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A Biden Executive Branch and Its Supporters May Find the Federal Courts an Obstacle

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INTRODUCTION

Relaxing nutrition standards for school meals.[1] Removing water-quality protection from a significant percentage of the nation's waters.[2] Allowing employers to pay the sub-minimum wage for tipped employees even when those employees are performing untipped work.[3] Loosening restrictions on

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[1] Child Nutrition Programs: Flexibilities for Milk, Whole Grains, and Sodium Requirements, 83 Fed. Reg. 63,775 (Dec. 12, 2018), *vacated and remanded by* Ctr. for Sci. in the Pub. Int. v. Perdue, 438 F. Supp. 3d 546 (D. Md. 2020).

[2] Navigable Waters Protection Rule, 85 Fed. Reg. 22,250 (Apr. 21, 2020).

[3] Tip Regulations Under the Fair Labor Standards Act (FLSA), 82 Fed. Reg. 57,395 (Dec. 5, 2017), *prohibited by* Public Law 115–141, Div. S., Tit. XII, sec. 1201, 132 Stat. 348, 1148–49 (2018).

toxic air pollutants.[4] Weakening workers' rights to unionize and bargain collectively.[5] Abandoning efforts to ensure fair housing opportunities.[6] These and dozens more actions[7] were taken by the Trump administration to weaken the workplace, consumer, and environmental regulations through which the federal government, at the behest of Congress, protects the American people.

President Joe Biden issued nearly a score of memoranda in his first weeks in office announcing plans to restore the federal regulations that make America safer, cleaner, and more equitable.[8] He ordered his administrative agencies to suspend Trump regulations where possible and to expedite the restoration of rules that protect consumers, workers, children, the environment, poor people, disabled people, and other vulnerable persons and entities.[9] Some of those actions, like the Trump actions before them, have already been stymied in court.[10]

Indeed, the federal courts played a key role in preventing some of the worst of Trump's abuses.[11] Unfortunately, federal courts are likely also to

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[4] National Emission Standards for Hazardous Air Pollutants: Coal- and Oil-Fired Electric Utility Steam Generating Units—Reconsideration of Supplemental Finding and Residual Risk and Technology Review, 85 Fed. Reg. 31,286 (May 22, 2020).

[5] *See, e.g.*, UPMC & Its Subsidiary, UMPC Presbyterian Shadyside, 368 N.L.R.B. No. 2 (2019); Bexar County Performing Arts Center Foundation, 368 N.L.R.B. No. 46 (2019); Kroger Limited Partnership, 368 N.L.R.B. No. 64 (2019).

[6] Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47,899 (Aug. 7, 2020).

[7] *See generally Regulatory Rollback Tracker*, ENV'T & ENERGY L. PROGRAM, HARV. L. SCH., https://eelp.law.harvard.edu/portfolios/environmental-governance/regulatory-rollback-tracker/ [https://perma.cc/B7EK-VEC5]; Isaac Arnsdorf et al., *Tracking the Trump Administrations "Midnight Regulations,"* PROPUBLICA (Feb. 8, 2021), https://projects.propublica.org/trump-midnight-regulations/ [https://perma.cc/EHT3-Z38M].

[8] Aishvarya Kavi, *Biden's 17 Executive Orders and Other Directives in Detail*, N.Y. TIMES (Jan. 20, 2021), https://www.nytimes.com/2021/01/20/us/biden-executive-orders.html [https://perma.cc/Y6A8-9QMZ].

[9] *E.g.*, Exec. Order No. 13,985, 86 Fed. Reg. 7,009 (Jan. 25, 2021); Exec. Order No. 13,988, 86 Fed. Reg. 7,023 (Jan. 25, 2021); Exec. Order No. 13,990, 86 Fed. Reg. 7,037 (Jan. 25, 2021); Exec. Order No. 13,992, 86 Fed. Reg. 7,049 (Jan. 25, 2021); Exec. Order No. 13,993, 86 Fed. Reg. 7,051 (Jan. 25, 2021); Exec. Order No. 13,999, 86 Fed. Reg. 7,211 (Jan. 26, 2021); Exec. Order No. 14,005, 86 Fed. Reg. 7,475 (Jan. 28, 2021); Exec. Order No. 14,009, 86 Fed. Reg. 7,793 (Feb. 2, 2021). *See generally 2021 Joseph R. Biden Jr. Executive Orders*, NAT'L ARCHIVES (July 7, 2021), https://www.federalregister.gov/presidential-documents/executive-orders/joe-biden/2021 [https://perma.cc/UT66-387S].

[10] *E.g.*, Texas v. United States, 524 F. Supp. 3d 598, 607 (S.D. Tex. 2021) (enjoining Biden administration moratorium on deportations); Ala. Ass'n of Realtors v. United States Dept. of Health & Hum. Servs., No. 20-CV-3377 (DLF), 2021 WL 1779282, at *1 (D.D.C. May 5, 2021) (vacating nationwide moratorium on evictions imposed by the Centers for Disease Control to help control the Covid-19 pandemic); 2021 WL 1946376 (D.D.C. May 14, 2021) (staying order pending appeal); 2021 WL 2221646 (D.C. Cir. June 2, 2021) (refusing to vacate stay).

[11] The Trump administration lost many of the lawsuits brought to challenge deregulatory actions, in large part by ignoring the requirements of the Administrative Procedure Act. *See, e.g.*, Lawrence Hurley, *Trump Administration's 'Sloppy' Work Has Led to Supreme Court Losses*, REUTERS (Jun. 18, 2020), https://www.reuters.com/article/us-usa-court-immigration-trump-analysis/trump-administrations-sloppy-work-has-led-to-supreme-court-losses-idUSKBN23P3M2 [https://perma.cc/Q33H-YBPS]; Fred Barbash & Deanna Paul, *The Real Reason the Trump Administration is Constantly Losing in Court*, WASH. POST (Mar. 19, 2019), https://www.washingtonpost.com/world/national-security/the-real-reason-president-trump-

hinder President Biden's efforts to return the federal government to its proper role in implementing federal statutes. Some of that judicial interference arises from doctrines that make it difficult for regulatory beneficiaries to defend regulation or to attack deregulation; some of it may arise from a revolution in administrative law doctrine threatened by the current Supreme Court.

First, current Article III standing doctrine throttles lawsuits by those who are protected by regulations while throwing wide the courthouse door for those regulated. As the Court held in *Lujan v. Defenders of Wildlife*, industries and other entities *regulated* by administrative agencies are much more likely to meet standing requirements—and thus have access to the federal courts—than are human beings and other entities *protected* by those administrative agencies.[12] The same asymmetry obstructs suits aimed at suspending deregulatory actions imposed in the last days of Trump's administration—suits intended to protect regulatory beneficiaries while the Biden administration moves to re-regulate. As a result, citizen suits intended to reinforce the Biden agenda may thus fail at the threshold, while suits challenging Biden regulations will proceed. Even when plaintiffs survive standing hurdles, moreover, the doctrine limits the relief courts may grant, making it more difficult for courts to reinforce regulatory action even when that is what the law demands.

Second, as many commentators have noticed, the Supreme Court seems poised to upset decades of administrative law precedent. Conservative Supreme Court justices criticize *Chevron* and its progeny, cases that require courts to defer to expert agencies when those experts give reasonable interpretations of ambiguous statutes and regulations. If those cases are overturned, Biden-agency expertise will at best have persuasive authority as courts reach their own resolutions of statutory ambiguities—which, given the recent influx of conservative jurists to the federal bench, are likely to narrow the scope of regulatory action.

Finally, some Justices apparently wish to abolish the administrative state itself, despite the essential protections and benefits administrative agencies provide to the American people. Current doctrine requires deference to *Congress*, even when Congress delegates extremely broad policymaking discretion to agencies;[13] several Justices have suggested that such delegation is unconstitutional.[14] Justices Thomas and Gorsuch have even gestured toward a belief that the structure of the administrative state itself unconstitutional,[15]

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is-constantly-losing-in-court/2019/03/19/f5ffb056-33a8-11e9-af5b-b51b7ff322e9_story.html [https://perma.cc/96M3-CH2Q].

[12] 504 U.S. 555, 561–62 (1992). *See infra* Part I.

[13] *See* Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 459 (2001).

[14] Gundy v. United States, 139 S. Ct. 2116, 2130 (2019) (Alito, J., concurring); *id.* at 2131 (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.). *See infra* Part III.

[15] Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2212 (2020) (Thomas, J., concurring); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1154 (10th Cir. 2016) (Gorsuch, J., concurring).

and the Court has taken small steps in that direction.[16] Moves to implement such beliefs jeopardize the progressive agenda the Biden administration was elected to pursue.

This Article examines the problems the Biden administration and its supporters face from these doctrines. Part I discusses the obstacles presented by current standing doctrine. Part II discusses threatened abandonment of *Chevron* and other deference doctrines. Part III discusses the broader threat to the administrative state posed by the views of at least four members of the Supreme Court. Finally, Part IV discusses some tools available to would-be litigators and to the Executive Branch itself to succeed in spite of these doctrines: writing statutes and regulations that bolster the standing of regulatory beneficiaries; improving statutes and regulations to survive judicial review, should the Court abolish some or all of the deference doctrines; and expanding the federal judiciary—and potentially the Supreme Court itself—to reduce the politicized nature of the courts. The use of those tools will help the Biden administration restore the federal regulatory safety net.

I. STANDING DOCTRINE WILL INHIBIT PUBLIC INTEREST LITIGATION IN SUPPORT OF THE BIDEN AGENDA

The basics of Article III standing doctrine are "numbingly familiar."[17] For a plaintiff to bring suit an Article III court, she must satisfy a three-part test: she must show that (1) that she has suffered (or is threatened with) an injury in fact that is "concrete and particularized" and is "actual or imminent," not "conjectural or hypothetical"; (2) that at least a portion of her

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[16] The Court recently held that administrative law judges (ALJs) are not "employees" of the Executive Branch but are instead "Officers of the United States" requiring nomination by the President under the Constitution's Appointments Clause. Lucia v. SEC, 138 S. Ct. 2044, 2053 (2018); *see also* Carr v. Saul, 141 S. Ct. 1352, 1359 (2021) (holding that administrative exhaustion was not required in cases challenging status of Social Security disability ALJs under *Lucia*). As Professor Beermann has argued, political appointment poses a threat to the perceived impartiality of ALJs. Jack Beermann, *The Future of Administrative Law Judge Selection*, REGUL. REV. (Oct. 29, 2019), https://www.theregreview.org/2019/10/29/beermann-administrative-law-judge-selection/ [https://perma.cc/6KCS-XKR5].

[17] William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222 (1988). For excellent recent discussions of standing doctrine more generally, see Rachel Bayefsky, *Constitutional Injury and Tangibility*, 59 WM. & MARY L. REV. 2285, 2286 (2018); Fred O. Smith, Jr., *Undemocratic Restraint*, 70 VAND. L. REV. 845, 845–46 (2017); ERWIN CHEMERINSKY, CLOSING THE COURTHOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECAME UNENFORCEABLE (2017); Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1112–14 (2015); Tara Leigh Grove, *Standing Outside Article III*, 162 U. Pa. L. Rev. 1311 (2014); Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435 (2013); Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U. L. REV. 169, 178–79 (2012); Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921–2006*, 62 STAN. L. REV. 591, 595–96 (2010); Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1134–35 (2009); Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 814–18 (2009); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 289–90 (2008); Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 75 (2007).

injury is fairly traceable to the actions of the defendant; and (3) that the relief requested in her suit redresses at least some of her claimed injury.[18]

As the Court held in *Lujan v. Defenders of Wildlife*, industries and other entities *regulated* by administrative agencies are much more likely to meet these requirements—and thus have access to the federal courts—than are human beings and other entities *protected* by those administrative agencies.[19] As a result, citizen suits intended to reinforce the Biden agenda—whether by suing those who violate Biden rules or by suing to suspend Trump-era deregulations—may fail at the threshold, while suits challenging Biden regulations will almost certainly proceed; even in suits where citizens are able to proceed, standing doctrine limits the relief courts may grant.

A. The Asymmetry in Court Access Authorized by Standing Doctrine Harms Public-Interest Litigants

In *Lujan v. Defenders of Wildlife*, the Supreme Court emphasized that its Article III standing doctrine gives certain plaintiffs easier access to the federal courts than other plaintiffs. When "the plaintiff is himself an object of the action (or forgone action) at issue . . . there is ordinarily little question that" he has standing.[20] When, however, "the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish."[21] The doctrine thus permits suits by regulated entities (companies or individuals whose activities will be limited by government regulation) much more readily than it does those by regulatory beneficiaries (those who will benefit from the restrictions imposed by government regulation).

Take, for example, the cases *Steel Co. v. Citizens for a Better Environment*[22] and *Bennett v. Spear*.[23] *Steel Company* involved an environmental group's challenge to the Steel Company's violations of the Emergency Protection and Community Right-to-Know Act (EPCRA), which Congress enacted to provide communities with knowledge about the toxic chemicals used in their midst.[24] The environmental group represented precisely the individuals that Congress, in enacting EPCRA, had intended to benefit, and the Steel Company had concededly violated the strictures of the Act. The Court undertook an extraordinarily complicated analysis of the plaintiffs' claimed injuries, the causal links between those injuries and the defendant Steel Company, and the likely redress provided by the remedies the plaintiffs

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[18] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).
[19] *Id.* at 561–62.
[20] *Id.*
[21] *Id.* at 562.
[22] 523 U.S. 83 (1998).
[23] 520 U.S. 154 (1997). This comparison rests on analysis given by Philip Weinberg in *Unbarring the Bar of Justice: Standing in Environmental Suits and the Constitution*, 21 PACE ENV'T. L. REV. 27 (2003).
[24] *See generally* Heather Elliott, *Steel Company v. Citizens for a Better Environment*, 26 ECOLOGY L.Q. 709 (1999).

sought, ultimately rejecting the plaintiffs' standing and dismissing the case while giving "a narrow, grudging, indeed hostile, reading of Congress's citizen suit provisions."[25]

By contrast, in *Bennett v. Spear*, the Court readily found that ranchers had standing to sue under the Endangered Species Act, because their ranching activities were constrained by the Act.[26] This was so even though a victory for the ranchers would *harm* protected species, showing that the Court had "greater concern for business interests alleging economic harm from government"[27] than for the entities—including endangered species—that Congress intended to protect.

Numerous other cases demonstrate the asymmetry in access created by Article III standing doctrine. To mention just a few: the Court has rejected standing for regulatory beneficiaries in *Sierra Club v. Morton*,[28] where environmental groups sued to protect forest lands; *Allen v. Wright*,[29] where Black parents challenged an IRS policy that allowed tax exemptions for whites-only private schools; *Lujan*,[30] already mentioned, where biologists and others sued to protect endangered species; *City of Los Angeles v. Lyons*,[31] where a Black man who had been subjected to violence at the hands of the Los Angeles Police Department sued to stop the LAPD's use of chokeholds; and *Summers v. Earth Island Institute*,[32] where an environmental group sued over federal forest policy. The lower courts, of course, follow suit. In recent cases, federal district judges found standing lacking for plaintiffs challenging the deregulation of for-profit tertiary schools[33] and for plaintiffs opposing the lifting of fair housing protections.[34]

This asymmetry in access has been the subject of numerous criticisms. For example, standing doctrine may reinforce the problem of agency "capture" (where an agency, which interacts regularly with those it regulates, comes to see the regulated, rather than those who benefit from regulation, as its constituency).[35] Given standing's asymmetry, lawsuits against agencies are

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[25] Weinberg, *supra* note 23, at 45.

[26] 520 U.S. at 166.

[27] The asymmetry extends to decisions, not just about standing, but also about the availability of judicial review. *See* Cass R. Sunstein, *Reviewing Agency Action after* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 660 (1985) ("The Court's decisions reflect skepticism about the appropriateness of judicial supervision of the regulatory process at the behest of statutory beneficiaries."). *But see* A.H. Barnett & Timothy D. Terrell, *Economic Observations on Citizen Suit Provisions of Environmental Legislation*, 12 DUKE ENV'T. L. & POL'Y F. 1 (2001) (contending that it is environmental groups that have the advantage, given generous citizen suit provisions and broad availability of standing).

[28] 405 U.S. 727, 735 (1972).

[29] 468 U.S. 737, 751 (1984).

[30] 504 U.S. at 562.

[31] 461 U.S. 95, 110 (1983).

[32] 555 U.S. 488, 496 (2009).

[33] Am. Fed'n of Tchrs. v. DeVos, 484 F. Supp. 3d 731, 743–44 (N.D. Cal. 2020).

[34] Nat'l Fair Hous. All. v. Carson, 330 F. Supp. 3d 14 (D.D.C. 2018).

[35] *See* Richard J. Pierce, Lujan v. Defenders of Wildlife*: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1170–71 (1993); *see also* Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163,

more likely to proceed when they are filed by regulated industry.[36] To stave off those lawsuits, an agency may craft its regulations in a way that favors the regulated industry. This, in turn, reinforces the capture of agencies by regulated industry; such "'capture' is a version of the phenomenon the Framers called 'factionalism.' [Standing doctrine thus may] maximiz[e] the potential growth of the political pathology the Framers most feared and strived to minimize."[37]

More broadly, standing's asymmetry "systematically favors the powerful over the powerless."[38] This bias means that "the power to trigger judicial review is afforded most readily to those who have traditionally enjoyed the greatest access to the processes of democratic government."[39] Standing doctrine has thus been found more readily not only for regulated entities over regulatory beneficiaries, but also, it has been argued, for the privileged rather than the underprivileged.[40]

Often, the Court has justified denying standing to regulatory beneficiaries on the grounds that large groups of people—such as those who benefit from pollution control laws or workplace regulation—can protect themselves through the political process, and that using the courts to redress widely shared injuries is improper.[41] But, as students of democracy have long

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165 (1992); *cf.* Hessick, *supra* note 17, at 327 (noting value of lawsuits in deterring undesirable private conduct).

[36] Pierce, *supra* note 35, at 1194–95.

[37] *Id.* at 1195; *see also* Sierra Club v. Morton, 405 U.S. 727, 745–46 (1972) (Douglas, J., dissenting) ("The suggestion that Congress can stop action which is undesirable is true in theory; yet even Congress is too remote to give meaningful direction and its machinery is too ponderous to use very often. The federal agencies of which I speak are not venal or corrupt. But they are notoriously under the control of powerful interests who manipulate them through advisory committees, or friendly working relations, or who have that natural affinity with the agency which in time develops between the regulator and the regulated.").

[38] Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 304 (2002); *see also* Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1168 (1993) ("Justice Scalia's view of separation of powers threatens to constitutionalize an unbalanced scheme of regulatory review. . . . The courts can protect the interests of regulated entities, but the interests of 'regulatory beneficiaries' are left to the political process." (footnote omitted)).

[39] Nichol, *Standing for Privilege*, *supra* note 38, at 333.

[40] *See id.* at 322–29; *cf.* Bayefsky, *supra* note 17, at 2292 (noting that courts tend to rely on quantifiable economic and property injuries in finding standing and tend to reject claims of injury that do not involve economic or property-based harms). Justice Douglas raised a similar concern when he dissented in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 229 (1974) (Douglas, J., dissenting). In preventing citizens from challenging certain actions under the Incompatibility Clause, Justice Douglas argued that standing doctrine "protects the status quo by reducing the challenges that may be made to it and to its institutions. It greatly restricts the classes of persons who may challenge administrative action. Its application in this case serves to make the bureaucracy of the Pentagon more and more immune from the protests of citizens." *Id.*

[41] *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 500 (1975) ("Without [standing] limitations . . . the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights."); United States v. Richardson, 418 U.S. 166, 179 (1974) (noting that the plaintiff could seek redress through the "traditional electoral process"). Then-Judge Scalia emphasized that standing was necessary to keep the courts from invading the provinces of the other branches.

noted, the mere fact of widespread harm does not lead to political mobilization.[42] Often, regulations protect large swathes of the population from harms that are relatively minor when considered person by person, but that are significant in the aggregate.

For example, EPA has imposed air quality regulations limiting the emissions of particulate matter because such particulates cause adverse health effects.[43] Imagine that an anti-regulatory EPA lifts those restrictions or fails to enforce against those violating them. A political movement can coalesce around these anti-regulatory actions only with a great deal of time and expense, which is unlikely in a world where citizens worry about any number of issues.[44] Yet the aggregate harm from EPA's action is significant and, if unlawful, should be prevented.[45]

Thus, dismissing a case because an injury is widely shared, on the assumption that the populace will mobilize to obtain redress through the political branches, does not take into account political reality. And the EPA example focuses primarily on transaction costs and other microeconomic aspects of political mobilization; even more problems arise when one takes into account America's history of excluding certain groups from the political process altogether[46] and of providing disproportionate access to and control over the political process and regulatory agencies to well-organized lobbies who represent the interests of the powerful.[47]

Some have even contended that standing doctrine—and its preference for challenges to regulation over suits to enforce regulation—is a modern version of economic substantive due process. After all, a strict view of standing produces results akin to those of the *Lochner* era, "when constitutional provisions were similarly interpreted so as to frustrate regulatory initiatives in

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Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983) (standing doctrine keeps plaintiffs from "remov[ing a] matter from the political process and plac[ing] it in the courts").

[42] Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1311 (1976).

[43] OFFICE OF AIR & RADIATION, U.S. EPA, AIR QUALITY INDEX: A GUIDE TO AIR QUALITY AND YOUR HEALTH 11 (2000).

[44] As scholars of market failures have shown, certain kinds of injuries shared by large numbers of people are unlikely to give rise to political solutions because of collective action problems such as free riding or the tragedy of the commons. *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965).

[45] *See generally* OFFICE OF AIR QUALITY PLANNING AND STANDARDS, U.S. EPA, REGULATORY IMPACT ANALYSIS FOR THE FINAL REVISIONS TO THE NATIONAL AMBIENT AIR QUALITY STANDARDS FOR PARTICULATE MATTER at ES-14 (2013), https://www3.epa.gov/ttnecas1/regdata/RIAs/finalria.pdf [https://perma.cc/G4PD-WVHF] (finding net benefits of particulate-matter air-quality standards in the billions of dollars).

[46] *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); JOHN GAVENTA, POWER AND POWERLESSNESS: QUIESCENCE AND REBELLION IN AN APPALACHIAN VALLEY (1980).

[47] *See generally* ROBERT G. KAISER, SO DAMN MUCH MONEY: THE TRIUMPH OF LOBBYING AND THE CORROSION OF AMERICAN GOVERNMENT (2009).

deference to private-law understandings of the legal system."[48] For this reason, many have criticized standing doctrine as a vehicle for judges to implement hidden assumptions about people and politics—for example, assumptions that economic harm is more important than stigmatic harm—that would be controversial if made plain.[49]

Standing doctrine, then, creates an asymmetry of access: it is easier for those who oppose regulation to challenge regulations than it is for those who support regulation to reinforce it. Of course, that regulated entities have easier access to the courts because of standing doctrine does not mean they will win on the merits. But they will win some or even many of them, especially in the more conservative Article III courts created by President Trump and the Republican-majority Senate since 2016.[50]

B. Standing's Asymmetry Makes Challenging Deregulatory Actions Even More Difficult

Standing's asymmetry not only prevents certain kinds of plaintiffs from suing; it also means that certain *types* of lawsuits are more likely to fail at the standing threshold. Deregulatory actions, for example, are usually pleasing to regulated entities, who therefore have no reason to sue over such actions.[51] Regulatory beneficiaries harmed by deregulation must thus bring their own lawsuits and, to do so, must satisfy the standing test, even though, for regulatory beneficiaries, standing is "ordinarily substantially more difficult to establish."[52] Some portion of those would-be plaintiffs fail the standing test, meaning that deregulation winds up subject to less judicial scrutiny than regulatory actions; judicial oversight of executive action is asymmetrical. When combined with other obstacles to suits challenging regulatory inaction,[53] deregulation is more likely to continue unchecked.

The Trump administration engaged in deregulatory efforts starting in 2017 (in the form of both deregulatory rules[54] and lack of enforcement[55]) and

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[48] Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1458 (1988); *see also* Fletcher, *supra* note 18, at 233.

[49] *E.g.*, Bayefsky, *supra* note 17, at 2323–422; Daniel A. Farber, *Standing on Hot Air:* American Electric Power *and the Bankruptcy of Standing Doctrine*, 121 YALE L.J. ONLINE 121 (2011).

[50] *E.g.*, Lawrence Hurley, *On Guns, Abortion and Voting Rights, Trump Leaves Lasting Mark on U.S. Judiciary*, REUTERS (Jan. 15, 2021), https://www.reuters.com/world/us/guns-abortion-voting-rights-trump-leaves-lasting-mark-us-judiciary-2021-01-15/ [https://perma.cc/2LWD-JQXW].

[51] This, of course, is not always true. *See* Am. Chemistry Council v. Dep't of Transp., 468 F.3d 810, 811 (D.C. Cir. 2006) (a regulated entity sought further regulation from the Department of Transportation because of a troublesome lacuna in the existing regulations; the court inexplicably found that they lacked standing).

[52] Lujan v. Defs. of Wildlife, 504 U.S. 555, 562 (1992).

[53] *See* Sunstein, *supra* note 27, at 666.

[54] *See generally Regulatory Rollback Tracker*, *supra* note 7.

[55] *See* ENV'T L. INST., ENVIRONMENTAL PROTECTION IN THE TRUMP ERA 34–37 (2018), https://www.eli.org/sites/default/files/book_pdfs/environmentalprotectiontrumpera.pdf [https://perma.cc/U3HL-3C7W].

continued to issue deregulating rules up to the days before President Biden was inaugurated.[56] Lame duck rules, issued after a president has lost an election for a second term, have been called "midnight regulation" —or, in the context of deregulatory actions, midnight *de*regulation.[57] As Professor Beermann has argued, midnight deregulation "is more likely to be contrary to the public interest" than midnight regulation, "benefiting narrow interests at the expense of the health and welfare of the general public" and "reflect[ing] favors to special interests that would not be palatable absent timing that reduce[s] the political consequences."[58]

But, despite the harm midnight deregulation causes, such deregulation is harder to challenge in the federal courts because of the Supreme Court's constitutional standing doctrine. Regulated entities are likely to be quite happy with midnight actions that lessen regulatory burdens; they will not bring suit. Those harmed by the deregulatory action—those who would have benefited from the higher regulatory burdens—must pass a tougher test to gain access to the federal courts. As I discussed above,[59] the Supreme Court has made clear that standing doctrine requires much more of regulatory beneficiaries. This is not to say that judicial review is unavailable; there may be plaintiffs with standing. The issue is one of likelihood: a midnight deregulation is more likely to avoid court oversight than a midnight regulation. Thus, Trump-era deregulatory rules will be less likely to be overturned in court, allowing such rules—antithetical to the Biden administration's agenda—to persist into the Biden-Harris years.

And it is likely not possible for the Biden administration to swiftly replace Trump administration deregulatory rules with new, re-regulatory rules. Since the *Seatbelts* case, the Supreme Court has essentially required a complete new rulemaking if an agency seeks to revise or rescind an existing rule.[60] Thus Biden's agencies will be required to go through the full Administrative Procedure Act process to replace Trump's deregulatory actions (though the agencies may in some cases be able to springboard off Obama-era rulemak-

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[56] *See* Dan Goldbeck & Sam Batkins, *Trump's Raucous "Midnight"*, 44 REGUL. 8, 8 (2021) (noting that the Trump administration promulgated 56 final rules in November, 84 in December, and 71 in the days of January before President Biden was inaugurated); *see also* Hannah Leibson, *A Primer on Midnight Regulations*, REGUL. REV. (Jan. 13, 2021), https://www.theregreview.org/2021/01/13/leibson-primer-midnight-regulations/ [https://perma.cc/37BA-BH4G]; Maegan Vazquez et al,, *Trump Administration Pushes 'Midnight Regulations' After Breaking Records for Final-Year Rulemaking*, CNN (Dec. 6, 2020), https://www.cnn.com/2020/12/06/politics/trump-midnight-regulations-record-rulemaking/index.html [https://perma.cc/P9C2-PMWZ].

[57] Jack M. Beermann, *Midnight Deregulation*, *in* TRANSITIONS: LEGAL CHANGE, LEGAL MEANINGS 27 (Austin Sarat ed., 2012).

[58] *Id.*

[59] *See supra* Section I.A.

[60] Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 45 (1983). In this case, the Reagan administration attempted to relax a rule promulgated under President Carter that imposed stringent requirements on automakers to provide seatbelts and air bags. The Supreme Court held that the new rule could survive only if supported by evidence of changed circumstances; it was not enough that the Reagan administration would have decided the matter differently, had it conducted the original rulemaking.

ings[61]). Moreover, the Biden rules—because they will presumably impose more burdens on regulated entities—will be challenged in court by plaintiffs that have almost unquestioned standing to sue.[62]

C. Standing Doctrine Also Constrains the Relief Courts Can Award

Standing doctrine does not only constrain would-be plaintiffs; it also constrains the courts themselves. The Court has held since the early 1980s that a party must show standing for every form of relief sought.[63] And, in 2017, the Court held that intervenors, if they seek relief different at all from that sought by the original plaintiff, must independently satisfy Article III standing requirements.[64] This prevents a regulatory beneficiary from intervening as a party in a suit brought by a regulated entity if, as would usually be the case, the would-be intervenor seeks relief different from that requested by the regulated entity, and the court concludes that the regulatory beneficiary lacks standing. Standing doctrine thus prevents a federal court exercising its discretion as to what relief best resolves the case before it.

Why does this matter? Imagine a case in which a chemical manufacturer is challenging a Biden administration regulation that limits the use of certain toxic substances. The manufacturer will have almost unquestioned standing, because its freedom of action is constrained by the regulation, and it will seek to have the regulation reversed. An environmental group seeks to intervene to defend the regulation and to seek penalties against the manufacturer for violating the regulation. If the environmental group cannot show independent standing, the court cannot impose penalties on the manufacturer; at best it can uphold the regulation.

II. Possible Abandonment of Judicial Deference Would Imperil Biden Agenda

As the previous Part demonstrates, federal courts are more hospitable to suits by regulated entities than to those brought by regulatory beneficiaries.

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[61] The Administrative Procedure Act requires an agency seeking to promulgate a regulation to publish a notice of proposed rulemaking, to receive public comment on the proposed rule, and to publish a final rule with a justification that includes the expert basis for the rule and explanations of how the agency considered and responded reasonably to public comment. *See generally* Todd Garvey, Cong. Rsch. Serv., R41546, A Brief Overview of Rulemaking and Judicial Review (2017). Because many of the rules overturned by the Trump administration had only recently been adopted by the Obama administration, the administrative records of at least some of the Obama rulemakings should require only minimal updating and could be reissued relatively swiftly. However, experts note that Trump's gutting of agency staff will slow agencies down even in rulemakings where little updating is required. *E.g.*, Coral Davenport, *Restoring Environmental Rules Rolled Back by Trump Could Take Years*, N.Y. Times (Jan. 22, 2021), https://www.nytimes.com/2021/01/22/climate/biden-environment.html [https://perma.cc/628P-CUE7].

[62] *See supra* Section I.A.

[63] City of Los Angeles v. Lyons, 461 U.S. 95, 110 (1983).

[64] Town of Chester, N.Y. v. Laroe Ests., Inc., 137 S. Ct. 1645, 1651 (2017).

Since the early 1980s, however, a regulatory beneficiary seeking to defend a regulation could, if it survived the standing threshold, have some confidence that the court would uphold the regulation. For decades, federal doctrine has required federal courts to defer to many types of administrative action. That required deference has, at least to some extent, limited court authority to stymie executive policy.

But a revolution in administrative law doctrine may be imminent. At least four members of the current Court have expressed a desire to overturn cases such as *Chevron*, *City of Arlington*, *Brand X*, and *Auer*, all of which require deference to agency interpretation of ambiguous statutes and regulations.[65] If deference is abandoned, a court, rather than accepting the expert agency's resolution of statutory ambiguity, establishes a single judicial interpretation—perhaps consistent with the agency view, perhaps not—that only Congress may alter.

While, in the absence of mandatory deference, an agency interpretation can *persuade* a court to view a statute a particular way,[66] the judge is free *not* to be persuaded. Given the number of conservative judges installed on the bench during the Trump administration, an abandonment of *Chevron* deference means that, in many cases, conservative, anti-regulatory, anti-federal-government judges would provide authoritative interpretations of ambiguous statutes and would presumably choose the interpretations that narrow the scope of agency action and limit the regulatory protections provided to the American people. President Biden may therefore face significant challenges in implementing his agenda, if his agencies do not receive the deference courts have accorded for the last four decades.

A. Current Doctrine Requires Extensive Deference to Agency Decisionmaking

Chevron, U.S.A., Inc. v. Natural Resources Defense Council famously requires courts to defer to an agency's reasonable interpretation of an ambiguous statute the agency is charged with implementing. The case involved the calculation of emissions from power plants.[67] A Carter administration rule

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[65] *See* Heather Elliott, *Gorsuch v. The Administrative State*, 70 ALA. L. REV. 703, 704 (2019).

[66] United States v. Mead Corp., 533 U.S. 218, 221 (2001) (holding that *Chevron* deference was not applicable to tariff classifications and that classifications deserved, at best, "respect according to [their] persuasiveness"); *see also* Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

[67] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 839–40 (1984).

resulted in stricter emissions controls, while the newer Reagan rule permitted more pollution.[68] Environmentalists sued, arguing that the Clean Air Act forbade increased pollution. The Court held that Clean Air Act did not, by its terms, preclude either interpretation.[69] Under existing doctrine governing the standard of review, the Court could have interpreted the Act de novo;[70] instead, the Court held that courts should defer to an agency's reasonable resolution of statutory ambiguity.[71] Once ambiguity is found, the court must guard against unreasonable interpretations, but its role goes no further.[72] That approach to review of agency statutory interpretation has been the law since 1984.

City of Arlington further broadened the scope of deference to agency interpretations of ambiguous statutes.[73] There, the statutory provision at issue affected the scope of the agency's authority. If the statute was interpreted one way, then the agency had power to act; if it was interpreted another way, then the agency lacked power. The question was whether the jurisdictional nature of the question counseled against deference (after all, one might expect the agency to self-deal in making a decision about the boundaries of its own power). The Court found that *Chevron* deference applied even to questions about the boundaries of the agency's jurisdiction. Chief Justice Roberts (joined by Justices Kennedy and Alito) dissented: courts must "ensur[e] that the Legislative Branch has in fact delegated lawmaking power to an agency within the Executive Branch, before the Judiciary defers to the Executive on what the law is."[74]

Another expansion of *Chevron* deference emerged in *Brand X*.[75] Chevron Step Two requires a court to defer to an agency's reasonable resolution of statutory ambiguity. But some ambiguous statutes have not yet been inter-

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[68] *Id.*

[69] *Id.* at 859–60 (interpreting 42 U.S.C. § 7411).

[70] *See* 5 U.S.C. § 706; *see also* Richard W. Murphy, *Abandon* Chevron *and Modernize Stare Decisis for the Administrative State*, 69 ALA. L. REV. 1, 5 n.15 (2017).

[71] *Chevron*, 467 U.S. at 865. *Chevron* has been called revolutionary. *E.g.*, Jonathan T. Molot, *Reexamining* Marbury *in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1259 n.78 (2002); Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L.J. 1051, 1062 (1995); Kenneth W. Starr, *Judicial Review in the Post-*Chevron *Era*, 3 YALE J. ON REG. 283, 284 (1986). *But see* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1120–21 (2008) ("Although the 'revolutionary' nature of *Chevron* seems accepted by lawyers, lower court judges, and academics, at the level of Supreme Court practice, and even doctrine, *Chevron*'s status strikes us as something short of that."); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 512 ("It should not be thought that the *Chevron* doctrine—except in the clarity and the seemingly categorical nature of its expression—is entirely new law.").

[72] *Chevron*, 467 U.S. at 866.

[73] *See generally* City of Arlington v. FCC, 569 U.S. 290, 290 (2013) (Scalia, J., writing for the court, held that courts must, when there is ambiguity, defer to an agency interpretation of its own authority).

[74] *Id.* at 327 (Roberts, C.J., dissenting).

[75] *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).

preted by agencies, and a lawsuit involving that statute, then, requires the *court* to interpret the ambiguous provision. What is the status of that interpretation going forward? The Supreme Court in *Brand X*[76] said that *Chevron* required the earlier judicial interpretation to give way to the later administrative interpretation.[77] If the earlier court opinion made clear that the statute was ambiguous, Justice Thomas wrote for the Court, then the agency remains free to interpret the statute for itself. Otherwise, "allowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute, as the Court of Appeals assumed it could, would allow a court's interpretation to override an agency's."[78]

In 1997, in *Auer v. Robbins*, the Court established an even stronger category of deference when agencies are interpreting their own ambiguous regulations.[79] Such interpretations are "controlling unless 'plainly erroneous or inconsistent with the regulation.'"[80] And agencies are "free to write the regulations as broadly as [they] wish[ ], subject only to the limits imposed by the statute."[81]

Taken together, *Chevron*, *City of Arlington*, *Brand X*, and *Auer* establish a regime of deference to expert regulatory agencies. Courts police the margins of agency statutory and regulatory interpretation, ensuring that those interpretations are reasonably supported by statutory and regulatory text, but courts do not "say what the law is." Instead, according to *Chevron*, Congress has deemed that agencies have that duty.

Chevron and its follow-on cases are not inherently pro-regulation: as *Chevron* itself shows, an interpretation adopted by a conservative administration—one that interprets the statute narrowly and lessens regulatory protections—will receive deference. But the deference doctrines do create a pro-regulation bias when applied to progressive regulation. Under those cases, the Biden administration can expect that its expert actions, when based on reasonable statutory interpretation, will survive judicial scrutiny.

An abandonment of *Chevron* deference, however, threatens Biden regulatory actions. Take the facts of *Chevron* itself. The Reagan administration had narrowed a Carter administration rule. Had Carter been returned to office in 1985, his administration could have re-imposed the more protective regulation, and, under *Chevron*, that interpretation would have been upheld. Without *Chevron*, however, the federal court decides for itself the meaning of the Clean Air Act provision at issue, considering the agency position as only one factor in many in interpreting the law.[82] If a federal court in 1985 were to adopt a conservative interpretation, the second Carter administration

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[76] *See id.*
[77] *Id.* at 982.
[78] *Id.*
[79] 519 U.S. 452, 461 (1997)
[80] *Id.* (internal quotation marks omitted) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)).
[81] *Id.* at 463.
[82] *See supra* note 66 (describing *Mead-Skidmore* "deference," under which the agency view is at best persuasive authority).

would have been required to regulate according to that conservative approach. Likewise, in a no-*Chevron* world, the Biden administration would be at the mercy of statutory interpretations adopted by federal judges—more than a quarter of whom have now been appointed by Donald Trump.[83] What's more, once the courts adopted a resolution of the statutory ambiguity, that resolution would bind the agency: it could not revisit the ambiguity. Only Congress could amend the statute to change its meaning.

B. Current Threats to Abandon the Deference Doctrines are a Threat to the Biden Agenda

The Court has already narrowed the application of *Chevron*. Courts are now required to ascertain whether Congress empowered the agency to take on the interpretive role before giving deference,[84] and courts are to look skeptically on an agency's interpretative role when a rule with major consequences is at issue.[85] Several members of the Court have expressed desire to further narrow or even abandon *Chevron* and its children.

Most vehement is Justice Gorsuch. While on the Tenth Circuit, then-Judge Gorsuch wrote a lengthy concurrence in a case called *Gutierrez-Brizuela v. Lynch* that lays out his position: "[T]he fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design."[86] Indeed, he says, "*Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty."[87] He describes *Chevron* ultimately as a threat to the constitutional structure:

> After all, *Chevron* invests the power to decide the meaning of the law, and to do so with legislative policy goals in mind, in the very entity charged with enforcing the law. Under its terms, an administrative agency may set and revise policy (legislative), override adverse judicial determinations (judicial), and exercise enforcement discretion (executive). Add to this the fact that today many administrative agencies "wield[ ] vast power" and are overseen by political appointees (but often receive little effective oversight from the chief executive to whom they nominally report), and you have a pretty potent mix. Under any conception of our separation of powers, I would have thought powerful and centralized authorities like

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[83] John Gramlich, *How Trump Compares With Other Presidents In Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2021), https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/ [https://perma.cc/D3EB-3HA3].

[84] *See* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

[85] *See* Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000); King v. Burwell, 576 U.S. 473, 485 (2015).

[86] 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

[87] *Id.* at 1152.

> today's administrative agencies would have warranted less deference from other branches, not more.[88]

Likewise, Justice Gorsuch would abandon *City of Arlington*: "[I]f an agency can interpret the scope of its statutory jurisdiction one way one day and reverse itself the next (and that is exactly what *City of Arlington*'s application of *Chevron* says it can), you might well wonder: where are the promised 'clearly delineated boundaries' of agency authority?"[89]

Justice Thomas is also on record as an opponent of *Chevron* deference. He wrote in *Michigan v. EPA* that "we seem to be straying further and further from the Constitution without so much as pausing to ask why. We should stop to consider that document before blithely giving the force of law to any other agency 'interpretations' of federal statutes."[90] Most recently, in a dissent from denial of certiorari,[91] he contended that *Chevron* was wrongly decided[92] and that, perhaps, it was not entitled to stare decisis.[93] One might think that Justice Thomas, as the author of *Brand X*, would not be a vote to overturn it. But, Justice Thomas wrote in 2020 with regard to *Brand X*, "it is never too late to surrender former views to a better considered position."[94] Moreover, he wrote, "*Chevron* arguably sets out an interpretive tool and so may not be entitled to stare decisis treatment. . . . The same can be said of . . . *Brand X* . . . ."[95]

Chief Justice Roberts may be a potential opponent of *Chevron* as well: he has certainly narrowed *Chevron*'s application, developing the "major questions" doctrine mentioned above.[96] And he has joined in some of the dissents from denial of certiorari and statements upon denial of certiorari that criticize *Chevron*.[97] But it is unclear whether he would take the step of overturning a forty-year-old precedent.[98] Indeed, in *June Medical Services v. Russo*, the Chief Justice voted to strike down a Louisiana abortion statute,[99] even though he had dissented in a case that struck down a virtually indistinguishable Texas statute.[100] After a discussion of the importance of precedent and

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[88] *Id.* at 1155 (citation and footnote omitted).

[89] *Id.* at 1154–55 (citing Mistretta v. United States, 488 U.S. 361, 372–73 (1989)).

[90] 576 U.S. 743, 760–64 (2015) (Thomas, J., concurring); *see also* PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., 139 S. Ct. 2051, 2057 (2019) (Thomas, J., concurring).

[91] *See infra* Section II.C.

[92] Baldwin v. United States, 140 S. Ct. 690, 690–94 (2020) (Thomas, J., dissenting from denial of certiorari) (making an argument that parallels then-Judge Gorsuch's concurrence in *Gutierrez-Brizuela*).

[93] *Id.* at 691 n.1 (2020) (Thomas, J., dissenting from denial of certiorari).

[94] *Id.* at 690 (internal quotation and citation omitted).

[95] *Id.* at 691 n.1.

[96] *See supra* note 85 and accompanying text.

[97] Scenic Am., Inc. v. Dep't of Transp., 138 S. Ct. 2 (2017) (statement of Gorsuch, J., joined by Roberts, C.J., and Alito, J., respecting the denial of certiorari).

[98] *Cf.* June Med. Servs. LLC v. Russo, 140 S. Ct. 2103, 2134 (2020) (Roberts, J., concurring in the judgment) (applying stare decisis to strike down a statute that he would have upheld if no precedent had existed).

[99] *Id.*

[100] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2330 (2016) (Alito, J., dissenting, joined by Roberts, C.J., and Thomas, J.).

stare decisis, the Chief Justice concluded that "[b]ecause Louisiana's admitting privileges requirement would restrict women's access to abortion to the same degree as Texas's law, it also cannot stand under our precedent."[101]

Similarly, Justice Alito has joined in a few opinions at the margins—for example, rejecting the extension of *Chevron* to certain fact patterns[102]—but does not appear to share the desire to overturn *Chevron* in full. Commentators have suggested that Justice Kavanaugh is likely to vote to change the deference doctrines.[103] In particular, they note a book review then-Judge Kavanaugh wrote in 2016 that suggested the need to "rein in" *Chevron* and emphasized that the rule of law "depends on neutral, impartial judges who say what the law is, not what the law should be."[104] We do not yet know about Justice Barrett, who wrote only two opinions applying *Chevron* during her brief tenure on the Seventh Circuit,[105] and who has participated in no Supreme Court case involving a debate over *Chevron* since she was confirmed.[106]

In perhaps a hopeful outcome for the Biden administration, the Court squarely faced the opportunity to abandon Auer deference and decided not to. Instead, it complicated *Auer* deference in *Kisor v. Wilkie*, listing a variety of conditions for applying *Auer* deference: is the regulation "genuinely ambiguous"?; even if so, is the agency's interpretation reasonable?; even if so, does the interpretation "reflect an agency's authoritative, expertise-based, fair, or considered judgment"?[107] *Auer* deference is thus presumably less deferential than before, but it is still good law.

Concurring in the judgment in *Kisor*, Justice Gorsuch argued that *Auer* should simply be overruled. He wrote an extensive opinion that criticizes *Auer* much as his concurrence in *Gutierrez-Brizuela* criticized *Chevron*.[108]

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[101] June Med. Servs., 140 S. Ct. at 2133, 2139; *see also* Kisor v. Wilkie, 139 S. Ct. 2400, 2424 (2019) (Roberts., C.J., concurring in part) (expressly joining majority opinion upholding *Auer v. Robbins* for stare decisis reasons).

[102] *See, e.g.*, City of Arlington v. FCC, 569 U.S. 290, 317 (2013) (Roberts, C.J., dissenting, joined by Kennedy & Alito, J.J.)

[103] *See* Kent Barnett, Christina L. Boyd, & Christopher J. Walker, *Judge Kavanaugh,* Chevron *Deference, and the Supreme Court*, REGUL. REV. (Sep. 3, 2018), www.theregreview.org/2018/09/03/barnett-boyd-walker-kavanaugh-chevron-deference-supreme-court/ [https://perma.cc/VHN5-FGKJ] (citing Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016)).

[104] *Id.* (citing Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016)).

[105] *See* Cook Cty., Ill. v. Wolf, 962 F.3d 208, 235 (7th Cir. 2020) (Barrett, J., dissenting) (stating her conclusion, contrary to the panel majority, that Department of Homeland Services interpretation would be upheld at Step Two of *Chevron*); Ruderman v. Whitaker, 914 F.3d 567, 573 (7th Cir. 2019) (Barrett, J.) (giving *Chevron* deference to a Board of Immigration Appeals decision regarding the meaning of a provision of the Immigration and Nationality Act). She also mentions *Chevron* in Meza Morales v. Barr, 973 F.3d 656 (7th Cir. 2020), but only in the process of stating that *Auer*, not *Chevron*, deference was relevant to the interpretive question.

[106] In *Salinas v. U.S. R.R. Ret. Bd.*, 141 S. Ct. 691, 701 (2021), Justice Barrett joined Justice Thomas's dissent in a statutory interpretation case, but the case did not involve *Chevron*.

[107] 139 S. Ct. 2400, 2415–18 (2019).

[108] *Id.* (Gorsuch, J., concurring).

Justices Thomas, Alito, and Kavanaugh joined part or all of that concurrence. While the Chief Justice, concurring in part with the majority opinion, wrote that "the distance between the majority and Justice GORSUCH is not as great as it may initially appear,"[109] Justice Gorsuch's concurrence in the judgment made clear his desire that, in the future, "this Court will find the nerve it lacks today and inter *Auer* at last."[110]

Say a majority of the Court does emerge to abandon one or more of the deference doctrines. What are the consequences for the Biden administration? As already noted, a return to *de novo* review of statutes altogether—thus completely abandoning *Chevron* deference—is likely harmful to the Biden regulatory agenda, especially given the increasing conservatism of the federal bench: federal judges, sans *Chevron*, would be the sole interpreters of federal statutes, finding Biden regulatory interpretations at best persuasive.[111] Conservative judges would presumably interpret ambiguous statutes in a way hostile to federal regulatory power.

Even without changes in the deference doctrines, some lower courts have already blocked Biden actions. A Trump-appointed judge enjoined the Biden administration's pause on immigration deportations,[112] for example, applying an interpretation of the Immigration and Naturalization Act that seems inconsistent with the text of the statute itself,[113] with prior precedent,[114] and with the longstanding policy of leaving immigration decisions almost entirely to the President.[115] Similarly, a Trump-appointed judge vacated the CDC's moratorium on evictions during the Covid-19 pandemic (albeit staying his ruling pending appeal),[116] despite broad statutory language

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[109] *Id.* at 2424 (Roberts, C.J., concurring in part).

[110] *Id.* at 2426 (Gorsuch, J., concurring). Then-Judge Barrett wrote only one opinion that even mentioned *Auer*, and that opinion was decided after *Kisor*; the opinion contains little to no hint at now-Justice Barrett's views on *Auer* deference. *See* Meza Morales v. Barr, 973 F.3d 656, 664 (7th Cir. 2020) (noting that *Kisor* "recently warned us not to leap too quickly to the conclusion that a rule is ambiguous").

[111] *See supra* note 66 (describing Mead-Skidmore "deference," under which the agency view is at best persuasive authority).

[112] *E.g.*, Texas v. United States, 524 F. Supp. 3d 598, 607 (S.D. Tex. 2021).

[113] *See* 8 U.S.C. § 1231 (while stating in paragraph (a)(1)(A) that aliens "shall" be removed within 90 days of being ordered removed, the provision in paragraph (a)(3) also authorizes extensions of that 90 days and anticipates that they will be common enough to require a regulatory structure: "If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General.").

[114] *E.g.*, Zadvydas v. Davis, 533 U.S. 678, 682 (2001) (noting that the Immigration & Naturalization Act contemplates deportable aliens remaining in the United States after the 90 day period); *see also* Shalini Bhargava Ray, *Immigration Law's Arbitrariness Problem*, 121 COLUM. L. REV. (forthcoming 2021) (discussing the myriad ways the immigration bureaucracy has long exercised discretion in deciding whether and when to deport those who have violated immigration laws, including in deferring deportation past the 90-day deadline).

[115] *E.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2409 (2018) (noting "the deference traditionally accorded the President in this sphere").

[116] Ala. Ass'n of Realtors v. U.S. Dept. of Health & Hum. Servs., No. 20-CV-3377 (DLF), 2021 WL 1779282, at *1 (D.D.C. May 5, 2021) (vacating nationwide moratorium on evictions imposed by the Centers for Disease Control to help control the Covid-19 pandemic);

empowering the CDC to prevent the transmission of disease.[117] In June 2021, a Trump-appointed judge enjoined President Biden's suspension of the sale of new oil and gas leases, applying a dubious interpretation of the Outer Continental Shelf Lands Act.[118] If conservative judges are willing to make such strained interpretations of statutory text in a world where deference to administrative action is required, it is easy to imagine how badly the Biden administration would fare in a world without deference.[119]

III. Some Justices Want to Abolish the Administrative State Altogether

More concerning than potential revamping of the deference doctrines is the possibility that the Court would take more drastic measures against the administrative state itself. Recent opinions by several Justices echo early New Deal cases that severely limited the powers of the federal government.[120] While a return to pre-1937 understandings of the constitutional structure seems unlikely, that the possibility even exists is frightening.

One merely need think of the state of the nation in the early 20th century to understand the devastating consequences of such a move. In the years

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2021 WL 1946376 (D.D.C. May 14, 2021) (staying order pending appeal); 2021 WL 2221646 (D.C. Cir. June 2, 2021) (refusing to vacate stay).

[117] *See* 42 U.S.C. § 264 ("The Surgeon General, with the approval of the Secretary, is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession."). The District Court in *Alabama Association of Realtors* found this power "tethered to—and narrowed by" the second sentence of the statute, which states "[f]or purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary." The court applied the canon of statutory construction *ejusdem generis* to conclude that the eviction moratorium was not sufficiently similar to inspection, fumigation, and the like. *Id.* at *5. But, as the Northern District of Georgia found in a similar challenge to the CDC's moratorium, this argument ignores the broad language of the first sentence granting authority to the CDC, failed to account for the statute's use of the word "including," and overlooked other provisions of the statute. Brown v. Azar, 497 F. Supp. 3d 1270, 1281–85 (N.D. Ga. 2020).

[118] Louisiana v. Biden, No. 2:21-CV-00778, 2021 WL 2446010 (W.D. La. June 15, 2021) (holding, implausibly, that states faced irreparable harm through mere delay in consideration of oil leases, and holding, in a strained reading of the Outer Continental Shelf Lands Act, that the President, to whom OCSLA gives broad authority in executing leases, lacked the implicit power to pause consideration of such leases).

[119] Trump-appointed judges are also making bad constitutional decisions. In late May 2021, the Sixth Circuit enjoined a component of President Biden's Covid-19 relief package, the Restaurant Revitalization Fund, which for 21 days targeted relief funds to businesses owned by women, veterans, and racial minorities before then opening the fund to all applicants; the court held that the brief period of targeted relief violated the Constitution, despite extensive evidence assembled by Congress that the Covid-19 pandemic had caused significantly worse problems for female- and minority-owned businesses. Vitolo v. Guzman, 999 F.3d 353, 356 (6th Cir. 2021).

[120] Gundy v. United States, 139 S. Ct. 2116, 2130 (2019) (Alito, J., concurring); *id.* at 2131 (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.)

preceding the Great Depression, the *Lochner* Court struck down law after law meant to protect workers, consumers, women, and children. To note just a few: *Lochner* itself struck down limits on weekly working hours for laborers;[121] *United States v. E. C. Knight Co.* (the Sugar Trust Case) limited Congress's power to regulate monopolistic practices in manufacturing;[122] *Adair v. United States* and *Coppage v. Kansas* allowed railroad companies to prohibit union membership among their employees;[123] *Hammer v. Dagenhart* and *Bailey v. Drexel Furniture Co.* struck down federal legislation prohibiting child labor;[124] and *Adkins v. Children's Hospital* struck down a federal minimum-wage law.[125]

China also provides a cautionary and contemporary comparative. Chinese workers famously enjoy few to no protections from exploitation by employers;[126] a recent exposé of working conditions in China describes the use of forced labor and even torture in the manufacture of many goods we purchase here in the United States.[127] China's environment is famously poisoned, with poor air quality, contaminated soil, and nonpotable water.[128] Critics describe China's current regulatory structure as similar to that in the United States before the explosion of consumer and environmental regulations in the late 1960s: laws exist, but enforcement is left to localities, which do little to enforce.[129] In the United States, this approach led famously to

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[121] 198 U.S. 45 (1905).

[122] 156 U.S. 1 (1895).

[123] 208 U.S. 161 (1908); 236 U.S. 1 (1915).

[124] 247 U.S. 251 (1918); 259 U.S. 20 (1922).

[125] 261 U.S. 525 (1923).

[126] *E.g.*, Paul Mazur, *Apple Puts Key Contractor on Probation over Labor Abuses in China*, N.Y TIMES (Nov. 9, 2020), https://www.nytimes.com/2020/11/09/business/apple-china-pegatron.html [https://perma.cc/2M4L-DHGJ] (stating that contractor "has been accused of a number of labor and environmental abuses over the years"); David Barboza, *After Spate of Suicides, Technology Firm in China Raises Workers' Salaries*, N. Y. TIMES (June 2, 2010), https://www.nytimes.com/2010/06/03/business/global/03foxconn.html [https://perma.cc/J5T7-VER9] (citing "recurring reports of harsh labor conditions at its factories, including long working hours and claims by labor rights activists that the company treats workers like machines").

[127] AMELIA PANG, MADE IN CHINA: A PRISONER, AN SOS LETTER, AND THE HIDDEN COST OF AMERICA'S CHEAP GOODS (2021).

[128] *E.g.* Mervyn Piesse, *China Continues to Confront Steep Environmental Challenges*, FUTURE DIRECTIONS INT'L (Nov. 5, 2020), https://www.futuredirections.org.au/publication/china-continues-to-confront-steep-environmental-challenges/ [https://perma.cc/XAD8-R7QC] (noting for example that, in 2013, particulate-matter air pollution in Beijing "had surpassed 800, far exceeding the 500-point scale used to measure air pollution internationally" and that 20 percent of China's rivers "are so severely polluted that they are too toxic for physical contact").

[129] Melanie Hart & Jeffrey Cavanagh, *Environmental Standards Give the United States an Edge over China*, CTR. FOR AM. PROGRESS (Apr. 20, 2012), https://www.americanprogress.org/issues/green/news/2012/04/20/11503/environmental-standards-give-the-united-states-an-edge-over-china/#:~:text=our%20environmental%20regulations%20give%20U.S.,polluting%20factories%20close%20their%20doors [https://perma.cc/AMP8-AXBC] ("China's current environmental protection system looks a lot like what was in place in the United States before 1970.").

rivers that were so polluted they could catch on fire,[130] air quality so poor that it killed people,[131] and levels of lead so high they caused increased criminality in generations of Americans.[132]

A decision finding unconstitutional the current delegation of power to federal agencies would thus undo decades of progress in consumer, environmental, and workplace protection: our currently broken Congress can't even pass a budget,[133] much less adopt complicated regulatory provisions. Of course, states should be free to step in (although the *Lochner* Court struck down state regulations as well[134]). But not all states will act to protect the vulnerable. Remember, for example, that more than half of the states seized the opportunity to be "right to work" —i.e., anti-labor-union—states, once the law permitted such a move.[135]

What is the argument against the federal administrative state? To be sure, it has long been clear that administrative agencies are constitutionally fraught. Administrative agencies appear to make law (exercising legislative power), enforce that law (executive power), and adjudicate disputes under that law (judicial power).[136] This combination of powers raises structural constitutional concerns, concerns that peaked in the mid-1930s as a result of

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[130] *Id.* (describing the Cuyahoga River in 1969 as "carr[ying] so much oil and debris that . . . it erupted into flames").

[131] Jim Dwyer, *Remembering a City Where the Smog Could Kill*, N.Y. TIMES (Feb. 28, 2017), https://www.nytimes.com/2017/02/28/nyregion/new-york-city-smog.html [https://perma.cc/H5RC-4KYF] ("Thanksgiving weekend in 1966 was warm, and a haze of smog — sulfur dioxide and carbon monoxide — wrapped around the city. About 200 people died, a toll similar to a smog crisis in 1953.").

[132] Alex Knapp, *How Lead Caused America's Violent Crime Epidemic*, FORBES (Jan. 3, 2013), https://www.forbes.com/sites/alexknapp/2013/01/03/how-lead-caused-americas-violent-crime-epidemic/?sh=E946cb412c48 [https://perma.cc/Z7VR-7UL2] ("[V]iolent crime rose as a result of lead poisoning because of leaded gasoline. It declined because of lead abatement policies.").

[133] Jennifer Scholtes & Caitlin Emma, *'Going to Be a Long Winter': Congress Hits Snooze on Funding the Government*, POLITICO (June 15, 2021), https://www.politico.com/news/2021/06/15/going-to-be-a-long-winter-congress-hits-snooze-on-funding-the-government-494410 [https://perma.cc/C3R7-7NYF] (noting that Congress has not passed a regular appropriations bill on time in over a decade and uses continuing resolutions as stop-gaps "that spell budgetary turmoil for the Pentagon, not to mention every non-defense agency at the whim of the fickle spending process").

[134] *Lochner* itself involved New York wage-and-hour statutes, Lochner v. New York, 198 U.S. 45 (1905), and *Coppage* struck down state protections for union members, Coppage v. Kansas, 236 U.S. 1 (1915).

[135] In 1947, the Taft-Hartley Act outlawed closed union shops (in which the union's collective bargaining contract with the employer authorized hiring only of union members), 29 U.S.C. §§ 158(a)(3), 158(b)(2), and also authorized individual states to prohibit union security clauses (in which employees could refuse to join the union but were required to contribute financially to the work of the union), 29 U.S.C. § 164(b). Twenty-seven states have exercised their authority to prohibit union security clauses. *See Right to Work States Timeline*, NAT'L RIGHT TO WORK COMM. (2018), https://nrtwc.org/facts/state-right-to-work-timeline-2016/ [https://perma.cc/9VKU-3UJG].

[136] *See, e.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231–54 (1994).

New Deal economic regulation adopted to address the unprecedented challenges of the Great Depression.[137]

The Supreme Court initially rejected key New Deal legislation, some on the ground that it exceeded Congress's authority to permit administrative agencies to take action that looked like legislation. In *Panama Refining Co. v. Ryan*, the Court struck down a provision of the National Industrial Recovery Act (NIRA) as an impermissible delegation of legislative authority.[138] And in *A.L.A. Schechter Poultry Corp. v. United States*, the Court struck down the heart of the NIRA, finding that it gave essentially standardless authority to the Executive Branch to regulate the economy.[139] As Justice Cardozo wrote in his concurrence, "[t]his is delegation running riot. No such plenitude of power is susceptible of transfer."[140] And, indeed, NIRA not only delegated essentially unconstrained powers to the Executive Branch, but also delegated authority to private industry trade groups to develop codes of fair competition for the President to approve.[141]

Schechter's nondelegation doctrine was essentially moribund within a couple of years,[142] however, as the Court issued the opinions that would establish the broad Commerce Clause power that characterizes modern federal legislation.[143] In the succeeding decades, the Court upheld statute after statute that gave agencies broad authority to regulate, so long as it could discern

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[137] *See, e.g.*, Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1248 (1986) (claiming that New Deal programs reveal "a belief that comprehensive government intervention was not only a useful corrective but an essential ingredient for maintaining a general state of equilibrium in the economy").

[138] 293 U.S. 388, 432–33 (1935).

[139] 295 U.S. 495, 541–42 (1935).

[140] *Id.* at 553.

[141] *See* Rabin, *supra* note 137, at 1243–44 ("Section 3 of the NIRA granted authority to the President to approve 'codes of fair competition' submitted by industry trade groups. The codes were to be promulgated by industry groups that were 'truly representative' and were not to 'promote monopolies.' But beyond these cautionary terms, the statute contained virtually no limiting language. . . . [T]he Act left the content of the codes purposely vague. . . . With so little substantive constraint, the codes could address a vast range of business practices, including price levels, wage and hour provisions, price discrimination, advertising practices, and output restrictions." (footnote omitted)).

[142] Lisa Schultz Bressman, Schechter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1401 (2000) (pointing out that, after *Schechter*, "[t]he Court never again expressly applied the nondelegation doctrine to invalidate a statute"). Of course, Congress has never again tried to delegate the authority to regulate the economy to private industry trade groups; presumably that would not fly even in the modern administrative state. *See* Rabin, *supra* note 137, at 1257 ("*Schechter* arguably retains its authority as a statement of the outer limits of federal regulatory power. Even today, a congressional act which set up a business regulatory commission with plenary power to establish 'fair competitive practices' enumerated by industry trade groups would be of doubtful validity. In *Schechter*, the nondelegation doctrine found its home as a residual check on wholesale amalgamation of public and private spheres of activity.").

[143] *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 111 (1942); United States v. Darby, 312 U.S. 100, 113–14 (1941); Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 548 (1937); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 1 (1937).

an "intelligible principle" laid down by Congress to constrain agency discretion.[144]

An effort to revive the nondelegation doctrine in the late twentieth century was rejected by a unanimous Court in *Whitman v. American Trucking Associations, Inc.*[145] Justice Scalia wrote for the Court:

> In the history of the Court we have found the requisite "intelligible principle" lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring "fair competition." We have, on the other hand, . . . found an "intelligible principle" in various statutes authorizing regulation in the "public interest." In short, we have "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."[146]

Justice Scalia wrote for a unanimous Court in rejecting the D.C. Circuit's effort to revive *Shechter* and *Panama Refining*. And his opinion on the matter had been clear from his confirmation hearing for the Supreme Court: "[I]t is very difficult for the courts to say how much delegation is too much. It is a very, very difficult question, and I think it expressed the view that, in most cases, the courts are just going to have to leave that constitutional issue to be resolved by the Congress."[147]

Justice Gorsuch would apparently take a different approach. In his Tenth Circuit *Guttierez-Brizuela* concurrence, he revealed a largely nineteenth century perspective on the administrative state.[148] Indeed, Judge Gorsuch seems to be staking out a pre-New Deal view of the delegation of

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[144] Bressman, *supra* note 142, at 1404–05.

[145] 531 U.S. 457, 476 (2001).

[146] *Id.* at 474–75 (citations omitted).

[147] *Nomination of Judge Antonin Scalia, to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 99th Cong. 36 (1986) (statement of Judge Antonin Scalia).

[148] For example, in his view, the kinds of things Congress can delegate to agencies are quite limited: "Congress may condition the application of a new rule of general applicability on factual findings to be made by the executive (so, for example, forfeiture of assets might be required if the executive finds a foreign country behaved in a specified manner)," Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1154 (10th Cir. 2016) (Gorsuch, J., concurring) (citing Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382, 388 (1813)), and "Congress may allow the executive to resolve 'details' (like, say, the design of an appropriate tax stamp)," *id.* (citing In re Kollock, 165 U.S. 526, 533 (1897)). This view, based on cases from 1813 and 1897, would rule out the work of almost all regulatory agencies and their organic acts. Making factual findings regarding asset forfeiture and designing tax stamps are a far cry from regulating "in the public interest," as many twentieth century statutes authorize. *See, e.g.*, Nat'l Broad. Co. v. United States, 319 U.S. 190, 224–25 (1943) (upholding Federal Communications Commission's power to regulate airwaves to serve the "public interest, convenience or necessity"); N.Y. Cent. Sec. Corp. v. United States, 287 U.S. 12, 24–25 (1932) (upholding Interstate Commerce Commission's power to approve railroad consolidations if in the "public interest"), or setting national ambient air quality standards at a level "requisite to protect the

legislative power. Elsewhere he refers to "so-called 'delegated' legislative authority."[149] He has written that "[s]ome thoughtful judges and scholars have questioned whether standards like [the intelligible principle doctrine] serve as . . . a license for [the improper delegation of legislative authority], undermining the separation between the legislative and executive powers that the founders thought essential."[150] Here is how he put it while on the Tenth Circuit:

> [C]an Congress really delegate its legislative authority—its power to write new rules of general applicability—to executive agencies? The Supreme Court has long recognized that under the Constitution "congress cannot delegate legislative power to the president" and that this "principle [is] universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution." Yet on this account of *Chevron* we're examining, its whole point and purpose seems to be exactly that—to delegate legislative power to the executive branch.[151]

Justice Gorsuch has now brought these views to the Supreme Court in *Gundy v. United States*.[152] The case involved the Sex Offender Registration and Notification Act (SORNA), which established registration criteria for sex offenders convicted after the statute's enactment and, for those already convicted, delegated authority to Attorney General "to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter . . . and to prescribe rules for the registration of any such sex offender."[153] Four Justices found that this latter "delegation easily passes constitutional muster."[154]

Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, dissented. "[I]t would frustrate 'the system of government ordained by the Constitution'," Gorsuch wrote, "if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals."[155] The intelligible-principle test "has been abused to permit delegations of legislative power that on any other conceivable account should be held unconstitutional."[156] Justice Gorsuch notes that the intelligible-principle test was first stated in the 1920s[157] and would take the doctrine back to those roots, when the Court would ask:

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public health," Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 473 (2001) (upholding Clean Air Act's delegation of authority to EPA to set national ambient air quality standards).

[149] Caring Hearts Pers. Home Servs., Inc. v. Burwell, 824 F.3d 968, 969 (10th Cir. 2016) (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984)).

[150] *Gutierrez-Brizuela*, 834 F.3d at 1154 (Gorsuch, J., concurring).

[151] *Id.* at 1153–54 (Gorsuch, J., concurring) (quoting Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892)) (citation and emphasis omitted).

[152] 139 S. Ct. 2116, 2131 (2019).

[153] 34 U.S.C. § 20913(d).

[154] *Gundy*, 139 S. Ct. at 2121.

[155] *Id.* at 2133 (quoting Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892)).

[156] *Id.* at 2140.

[157] *Id.* at 2138–39.

> Does the statute assign to the executive only the responsibility to make factual findings? Does it set forth the facts that the executive must consider and the criteria against which to measure them? And most importantly, did Congress, and not the Executive Branch, make the policy judgments? Only then can we fairly say that a statute contains the kind of intelligible principle the Constitution demands.[158]

He concludes by writing, "I remain hopeful that the Court may yet recognize that, while Congress can enlist considerable assistance from the executive branch in filling up details and finding facts, it may never hand off to the nation's chief prosecutor the power to write his own criminal code. That 'is delegation running riot.'"[159]

Justice Alito concurred in the judgment but wrote separately to state "since 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards." He then made clear that he was open to revisiting nondelegation doctrine: "If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment."[160]

As indicated by his joining the *Gundy* dissent, Justice Thomas would take extreme steps to limit the authority that Congress can confer on administrative agencies. In *Whitman*, he stated "On a future day, . . . I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers."[161] Unlike Justice Scalia, who described himself as a "fainthearted originalist" because there were certain cases where he would not be able to bring himself to vote for the originalist view,[162] Justice Thomas has repeatedly suggested he

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[158] *Id.* at 2141.

[159] *Id.* at 2148.

[160] *Id.* at 2130–31.

[161] Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 487 (2001) (Thomas, J., concurring) ("I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'"). *Cf.* Wellness Intern. Network, Ltd. v. Sharif, 575 U.S. 665, 709 (2015) (Thomas, J., dissenting) ("Our Constitution is not a matter of convenience, to be invoked when we feel uncomfortable with some Government action and cast aside when we do not.").

[162] *See generally* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989). He gives flogging as an example; flogging would not be cruel and unusual punishment on an originalist view, but he still could not see himself voting to affirm a law that imposed flogging as a punishment. Given Justice Scalia's firm support for the administrative state, see generally Elliott, *supra* note 65.

is willing to burn down various longstanding structures of constitutional law.[163] And he appears to be inviting nondelegation challenges.[164]

Justice Kavanaugh did not participate in *Gundy*, but in a more recent concurrence to a denial of certiorari, he indicated he would be willing to limit Congress's authority to delegate rulemaking power to agencies, at least when "a major policy question of great economic and political importance" is at stake.[165] Justice Barrett had not yet joined the Court when *Gundy* was decided, but, in previous academic writing, she sounds more like Justice Scalia in *Whitman*: "[T]he Suspension Clause stands as an exception to the nondelegation doctrine, which emphasizes the extremely broad leeway that Congress enjoys in assigning responsibilities to the Executive Branch. . . . [T]he notoriously lax 'intelligible principle' test reflects the Court's conclusion that the decision of how to carry out routine social and economic policy belongs almost entirely to Congress."[166]

In the end, four clear votes exist for a revolution in nondelegation doctrine, and Justice Kavanaugh is apparently a fifth vote for at least a constriction of Congress's authority to delegate. It remains to be seen how Justice Barrett will influence the debate. The Court has, however, recently rejected other invitations to rewrite the constitutional law of the Executive Branch.[167] At the same time, the conservative majority created by the Trump adminis-

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[163] *E.g.* Comptroller of Treasury of Md. v. Wynne, 575 U.S. 542, 577 (2015) (Thomas, J., dissenting) (arguing for rejection of dormant commerce clause doctrine); Gonzales v. Raich, 545 U.S. 1, 57 (2005) (O'Connor, J., dissenting, joined by Roberts, C.J. and Thomas, J.) (arguing for rejection of modern view of interstate commerce clause).

[164] *See* Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2382 (2020) (noting that "[n]o party has pressed a constitutional challenge to the breadth of the delegation involved here").

[165] Paul v. United States, 140 S. Ct. 342 (2019) (Kavanaugh, J., concurring with denial of certiorari).

[166] Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 318 (2014).

[167] For example, in one recent decision, a majority of the Court took a modest step to constrain the administrative step but refused to take the bold step; Justices Thomas and Gorsuch would have been bold. *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2192 (2020) (striking down provision of the Dodd-Frank Act that prevented the president from freely removing the director of the Consumer Financial Protection Bureau but refusing to overturn *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), which allows restrictions on the President's power of removal when the agency is headed by a multi-member panel); *id.* at 2211–12 (Thomas, J., joined by Gorsuch, J. concurring in part) ("The decision in *Humphrey's Executor* poses a direct threat to our constitutional structure and, as a result, the liberty of the American people. The Court concludes that it is not strictly necessary for us to overrule that decision. . . . But with today's decision, the Court has repudiated almost every aspect of *Humphrey's Executor*. In a future case, I would repudiate what is left of this erroneous precedent."). Interestingly, Justice Kavanaugh did not join Justice Thomas's dissent even though Kavanaugh had written a D.C. Circuit opinion finding the CFPB's structure unconstitutional and had noted strong criticisms of *Humphrey's Executor*. *See* PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1, 34 n.15 (D.C. Cir. 2016), *rev'd en banc* 881 F.3d 75 (2018). In the *en banc* opinion reversing, Judge Pillard noted the seeds of destruction that would be sown by affirming Justice Kavanaugh's opinion: "A constitutional analysis that condemns the CFPB's for-cause removal provision provides little assurance against—indeed invites—the judicial abolition of all independent agencies." *Id.* at 133. Given that the Supreme Court has now condemned the for-cause provision, independent agencies are a threatened species.

tration and the then-majority-Republican Senate has only just gotten started.[168]

IV. Ways to Counter These Potential Problems

The Biden administration and Democrats in Congress could and should pursue several avenues to address the problems I have described. First, when agencies adopt new rules and regulations to replace Trump-era deregulatory measures, the agencies should include factual findings that make it harder for the federal courts to dismiss cases based on Article III standing doctrine. Second, Congress should write clearer statutes, and agencies should root their regulations, to the extent possible, in strong interpretations so that Biden policies can survive judicial review, should the Court abolish some or all of the deference doctrines. Third, Congress should add many judges to the lower federal courts; President Biden should then nominate judges who take broader views of standing doctrine, deference to administrative agencies, and the constitutionality of the administrative state; and the Senate should confirm these judges as quickly as possible. Finally, Congress and President Biden should take steps to alter the politicization of the Supreme Court, which could include expanding the size of the Court itself.

A. Addressing Standing Issues Through Regulation

While I have argued that the Court would push back against legislative and executive efforts to *alter* Article III standing (by, *e.g.*, abolishing the injury-in-fact requirement),[169] some aspects of the doctrine can be exploited by the Biden administration and Democrats in Congress to allow standing to more plaintiffs. First, as Mark Seidenfeld and Allie Akre argue, "Congress can influence standing by explicitly recognizing actual harms and causal connections."[170] On their view, Congress can use statutory language to identify the concrete interests protected by the legislation (thus helping the federal

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[168] For example, in July 2021, the conservative wing of the Court dismantled most of the rest of the Voting Rights Act, clearing the way for most of the anti-democratic voting laws being enacted in Republican states. *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021) (decided 6-3 along straight party lines). *See also* Adam Liptak, *Supreme Court Upholds Arizona Voting Restrictions*, N.Y Times (July 1, 2021), https://www.nytimes.com/2021/07/01/us/politics/supreme-court-arizona-voting-restrictions.html [https://perma.cc/VW7D-MYMD] ("The Supreme Court on Thursday gave states new latitude to impose restrictions on voting, using a ruling in a case from Arizona to signal that challenges to laws being passed by Republican legislatures that make it harder for minority groups to vote would face a hostile reception from a majority of the justices.").

[169] Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. Rev. 159, 190 (2011) (in part invoking *City of Boerne v. Flores* to argue that the Court will no more let Congress alter Article III standing doctrine than it would let Congress alter First Amendment doctrine).

[170] Mark Seidenfeld & Allie Akre, *Standing in the Wake of Statutes*, 47 Ariz. L. Rev. 745, 748 (2015).

courts understand that a plaintiff suing under the statute has suffered an injury in fact), can trace the causal chain between a statutory violation and that injury in fact, and can explain why statutory remedies redress that injury.[171] The Biden administration could thus work with Congress to amend existing statutes and write new statutes that contain explicit language supporting the standing of citizens who would sue to enforce those statutes.

Second, Biden administrative agencies may also take steps to facilitate standing for those who would sue in the federal courts. As Rachel Klarman and Will Dobbs-Allsopp argue in a forthcoming essay, agencies can "design regulations so as to increase the likelihood advocates can establish standing in the event of future rollbacks, thereby empowering progressive groups to more robustly challenge the next conservative administration's inevitable deregulatory agenda."[172] The authors seize on two wrinkles in the Court's standing jurisprudence: injury caused by the denial of information,[173] and injury caused to organizations by interference with their organizational mission.[174] Agencies, they argue, should craft regulations that create a right to information in individual citizens or groups, that mandate input from advocacy organizations in administering agency programs, or that allow advocacy organizations to enforce regulatory requirements through agency procedures, enabling regulatory beneficiaries in later lawsuits to satisfy Article III standing requirements by pointing to concrete injuries caused by denial of information, denial of the opportunity to provide input, or denial of agency procedures.

B. Writing Clearer Statutes and More Persuasive Regulations

If the Supreme Court abandons some or all of the deference doctrines, the Biden administration can, first, ask Congress to enact statutes that authorize the Biden regulatory agenda. After all, *Chevron*, *Brand X*, and *City of Arlington* apply only when statutes are ambiguous. While Congress often writes vague statutes and leaves the details to regulatory agencies, legislators

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[171] *Id.* at 749–52.

[172] Rachel Klarman & Will Dobbs-Allsopp, *Solving Standing's Corporate Bias: How Agencies Can Empower Advocates to Challenge Deregulation*, ROOSEVELT INST. (July 2021), https://rooseveltinstitute.org/wp-content/uploads/2021/07/RI_GFILegalStanding_IssueBrief_202107-1.pdf [https://perma.cc/HVV5-6PUB].

[173] *E.g.*, FEC v. Akins, 524 U.S. 11, 21 (1998) ("this Court has previously held that a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute") (citing Public Citizen v. Dep't of Just., 491 U.S. 440, 449 (1989)).

[174] *E.g.*, Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982) ("concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes" injury in fact for Article III standing purposes).

are free to adopt more detailed statutes.[175] Indeed, Congress could incorporate Biden regulations *as* those details.[176]

Enacting such statutes would almost certainly require abolishing the filibuster, given that the current Republican members of the Senate would otherwise obstruct any such efforts.[177] To abolish the filibuster is to make it easier not only for the current Democratic Congress to pass laws but also for a later Republican Congress to do the same. Democrats should therefore think carefully about whether the near-term advantage of a filibuster-free Senate is worth the long-term costs of losing a powerful tool to obstruct future Republican lawmaking.

Agencies can also promulgate regulations with especial care, knowing that (in the absence of *Chevron*) a regulation must *persuade* the courts. In this regard, remember that *Skidmore* "deference" is not solely about a regulation's persuasive logic; the Court in *Skidmore* emphasized that courts should recognize agency expertise and should seek to make court actions consonant with agency enforcement.[178] Agencies could therefore craft regulations with an eye toward persuading federal judges that jettisoning agency interpretations would violate *Skidmore*.

C. Expanding the Lower Federal Courts

President Trump appointed 226 judges to the federal bench, including 54 appeals court judges.[179] In doing so, he altered the political balance of the Second, Third, and Eleventh Circuits.[180] As discussed above, some of these new judges have already blocked regulatory actions of the Biden administration.[181] Because federal judges are appointed for life, they are immovable obstacles (at least as long as their opinions are consistent with Supreme Court precedent).

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[175] *E.g.*, Christopher J. Walker, *Restoring Congress's Role in the Modern Administrative State*, 116 MICH. L. REV. 1101, 1116–17 (2018) (review of JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND SEPARATION OF POWERS (2017)).

[176] *Cf.* Bradford C. Mank, *Are Title VI's Disparate Impact Regulations Valid?*, 71 U. CIN. L. REV. 517, 520 (2002) (noting that Congress has incorporated regulatory language into certain statutes).

[177] *E.g.*, Carl Hulse & Nicholas Fandos, *Democrats and Activists Focus on the Filibuster After a Defeat on Voting Rights*, N.Y. TIMES (June 23, 2021), https://www.nytimes.com/2021/06/23/us/politics/filibuster-elections-bill.html [https://perma.cc/P3K3-S2JQ] ("Democrats and activists say the increasing Republican reliance on the filibuster will only intensify calls to jettison it and potentially bring about critical mass for a rules change as Democrats remain determined to pass some form of the elections measure and other parts of their agenda opposed by Republicans.").

[178] Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("[G]ood judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons.").

[179] Gramlich, *supra* note 83.

[180] *Factbox: Donald Trump's Legacy—Six Policy Takeaways*, REUTERS (Oct. 30, 2020), https://www.reuters.com/article/us-usa-trump-legacy-factbox/factbox-donald-trumps-legacy-six-policy-takeaways-idUSKBN27F1GK [https://perma.cc/KYE5-25E8].

[181] *See supra* notes 112–19 and accompanying text.

One avenue for ameliorating the influence of these judges is to expand the number of seats on the lower federal courts. This is not a partisan suggestion: the caseload of the federal judiciary has expanded significantly over the last three decades while the number of judges has stayed the same.[182] The Judicial Conference of the United States in 2020 recommended adding 5 judges to the Ninth Circuit, adding 65 new judges to the district courts, and making 5 temporary district court judgeships permanent. noting that case filings from 1990 to 2018 had increased 39 percent in the district courts and 15 percent in the appeals courts.[183] By March 2021, the Judicial Conference had upped the district court numbers to 77 new seats and 9 temporary seats made permanent.[184] Both Democratic and Republican lawmakers agree on the need to increase the size of the federal judiciary.[185]

The Biden administration should work with Congress to add these new judgeships. President Biden should then appoint, and the Senate confirm, judges with approaches to constitutional law, statutory interpretation, and administrative law that will serve to counterbalance the extreme conservatives appointed by President Trump and the McConnell-led Senate.

D. Altering the U.S. Supreme Court

The current Supreme Court includes two justices whose presence results from appalling political manipulations by Republicans. Justice Gorsuch holds a seat that should have been filled by then-Chief-Judge of the D.C. Circuit Merrick Garland, who was nominated by President Obama after Justice Antonin Scalia's death. Then Senate majority leader Mitch McConnell refused to hold hearings on the Garland nomination, kept the seat empty for 422 days, and led Republicans to confirm Gorsuch after Donald Trump took the Presidency.[186] McConnell argued that the presidential election—nine months away—was too close to justify President Obama's filling the seat.[187]

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[182] *Judiciary Makes the Case for New Judgeships*, UNITED STATES COURTS (June 30, 2020), https://www.uscourts.gov/news/2020/06/30/judiciary-makes-case-new-judgeships [https://perma.cc/FZW5-48A4] ("The creation of new judgeships has not kept pace with the growth in case filings over three decades, producing 'profound' negative effects for many courts across the country, U.S. District Judge Brian S. Miller told Congress today.").

[183] *Id.*

[184] *Judiciary Seeks New Judgeships, Reaffirms Need for Enhanced Security*, U.S. COURTS (Mar. 16, 2021), https://www.uscourts.gov/news/2021/03/16/judiciary-seeks-new-judgeships-reaffirms-need-enhanced-security [https://perma.cc/YGY3-PW8X].

[185] Todd Ruger, *Lawmakers in Both Parties Push to Add Judges to Overworked Federal Courts*, ROLLCALL (Mar. 16, 2021), https://www.rollcall.com/2021/03/16/lawmakers-in-both-parties-push-to-add-judges-to-overworked-federal-courts/ [https://perma.cc/K5T8-CMVP] ("A House Judiciary subcommittee already held a hearing that highlighted bipartisan backing to add judges to overworked district courts that are the most used by the public — something Congress hasn't done in a comprehensive way since 1990.").

[186] Alana Abramson, *Neil Gorsuch Confirmation Sets Record for Longest Vacancy on 9-Member Supreme Court*, TIME (Apr. 7, 2017), https://time.com/4731066/neil-gorsuch-confirmation-record-vacancy/ [https://perma.cc/7V5X-JSQG].

[187] Mitch McConnell & Chuck Grassley, *Democrats Shouldn't Rob Voters of Chance to Replace Scalia*, WASH. POST (Feb. 18, 2016), https://www.washingtonpost.com/opinions/mccon-

Then, when Justice Ruth Bader Ginsburg died only 45 days before the 2020 presidential election, McConnell rushed to install Justice Amy Coney Barrett, who was confirmed on October 26, 2020, barely a month after Justice Ginsburg's death.[188]

The Biden administration has been urged to take steps to redress this malfeasance. Professor Klarman has written that, "[e]ssentially, Democrats face a choice between responding to norm violations in kind, which risks furthering a vicious cycle to the bottom that eventually will destroy democracy, or adhering to the norms while Republicans systematically violate them—a sort of unilateral disarmament that rarely works out well for the disarming party."[189] Professor Grove, on the other hand, has cautioned that the very independence of the federal judiciary is at stake.[190]

The question, then, is what, if anything, to do. In April 2021, Democrats in both houses of Congress introduced bills to expand the size of the Supreme Court from nine to thirteen seats.[191] Structural proposals have been floated that would make the Supreme Court even larger,[192] would do away with the idea of permanent Supreme Court justices (instead rotating lower court judges on and off the Court),[193] would impose term limits on the justices,[194] would give each President two appointments,[195] or would change the

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nell-and-grassley-democrats-shouldnt-rob-voters-of-chance-to-replace-scalia/2016/02/18/e5ae9bdc-d68a-11e5-be55-2cc3c1e4b76b_story.html [https://perma.cc/MY25-6FL4].

[188] Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 26, 2020), https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html [https://perma.cc/DY6K-8NXR] ("The vote concluded a brazen drive by Republicans to fill the vacancy created by the death of Justice Ruth Bader Ginsburg just six weeks before the election. They shredded their own past pronouncements and bypassed rules in the process, even as they stared down the potential loss of the White House and the Senate.").

[189] Michael Klarman, *Why Democrats Should Pack the Supreme Court*, TAKE CARE BLOG (Oct. 15, 2018), https://takecareblog.com/blog/why-democrats-should-pack-the-supreme-court [https://perma.cc/45EP-8FXF].

[190] Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 544–45 (2018).

[191] Judiciary Act of 2021, S. 1141, 117th Cong. (2021); Judiciary Act of 2021, H.R. 2584, 117th Cong. (2021).

[192] *E.g.*, Elie Mystal, *There is Only One Solution to the Amy Coney Barrett Debacle*, NATION (Oct. 15, 2020), https://www.thenation.com/article/politics/expand-supreme-court/ [https://perma.cc/LG2Z-JTGR] (suggesting, for a variety of reasons, a Court with 29 seats); Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts' of Appeals Image*, 58 DUKE L.J. 1439, 1442 (2009) (suggesting that the Court increase in size to at least 13 and hear cases in panels with the possibility of *en banc* review).

[193] Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 185 (2019) (technically, Epps and Sitaraman suggest confirming all members of the lower courts of appeal as associate justices, so that the Court would have, given current numbers, 188 members—the current 9 plus all 179 circuit court judges; the Court would then sit in panels of 9 selected at random with some controls for political balance).

[194] AM. ACAD. ARTS & SCIS., OUR COMMON PURPOSE: REINVENTING AMERICAN DEMOCRACY FOR THE 21ST CENTURY 6 (2020); Bruce Ackerman, *Trust in the Justices of the Supreme Court Is Waning. Here Are Three Ways to Fortify the Court*, L.A. TIMES (Dec. 20, 2018), https://www.latimes.com/opinion/op-ed/la-oe-ackerman-supreme-court-reconstruction-20181220-story.html [https://perma.cc/SLF8-NKZ6]; Roger C. Cramton, *Reforming the Supreme Court*, 95 CALIF. L. REV. 1313, 1323–24 (2007); Steven G. Calabresi & James Lin-

selection process to make nominations less political.[196] Critics have also suggested altering the power of judicial review[197] or stripping the Court of jurisdiction over certain types of cases.[198]

Even in early 2021, I would have been reluctant to recommend any significant changes to the Court, on the ground that such changes would lead to a continual tit-for-tat competition between Democrats and Republicans as power switched between the parties election by election. Now that the current Court has legitimized the Republican assault on democracy, however,[199] it seems that the nation stands on a knife-edge between democracy and one-party rule. President Biden's Supreme Court commission may arrive at sensible solutions,[200] but seems unlikely to reach any definitive answers in time to save the 2022 primaries from the machinations of anti-democratic Republicans.[201] The Biden administration and the Democratic Congress need either (1) to abolish the filibuster and enact the For the People Act of 2021[202] and the John Lewis Voting Rights Act[203] or (2) add at least two seats to the Supreme Court.

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dgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 822 (2006).

[195] Alicia Bannon, *An Overlooked Idea for Fixing the Supreme Court*, BRENNAN CTR. FOR JUST. (Mar. 12, 2021), https://www.brennancenter.org/our-work/analysis-opinion/overlooked-idea-fixing-supreme-court [https://perma.cc/YH7C-7S3B] ("Giving each president two seats to fill during a four-year term would decouple the nomination process from the departure of sitting justices: a president would get two appointments regardless of whether three justices leave the bench or none at all. . . . [As a result] the size of the Court would fluctuate and likely stay above the current nine justices, and it would include periods with an even number of justices."); Daniel Hemel, *Can Structural Changes Fix the Supreme Court?*, 35 J. OF ECON. PERSPS. 119, 133–34 (2021).

[196] *E.g.*, Epps & Sitaraman, *supra* note 193, at 193 (proposing a 15-member Court, five appointed by Democrats, five appointed by Republicans, and five selected unanimously, or by super-majority, by those ten justices from existing circuit and district court judges).

[197] Charlie Savage, *Experts Debate Reducing the Supreme Court's Power to Strike Down Laws*, N.Y. TIMES (June 30, 2021), https://www.nytimes.com/2021/06/30/us/politics/supreme-court-commission.html [https://perma.cc/E8T6-FE99] ("Nikolas Bowie, a Harvard Law School professor, denounced the power of the Supreme Court to strike down laws enacted by Congress as an 'antidemocratic superweapon' and said, 'I encourage you to advocate for reforms that will abolish the practice.'").

[198] *Id.* For a general discussion of jurisdiction stripping, see Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 888–916 (2011).

[199] *See supra* note 168.

[200] Savage, *supra* note 197 ("Mr. Biden has charged the 36-member, ideologically diverse commission — which is led by Bob Bauer, an N.Y.U. Law professor who served as a White House counsel under President Barack Obama, and Cristina M. Rodríguez, a Yale Law School professor and former Justice Department official — with producing a report assessing ideas for changing the court.").

[201] *Voting Laws Roundup: May 2021*, BRENNAN CTR. FOR JUST. (May 28, 2021), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021 [https://perma.cc/UKV2-XKMB] (cataloging anti-democratic laws enacted and bills introduced by Republicans around the country).

[202] H.R. 1, 117th Cong. (2021).

[203] H.R. 4, 116th Cong. (2019).

Conclusion

Joe Biden and Kamala Harris were elected with over 81 million votes to Trump and Pence's 74 million, and with an Electoral College vote of 306 to 232. Biden and Harris are thus entitled to pursue the agenda on which they ran, which includes a restoration of a wide variety of strong federal regulatory protections for consumers, workers, and the environment. Yet existing Supreme Court doctrine, as well as doctrinal changes that may occur in the future, threaten to derail that agenda. The Biden administration should take steps—from the relatively minor (taking especial care in writing regulations, given the threats posed by later judicial review) to the unprecedented (adding several seats to the U.S. Supreme Court) —to protect the American people.