of the Federal Reserve's Board of Governors or other members of the Federal Open Market Committee. We disagree. The Federal Reserve is a uniquely structured, quasi-private entity that follows in the distinct historical tradition of the First and Second Banks of the United States.

The March 4, 2025, order of the United States District Court for the District of Columbia, No. 25−cv−412, ECF Doc. 39, and the March 6, 2025, order of the United States District Court for the District of Columbia, No. 25−cv−334, ECF Doc. 34, are stayed pending the disposition of the appeal in the United States Court of Appeals for the District of Columbia Circuit and disposition of a petition for a writ of certiorari, if such a writ is timely sought. Should certiorari be denied, this stay shall terminate automatically. In the event certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.

Justice KAGAN, with whom Justice SOTOMAYOR and Justice JACKSON join, dissenting from the grant of the application for stay.

For 90 years, *Humphrey's Executor* v. *United States* has stood as a precedent of this Court. And not just any precedent. *Humphrey's* undergirds a significant feature of American governance: bipartisan administrative bodies carrying out expertise-based functions with a measure of independence from presidential control. The two such agencies involved in this application are the National Labor Relations Board (NLRB) and Merit Systems Protection Board (MSPB). But there are many others—among them, the Federal Communications Commission (FCC), Federal Trade Commission (FTC), and Federal Reserve Board. Congress created them all, though at different times, out of one basic vision. It thought that in certain spheres of government, a group of knowledgeable peo-

ple from both parties—none of whom a President could remove without cause—would make decisions likely to advance the long-term public good. And that congressional judgment, *Humphrey's* makes clear, creates no conflict with the Constitution. Rejecting a claim that the removal restriction enacted for the FTC interferes with "the executive power," the *Humphrey's* Court held that Congress has authority, in creating such "quasi-legislative or quasi-judicial" bodies, to "forbid their [members'] removal except for cause.").

The current President believes that *Humphrey's* should be either overruled or confined. See Application 14; Letter from S. Harris, Acting Solicitor General, to Rep. J. Raskin, Re: Restrictions on the Removal of Certain Principal Officers of the United States (Feb. 12, 2025). And he has chosen to act on that belief—really, to take the law into his own hands. Not since the 1950s (or even before) has a President, without a legitimate reason, tried to remove an officer from a classic independent agency—a multi-member, bipartisan commission exercising regulatory power whose governing statute contains a for-cause provision. Yet now the President has discharged, concededly without cause, several such officers, including a member of the NLRB (Gwynne Wilcox) and a member of the MSPB (Cathy Harris). Today, this Court effectively blesses those deeds. I would not. Our *Humphrey's* decision remains good law, and it forecloses both the President's firings and the Court's decision to award emergency relief.

Our emergency docket, while fit for some things, should not be used to overrule or revise existing law. We consider emergency applications "on a short fuse without benefit of full briefing and oral argument"; and we resolve them without fully (or at all) stating our reasons. It is one thing to grant relief in that way when doing so vindicates established legal rights, which somehow the courts below have disregarded. It is a wholly different thing to skip the usual appellate process when issuing an order that itself changes the law. And nowhere is short-circuiting our deliberative process less appropriate than when the ruling requested would disrespect—by either overturning or narrowing—one of this Court's longstanding precedents, like our nearly century-old *Humphrey's* decision.

Under that decision, this case is easy, as the courts below found: The President has no legal right to relief. Congress, by statute, has protected members of the NLRB and MSPB (like Wilcox and Harris) from Presidential removal except for good cause. And, again, *Humphrey's* instructs that Congress can do so without offending the Constitution. Just like the agency at issue there (the FTC), the NLRB and MSPB are multi-member bodies of experts, balanced along partisan lines, with "quasi-legislative or quasi-judicial" (not "purely executive") functions. So both fit securely within the ambit of *Humphrey's*—as no one in the history of either agency has ever doubted. That means to fire their members, the President—under existing law—needs good cause, which he admits he does not have. The only way out of that box is to upend *Humphrey's*.

For that reason, the majority's order granting the President's request for a stay is nothing short of extraordinary. That order consents to the President's (statutorily barred) removal of the NLRB and MSPB Commissioners, at least until we decide their suits on the merits. And so the order allows the President to overrule *Humphrey's* by fiat, again pending our eventual review. This Court often reminds other judges that if one of our precedents "has direct application in a case," they must follow it, even if they dislike it—"leaving to this Court the prerogative of overruling its own decisions." In keeping with that directive, lower courts recently faced with challenges to independent agencies' removal provisions have uniformly rejected them based on *Humphrey's*. It should go without saying that the President must likewise follow existing precedent, however strong he thinks the arguments against it—unless and

until he convinces us to reject what we previously held. Yet here the President fired the NLRB and MSPB Commissioners in the teeth of *Humphrey's*, betting that this Court would acquiesce. And the majority today obliges—without so much as mentioning *Humphrey's*.

The majority's explanation of its action unfolds in two parts, neither rising to the occasion.

The first gestures toward the merits, but in a most unusual and unedifying way. Our normal (invariable?) practice is to grant a stay pending appeal only when we decide the applicant is likely to succeed on the merits. But the majority's order purports not to reach that conclusion. According to the majority, the President may remove without cause officers exercising executive power, "subject to narrow exceptions recognized by our precedents." The majority will not say the name of the relevant precedent, but one of those "exceptions" of course comes from *Humphrey's*. The question thus becomes: Does *Humphrey's* protect the NLRB and MSPB Commissioners? Well, the majority says, those officers likely exercise "considerable executive power"; but whether they fall within "a recognized exception"—*i.e., Humphrey's*—is better left for the future. So the majority's order just restates the question this case raises—despite the need to give a preliminary answer before ordering relief. Unless ... unless the majority thinks it has provided a hint. Maybe by saying that the Commissioners exercise "considerable" executive power, the majority is suggesting that they cannot fall within the *Humphrey's* "exception." But if that is what the majority means, then it has foretold a massive change in the law—reducing *Humphrey's* to nothing and depriving members of the NLRB, MSPB, and many other independent agencies of tenure protections. And it has done so on the emergency docket, with little time, scant briefing, and no argument.

The second part of the majority's explanation, focusing on what we typically call the balance of equities, in no way compensates for the first's failures. Here, the majority reasons that a stay is justified because the interests at stake are lopsided. "[T]he Government," it declares, "faces greater risk of harm from an order allowing a removed officer to continue exercising the executive power than a wrongfully removed officer faces from being unable to perform her statutory duty." *Ante,* at - 1417. But that statement misapprehends, on both sides, what this case involves.

On the latter side, the relevant interest is not the "wrongfully removed officer[s']," but rather Congress's and, more broadly, the public's. What matters, in other words, is not that Wilcox and Harris would love to keep serving in their nifty jobs. What matters instead is that Congress provided for them to serve their full terms, protected from a President's desire to substitute his political allies. Or differently put, the interest at stake is in maintaining Congress's idea of independent agencies: bodies of specialists balanced along partisan lines, which will make sound judgments precisely because not fully controlled by the White House. Even without *Humphrey's*, this Court would have to give respect, in balancing equities, to Congress's expression of that idea in legislation. See *Turner Broadcasting System, Inc. v. FCC*, 507 U.S. 1301, 1302 (1993) (Rehnquist, C. J., in chambers) (Acts of Congress "should remain in effect pending a final decision on the merits by this Court"); *Walters v. National Assn. of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers) ("The presumption of constitutionality which attaches to every Act of Congress" is "an equity to be considered" in the stay analysis). And of course the Court is not without *Humphrey's*, which already approved the kind of removal restrictions at issue here. Given that decision—and the near-century of administrative practice that has followed—the majority has no excuse for so misidentifying the interest that cuts against unconstrained removal. It is, again, the interest in the NLRB, MSPB, and all their ilk working as Congress intended them to, on the view that a

measure of independence would serve the public good.

And on the former side of the balance, the majority distorts and overstates the interest in preventing Wilcox and Harris from continuing in office. That interest, to begin with, is not "the Government['s]," but only the President's. Congress, after all, is also part of the Government, and (as just noted) its equities lie in preserving the legislation it has enacted to limit removals. And as to the President's interest in firing Wilcox and Harris, the majority gives it more weight than it has borne in almost a century. Between *Humphrey's* and now, 14 different Presidents have lived with Congress's restrictions on firing members of independent agencies. No doubt many would have preferred it otherwise. But can it really be said, after all this time, that the President has a crying need to discharge independent agency members right away—before this Court (surely next Term) decides the fate of *Humphrey's* on the merits? The impatience to get on with things—to *now* hand the President the most unitary, meaning also the most subservient, administration since Herbert Hoover (and maybe ever)—must reveal how that eventual decision will go. In valuing so highly—in an emergency posture—the President's ability to fire without cause Wilcox and Harris and everyone like them, the majority all but declares *Humphrey's* itself the emergency.[11]

Except apparently for the Federal Reserve. The majority closes today's order by stating, out of the blue, that it has no bearing on "the constitutionality of for-cause removal protections" for members of the Federal Reserve Board or Open Market Committee. I am glad to hear it, and do not doubt the majority's intention to avoid imperiling the Fed. But then, today's order poses a puzzle. For the Federal Reserve's independence rests on the same constitutional and analytic foundations as that of the NLRB, MSPB, FTC, FCC, and so on—which is to say it rests largely on *Humphrey's*. So the majority has to offer a different story: The Federal Reserve, it submits, is a "uniquely structured" entity with a "distinct historical tradition"—and it cites for that proposition footnote 8 of this Court's opinion in *Seila Law*.). But—sorry—footnote 8 provides no support. Its only relevant sentence rejects an argument made in the dissenting opinion "even assuming [that] financial institutions like the Second Bank and Federal Reserve can claim a special historical status." And so an assumption made to humor a dissent gets turned into some kind of holding. Because one way of making new law on the emergency docket (the deprecation of *Humphrey's*) turns out to require yet another (the creation of a bespoke Federal Reserve exception). If the idea is to reassure the markets, a simpler—and more judicial—approach would have been to deny the President's application for a stay on the continued authority of *Humphrey's*.

"To avoid an arbitrary discretion in the courts," Hamilton wrote, "it is indispensable that they should be bound down by strict rules and precedents." Federalist No. 78. Today's order, however, favors the President over our precedent; and it does so unrestrained by the rules of briefing and argument—and the passage of time—needed to discipline our decision-making. I would deny the President's application. I would do so based on the will of Congress, this Court's seminal decision approving independ-

[1] The majority also justifies its stay on the ground that it will "avoid the disruptive effect of the repeated removal and reinstatement of officers during the pendency of this litigation." But that reason, too, gives the ultimate game away. As this case came to us, Wilcox and Harris had been reinstated to their positions, by the combined rulings of the district and appellate courts. So by re-removing them, the majority's order itself causes disruption—except, of course, if that order presumes or implies that they will be re-removed next Term anyway.

ent agencies' for-cause protections, and the ensuing 90 years of this Nation's history. Respectfully, I dissent.

Amy Howe, Supreme Court appears likely to prevent Trump from firing Fed governor, Scotusblog, 1/21/26

The Supreme Court on Wednesday appeared likely to leave Lisa Cook, a member of the Federal Reserve's Board of Governors, on the job while her challenge to President Donald Trump's attempt to fire her continues. Although the Trump administration contends that the president acted within the law, a majority of the justices seemed ready to reject the government's request to allow him to remove her, even if it was not clear whether the justices would send the case back to the lower courts or instead go ahead and rule that Trump does not have a good reason to fire Cook.

Wednesday's arguments in Trump v. Cook implicated two related issues – the president's power to fire the heads of multi-member, independent agencies and his ongoing frustration with the actions (or lack thereof) of the Federal Reserve. Since Trump took office last year, the court – on its interim docket – has allowed him to remove members of the National Labor Relations Board, Consumer Product Safety Commission, and the Merit Systems Protection Board. The justices also heard arguments in December in the case of Rebecca Slaughter, a member of the Federal Trade Commission whom Trump fired in March. They are expected to decide by summer whether a federal law that bars him from removing members of the FTC except in cases of "inefficiency, neglect of duty, or malfeasance in office" violates the constitutional separation of powers.

Trump has also been sharply critical of the Fed and its chair, Jerome Powell, since he was sworn in for a second term last year, particularly for its reluctance to lower interest rates. The Fed eventually lowered rates at meetings this fall.

Powell disclosed earlier this month that he is under investigation by Jeanine Pirro, the U.S. attorney for the District of Columbia, for alleged irregularities in the $2.5 billion renovation of the Fed's headquarters and Powell's statements to Congress about the renovation. The White House has said that Trump did not direct Pirro to investigate Powell, who attended Wednesday's argument.

Cook was first appointed to the Fed in 2022; then-President Joe Biden reappointed her to serve a new 14-year term on the board in 2023. Under the Federal Reserve Act, Trump can only fire Cook "for cause" – a term that the law does not define.

In August 2025, Trump posted screenshots on the social media site Truth Social of a letter in which he fired Cook from the Fed. Trump contended that, before joining the Fed, Cook had committed mortgage fraud by designating both a house in Michigan and a condo in Atlanta as her "primary residence" when taking out loans within a two-week period. (Cook "unequivocally" denies the allegations and says that she is "prepared to refute the allegations in an appropriate forum.")

Cook went to federal court in Washington, D.C., where U.S. District Judge Jia Cobb issued an order that allowed Cook to stay at the Fed while her challenge continued. When a federal appeals court declined to disturb that decision, the Trump administration went to the Supreme Court, asking the justices to intervene and allow it to remove Cook. In an order on Oct. 1, the court put that request on hold but agreed to hear arguments in January.

U.S. Solicitor General D. John Sauer, representing the Trump administration, told the court on Wednesday that deceit or gross negligence by a financial regulator in a financial transaction should be cause for her removal. It "sends the wrong message," he suggested, for someone like Cook to be setting interest rates for the American people.

Former U.S. Solicitor General Paul Clement, representing Cook, emphasized that the Federal Reserve is a "uniquely structured entity" with a

distinct historical tradition. Adopting the administration's view of the "for cause" removal provision, Clement contended, "would reduce the removal restriction in this unique institution to something that could only be recognized as at-will employment." There was no reason, Clement continued, for Congress to create the Fed as an independent entity only to give it a removal restriction as "toothless" as the president contends.

During just under two hours of oral arguments, the court wrestled with a variety of difficult questions. One such question stemmed from Cook's contention that she was entitled to notice and an opportunity to be heard before she could be fired. The Trump administration disputed that Cook has such a right, pointing to the lack of any provision for notice and a hearing in the removal law.

Justice Clarence Thomas was sympathetic. He suggested to Clement that, if Congress was truly concerned about the Fed's independence, it could have included language in the removal statute to require notice and a hearing. Clement countered that when Congress drafted the removal law, the Senate debate featured legislators using the terms "for cause" and "inefficiency, neglect of duty, and malfeasance in office" (a standard used for other agency officials that the Supreme Court has interpreted to require notice and a hearing) "interchangeably."

But even if Cook has a right to notice and to be heard, some justices asked, what kind of procedures would be required? Clement cited the system used by former President William Taft, which gave officials notice and an opportunity to be heard before a full tribunal. For Clement, the key point was that if an administration created a more detailed system, there would be "less room .. for judicial review" and for "judicial second-guessing of factual determinations."

Justice Samuel Alito found Clement's "sliding scale" "extraordinarily unhelpful," and asked Clement to describe the "minimum" process that would be required in a case like Cook's.

Clement responded that an official like Cook would be entitled to notice, an opportunity to provide evidence to the decision-maker, and an opportunity to keep the decision-maker from prejudging the evidence. The president, Clement argued, should not have said in his Truth Social post that Cook should "resign or be fired." Other justices seemed more amenable to the idea that Cook should receive greater process. Justice Brett Kavanaugh asked Sauer to explain "what's the fear of more process here?" Providing Cook with notice and an opportunity to present her case, he posited, would help the executive branch make better decisions and improve public confidence in those decisions.

Justice Amy Coney Barrett appeared to agree. She told Sauer that the Trump administration had "spent a lot of time litigating [Cook's] case." Why couldn't it have put those resources into a hearing instead, she wondered aloud, to show that it had cause to fire Cook?

The court also grappled with what it would mean for the president to fire a member of the Fed "for cause," and whether that standard had been met in Cook's case. Clement insisted that, as Cobb had held, a member of the Fed cannot be fired for conduct that occurred before she took office. When some justices questioned whether that standard would allow a Fed governor to remain in office despite severe misconduct, Clement pointed out that (among other things) Congress could always impeach the governor.

Other justices disputed Sauer's contention that the allegations against Cook rose to the level of "deceit" or "gross[] negligence." Chief Justice John Roberts, for example, observed that the allegations were "contradicted by other documents in the record," and he noted that any representations about her residences would have been made as part of a "stack of papers you have to fill out."

Justice Ketanji Brown Jackson suggested that the facts of Cook's case still needed to be developed – for example, when Cook signed the mortgage applications and what she thought she was attesting to.

Justice Sonia Sotomayor also suggested that there is still a "factual dispute" about the allegations against Cook, citing assertions made in a letter to the Department of Justice by Cook's lawyer. Is it "grossly negligent," she asked to make a mistake on a mortgage application, and who should resolve that issue?

Roberts appeared frustrated with the Trump administration's contention that federal courts do not have the power to reinstate officials who have been wrongly removed. If you are correct, he said to Sauer, then "why are we wasting our time wondering if there's cause" to fire an official in the first place – because the answer to the latter question ultimately would not make a difference?

Justice Elena Kagan raised a similar concern. "If there's no way to reinstate" an official who was improperly fired, she said, then "what does this cause requirement amount to?" It seems, she said "non-effectual."

Several justices expressed dissatisfaction with the posture in which the dispute came to the court – on its interim docket, rather than after full briefing on the merits. This included Alito, who pressed Sauer to explain why the case had "to be handled by everyone" – including the lower courts – on an expedited basis? Even the executive branch, Alito complained, handled Cook's termination "in a very cursory manner."

Sotomayor echoed this sentiment, emphasizing the many questions that the lower courts had not addressed. Why, she said to Sauer, are you asking us to decide these issues – such as whether the president's determination of "for cause" is reviewable at all – once and for all in an emergency application?

Because the case came to the Supreme Court on its interim docket, with the Trump administration asking the justices to pause Cobb's order, the factors that the justices will consider in deciding whether to grant that request include not only whether the administration is ultimately likely to prevail on the merits of the dispute, but also the public interest and whether either set of litigants will be permanently harmed by a ruling for the other side.

Addressing the "public interest" factor, Barrett asked Sauer about a "friend of the court" brief by a group of economists supporting Cook, who contended that granting the stay requested by the Trump administration "could trigger a recession. How," Barrett queried, "should we think about the public interest in a case like this?"

Sauer urged the justices to "consider all those amicus briefs and their … predictions of doom with a fairly jaundiced eye," dismissing the briefs "as a reflection of very elite opinion."

But when, at Barrett's prompting, Sauer conceded that there is a risk of a recession, Barrett countered, "I don't want to be responsible for quantifying that risk. I'm a judge, not an economist."

In an exchange with Clement later in the argument, Barrett also asked him to explain why, even if the court were to ultimately rule that Trump does have the power to fire Cook, the president is not permanently harmed by allowing her to remain in office for now.

Clement told the justices that the Trump administration had agreed that "the Fed is different at least for purposes of this case and that we can't remove somebody just for policy disagreements." Therefore, he said, "having somebody continuing in office just because you have a different conception of 'for cause' … doesn't strike me as irreparable harm." By contrast, he posited, "there are enormous irreparable harms" from allowing Trump to fire Cook now

because of the unique role of the Fed in determining monetary policy and the extent to which "markets watch the Fed a little more closely than they watch really any other agency of government."

Kavanaugh expressed concern about the perceived independence of the Federal Reserve. He told Sauer that, "on … your position that there's no judicial review" for the president's determination that he has cause to fire a Fed governor, "no process required, no remedy available, a very low bar for cause that the president alone determines … that would weaken, if not shatter, the independence of the Federal Reserve."

Kavanaugh also cited what he described as the "real-world effect" of a ruling for the Trump administration: if the court allows Trump to remove Cook, "what goes around comes around," and a future Democratic president will remove Republican appointees to the Fed. When Sauer demurred, telling Kavanaugh that he "cannot predict" what might happen in the future, Kavanaugh retorted that "history is a pretty good guide. Once these tools are unleashed, they are used by both sides and usually more the second time around."

Toward the end of Clement's time at the lectern, Kavanaugh was looking for what he described as the "simplest way … to decide" the case. Would it be for the court to deny the Trump administration's request to pause Cobb's order, on the ground that Cook had not had sufficient process before she was fired?

Clement agreed that it would be, but with a caveat. Such a ruling, he said, would "maximize[] the chances" that the dispute would return to the justices again in the future.

A decision in the case is expected by summer.

National Federation of Independent Business v. Department of Labor, 142 S.Ct. 661 (2022)

[*Plaintiffs challenged an emergency OSHA regulation that temporarily ordered employers with at least 100 employees to require them to be vaccinated against COVID–19 or take a weekly COVID–19 test and wear a mask at work. A number of challenges to the regulation were filed in various Circuits. (Such actions are typically filed in the circuit courts, not federal district court.) Pursuant to a federal statute, the challenges were consolidated in one circuit, the Sixth. The Sixth Circuit lifted a stay of enforcement of the regulation that the Fifth Circuit had previously imposed. Petitioners presented a request to Justice Kavanaugh, who is assigned to the Sixth Circuit, for a stay of enforcement. He referred the matter to the full Court. Thus the opinions excerpted below were issued after limited briefing, on an accelerated schedule. The circuit courts are empowered to issue a stay of enforcement of a challenged regulation pending determination of the merits only if (1) plaintiffs' claims "are likely to prevail," (2) a denial of relief pending litigation would cause irreparable injury, and (3) a grant of relief would not harm the public interest. The Supreme Court will grant a stay in the face of a lower court denial of one only if the case for a stay is "indisputably clear." The Court granted the stay and remanded the case to the Sixth Circuit for determination of the merits.*]

Per Curiam. Congress enacted the Occupational Safety and Health Act in 1970. 29 U.S.C. § 651 *et seq.* The Act created the Occupational Safety and Health Administration (OSHA), which is part of the Department of Labor and under the supervision of its Secretary. OSHA is tasked with ensuring *occupational* safety—that is, "safe and healthful working conditions." § 651(b). It does so by enforcing occupational safety and health standards promulgated by the Secretary. § 655(b). Such standards must be "reasonably necessary or appropriate to provide safe or healthful *employment*." § 652(8). They must also be developed using a rigorous process that includes notice, comment, and an opportunity for a public hearing. § 655(b).

The Act contains an exception to those ordinary notice-and-comment procedures for "emergency temporary standards." § 655(c)(1). Such standards may "take immediate effect upon publication in the Federal Register." They are permissible, however, only in the narrowest of circumstances: the Secretary must show (1) "that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards," and (2) that the "emergency standard is necessary to protect employees from such danger." Prior to the emergence of COVID–19, the Secretary had used this power just nine times before (and never to issue a rule as broad as this one). Of those nine emergency rules, six were challenged in court, and only one of those was upheld in full.

Applicants are likely to succeed on the merits of their claim that the Secretary lacked authority to impose the mandate. Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided. The Secretary has ordered 84 million Americans to either obtain a COVID–19 vaccine or undergo weekly medical testing at their own expense. This is no "everyday exercise of federal power." It is instead a significant encroachment into the lives—and health—of a vast number of employees. "We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 141 S.Ct. 2485, 2489 (2021) (*per curiam*) There can be little doubt that OSHA's mandate qualifies as an exercise of such authority.

The question, then, is whether the Act plainly authorizes the Secretary's mandate. It does not. The Act empowers the Secretary to set *workplace* safety standards, not broad public health

measures. § 655(b) (directing the Secretary to set "*occupational* safety and health standards" (emphasis added)); § 655(c)(1) (authorizing the Secretary to impose emergency temporary standards necessary to protect "employees" from grave danger in the workplace). Confirming the point, the Act's provisions typically speak to hazards that employees face at work. And no provision of the Act addresses public health more generally, which falls outside of OSHA's sphere of expertise.

The dissent protests that we are imposing "a limit found no place in the governing statute." Not so. It is the text of the agency's Organic Act that repeatedly makes clear that OSHA is charged with regulating "occupational" hazards and the safety and health of "employees."

The Solicitor General does not dispute that OSHA is limited to regulating "work-related dangers." She instead argues that the risk of contracting COVID–19 qualifies as such a danger. We cannot agree. Although COVID–19 is a risk that occurs in many workplaces, it is not an *occupational* hazard in most. COVID–19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather. That kind of universal risk is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases. Permitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA's regulatory authority without clear congressional authorization.

The dissent contends that OSHA's mandate is comparable to a fire or sanitation regulation imposed by the agency. But a vaccine mandate is strikingly unlike the workplace regulations that OSHA has typically imposed. A vaccination, after all, "cannot be undone at the end of the workday." Contrary to the dissent's contention, imposing a vaccine mandate on 84 million Americans in response to a worldwide pandemic is simply not "part of what the agency was built for."

That is not to say OSHA lacks authority to regulate occupation-specific risks related to COVID–19. Where the virus poses a special danger because of the particular features of an employee's job or workplace, targeted regulations are plainly permissible. We do not doubt, for example, that OSHA could regulate researchers who work with the COVID–19 virus. So too could OSHA regulate risks associated with working in particularly crowded or cramped environments. But the danger present in such workplaces differs in both degree and kind from the everyday risk of contracting COVID–19 that all face. OSHA's indiscriminate approach fails to account for this crucial distinction—between occupational risk and risk more generally—and accordingly the mandate takes on the character of a general public health measure, rather than an "*occupational* safety or health standard." § 655(b) (emphasis added).

In looking for legislative support for the vaccine mandate, the dissent turns to the American Rescue Plan Act of 2021, Pub. L. 117–2, 135 Stat. 4. That legislation, signed into law on March 11, 2021, of course said nothing about OSHA's vaccine mandate, which was not announced until six months later.

It is telling that OSHA has never before adopted a broad public health regulation of this kind—addressing a threat that is untethered, in any causal sense, from the workplace. This "lack of historical precedent," coupled with the breadth of authority that the Secretary now claims, is a "telling indication" that the mandate extends beyond the agency's legitimate reach.

The equities do not justify withholding interim relief. We are told by the States and the employers that OSHA's mandate will force them to incur billions of dollars in unrecoverable compliance costs and will cause hundreds of thousands of employees to leave their jobs. For its part, the Federal Government says that the

mandate will save over 6,500 lives and prevent hundreds of thousands of hospitalizations.

It is not our role to weigh such tradeoffs. In our system of government, that is the responsibility of those chosen by the people through democratic processes. Although Congress has indisputably given OSHA the power to regulate occupational dangers, it has not given that agency the power to regulate public health more broadly.

The applications for stays presented to Justice KAVANAUGH and by him referred to the Court are granted.

Justice GORSUCH, with whom Justice THOMAS and Justice ALITO join, concurring.

The central question we face today is: Who decides? No one doubts that the COVID–19 pandemic has posed challenges for every American. Or that our state, local, and national governments all have roles to play in combating the disease. The only question is whether an administrative agency in Washington, one charged with overseeing workplace safety, may mandate the vaccination or regular testing of 84 million people. Or whether, as 27 States before us submit, that work belongs to state and local governments across the country and the people's elected representatives in Congress. This Court is not a public health authority. But it is charged with resolving disputes about which authorities possess the power to make the laws that govern us under the Constitution and the laws of the land.

There is no question that state and local authorities possess considerable power to regulate public health. They enjoy the "general power of governing," including all sovereign powers envisioned by the Constitution and not specifically vested in the federal government. And in fact, States have pursued a variety of measures in response to the current pandemic. The federal government's powers, however, are not general but limited and divided. Not only must the federal government properly invoke a constitutionally enumerated source of authority to regulate in this area or any other. It must also act consistently with the Constitution's separation of powers. And when it comes to that obligation, this Court has established at least one firm rule: "We expect Congress to speak clearly" if it wishes to assign to an executive agency decisions "of vast economic and political significance." We sometimes call this the major questions doctrine. *Gundy* v. *United States*, 139 S.Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting).

OSHA's mandate fails that doctrine's test. The Court rightly applies the major questions doctrine and concludes that this lone statutory subsection does not clearly authorize OSHA's mandate. Section 655(c)(1) was not adopted in response to the pandemic, but some 50 years ago at the time of OSHA's creation. Since then, OSHA has relied on it to issue only comparatively modest rules addressing dangers uniquely prevalent inside the workplace, like asbestos and rare chemicals. As the agency itself explained to a federal court less than two years ago, the statute does "not authorize OSHA to issue sweeping health standards" that affect workers' lives outside the workplace. Yet that is precisely what the agency seeks to do now—regulate not just what happens inside the workplace but induce individuals to undertake a medical procedure that affects their lives outside the workplace. Historically, such matters have been regulated at the state level by authorities who enjoy broader and more general governmental powers. Meanwhile, at the federal level, OSHA arguably is not even the agency most associated with public health regulation. And in the rare instances when Congress has sought to mandate vaccinations, it has done so expressly. We have nothing like that here.

Why does the major questions doctrine matter? It ensures that the national government's power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people's elected representa-

tives. If administrative agencies seek to regulate the daily lives and liberties of millions of Americans, the doctrine says, they must at least be able to trace that power to a clear grant of authority from Congress.

The major questions doctrine is closely related to what is sometimes called the nondelegation doctrine. Indeed, for decades courts have cited the nondelegation doctrine as a reason to apply the major questions doctrine. Both are designed to protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands.

The nondelegation doctrine ensures democratic accountability by preventing Congress from intentionally delegating its legislative powers to unelected officials. The major questions doctrine serves a similar function by guarding against unintentional, oblique, or otherwise unlikely delegations of the legislative power. Sometimes, Congress passes broadly worded statutes seeking to resolve important policy questions in a field while leaving an agency to work out the details of implementation. Later, the agency may seek to exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond its initial assignment. The major questions doctrine guards against this possibility by recognizing that Congress does not usually "hide elephants in mouseholes."

Whichever the doctrine, the point is the same. Both serve to prevent "government by bureaucracy supplanting government by the people." On the one hand, OSHA claims the power to issue a nationwide mandate on a major question but cannot trace its authority to do so to any clear congressional mandate. On the other hand, if the statutory subsection the agency cites really did endow OSHA with the power it asserts, that law would likely constitute an unconstitutional delegation of legislative authority.

Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN, dissenting.

In 1970, Congress enacted the Occupational Safety and Health Act (Act) "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources," including "by developing innovative methods, techniques, and approaches for dealing with occupational safety and health problems." §§ 651(b), (b)(5). The Act requires OSHA to issue "an emergency temporary standard to take immediate effect upon publication in the Federal Register if [the agency] determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger." § 655(c)(1).

Every day, COVID–19 poses grave dangers to the citizens of this country—and particularly, to its workers. The disease has by now killed almost 1 million Americans and hospitalized almost 4 million. It spreads by person-to-person contact in confined indoor spaces, so causes harm in nearly all workplace environments. And in those environments, more than any others, individuals have little control, and therefore little capacity to mitigate risk. COVID–19, in short, is a menace in work settings. The proof is all around us: Since the disease's onset, most Americans have seen their workplaces transformed.

Acting under that statutory command, OSHA promulgated the emergency temporary standard at issue here. The Standard obligates employers with at least 100 employees to require that an employee either (1) be vaccinated against COVID–19 or (2) take a weekly COVID–19 test and wear a mask at work. The Standard falls within the core of the agency's mission: to "protect employees" from "grave danger" that comes from "new hazards" or exposure to harmful agents. § 655(c)(1). OSHA estimates—and there is no ground for disputing—that the Standard will save over 6,500 lives and prevent over 250,000 hospitalizations

in six months' time.

The Standard encourages vaccination, but permits employers to adopt a masking-or-testing policy instead. (The majority obscures this choice by insistently calling the policy a "vaccine mandate.") Further, the Standard does not apply in a variety of settings. It exempts employees who are at a reduced risk of infection because they work from home, alone, or outdoors. It makes exceptions based on religious objections or medical necessity. And the Standard does not constrain any employer able to show that its "conditions, practices, means, methods, operations, or processes" make its workplace equivalently "safe and healthful." Consistent with statutory requirements, the Standard lasts only six months.

None of [the] requirements [for the Court to grant a stay] is met here. The applicants are not "likely to prevail" under any proper view of the law. OSHA's rule perfectly fits the language of the applicable statutory provision. Once again, that provision commands—not just enables, but commands—OSHA to issue an emergency temporary standard whenever it determines "(A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger." Each and every part of that provision demands that, in the circumstances here, OSHA act to prevent workplace harm.

The virus that causes COVID–19 is a "new hazard" as well as a "physically harmful" "agent." Merriam-Webster's Collegiate Dictionary 572 (defining "hazard" as a "source of danger"); *id.,* at 24 (defining "agent" as a "chemically, physically, or biologically active principle"); *id.*, at 1397 (defining "virus" as "the causative agent of an infectious disease").

The virus also poses a "grave danger" to millions of employees. As of the time OSHA promulgated its rule, more than 725,000 Americans had died of COVID–19 and millions more had been hospitalized. Since then, the disease has continued to work its tragic toll. In the last week alone, it has caused, or helped to cause, more than 11,000 new deaths. And because the disease spreads in shared indoor spaces, it presents heightened dangers in most workplaces.

Finally, the Standard is "necessary" to address the danger of COVID–19. OSHA based its rule, requiring either testing and masking or vaccination, on a host of studies and government reports showing why those measures were of unparalleled use in limiting the threat of COVID–19 in most workplaces. The agency showed, in meticulous detail, that close contact between infected and uninfected individuals spreads the disease; that "[t]he science of transmission does not vary by industry or by type of workplace"; that testing, mask wearing, and vaccination are highly effective—indeed, essential—tools for reducing the risk of transmission, hospitalization, and death; and that unvaccinated employees of all ages face a substantially increased risk from COVID–19 as compared to their vaccinated peers. In short, OSHA showed that no lesser policy would prevent as much death and injury from COVID–19 as the Standard would.

OSHA's determinations are "conclusive if supported by substantial evidence." § 655(f). Judicial review under that test is deferential, as it should be. OSHA employs, in both its enforcement and health divisions, numerous scientists, doctors, and other experts in public health, especially as it relates to work environments. Their decisions, we have explained, should stand so long as they are supported by "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Given the extensive evidence in the record supporting OSHA's determinations about the risk of COVID–19 and the efficacy o masking, testing, and vaccination, a court could not conclude that the Standard fails substantial-evidence review.

The Court does not dispute that the statutory terms just discussed, read in the ordinary way, authorize this Standard. In other words, the majority does not contest that COVID–19 is a "new hazard" and "physically harmful agent"; that it poses a "grave danger" to employees; or that a testing and masking or vaccination policy is "necessary" to prevent those harms. Instead, the majority claims that the Act does not "plainly authorize[]" the Standard because it gives OSHA the power to "set *workplace* safety standards" and COVID–19 exists both inside and outside the workplace. In other words, the Court argues that OSHA cannot keep workplaces safe from COVID–19 because the agency (as it readily acknowledges) has no power to address the disease outside the work setting.

But nothing in the Act's text supports the majority's limitation on OSHA's regulatory authority. Of course, the majority is correct that OSHA is not a roving public health regulator: It has power only to protect employees from workplace hazards. But as just explained, that is exactly what the Standard does. And the Act requires nothing more: Contra the majority, it is indifferent to whether a hazard in the workplace is also found elsewhere. The statute generally charges OSHA with "assur[ing] so far as possible ... safe and healthful working conditions." § 651(b). That provision authorizes regulation to protect employees from all hazards present in the workplace—or, at least, all hazards in part created by conditions there. It does not matter whether those hazards also exist beyond the workplace walls. The same is true of the provision at issue here demanding the issuance of temporary emergency standards. Once again, that provision kicks in when employees are exposed in the workplace to "new hazards" or "substances or agents" determined to be "physically harmful." § 655(c)(1). The statute does not require that employees are exposed to those dangers only while on the workplace clock. And that should settle the matter. When Congress "enact[s] expansive language offering no indication whatever that the statute limits what [an agency] can" do, the Court cannot "impos[e] limits on an agency's discretion that are not supported by the text." That is what the majority today does—impose a limit found no place in the governing statute.

Consistent with Congress's directives, OSHA has long regulated risks that arise both inside and outside of the workplace. For example, OSHA has issued, and applied to nearly all workplaces, rules combating risks of fire, faulty electrical installations, and inadequate emergency exits—even though the dangers prevented by those rules arise not only in workplaces but in many physical facilities (*e.g.,* stadiums, schools, hotels, even homes). Similarly, OSHA has regulated to reduce risks from excessive noise and unsafe drinking water—again, risks hardly confined to the workplace. A biological hazard is no different. Indeed, Congress just last year made this clear. It appropriated $100 million for OSHA "to carry out COVID–19 related worker protection activities" in work environments of all kinds. That legislation refutes the majority's view that workplace exposure to COVID–19 is somehow not a workplace hazard. Congress knew—and Congress said—that OSHA's responsibility to mitigate the harms of COVID–19 in the typical workplace do not diminish just because the disease also endangers people in other settings.

That is especially so because—as OSHA amply established—COVID–19 poses special risks in most workplaces, across the country and across industries. The majority ignores these findings, but they provide more-than-ample support for the Standard. OSHA determined that the virus causing COVID–19 is "readily transmissible in workplaces because they are areas where multiple people come into contact with one another, often for extended periods of time." In other words, COVID–19 spreads more widely in workplaces than in other venues because more people spend more time together there. And critically, employees

usually have little or no control in those settings. "[D]uring the workday," OSHA explained, "workers may have little ability to limit contact with coworkers, clients, members of the public, patients, and others, any one of whom could represent a source of exposure to" the virus. The agency backed up its conclusions with hundreds of reports of workplace COVID–19 outbreaks—not just in cheek-by-jowl settings like factory assembly lines, but in retail stores, restaurants, medical facilities, construction areas, and standard offices. But still, OSHA took care to tailor the Standard. Where it could exempt work settings without exposing employees to grave danger, it did so. In sum, the agency did just what the Act told it to: It protected employees from a grave danger posed by a new virus as and where needed, and went no further. The majority, in overturning that action, substitutes judicial diktat for reasoned policymaking.

The result of its ruling is squarely at odds with the statutory scheme. As shown earlier, the Act's explicit terms authorize the Standard. Once again, OSHA must issue an emergency standard in response to new hazards in the workplace that expose employees to "grave danger." § 655(c)(1). The entire point of that provision is to enable OSHA to deal with emergencies—to put into effect the new measures needed to cope with new workplace conditions. The enacting Congress of course did not tell the agency to issue this Standard in response to this COVID–19 pandemic—because that Congress could not predict the future. But that Congress did indeed want OSHA to have the tools needed to confront emerging dangers (including contagious diseases) in the workplace. We know that, first and foremost, from the breadth of the authority Congress granted to OSHA. And we know that because of how OSHA has used that authority from the statute's beginnings—in ways not dissimilar to the action here. OSHA has often issued rules applying to all or nearly all workplaces in the Nation, affecting at once many tens of millions of employees. It has previously regulated infectious disease, including by facilitating vaccinations. And it has in other contexts required medical examinations and face coverings for employees. In line with those prior actions, the Standard here requires employers to ensure testing and masking if they do not demand vaccination. Nothing about that measure is so out-of-the-ordinary as to demand a judicially created exception from Congress's command that OSHA protect employees from grave workplace harms.

If OSHA's Standard is far-reaching—applying to many millions of American workers—it no more than reflects the scope of the crisis. The Standard responds to a workplace health emergency unprecedented in the agency's history: an infectious disease that has already killed hundreds of thousands and sickened millions; that is most easily transmitted in the shared indoor spaces that are the hallmark of American working life; and that spreads mostly without regard to differences in occupation or industry. Over the past two years, COVID–19 has affected—indeed, transformed—virtually every workforce and workplace in the Nation. Employers and employees alike have recognized and responded to the special risks of transmission in work environments. It is perverse to read the Act's grant of emergency powers in the way the majority does—as constraining OSHA from addressing one of the gravest workplace hazards in the agency's history. The Standard protects untold numbers of employees from a danger especially prevalent in workplace conditions. It lies at the core of OSHA's authority. It is part of what the agency was built for.

Even if the merits were a close question—which they are not—the Court would badly err by issuing this stay. That is because a court may not issue a stay unless the balance of harms and the public interest support the action. Here, they do not. The lives and health of the Nation's workers are at stake. And the majority deprives the Government of a measure it needs to keep them safe.

Consider first the economic harms asserted in support of a stay. The employers principally argue that the Standard will disrupt their businesses by prompting hundreds of thousands of employees to leave their jobs. But OSHA expressly considered that claim, and found it exaggerated. According to OSHA, employers that have implemented vaccine mandates have found that far fewer employees actually quit their jobs than threaten to do so. And of course, the Standard does not impose a vaccine mandate; it allows employers to require only masking and testing instead. In addition, OSHA noted that the Standard would provide employers with some countervailing economic benefits. Many employees, the agency showed, would be more likely to stay at or apply to an employer complying with the Standard's safety precautions. And employers would see far fewer work days lost from members of their workforces calling in sick. All those conclusions are reasonable, and entitled to deference.

More fundamentally, the public interest here—the interest in protecting workers from disease and death—overwhelms the employers' alleged costs. As we have said, OSHA estimated that in six months the emergency standard would save over 6,500 lives and prevent over 250,000 hospitalizations. Tragically, those estimates may prove too conservative. Since OSHA issued the Standard, the number of daily new COVID–19 cases has risen tenfold. And the number of hospitalizations has quadrupled, to a level not seen since the pandemic's previous peak. And as long as the pandemic continues, so too does the risk that mutations will produce yet more variants—just as OSHA predicted before the rise of Omicron. Far from diminishing, the need for broadly applicable workplace protections remains strong, for all the many reasons OSHA gave. These considerations weigh decisively against issuing a stay.

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

Here, an agency charged by Congress with safeguarding employees from workplace dangers has decided that action is needed. The agency has thoroughly evaluated the risks that the disease poses to workers across all sectors of the economy. And in doing all this, it has acted within the four corners of its statutory authorization—or actually here, its statutory mandate.

And then, there is this Court. Its Members are elected by, and accountable to, no one. And we "lack[] the background, competence, and expertise to assess" workplace health and safety issues. *South Bay United Pentecostal Church*, 140 S.Ct. 1613 (2020) (Roberts, C.J., concurring). When we are wise, we know enough to defer on matters like this one. When we are wise, we know not to displace the judgments of experts, acting within the sphere Congress marked out and under Presidential control, to deal with emergency conditions. Today, we are not wise. In the face of a still-raging pandemic, this Court tells the agency charged with protecting worker safety that it may not do so in all the workplaces needed. As disease and death continue to mount, this Court tells the agency that it cannot respond in the most effective way possible. Without legal basis, the Court usurps a decision that rightfully belongs to others. It undercuts the capacity of the responsible federal officials, acting well within the scope of their authority, to protect American workers from grave danger.

To ensure that Americans could keep up with increasing international competition, Congress authorized the first federal student loans in 1958—up to a total of $1,000 per student each year. National Defense Education Act of 1958, 72 Stat. 1584. Outstanding federal student loans now total $1.6 trillion extended to 43 million borrowers. Last year, the Secretary of Education established the first comprehensive student loan forgiveness program, invoking the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act) for authority to do so. The Secretary's plan canceled roughly $430 billion of federal student loan balances, completely erasing the debts of 20 million borrowers and lowering the median amount owed by the other 23 million from $29,400 to $13,600. Six States sued, arguing that the HEROES Act does not authorize the loan cancellation plan. We agree.

I

The Higher Education Act of 1965 was enacted to increase educational opportunities and "assist in making available the benefits of postsecondary education to eligible students . . . in institutions of higher education." 20 U.S.C. § 1070(a). To that end, Title IV of the Act restructured federal financial aid mechanisms and established three types of federal student loans. Direct Loans are, as the name suggests, made directly to students and funded by the federal fisc; they constitute the bulk of the Federal Government's student lending efforts. The Government also administers Perkins Loans—government-subsidized, low-interest loans made by schools to students with significant financial need—and Federal Family Education Loans, or FFELs—loans made by private lenders and guaranteed by the Federal Government. While FFELs and Perkins Loans are no longer issued, many remain outstanding.

The terms of federal loans are set by law, not the market, so they often come with benefits not offered by private lenders. Such benefits include deferment of any repayment until after graduation, loan qualification regardless of credit history, relatively low fixed interest rates, income-sensitive repayment plans, and—for undergraduate students with financial need—government payment of interest while the borrower is in school..

The Education Act specifies in detail the terms and conditions attached to federal loans, including applicable interest rates, loan fees, repayment plans, and consequences of default. See §§ 1077, 1080, 1087e, 1087dd. It also authorizes the Secretary to cancel or reduce loans, but only in certain limited circumstances and to a particular extent. Specifically, the Secretary can cancel a set amount of loans held by some public servants—including teachers, members of the Armed Forces, Peace Corps volunteers, law enforcement and corrections officers, firefighters, nurses, and librarians—who work in their professions for a minimum number of years. §§ 1078–10, 1087j, 1087ee. The Secretary can also forgive the loans of borrowers who have died or been "permanently and totally disabled," such that they cannot "engage in any substantial gainful activity." § 1087(a)(1). Bankrupt borrowers may have their loans forgiven. § 1087(b). And the Secretary is directed to discharge loans for borrowers falsely certified by their schools, borrowers whose schools close down, and borrowers whose schools fail to pay loan proceeds they owe to lenders. § 1087(c).

Shortly after the September 11 terrorist attacks, Congress became concerned that borrowers affected by the crisis— particularly those who served in the military—would need additional assistance. As a result, it enacted the Higher Education Relief Opportunities for Students Act of 2001. That law provided the Secretary of Education, for a limited period of time, with "specific waiver authority to respond to conditions in the national emergency" caused by the

September 11 attacks. 115 Stat. 2386. Rather than allow this grant of authority to expire by its terms at the end of September 2003, Congress passed the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act). 117 Stat. 904. That Act extended the coverage of the 2001 statute to include any war or national emergency—not just the September 11 attacks. By its terms, the Secretary "may waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Education Act] as the Secretary deems necessary in connection with a war or other military operation or national emergency." 20 U.S.C. § 1098bb(a)(1).[28]

The Secretary may issue waivers or modifications only "as may be necessary to ensure" that "recipients of student financial assistance under title IV of the [Education Act] who are affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals." § 1098bb(a)(2)(A). An "affected individual" is defined, in relevant part, as someone who "resides or is employed in an area that is declared a disaster area by any Federal, State, or local official in connection with a national emergency" or who "suffered direct economic hardship as a direct result of a war or other military operation or national emergency, as determined by the Secretary." §§ 1098ee(2)(C)–(D). And a "national emergency" for the purposes of the Act is "a national emergency declared by the President of the United States." § 1098ee(4).

Immediately following the passage of the Act in 2003, the Secretary issued two dozen waivers and modifications addressing a handful of specific issues. 68 Fed. Reg. 69312–69318. …

But the Secretary took more significant action in response to the COVID–19 pandemic. On March 13, 2020, the President declared the pandemic a national emergency. Presidential Proclamation No. 9994, 85 Fed. Reg. 15337–15338 (2020). One week later, then-Secretary of Education Betsy DeVos announced that she was suspending loan repayments and interest accrual for all federally held student loans. The following week, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act, which required the Secretary to extend the suspensions through the end of September 2020. 134 Stat. 404–405. Before that extension expired, the President directed the Secretary, "[i]n light of the national emergency," to "effectuate appropriate waivers of and modifications to" the Education Act to keep the suspensions in effect through the end of the year. 85 Fed. Reg. 49585. And a few months later, the Secretary further extended the suspensions, broadened eligibility for federal financial assistance, and waived certain administrative requirements (to allow, for example, virtual rather than on-site accreditation visits and to extend deadlines for filing reports). Id., at 79856–79863; 86 Fed. Reg. 5008–5009 (2021).

Over a year and a half passed with no further action beyond keeping the repayment and interest suspensions in place. But in August 2022, a few weeks before President Biden stated that "the pandemic is over," the Department of Education announced that it was once again issuing "waivers and modifications" under the Act—this time to reduce and eliminate student debts directly. During the first year of the pandemic, the Department's Office of General Counsel had issued a memorandum concluding that "the Secretary does not have statutory authority to provide blanket or mass cancellation, compromise, discharge, or forgiveness of student loan principal balances."

[28] Like its 2001 predecessor, the HEROES Act enjoyed virtually unanimous bipartisan support at the time of its enactment, passing by a 421-to-1 vote in the House of Representatives and a unanimous voice vote in the Senate.

Memorandum from R. Rubinstein to B. DeVos, p. 8 (Jan. 12, 2021). After a change in Presidential administrations and shortly before adoption of the challenged policy, however, the Office of General Counsel "formally rescinded" its earlier legal memorandum and issued a replacement reaching the opposite conclusion. 87 Fed. Reg. 52945 (2022). The new memorandum determined that the HEROES Act "grants the Secretary authority that could be used to effectuate a program of targeted loan cancellation directed at addressing the financial harms of the COVID–19 pandemic." Id., at 52944. Upon receiving this new opinion, the Secretary issued his proposal to cancel student debt under the HEROES Act. Two months later, he published the required notice of his "waivers and modifications" in the Federal Register. 87 Fed. Reg. 61512–61514.

The terms of the debt cancellation plan are straightforward: For borrowers with an adjusted gross income below $125,000 in either 2020 or 2021 who have eligible federal loans, the Department of Education will discharge the balance of those loans in an amount up to $10,000 per borrower. Borrowers who previously received Pell Grants qualify for up to $20,000 in loan cancellation….

II

Before addressing the legality of the Secretary's program, we must first ensure that the States have standing to challenge it.… [We hold that] Missouri thus has suffered an injury in fact sufficient to give it standing to challenge the Secretary's plan. With Article III satisfied, we turn to the merits.

III

The Secretary asserts that the HEROES Act grants him the authority to cancel $430 billion of student loan principal. It does not. We hold today that the Act allows the Secretary to "waive or modify" existing statutory or regulatory provisions applicable to financial assistance programs under the Education Act, not to rewrite that statute from the ground up.…

The HEROES Act . . . power has limits. To begin with, statutory permission to "modify" does not authorize "basic and fundamental changes in the scheme" designed by Congress. MCI Telecommunications Corp. v. American Telephone & Telegraph Co., 512 U.S. 218, 225 (1994). Instead, that term carries "a connotation of increment or limitation," and must be read to mean "to change moderately or in minor fashion." Ibid. That is how the word is ordinarily used. See, e.g., Webster's Third New International Dictionary 1952 (2002) (defining "modify" as "to make more temperate and less extreme," "to limit or restrict the meaning of," or "to make minor changes in the form or structure of [or] alter without transforming"). The legal definition is no different. Black's Law Dictionary 1203 (11th ed. 2019) (giving the first definition of "modify" as "[t]o make somewhat different; to make small changes to," and the second as "[t]o make more moderate or less sweeping"). The authority to "modify" statutes and regulations allows the Secretary to make modest adjustments and additions to existing provisions, not transform them.

The Secretary's previous invocations of the HEROES Act illustrate this point. Prior to the COVID–19 pandemic, "modifications" issued under the Act implemented only minor changes, most of which were procedural. Examples include reducing the number of tax forms borrowers are required to file, extending time periods in which borrowers must take certain actions, and allowing oral rather than written authorizations.

The Secretary's new "modifications" . . . were not "moderate" or "minor." Instead, they created a novel and fundamentally different loan forgiveness program. . . . No prior limitation on loan forgiveness is left standing. Instead, every borrower within the specified income cap automatically qualifies for debt cancellation, no

matter their circumstances. The new program vests authority in the Department of Education to discharge up to $10,000 for every borrower with income below $125,000 and up to $20,000 for every such borrower who has received a Pell Grant. 87 Fed. Reg. 61514. No prior limitation on loan forgiveness is left standing. Instead, every borrower within the specified income cap automatically qualifies for debt cancellation, no matter their circumstances. The Department of Education estimates that the program will cover 98.5% of all borrowers. From a few narrowly delineated situations specified by Congress, the Secretary has expanded forgiveness to nearly every borrower in the country.

The Secretary's plan has "modified" the cited provisions only in the same sense that "the French Revolution 'modified' the status of the French nobility"—it has abolished them and supplanted them with a new regime entirely. MCI, 512 U.S. at 228.

The Secretary responds that the Act authorizes him to "waive" legal provisions as well as modify them—and that this additional term "grant[s] broader authority" than would "modify" alone. But the Secretary's invocation of the waiver power here does not remotely resemble how it has been used on prior occasions. Previously, waiver under the HEROES Act was straightforward: the Secretary identified a particular legal requirement and waived it, making compliance no longer necessary. . . . Here, the Secretary does not identify any provision that he is actually waiving. . . .

In a final bid to elide the statutory text, the Secretary appeals to congressional purpose. "The whole point of" the HEROES Act, the Government contends, "is to ensure that in the face of a national emergency that is causing financial harm to borrowers, the Secretary can do something." Tr. of Oral Arg. 55. . . .

The question here is not whether something should be done; it is who has the authority to do it. Our recent decision in *West Virginia v. EPA* (2022) involved similar concerns over the exercise of administrative power. That case involved the EPA's claim that the Clean Air Act authorized it to impose a nationwide cap on carbon dioxide emissions. Given "the 'history and the breadth of the authority that [the agency] ha[d] asserted,' and the 'economic and political significance' of that assertion," we found that there was "'reason to hesitate before concluding that Congress' meant to confer such authority."

So too here. . . . The Secretary has never previously claimed powers of this magnitude under the HEROES Act. As we have already noted, past waivers and modifications issued under the Act have been extremely modest and narrow in scope. . . . Under the Government's reading of the HEROES Act, the Secretary would enjoy virtually unlimited power to rewrite the Education Act. This would "effec[t] a 'fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation' into an entirely different kind," *West Virginia v. EPA*.

The "'economic and political significance'" of the Secretary's action is staggering by any measure. *West Virginia v. EPA*. Practically every student borrower benefits, regardless of circumstances. A budget model issued by the Wharton School of the University of Pennsylvania estimates that the program will cost taxpayers "between $469 billion and $519 billion," depending on the total number of borrowers ultimately covered. . . .

Student loan cancellation "raises questions that are personal and emotionally charged, hitting fundamental issues about the structure of the economy." J. Stein, Biden Student Debt Plan Fuels Broader Debate Over Forgiving Borrowers, Washington Post, Aug. 31, 2022.

The sharp debates generated by the Secretary's extraordinary program stand in stark contrast to the unanimity with which Congress passed the HEROES Act. . . . Congress did not unanimously pass the HEROES Act with such power

in mind. "A decision of such magnitude and consequence" on a matter of "'earnest and profound debate across the country'" must "res[t] with Congress itself, or an agency acting pursuant to a clear delegation from that representative body." *West Virginia v. EPA.*

It has become a disturbing feature of some recent opinions to criticize the decisions with which they disagree as going beyond the proper role of the judiciary. Today, we have concluded that an instrumentality created by Missouri, governed by Missouri, and answerable to Missouri is indeed part of Missouri; that the words "waive or modify" do not mean "completely rewrite"; and that our precedent—old and new—requires that Congress speak clearly before a Department Secretary can unilaterally alter large sections of the American economy. We have employed the traditional tools of judicial decisionmaking in doing so. Reasonable minds may disagree with our analysis—in fact, at least three do. See post (KAGAN, J., dissenting). We do not mistake this plainly heartfelt disagreement for disparagement. It is important that the public not be misled either. Any such misperception would be harmful to this institution and our country.

Justice BARRETT, concurring.

I join the Court's opinion in full. I write separately to address the States' argument that, under the "major questions doctrine," we can uphold the Secretary of Education's loan cancellation program only if he points to " 'clear congressional authorization' " for it.. In this case, the Court applies the ordinary tools of statutory interpretation to conclude that the HEROES Act does not authorize the Secretary's plan. The major questions doctrine reinforces that conclusion but is not necessary to it.

Still, the parties have devoted significant attention to the major questions doctrine, and there is an ongoing debate about its source and status. I take seriously the charge that the doctrine is inconsistent with textualism. *West Virginia*, 597 U. S., at ——, 142 S.Ct., at 2641 (KAGAN, J., dissenting) ("When [textualism] would frustrate broader goals, special canons like the 'major questions doctrine' magically appear as get-out-of-text-free cards"). And I grant that some articulations of the major questions doctrine on offer—most notably, that the doctrine is a substantive canon—should give a textualist pause.

Yet for the reasons that follow, I do not see the major questions doctrine that way. Rather, I understand it to emphasize the importance of *context* when a court interprets a delegation to an administrative agency. Seen in this light, the major questions doctrine is a tool for discerning—not departing from—the text's most natural interpretation.

Substantive canons are rules of construction that advance values external to a statute. Some substantive canons, like the rule of lenity, play the modest role of breaking a tie between equally plausible interpretations of a statute. Others are more aggressive—think of them as strong-form substantive canons. Unlike a tie-breaking rule, a strong-form canon counsels a court to *strain* statutory text to advance a particular value. There are many such canons on the books, including constitutional avoidance, the clear-statement federalism rules, and the presumption against retroactivity. Such rules effectively impose a "clarity tax" on Congress by demanding that it speak unequivocally if it wants to accomplish certain ends.

While many strong-form canons have a long historical pedigree, they are "in significant tension with textualism" insofar as they instruct a court to adopt something other than the statute's most natural meaning.

Some have characterized the major questions doctrine as a strong-form substantive canon designed to enforce Article I's Vesting Clause. On this view, the Court overprotects the nondelegation principle by increasing the cost of delegating authority to agencies—namely, by re-

quiring Congress to speak unequivocally in order to grant them significant rule-making power. No matter which rationale justifies it, this "clear statement" version of the major questions doctrine "loads the dice" so that a plausible antidelegation interpretation wins even if the agency's interpretation is better.

While one could walk away from our major questions cases with this impression, I do not read them this way. No doubt, many of our cases express an expectation of "clear congressional authorization" to support sweeping agency action. But none requires "an 'unequivocal declaration' " from Congress authorizing the *precise* agency action under review, as our clear-statement cases do in their respective domains. And none purports to depart from the best interpretation of the text—the hallmark of a true clear-statement rule.

So what work is the major questions doctrine doing in these cases? I will give you the long answer, but here is the short one: The doctrine serves as an interpretive tool reflecting "common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency."

The major questions doctrine situates text in context, which is how textualists, like all interpreters, approach the task at hand. Context is not found exclusively " 'within the four corners' of a statute." Background legal conventions, for instance, are part of the statute's context. Context also includes common sense, which is another thing that "goes without saying."

Why is any of this relevant to the major questions doctrine? Because context is also relevant to interpreting the scope of a delegation. In my view, the major questions doctrine grows out of these same commonsense principles of communication. This expectation of clarity is rooted in the basic premise that Congress normally "intends to make major policy decisions itself, not leave those decisions to agencies." We have been "[s]keptical of mismatches" between broad "invocations of power by agencies" and relatively narrow "statutes that purport to delegate that power."

Another telltale sign that an agency may have transgressed its statutory authority is when it regulates outside its wheelhouse. In *National Federation of Independent Business* v. *OSHA* we held that the Occupational Safety and Health Administration's (OSHA's) authority to ensure " 'safe and healthful working conditions' " did not encompass the power to mandate the vaccination of employees; as we explained, the statute empowered the agency "to set *workplace* safety standards, not broad public health measures." The shared intuition behind these cases is that a reasonable speaker would not understand Congress to confer an unusual form of authority without saying more.

Here, enough of those indicators are present to demonstrate that the Secretary has gone far "beyond what Congress could reasonably be understood to have granted" in the HEROES Act.

Justice Kagan, with whom Justice Sotomayor and Justice Jackson join, dissenting.

In every respect, the Court today exceeds its proper, limited role in our Nation's governance.

Some 20 years ago, Congress enacted legislation, called the HEROES Act, authorizing the Secretary of Education to provide relief to student-loan borrowers when a national emergency struck. The Secretary's authority was bounded: He could do only what was "necessary" to alleviate the emergency's impact on affected borrowers' ability to repay their student loans. 20 U.S.C. § 1098bb(a)(2). But within that bounded area, Congress gave discretion to the Secretary. He could "waive or modify any statutory or regulatory provision" applying to federal student-loan programs, including provisions relating to loan repayment and forgiveness. And in so doing, he could replace the

old provisions with new "terms and conditions." §§ 1098bb(a)(1), (b)(2). The Secretary, that is, could give the relief that was needed, in the form he deemed most appropriate, to counteract the effects of a national emergency on borrowers' capacity to repay. That may have been a good idea, or it may have been a bad idea. Either way, it was what Congress said. . . .

As in other recent cases, the rules of the game change when Congress enacts broad delegations allowing agencies to take substantial regulatory measures. See, e.g., West Virginia v. EPA. Then, as in this case, the Court reads statutes unnaturally, seeking to cabin their evident scope. And the Court applies heightened-specificity requirements, thwarting Congress's efforts to ensure adequate responses to unforeseen events. The result here is that the Court substitutes itself for Congress and the Executive Branch in making national policy about student-loan forgiveness. Congress authorized the forgiveness plan (among many other actions); the Secretary put it in place; and the President would have been accountable for its success or failure. But this Court today decides that some 40 million Americans will not receive the benefits the plan provides, because (so says the Court) that assistance is too "significan[t]."

II

The majority picks the statute apart piece by piece in an attempt to escape the meaning of the whole. But the whole—the expansive delegation—is so apparent that the majority has no choice but to justify its holding on extra-statutory grounds. So the majority resorts, as is becoming the norm, to its so-called major-questions doctrine. And the majority again reveals that doctrine for what it is—a way for this Court to negate broad delegations Congress has approved, because they will have significant regulatory impacts. Thus the Court once again substitutes itself for Congress and the Executive Branch—and the hundreds of millions of people they represent—in making this Nation's most important, as well as most contested, policy decisions.

Before turning to the scope of that power, note the stringency of the triggering conditions. Putting aside military applications, the Secretary can act only when the President has declared a national emergency. See § 1098ee(4). Further, the Secretary may provide benefits only to "affected individuals"—defined as anyone who "resides or is employed in an area that is declared a disaster area . . . in connection with a national emergency" or who has "suffered direct economic hardship as a direct result of a . . . national emergency." §§ 1098ee(2)(C)–(D). And the Secretary can do only what he determines to be "necessary" to ensure that those individuals "are not placed in a worse position financially in relation to" their loans "because of " the emergency. § 1098bb(a)(2). That last condition, said more simply, requires the Secretary to show that the relief he awards does not go beyond alleviating the economic effects of an emergency on affected borrowers' ability to repay their loans.

But if those conditions are met, the Secretary's delegated authority is capacious. As in the prior statutes, the Secretary has the linked power to "waive or modify any statutory or regulatory provision" applying to the student-loan programs. § 1098bb(a)(1). To start with the phrase after the verbs, "the word 'any' has an expansive meaning." United States v. Gonzales (1997). "Any" of the referenced provisions means, well, any of those provisions. And those provisions include several relating to student-loan cancellation—more precisely, specifying conditions in which the Secretary can discharge loan principal. See §§ 1087, 1087dd(g); 34 C.F.R. §§ 682.402, 685.212 (2022). Now go back to the twin verbs: "waive or modify." To "waive" means to "abandon, renounce, or surrender"—so here, to eliminate a regulatory requirement or condition. Black's Law Dictionary 1894 (11th ed. 2019). To "modify" means "[t]o make somewhat different" or "to reduce in degree or extent"—so here, to lessen rather

than eliminate such a requirement. Id., at 1203. Then put the words together, as they appear in the statute: To "waive or modify" a requirement means to lessen its effect, from the slightest adjustment up to eliminating it altogether. . . .

Before reviewing how that statutory scheme operated here, consider how it might work for a hypothetical emergency that the enacting Congress had in the front of its mind. . . . The HEROES Act, as Congress designed it, would give him the identical power to address similar terrorist attacks in the future. So imagine the horrific. A terrorist organization sets off a dirty bomb in Chicago. Beyond causing deaths, the incident leads millions of residents (including many with student loans) to flee the city to escape the radiation. They must find new housing, probably new jobs. And still their student-loan bills are coming due every month. To prevent widespread loan delinquencies and defaults, the Secretary wants to discharge $10,000 for the class of affected borrowers. Is that legal? Of course it is; it is exactly what Congress provided for. . . .

The HEROES Act applies to the COVID loan forgiveness program in just the same way. Of course, Congress did not know COVID was coming; and maybe it wasn't even thinking about pandemics generally. But that is immaterial, because Congress delegated broadly, for all national emergencies. . . .

The tell comes in the last part of the majority's opinion. When a court is confident in its interpretation of a statute's text, it spells out its reading and hits the send button. Not this Court, not today. This Court needs a whole other chapter to explain why it is striking down the Secretary's plan. And that chapter is not about the statute Congress passed and the President signed, in their representation of many millions of citizens. It instead expresses the Court's own "concerns over the exercise of administrative power. . . ." This Court objects to Congress's permitting the Secretary (and other agency officials) to answer so-called major questions. Or at least it objects when the answers given are not to the Court's satisfaction. So the Court puts its own heavyweight thumb on the scales. It insists that "[h]owever broad" Congress's delegation to the Secretary, it (the Court) will not allow him to use that general authorization to resolve important issues. The question, the majority helpfully tells us, is "who has the authority" to make such significant calls. Ibid. The answer, as is now becoming commonplace, is this Court. . . .

The majority's stance . . . prevents Congress from doing its policy-making job in the way it thinks best. See *West Virginia v. EPA* (dissenting opinion). The new major-questions doctrine works not to better understand—but instead to trump—the scope of a legislative delegation. Here is a fact of the matter: Congress delegates to agencies often and broadly. And it usually does so for sound reasons. Because agencies have expertise Congress lacks. Because times and circumstances change, and agencies are better able to keep up and respond. Because Congress knows that if it had to do everything, many desirable and even necessary things wouldn't get done. In wielding the major-questions sword, last Term and this one, this Court overrules those legislative judgments. The doctrine forces Congress to delegate in highly specific terms—respecting, say, loan forgiveness of certain amounts for borrowers of certain incomes during pandemics of certain magnitudes. Of course Congress sometimes delegates in that way. But also often not. Because if Congress authorizes loan forgiveness, then what of loan forbearance? And what of the other 10 or 20 or 50 knowable and unknowable things the Secretary could do? And should the measure taken—whether forgiveness or forbearance or anything else—always be of the same size? Or go to the same classes of people? Doesn't it depend on the nature and scope of the pandemic, and on a host of other foreseeable and unforeseeable factors?

You can see the problem. It is hard to identify and enumerate every possible application of a statute to every possible condition years in the future. So, again, Congress delegates broadly. Except that this Court now won't let it reap the benefits of that choice.

And that is a major problem not just for governance, but for democracy too. Congress is of course a democratic institution; it responds, even if imperfectly, to the preferences of American voters. And agency officials, though not themselves elected, serve a President with the broadest of all political constituencies. But this Court? It is, by design, as detached as possible from the body politic. That is why the Court is supposed to stick to its business . . . , and to stay away from making this Nation's policy about subjects like student-loan relief. The policy judgments, under our separation of powers, are supposed to come from Congress and the President. But they don't when the Court refuses to respect the full scope of the delegations that Congress makes to the Executive Branch. When that happens, the Court becomes the arbiter—indeed, the maker—of national policy. See West Virginia v. EPA (KAGAN, J., dissenting) ("The Court, rather than Congress, will decide how much regulation is too much"). That is no proper role for a court. And it is a danger to a democratic order.

The HEROES Act is a delegation both purposive and clear. Recall that Congress enacted the statute after passing two similar laws responding to specific crises. See *supra*, at ——. Congress knew that national emergencies would continue to arise. And Congress decided that when they did, the Secretary should have the power to offer relief without waiting for another, incident-specific round of legislation. Emergencies, after all, are emergencies, where speed is of the essence. For similar reasons, Congress replicated its prior (two-time) choice to leave the scope and nature of the loan relief to the Secretary, so that he could respond to varied conditions. As the House Report noted, Congress provided "the authority to implement waivers" that were "not yet contemplated" but might become necessary to deal with "any unforeseen issues that may arise." That delegation is at the statute's very center, in its "waive or modify" language. And the authority it grants goes only to the Secretary—the official Congress knew to hold the responsibility for administering the Government's student-loan portfolio and programs. Student loans are in the Secretary's wheelhouse. And so too, Congress decided, relief from those loan obligations in case of emergency. That delegation was the entire point of the HEROES Act. Indeed, the statute accomplishes nothing else.

The majority is therefore wrong to say that the "indicators from our previous major questions cases are present here." Compare the HEROES Act to other statutes containing broad delegations that the same majority has found to raise major-questions problems. Last Term, for example, the majority thought the trouble with the Clean Power Plan lay in the EPA's use of a "long-extant" and "ancillary" provision addressed to other matters. Before that, the majority invalidated the CDC's eviction moratorium because the agency had asserted authority far outside its "particular domain." *Alabama Assn. of Realtors*. I thought both those decisions wrong. But assume the opposite; there is, even on that view, nothing like those circumstances here. (Or, to quote the majority quoting me, those "case[s are] distinguishable from this one." In this case, the Secretary responsible for carrying out the student-loan programs forgave student loans in a national emergency under the core provision of a recently enacted statute empowering him to provide student-loan relief in national emergencies.[29] Today's decision thus

[29] The nature of the delegation here poses a particular challenge for Justice Barrett, given her distinctive understanding of the major-questions doctrine. In her thoughtful concurrence, she notes the "importance of *context* when a court interprets a delegation to an administrative agency." I agree, and

moves the goalposts for triggering the major-questions doctrine. Who knows—by next year, the Secretary of Health and Human Services may be found unable to implement the Medicare program under a broad delegation because of his actions' (enormous) "economic impact."

To justify *this* use of its heightened-specificity requirement, the majority relies largely on history: "[P]ast waivers and modifications," the majority argues, "have been extremely modest." But first, it depends what you think is "past." One prior action, nowhere counted by the majority, is the suspension of loan payments and interest accrual begun in COVID's first days. That action cost the Federal Government over $100 billion, and benefited many more borrowers than the forgiveness plan at issue. And second, it's all relative. Past actions were more modest because the precipitating emergencies were more modest. (The COVID emergency generated, all told, over $5 *trillion* in Government relief spending.) In providing more significant relief for a more significant emergency—or call it unprecedented relief for an unprecedented emergency—the Secretary did what the HEROES Act contemplates.

Similarly unavailing is the majority's reliance on the controversy surrounding the program. Student-loan cancellation, the majority says, "raises questions that are personal and emotionally charged," precipitating "profound debate across the country." I have no quarrel with that description. Student-loan forgiveness, and responses to COVID generally, have joined the list of issues on which this Nation is divided. But that provides yet more reason for the Court to adhere to its properly limited role. There are two paths here. One is to respect the political branches' judgments. On that path, the Court recognizes the breadth of Congress's delegation to the Secretary, and declines to interfere with his use of that granted authority. Maybe Congress was wrong to give the Secretary so much discretion; or maybe he, and the President he serves, did not make good use of it. But if so, there are political remedies—accountability for all the actors, up to the President, who the public thinks have made mistakes. So a political controversy is resolved by political means, as our Constitution requires. That is one path. Now here is the other, the one the Court takes. Wielding its judicially manufactured heightened-specificity requirement, the Court refuses to acknowledge the plain words of the HEROES Act. It declines to respect Congress's decision to give broad emergency powers to the Secretary. It strikes down his lawful use of that authority to provide student-loan assistance. It does not let the political system, with its mechanisms of accountability, operate as normal. It makes itself the decisionmaker on, of all things, federal student-loan policy. And then, perchance, it wonders why it has only compounded the "sharp debates" in the country?

III

From the first page to the last, today's opinion departs from the demands of judicial restraint. At the behest of a party that has suffered no injury, the majority decides a contested public

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have said so; there are, indeed, some significant overlaps between my and Justice Barrett's views on properly contextual interpretation of delegation provisions. But then consider two of the contextual factors Justice Barrett views as "telltale sign[s]" of whether an agency has exceeded the scope of a delegation. First, she asks, is there a "mismatch[]" between a "backwater provision" or "subtle device" and an agency's exercise of power? And second, is the agency official operating within or "outside [his] wheelhouse"? Here, for the reasons stated above, there is no mismatch: The broadly worded "waive or modify" delegation IS the HEROES Act, not some tucked away ancillary provision. And as Justice Barrett agrees, "this is not a case where the agency is operating entirely outside its usual domain." So I could practically rest my case on Justice Barrett's reasoning.

policy issue properly belonging to the politically accountable branches and the people they represent. In saying so, and saying so strongly, I do not at all "disparage[]" those who disagree. The majority is right to make that point, as well as to say that "[r]easonable minds" are found on both sides of this case. And there is surely nothing personal in the dispute here. But Justices throughout history have raised the alarm when the Court has overreached—when it has "exceed[ed] its proper, limited role in our Nation's governance." It would have been "disturbing," and indeed damaging, if they had not. The same is true in our own day. . . .

The opinion ends by applying the Court's made-up major-questions doctrine to jettison the Secretary's loan forgiveness plan. Small wonder the majority invokes the doctrine. The majority's "normal" statutory interpretation cannot sustain its decision. The statute, read as written, gives the Secretary broad authority to relieve a national emergency's effect on borrowers' ability to repay their student loans. The Secretary did no more than use that lawfully delegated authority. So the majority applies a rule specially crafted to kill significant regulatory action, by requiring Congress to delegate not just clearly but also micro-specifically. The question, the majority maintains, is "who has the authority" to decide whether such a significant action should go forward.. The right answer is the political branches: Congress in broadly authorizing loan relief, the Secretary and the President in using that authority to implement the forgiveness plan. The majority instead says that it is theirs to decide.

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. is the Supreme Court's leading statement about the division of authority between agencies and courts in interpreting statutes. The two-step framework announced by *Chevron* for resolving such questions has taken the legal world by storm. In its relatively brief life span, *Chevron* has been cited in 11,760 judicial decisions and 2,130 administrative decisions. It continues to accumulate judicial citations at the rate of about 1000 per year. It is eclipsed only by decisions like Erie Railroad Co. v. Tompkins (14,663 decisions) and Bell Atlantic Corp. v. Twombly (47,339 decisions). The company it keeps confirms its status as a leading decision prescribing the standard of review across a wide range of cases that come before the courts.

Chevron's significance goes far beyond its utility as a statement of the standard of review, however. This is revealed by its frequency of citation in law review articles. *Chevron* has been cited by 8,009 articles included in the Westlaw database. The fascination academics have for *Chevron* means it has now been cited far more than Erie (5,052), a decision Bruce Ackerman once described as the "Pole Star" for an entire generation of legal scholarship. Indeed, *Chevron*'s frequency of citation in law review articles puts it in roughly the same league as Marbury v. Madison (8,492), which is perhaps appropriate given that *Chevron* has been called the "counter-Marbury" for the administrative state.

As suggested by its frequent appearance in law reviews, *Chevron* is also a controversial decision. The opinion marks a significant shift in the justification for giving deference to agency interpretations of law. Before *Chevron*, deference was justified largely on pragmatic grounds; after *Chevron*, deference has been justified largely in terms of implied delegations of authority from Congress. This shift in the theoretical underpinnings of the deference doctrine has made *Chevron* a magnet for commentators, with the result that "the *Chevron* doctrine" has been debated, analyzed, and measured in countless articles. Legal revolutions are rare, and the general proposition for which *Chevron* stands--that courts should accept reasonable agency interpretations of statutes they are charged with administering--was not in and of itself revolutionary. The Court had said something similar in previous decisions. What was new was the way Justice John Paul Stevens creatively packaged this proposition in his opinion for a unanimous but short-handed Court of six justices.

The *Chevron* opinion contains four significant innovations relative to previous judicial discussion. First, the Court laid down a new two-step framework for reviewing agency statutory interpretations. At what was quickly dubbed "step one," courts, using "traditional tools of statutory construction," ask whether Congress had a "specific intention" with respect to the issue at hand. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." But if no clear congressional intent can be discerned, then the court, at "step two," determines whether the agency's interpretation was a "permissible construction of the statute." The court should not ask whether the agency construction is the one "the court would have reached if the question initially had arisen in a judicial proceeding;" it is enough to show that "reasonable" interpreter might adopt the construction.

This two-step framework seems innocuous enough, but in fact contained subtle but significant departures from prior law. That law had been something of a hodge-podge, but the conventional wisdom was that it required courts to assess agency interpretations against multiple

contextual factors, such as whether the agency interpretation was longstanding, consistently held, contemporaneous with the enactment of the statute, thoroughly considered, or involved a technical subject as to which the agency had expertise. The two-step formula provided no logical place for courts to consider these contextual factors.

The two-step formula also implied that deference to the agency interpretation was all-or-nothing. If the court decided the matter at step one, the agency would get no deference (although the court might uphold the agency if it agreed that its interpretation was the one intended by Congress); if the court decided the matter at step two, the agency would get maximal deference. In contrast, the prior approach had seemed to suggest that any particular agency interpretation would get more or less deference along a sliding-scale, depending on how it stacked up against the traditional factors.

Second, *Chevron* departed from previous law by suggesting that Congress has delegated authority to agencies to function as the primary interpreters of statutes they administer. Sometimes, the Court noted, Congress expressly delegates authority to agencies to define specific statutory provisions by regulation. In these circumstances, the Court observed, agency regulations are "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." The opinion then immediately noted that delegations can be implicit rather than explicit, and seemed to suggest that the same consequences would follow. By equating explicit and implicit delegations to agencies to fill in statutory gaps, the Court seemed to say that anytime Congress charges an agency with administration of a statute and leaves an ambiguity in the statute, it has impliedly delegated primary authority to the agency to interpret the statute. This vastly expanded the sphere of delegated agency lawmaking.

Third, *Chevron* broke new ground by invoking democratic theory as a reason for deferring to agency interpretations of statutes. In an unusual passage near the end of the opinion, the Court explained that judges "are not part of either political branch" and hence "have no constituency." Agencies, while "not directly accountable to the people," are subject to the general oversight and supervision of the president, who is elected by all the people. Hence, it is fitting that agencies, rather than courts, resolve "the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities." The new emphasis on democratic theory reinforced the presumption of delegated interpretational authority, and seemed to offer a universal reason to prefer agency interpretations to judicial ones.

Fourth, *Chevron* introduced the theme of comparative institutional choice into statutory interpretation. Prior to *Chevron*, it was universally assumed that it is the province of the courts to "say what the law is," including pronouncing on the meaning of statutes. After *Chevron*, courts and commentators gradually came to realize that other institutions (such as administrative agencies) may have a comparative advantage as interpreters, at least in some circumstances. This in turn introduced a metaquestion into the theory and practice of statutory interpretation, namely determining the "preferred interpreter" before engaging in the process of interpretation. The full implications of this new perspective have yet to be fully assimilated, but it may ultimately revolutionize the process of statutory interpretation.

. . .

There is no evidence that *Chevron* has led to a greater rate of acceptance of agency interpretations of statutes by the Supreme Court. The evidence of its effect on acceptance of agency views by lower courts is mixed. Nevertheless, *Chevron*'s impact on the legal system has been

profound. By separating out for judicial determination the question whether the statute has a clear or unambiguous meaning, and suppressing other contextual variables traditionally considered by courts in considering agency interpretations, the decision subtly but profoundly reinforced the movement toward textualism in statutory interpretation. By highlighting agency accountability to the president, and the judiciary's lack of democratic pedigree, the decision accelerated the movement toward "presidential administration." Perhaps most importantly, the decision has led to a sustained discussion among judges and academics about the proper role of courts in the administrative state, and has ignited an awareness of questions of institutional choice that have long remained submerged. It is not overstating the matter to say that *Chevron* has become one of a handful of decisions--along with Marbury v. Madison, Brown v. Board of Education, and Roe v. Wade--that are the material for a continuing collective meditation about the role of the courts and indeed of the law itself in the governance of our society.

The U.S. Supreme Court has overturned a 40-year-old precedent that directed courts to defer to federal agencies' interpretations of ambiguous laws.

In *Loper Bright Enterprises v. Raimondo*, a 6-3 decision by Chief Justice John Roberts overruled the 1984 case of *Chevron U.S.A. v. Natural Resources Defense Council.* Justices Elena Kagan, Sonia Sotomayor and Ketanji Brown Jackson dissented.

The question before the court focused on the so-called *Chevron* deference, an administrative law concept that says courts should defer to a federal agency's reasonable interpretation of an ambiguous statute.

The majority's holding relies on the Administrative Procedure Act, a 1940s statute that Congress passed to keep unelected federal agencies from overstepping their statutory mandate. Roberts wrote that the act "requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous; *Chevron* is overruled." The court said that the *Chevron* doctrine cannot be reconciled with the APA and rejected the notion that "statutory ambiguities are implicit delegations to agencies."

The *Loper* case involved the Magnuson-Stevens Fishery Conservation and Management Act, which Congress passed in 1976 after determining that overfishing off the U.S. coasts threatened the "food supply, economy and health of the Nation." The statute directs the secretary of commerce and the National Marine Fisheries Service to develop a comprehensive fishery management program.

Pursuant to the act, [in 2020] the fisheries service required the Atlantic herring fishery to adopt an industry-funded monitoring program. A group of herring fishing companies, led by main plaintiff Loper Bright Enterprises of New Jersey, filed suit to challenge the service's rule as too expensive and overly burdensome, alleging they had very limited vessel space and financial resources. They said the service exceeded its statutory authority because the act does not specifically state that industry may be required to pay for the monitoring program, and asked the courts to overrule *Chevron*, or hold that where a statute does not expressly provide for the specific power exercised by the agency, no statutory ambiguity exists, and no agency deference should be provided.

The lower courts ruled in favor of the agency. Seventeen states filed an amicus brief in support of the herring fishing companies, stating that historically, courts have applied *Chevron* inconsistently, and "(t)he confused status quo has real costs for the people who live and work within our borders. … Regulation is costly; over-regulation and mercurial regulation even more so. Waiting longer to intervene forces painful tradeoffs, and they hurt the states and our residents."

The majority agreed, reasoning that courts, not agencies, decide "all relevant questions of law arising on review of agency action—even those involving ambiguous laws—and set aside any such action inconsistent with the law as they interpret it." The court also agreed with the position that the *Chevron* doctrine has promoted agency inconsistencies in statutory interpretation.

Dissenters See 'Judicial Hubris'

In a scathing dissent, Justice Elena Kagan castigated the majority for once again overturning long-standing precedent. She noted that the *Chevron* doctrine had supported regulatory efforts by giving agency experts the ability to make reasonable decisions where congressional law was unclear, and cited examples such as "keeping air and water clean, food and drugs safe, and financial markets honest."

Kagan said that the majority had taken the power to make complex decisions over regulatory matters away from federal agencies—and given it to themselves.

"As if it did not have enough on its plate, the majority turns itself into the country's administrative czar," she wrote. "A rule of judicial humility gives way to a rule of judicial hubris."

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On June 28, 2024, in a maximalist decision that went further than even the most ardent opponents of *Chevron* deference thought possible, the Supreme Court finally and emphatically overruled *Chevron* deference, the watershed rule that governed the level of deference afforded to administrative agency interpretation of ambiguous statutes for nearly forty years.

The Court's decision will have an immediate and lasting impact on executive agency interpretations of ambiguous federal statutes, as well as potentially on hundreds, if not thousands, of prior decisions decided on *Chevron* deference grounds—and the future of the administrative state in America.

An Emphatic Rejection of Judicial Deference to Agency Interpretation

Chevron deference, established in 1984, required courts to defer to "permissible" agency interpretations of the statutes those agencies administer, even when a reviewing court reads the statute differently. This principle of deference to administrative agencies was a cornerstone of administrative law for nearly four decades and one that *Chevron* opponents had looked to overturn for years.

Enter *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Department of Commerce*, a pair of cases that sought to overturn *Chevron* deference once and for all. As the Court's questions at oral argument made clear, *Chevron* deference was on borrowed time. Even so, the majority opinion in Loper Bright and Relentless, Inc. represents an emphatic rejection of the agency deference ushered in by *Chevron* and its progeny.

Chief Justice Roberts's majority opinion focused on not only the history of statutory interpretation in the United States, but also the creation of the Administrative Procedures Act (APA), as well as what the majority viewed as the unworkability of *Chevron* deference in its current form. The Chief Justice first noted that Article III was always interpreted to vest in the courts the power to interpret what a law means. Despite this, Chief Justice Roberts noted that courts have always understood that some deference was afforded to the Executive Branch's interpretation of statutes. But, according to the Chief Justice, that deference was not unlimited. Rather, "[t]he views of the Executive Branch could inform the judgment of the Judiciary, but did not supersede it." The majority opinion explained that this version of agency deference continued throughout the New Deal era, further noting that when deference was given to an agency, it was to fact-based inquiries, not questions of law.

The APA was enacted in 1946 "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." As Chief Justice Roberts noted, under the APA, courts utilize their own judgment in deciding questions of law, notwithstanding an agency's interpretation of the particular law. In the majority's view, the APA "makes clear that agency interpretations of statutes—like agency interpretations of the Constitution—are not entitled to deference. The APA's history and the contemporaneous views of various respected commentators underscore the plain meaning of its text." This reasoning, according to the majority, supports a de novo (i.e., no deference given) review standard of an ambiguity's meaning in a particular statute.

Despite this, the Court did note that some degree of agency deference may still be appropriate in certain circumstances. As the Chief Justice explained:

> Courts exercising independent judgment in determining the meaning of statutory provisions, consistent with the APA, may—as they have from the start—seek aid from the inter-

> pretations of those responsible for implementing particular statutes. And when the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations, fixing the boundaries of the delegated authority, and ensuring the agency has engaged in " 'reasoned decision making' " within those boundaries.

According to the majority, *Chevron* cannot be reconciled with the text and framework of the APA because it requires a court to "ignore, not follow" the reading of the text the court would have reached if it exercised its own independent judgment as the APA (and Article III) require. The Court further rejected the claim that statutory ambiguities are implicitly delegated to agencies as *Chevron* presupposes.

Not only did the majority find that *Chevron* contradicts the mandates of the APA, but it also rejected the government's (and dissents') arguments in support of the continued viability of *Chevron* deference. For instance, the majority disagreed that agency experts are better suited to decide and interpret tough and complicated statutory questions. According to Chief Justice Roberts, "agencies have no special competence in resolving statutory ambiguities. Courts do," and "even when an ambiguity happens to implicate a technical matter, it does not follow that Congress has taken the power to authoritatively interpret the statute from the courts and given it to the agency." The Court further rejected the claim that such interpretations should be made by policymakers as opposed to unelected judges, noting that "[r]esolution of statutory ambiguities involves legal interpretation, and that task does not suddenly become policymaking just because a court has an 'agency to fall back on.' "

What about Consistency?

What about the consistency that adherents claim comes with applying *Chevron* deference? According to the majority, it provides no such consistency at all. Rather, because *Chevron* deference is so indeterminate and sweeping, the Court has had to consistently amend and revise the test, "transforming the original two-step into a dizzying breakdance." The Court was also not persuaded that its decision would have any impact on the more than 18,000 lower court cases decided on *Chevron* deference grounds. According to the majority, a party seeking to challenge one of those rulings must establish a "special justification" to do so, and the end of *Chevron* deference does not constitute such a justification.

Finally, the majority rejected the argument that stare decisis warranted saving *Chevron* from the chopping block, stating that *Chevron* is "unworkable"; that there has not been, according to the majority, a meaningful reliance on *Chevron* in recent years by the Court; and that it has been chipped away at over the years, which calls into question its continued validity and reliance by lower courts.

A Fiery Dissent

Justice Kagan pulled no punches in her dissent and took the majority to task for, in her opinion, giving "itself exclusive power over every open issue—no matter how expertise-driven or policy-laden—involving the meaning of regulatory law." As Justice Kagan explained:

> Its justification comes down, in the end, to this: Courts must have more say over regulation—over the provision of health care, the protection of the environment, the safety of consumer products, the efficacy of transportation systems, and so on. A longstanding precedent at the crux of administrative governance thus falls victim to a bald assertion of judicial authority. The majority disdains restraint, and grasps for power.

Justice Kagan also emphatically disagreed with both the majority's rationale and its disregard,

in her opinion, for what comes next with the end of *Chevron* deference. For instance, she disagreed with the majority that section 706 of the APA mandated a court to utilize a de novo standard when deciding an agency's interpretation of an ambiguous statute. The dissent also vehemently disagreed with the majority's contention that courts are in a better position to resolve statutory ambiguities than the so-called agency experts.

In addition, the dissent took the majority to task for not adhering to stare decisis, claiming that *Chevron* was entitled to a particularly strong form of reliance because (1) Congress has had opportunities to overrule it in the past but has declined to do so; and (2) the Court has continued to rely on *Chevron* deference in thousands of decisions, as have lower courts. And what about the justification that the Court had not relied on *Chevron* lately? According to Justice Kagan, that was all by design:

> This Court has "avoided deferring under *Chevron* since 2016" because it has been preparing to overrule *Chevron* since around that time. That kind of self-help on the way to reversing precedent has become almost routine at this Court. Stop applying a decision where one should; "throw some gratuitous criticisms into a couple of opinions"; issue a few separate writings "question[ing the decision's] premises"; give the whole process a few years . . . and voila!—you have a justification for overruling the decision."

Justice Kagan likewise found little comfort in the majority's attempt to insulate prior *Chevron*-based decisions from being collaterally attacked, noting that finding a "special justification" to warrant overturning such precedent is a low burden to meet.

What Comes Next?

The decision is expected to impact a wide range of regulatory environments, from environmental protections and healthcare to maritime, securities, tax, and financial regulations, and a litany of other federally regulated areas. Federal agencies will now face closer scrutiny and potentially more frequent legal challenges when interpreting ambiguous statutes. Moreover, federal district and circuit courts do not always agree, and this will result in inconsistent application of regulations throughout the country. This, in turn, will result in more issues needing to be resolved by the Supreme Court.

Perhaps unsurprisingly, the Court did not replace *Chevron* deference with another test for courts to apply when confronted with an ambiguous statute and an agency's interpretation of the same. Rather, it appears that when faced with ambiguity in a statute, pursuant to the APA, courts will utilize the normal tools of statutory interpretation to decide what the ambiguity means, and that no deference will ordinarily be given to an administrative agency's interpretation of the ambiguity.

Notably, the majority did find that in some circumstances (like when Congress expressly authorizes it) deference may be appropriate to an administrative agency. Regardless, it is likely that the end of *Chevron* deference will turbocharge forum shopping. Plaintiffs hostile to an agency's particular statutory interpretation or final rule will most likely seek out sympathetic courts, whereas those seeking to uphold an agency's decision will look for courts traditionally more deferential to the Executive Branch.

And what about those 18,000-plus cases previously decided on *Chevron* deference grounds? While there certainly may be defenses the government can raise to a belated challenge (e.g., laches, statute of limitations), the dissent's worry that a requirement of a "special justification" to overturn such precedent amounts to no justification at all is well-founded. Indeed, a court hostile to a particular agency or its interpretation can easily come up with a rationale it labels as a "special justification" to overturn an old *Chevron*-based decision, should it choose to do so. And as Solicitor General Elizabeth B.

Prelogar stated at oral argument, litigants almost assuredly "will come out of the woodwork" to challenge *Chevron*-based decisions.

Further, *Loper Bright* and *Relentless, Inc.*, at least on paper, represent a seismic shift in power in Washington. Under *Chevron*, the Executive Branch's interpretation of statutory ambiguities was given heightened deference. Now that interpretation belongs almost exclusively to the judicial branch to, in the words of Justice Kagan, decide hyper-technical questions like "[w]hen does an alpha amino acid polymer qualify as such a 'protein' " under the Public Health Service Act, or "[h]ow much noise is consistent with 'the natural quiet' " that the Department of the Interior must regulate from aircraft flying over the Grand Canyon?

Finally, while this decision represents an emphatic rejection of agency deference, the majority did concede that agency deference is appropriate in certain circumstances. Indeed, Chief Justice Roberts made clear that *Skidmore* deference (in which courts grant a modicum of deference to an agency's statutory interpretation " 'to the extent it rests on factual premises within [the agency's] expertise' . . . which may give an Executive Branch interpretation particular 'power to persuade' ") remains alive and well. Moreover, the Court's opinion makes clear that Congress is free to delegate authority to the Executive Branch to interpret the meaning of certain statutes. It remains to be seen how often courts will utilize *Skidmore* deference moving forward when confronted with agency interpretation of ambiguous statutes.

Regardless, *Loper Bright* and *Relentless, Inc*. mark a tectonic shift in administrative law and could reshape the landscape of American governance for years to come. Federal agencies will need to adapt to new judicial scrutiny, legislators may face increased pressure to craft more precise laws, and courts will brace for a heavier caseload as they take on a more prominent role in statutory interpretation.