

A Critical Analysis of Separation-of-Powers Functionalism

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The separation of powers, and the narrow formalist/functionalist tension on which this framework rests, is in need of moral grounding. A critical legal perspective could enable administrative law and separation-of-powers scholars to better articulate overlooked problems, stakes, and possibilities, as a theoretical, normative, and prescriptive matter. This essay begins the work of integrating the insights of critical theory into the separation of powers. This essay is not, however, a critique of formalism, in the vein of conventional critical legal studies. Rather, this essay centers on functionalism. By employing a critical—not formalist—perspective, this essay questions separation-of-powers functionalism’s capacity both to further its own conventional purposes, and to support administration that benefits people. This essay also considers how separation-of-powers functionalism may lead to underexamined moments of branch aggrandizement.

First, this essay brings into focus a critique of separation-of-powers functionalism and identifies how functionalist approaches have been exploited by each branch of government to ends that are problematic both for functionalism’s own aims and for achieving administration that does not harm vulnerable people. More specifically, it illustrates three, perhaps counterintuitive, outcomes of functionalism: the use of the functionalist “major questions doctrine” by the judiciary to arrogate its own authority to concerning ends; the way in which functional congressional oversight of agencies may reduce democratic policymaking to the detriment of marginalized communities; and

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problematic administration resulting from the biased and expansive exercise of agency power.

Second, this essay considers how to respond to these concerning applications of functionalism. solution is neither the absolutist formalist call to dismantle the administrative state, nor reflexive functionalism. Rather, disentrenching concerning practices by making modest shifts to the relationships between the constitutional branches and agencies could inspire the development of an internally consistent functionalism, and perhaps even a functionalism that furthers justice. In this vein, this essay suggests reframing the major questions doctrine to emphasize judicial restraint, diversifying and democratizing legislative oversight, and both shifting administrative institutions and revitalizing judicial review of discretion to reduce and excise bias.

TABLE OF CONTENTS

I. INTRODUCTION	1009
II. CRITIQUING FUNCTIONALISM	1020
A. <i>Major Questions & Judicial Aggrandizement</i>	1023
1. <i>Judicial Administration</i>	1028
2. <i>Anti-Democratic Policymaking</i>	1029
B. <i>Legislative Oversight & Undemocratic Administration</i>	1030
1. <i>Legislative Intervention Without Safeguards</i>	1033
2. <i>Legislative Self-Interest</i>	1035
C. <i>Idiosyncratic Administrative Policy and Decisionmaking</i>	1038
1. <i>Discrimination in Agency Enforcement</i>	1039
2. <i>Bias in Administrative Adjudication</i>	1042
3. <i>Inadequate Process by Discretion</i>	1045
III. ENCOURAGING A CONSISTENT AND JUST FUNCTIONALISM	1047
A. <i>Restraining Judicial Administration</i>	1049
1. <i>Returning Major Questions to Chevron</i>	1049
2. <i>Improving Statutory Interpretation</i>	1050
3. <i>A Progressive Nondelegation Doctrine</i>	1051
B. <i>Fostering Accountable & Diverse Legislative Oversight</i>	1053
1. <i>Agency Independence from a Sitting Congress</i>	1054
2. <i>Democratizing Legislative Oversight</i>	1054
3. <i>Statute-Focused Administration</i>	1056
C. <i>Improving Administrative Discretion</i>	1056
1. <i>Institutional Change to Reduce Discrimination</i>	1057
2. <i>Systems of Review to Excise Bias</i>	1061
IV. CONCLUSION	1066

I. INTRODUCTION

Structural constitutionalism and administrative law literature discusses norms in narrow and disjointed ways.¹ Both scholars and the Supreme Court parse the structural provisions of the Constitution by applying an “overarching framework of ‘separation of powers’” that “reflect[s] two distinct visions”: formalism and functionalism.² In broad and simple strokes, “[f]ormalist opinions favor bright-lines rules over standards, text over prudence, and clear separation between the branches. Functionalist opinions favor more flexible standards, governance that adapts to modern times, and interbranch relations that emphasize checks and balances rather than strict separation.”³ Furthermore, the “the Supreme Court vacillates back and forth between the two dominant approaches.”⁴

During the rise of critical legal studies (CLS) in the 1980s,⁵ it was posited independently that structural constitutionalism move beyond its “preoccupation with the method of legal analysis to a level of substantive normative debate in the doctrine,” and that it recognize “fundamental controversies not only about the relative emphasis of the separation and checks and balances themes, but also about the legitimacy” of modern government.⁶ However, the idea that the separation of powers could have a distinct value-laden framing of its own has remained underexplored and has not yet been integrated with critical theories,

¹ See generally Bijal Shah, *Toward a Critical Theory of Administrative Law*, YALE J. ON REGUL.: NOTICE & COMMENT (July 30, 2020) [hereinafter Shah, *Critical Theory*], <https://www.yalejreg.com/nc/toward-a-critical-theory-of-administrative-law-by-bijal-shah/> [https://perma.cc/36S6-4LXH], reprinted in 45 ADMIN. & REGUL. L. NEWS 10, 10 (2020) (noting the lack of critical race perspectives in administrative and separation of powers law); see also Bijal Shah, *Administrative Subordination*, 91 U. CHI. L. REV. (forthcoming 2024) [hereinafter Shah, *Administrative Subordination*] (on file with the *Ohio State Law Journal*) (arguing against the conventional view that bias in administration unrelated to the core values of bureaucracy).

² John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1941 (2011); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1136 (2000) (“Among [separation-of-powers] commentators there are two well-defined and competing positions: formalism and functionalism.”); Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 433 (1987) (“[T]he traditional picture of the separation of powers holds fast to what may be called the formalist-functionalist dichotomy”; in other words, “the axis for understanding separation questions ranges between two major poles: a formalist approach and a functionalist perspective.”).

³ Justin Weinstein-Tull, *The Experience of Structure*, 55 ARIZ. ST. L.J. 1513, 1539 (2024).

⁴ M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 609–10 (2001) (noting that the Supreme Court has relied on formalism to invalidate the legislative veto and functionalism to validate “the exercise of adjudicatory authority by administrative agencies”).

⁵ See, e.g., sources cited *infra* note 78.

⁶ Sargentich, *supra* note 2, at 433.

which evaluate and seek to shape legal systems and institutions in order to foster liberation and equity.⁷ Indeed, the dominant theories of constitutional structure—namely, formalism and functionalism—have yet to be viewed through a critical lens, let alone evolved in ways that improve how interbranch dynamics contend with the concerns of critical theorists.⁸

The normative commitments of the separation of powers are highly focused on how the founders conceived of power,⁹ and rarely prioritize societal, humane, and equality or equity-focused values.¹⁰ Rather, scholarly paradigms “addressing the separation of powers . . . tend to place primary emphasis not on the prevention of tyranny or protection of individual liberties, but on the advancement of institutional interests”—in other words, on turf-protection by “the branches themselves, as if that goal were itself a good.”¹¹ Perhaps as a result, “[o]n the whole, the Court’s separation-of-powers decisions have protected the mechanics of government operations . . . [but] there is no look beyond any specific case to a higher objective that the separation of powers may serve.”¹²

An underlying assumption is that unlike the equal protection amendments, for instance, the structural provisions of the Constitution do not require a moral philosophy in order to be coherently interpreted or applied.¹³ As has been

⁷ See generally *id.* (discussing critical theories and their relevance to administrative law).

⁸ See Shah, *Critical Theory*, *supra* note 1, at 11; cf. Bernard Bell, *Race and Administrative Law*, YALE J. ON REGUL.: NOTICE & COMMENT (Aug. 10, 2020), <https://www.yalejreg.com/nc/race-and-administrative-law-by-bernard-bell/> [<https://perma.cc/S4V C-R6GA>] (asking whether “critical race theory” can “break into” administrative law).

⁹ See Shah, *Critical Theory*, *supra* note 1, at 11.

¹⁰ By using the terms “equality” and “equity,” this essay is engaging “the conception, associated at times with equality and at times with equity, of laws and policies that are responsive to individual and structural differences in people’s circumstances.” Martha Minow, *Equality vs. Equity*, 1 AM. J.L. & EQUALITY 167, 169 (2021).

¹¹ Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1518 (1991).

¹² *Id.* at 1520 (“The operation has been a success thus far, but the patient may be dying.”).

¹³ See, e.g., Peter M. Shane, *Conventionalism in Constitutional Interpretation and the Place of Administrative Agencies*, 36 AM. U. L. REV. 573, 582 (1987). The assumption goes as follows:

Articles I and II, unlike the fourteenth amendment, establish universally recognized institutions. The words of these articles almost always have well-known ordinary meanings, whose applicability often follows conventional understanding quite readily. To the extent normative theory is needed to apply the words, it may be sufficient for such application to recur to normative theories about the operation of government that are conventionally well understood and are not presently at issue in our society.

Id.

observed: “If you want to study the distribution of power, you study . . . the separation of powers. If you care about equality, . . . you study the First and Fourteenth Amendments.”¹⁴ Indeed, “[r]ather than reinforcing a governmental design that furthers the public good, the Court’s institutional rhetoric [pertaining to the separation of powers] suggests an aim of preserving the government for its own sake.”¹⁵ Furthermore, this is not a critique of separation-of-powers formalism alone, but of separation-of-powers functionalism as well.¹⁶ Note that Brown cites the Federalist Papers to define the “public good.”¹⁷ This essay considers, given its critical orientation, a cornerstone of “public good” to be the collective emphasis of critical legal theory, including CLS and critical race theory (CRT),¹⁸ on justice for vulnerable communities, including people of color, immigrants, women, and those in need of social welfare.

On the one hand, separation-of-powers formalism should be held to account, and to some extent, it has been. Formalism benefits from rich disagreement regarding its interpretive methods, including originalism and textualism,¹⁹ as well as its favor of rigid governmental and administrative structure.²⁰ In addition, functionalists critique formalism’s inability to meet its aims of neutrality, objectivity, and legal imperative, as well as formalism’s obfuscation of its normative preferences, arguably to the detriment of the public good.²¹

On the other hand, functionalism within public law, and particularly in regard to traditional separation-of-powers discourse, is also both constrained and ripe for interrogation and has suffered from a lack of critical attention. As an initial matter, functionalism would benefit from the clear identification and evaluation of its own interpretive methodologies and structural commitments, just as formalism has. A closer look at functionalism is particularly warranted at a time when formalists appear to be embracing the tools of interpretation often

¹⁴ Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1695, 1709 (2017); see also Weinstein-Tull, *supra* note 3, at 1539 (“Although the formalist/functionalist distinction provides an appealing framework for debate, it excludes meaningful conversation about experience.”).

¹⁵ Brown, *supra* note 10, at 1520.

¹⁶ More specifically, Brown criticizes the Supreme Court for taking this approach “[w]hen possible excesses by one branch present issues that cannot be resolved easily by resort to the text of the Constitution,” which implies a critique of functionalism as well. *Id.* at 1518–19; see also *infra* notes 28–29 (noting that non-textualist interpretations are associated with functionalism).

¹⁷ Brown, *supra* note 10, at 1520 n.21.

¹⁸ See *infra* notes 77–80 and accompanying text.

¹⁹ See Bijal Shah, *A Critical Take on Formalist Interpretation*, 22 GEO. J. L. & PUB. POL. 2 (forthcoming 2024) (manuscript at 3–7) (citations omitted) (on file with the *Ohio State Law Journal*).

²⁰ See Bijal Shah, *The President’s Fourth Branch?*, 92 FORDHAM L. REV. 499, 524–36 (2023) (citations omitted).

²¹ See generally, Shah, *supra* note 19.

associated with functionalism.²² In addition, functionalists should consider in greater detail whether we have met our own conventional commitments, as well as the extent to which public good norms and values have been compromised by functionalist moves.

This essay offers a critique of how a functionalist approach to the separation of powers operates in the real world. More specifically, this essay argues, functionalism may be failing to meet its own commitments and to ensure meaningful limits to each branch's power. In addition, this essay observes that functionalism has been applied to concerning effect as it pertains to the interests of minorities and other marginalized communities. As a result, functionalism has become, in some contexts, a tool for the branches of government to arrogate authority at the expense of vulnerable people.

In general, functionalism “builds on various impulses in modern law that are critical of formalism.”²³ More specifically, functionalism is based in democratic principles that both find legitimacy in a system of checks and balance among federal powers and reflect institutional realities.²⁴ Accordingly, functionalism encompassed a set of ideals that emphasizes representative democracy and supports a flexible approach to the relationships among and divisions between the branches, and is encoded in judicial decisions leveraging these frameworks.²⁵ “The agreed-upon ‘ultimate purpose’ [of functionalism] is to achieve an appropriate balance of power among the three spheres of government.”²⁶

One notable aspect of functionalism is that it ideally “employs the principle of judicial restraint,”²⁷ and privileges Congress's power to structure the

²² See *infra* notes 103-125 and accompanying text (discussing formalist Justices' adoption of purposivism in the major questions doctrine); *infra* note 157 and accompanying text (discussing formalist support for the Congressional Review Act).

²³ Sargentich, *supra* note 2, at 433.

²⁴ *Id.* (“Functionalism is closely allied with the vision of checks and balances among the branches of government. This vision stresses the complex interaction and tension among the institutions of government.”); Ronald J. Krotoszynski, Jr., *Transcending Formalism and Functionalism in Separation-of-Powers Analysis: Reframing the Appointments Power After Noel Canning*, 64 DUKE L.J. 1513, 1528 (2015); William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21, 29 (1998) (noting that functionalism undergirds a continuing system of administration); see also David Epstein & Sharyn O'Halloran, *Administrative Procedures, Information, and Agency Discretion*, 38 AM. J. POL. SCI. 697, 701 (1994).

²⁵ Manning, *supra* note 2, at 1942–43. Functionalists stand in contrast to formalists, who are concerned about the constitutionality of administrative authority. Sargentich, *supra* note 2, at 433; see M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1408 (2004); see, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–35, 637–38 (1952) (Jackson, J., concurring); *Humphrey's Executor v. United States*, 295 U.S. 602, 631 (1935).

²⁶ Magill, *supra* note 2, at 1142–43.

²⁷ Brown, *supra* note 10, at 1529.

administrative state as it wishes.²⁸ Accordingly, a primary interpretive methodology of functionalism is purposivism,²⁹ which encourages judicial reliance “on interpretive tools disfavored by textualists—namely, purpose, legislative history, and intent”³⁰—to identify the meaning of statute and to identify the bounds of agencies’ authority in a manner that recognizes legislative primacy in shaping administrative authority. The judicial establishment of a permissive nondelegation doctrine has also allowed Congress to work out the proper distribution of policymaking responsibilities between itself and administrative agencies.

Another facet of functionalism is that it “relies largely upon the departments of government themselves to work out what is best for them politically.”³¹ Traditionally, “the structure of government for the functionalists” has been “a matter of politics, because the Court’s deferential approach leaves the bulk of the responsibility for structural design to the elected departments of government.”³² As a result, functionalists have conventionally supported legislative oversight of the workings of the bureaucracy.³³ In this way, functionalism is supportive of a dynamic relationship between the legislative and executive branches.

More generally, functionalism is also understood to be consistent with pragmatism,³⁴ which requires acknowledging the “reality of the existing government.”³⁵ As a result, functionalists “tend to generalize the underlying purposes of specific constitutional assignments of powers to particular branches” and then balance these against “a larger, and more pressing,

²⁸ Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 860 (1990) (“The functionalist thus infers that Congress is free to allocate authority as it pleases . . . as long as the ‘overall character or quality’ of the relationships between those institutions and the named heads of government is consistent with the latter’s performance of their core functions.” (quoting Peter L. Strauss, *Formal and Functional Approaches to Separation of Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 493 (1987)); Manning, *supra* note 2, at 1941 (“Formalist opinions, in contrast, assume that the constitutional structure adopts a norm of strict separation which may sharply limit presumptive congressional power to structure the government.”).

²⁹ Peter L. Strauss, *A Softer Formalism*, 124 HARV. L. REV. F. 55, 55–56 (2011).

³⁰ Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1277 (2020).

³¹ Brown, *supra* note 10, at 1529.

³² *Id.*; see also Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2020 (2022) (critiquing today’s “juristocratic” view of the separation of powers: that is, the formalist assumption that there are unwritten constitutional and judicially enforceable limits on how Congress and the president may engage by statute).

³³ See *infra* notes 152–156 and accompanying text.

³⁴ See David Luban, *What’s Pragmatic About Legal Pragmatism?*, 18 CARDOZO L. REV. 43, 44 (1996) (describing legal pragmatism as, among other things, antiformalist).

³⁵ Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 581 (1984).

commitment to creating an effective and efficient federal government.”³⁶ From this perspective, functionalism leads to better administration, as compared to formalism.³⁷ Accordingly, functionalists also tend to tolerate, or even support, a robust administrative state.³⁸ In order to justify this pragmatism, functionalists emphasizes democratic processes in policymaking, including public participation, as an important aspect of accountability in administration.³⁹

Over time, however, both the dynamics and impact of functionalism have become inconsistent with its core commitments and unwieldy. As to whether separation-of-powers functionalism has achieved its own aims consistently, matters are initially confused by the fact that there does not appear to be a clear definition of functionalism.⁴⁰ According to John Manning, “functionalist decisions presuppose that Congress has plenary authority to compose the government under the Necessary and Proper Clause, subject only to the requirement that a particular governmental scheme maintain a proper overall balance of power.”⁴¹ Then again, Peter Strauss disagrees with this definition, suggesting instead that “[n]o functionalist scholar—certainly not this one—treats the Necessary and Proper Clause as ‘giv[ing] Congress virtually limitless room to innovate as long as the overall balance of power is maintained.’”⁴² Strauss also contests Manning’s conception of functionalist interpretive methodology by asserting that characterizing functionalism as “indifferent to text” is an “oversimplified view.”⁴³

Furthermore, while functionalism emphasizes deference to Congress’s power to structure administrative agencies,⁴⁴ this has been stymied by emboldened judicial policymaking based in statutory interpretation that sounds in purposivism.⁴⁵ In addition, while functionalism emphasizes democratic process and participatory policymaking,⁴⁶ this has been undercut by agency responsiveness to the political interests of sitting legislatures stemming from a

³⁶ Krotoszynski, *supra* note 22, at 1528.

³⁷ See Eskridge, *supra* note 24, at 21; Manning, *supra* note 2, at 1959–60 (“[F]ormalists favor unyielding enforcement of what they see as a strict norm of separation even where the resultant separation might yield inefficiencies.”).

³⁸ See *infra* notes 204–215.

³⁹ Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 YALE L.J. 1600, 1655–56 (2023).

⁴⁰ See Magill, *supra* note 4, at 611–12 (noting that functionalism’s flexibility and interest in protecting the “core” functions of each of the branches is muddled by that fact that “there is no well-accepted doctrine or theory that offers a way to identify the differences among the governmental functions in contested cases”); cf. Eskridge, *supra* note 24, at 24 (suggesting that “constitutional reasoning pervasively, and often unconsciously, melds formalist and functionalist justifications”).

⁴¹ Manning, *supra* note 2, at 1941.

⁴² Strauss, *supra* note 28, at 55.

⁴³ *Id.*

⁴⁴ See *supra* notes 26–27 and accompanying text.

⁴⁵ See *infra* Part II.A.

⁴⁶ See *supra* notes 23, 35 and accompanying text.

functionalist relationship between the political branches.⁴⁷ Finally, functionalism have not plainly articulated, let alone fully acknowledged, the trade-offs and pathologies⁴⁸ resulting from the preservation and promotion of vigorous administrative governance.⁴⁹

As to whether functionalism harms vulnerable marginalized people, note that it encompasses a broader intuition that agencies generally implement and protect important interests of society.⁵⁰ Certainly, some functionalists support equality ideals, and both functionalism's critics and its proponents cast it as results-oriented.⁵¹ At the very least, functionalist interpretations of the law are "more attentive to evidence of the concrete social issues catalyzing legislative action" than are formalist interpretive conventions.⁵² But as of now, separation-of-powers functionalism lacks a cohesive and grounding social theory,⁵³ beyond as a rejoinder to formalism.⁵⁴ Therefore, unadulterated support for shared duties among the branches of government and for powerful administrative agencies is unsatisfying from a critical theoretical perspective.

For many functionalists, any interest in justice is subsumed by democratic process ideals, which frame the government as a system of inherently competing interests that, at its best, can lead to democratically representative policies.⁵⁵ Essentially, this view maintains that the values that drive administrative policymaking originate in the legislation governing administrative agencies. Indeed, most discussions of power in the administrative state have been advanced by political theorists, particularly those observing that the political

⁴⁷ See *infra* Part II.B.

⁴⁸ See *infra* Part II.C.

⁴⁹ See *supra* notes 33–38 and accompanying text.

⁵⁰ See Sargentich, at 439 (observing that functionalism "holds that legal analysis should center on the actual operation and values of a given doctrine").

⁵¹ See, e.g., William Baude, *Conservatives, Don't Give Up on Your Principles or the Supreme Court*, N.Y. TIMES (July 9, 2020), <https://www.nytimes.com/2020/07/09/opinion/supreme-court-originalism-conservatism.html> [<https://perma.cc/Q35W-RV94>] ("If what matters most to you are the results in specific cases, you may want non-originalist justices."); Sargentich, *supra* note 2, at 439, n.42 (citing EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* 23–24 (1973)).

⁵² Strauss, *supra* note 28, at 56.

⁵³ Relatedly, critical legal theorists have suggested that the law requires grounding in social theory. Jonathan Turley, *The Hitchhikers Guide to CLS, Unger, and Deep Thought*, 81 NW. U. L. REV. 593, 601 (1987) ("[T]here can be no plausible legal theory without a social theory." (quoting John Henry Schlegel, *Introduction*, 28 BUFFALO L. REV. 203, 203 (1979)); see also Scott L. Cummings, *The Puzzle of Social Movements in American Legal Theory*, 64 UCLA L. REV. 1554, 1556 (2017) (noting that social movements have become central to the study of law).

⁵⁴ See *supra* note 41 and accompanying text.

⁵⁵ See Manning, *supra* note 2, at 2000, 2004.

branches are empty vessels for the value choices and preferred policy outcomes of whichever political party happens to presently control each of them.⁵⁶

For example, if the dominant political party wills that anti-subordination or some other interest in justice is worth pursuing, then Congress will pass legislation accordingly and agencies will implement it. Otherwise, functionalists do not advocate for the advancement of particular norms or values furthering the public good. While “demonstrated social benefits” may be valued individually by some functionalists, they are not to be accomplished at the expense of the “original structure.”⁵⁷ It is the case that, for functionalists, principles including “avoidance of factionalism, protection against self-interested or unaccountable representation, and promotion of deliberation in government” are valuable primarily insofar as they maintain “basic structural principles.”⁵⁸

Furthermore, the fact that functionalism has situated itself, in some circles, as a preferable approach to separation-of-powers analysis for those who care about justice does not mean that it is well-suited for that pursuit. First, functionalist structural constitutionalism “pays little attention to the effects of inter-institutional alliances on those outside the government, namely private individuals.”⁵⁹ At best, concerns about inequality and justice have been folded into matters of administrative procedure,⁶⁰ with the assumption that transparency, reason, and public participation ensure responsive and legitimate administration.⁶¹ In addition, research in this and related areas of law are focused on judicial decisions, and therefore tend to exclude interests (such as racial equality) that have been eschewed by the courts in this context.⁶² This all

⁵⁶ See, e.g., Jonathan S. Gould & David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. REV. 59, 62 (2022) (arguing and identifying biases in structural constitutionalism that “tilt the playing field . . . for or against” certain political factions); Daryl J. Levinson, *Looking for Power in Public Law*, 130 HARV. L. REV. (SUP. CT. 2015 TERM) 31, 86 (2016); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2323–24 (2006); Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 540–41 (2004).

⁵⁷ Manning, *supra* note 2, at 1951.

⁵⁸ Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 495–96 (1987).

⁵⁹ Brown, *supra* note 10, at 1529.

⁶⁰ See, e.g., Sophia Z. Lee, *Racial Justice and Administrative Procedure*, 97 CHI.-KENT L. REV. 161, 169 (2022) (noting that in the 1960s and 1970s, racial justice advocates breathed new life into the notice-and-comment provisions of agency rulemaking). *But see* Cristina Isabel Ceballos, David Freeman Engstrom & Daniel E. Ho, *Disparate Limbo: How Administrative Law Erased Antidiscrimination*, 131 YALE L.J. 370 (2021) (arguing that the arbitrary and capricious standard fails to exclude agency policies based in racial bias).

⁶¹ See, e.g., George W. Johnston, *AEC Rulemaking and Public Participation*, 62 GEO. L.J. 1737, 1737 (1974).

⁶² Joy Milligan & Karen Tani, *Seeing Race in Administrative Law: An Interdisciplinary Perspective*, YALE J. ON REGUL.: NOTICE & COMMENT (Sept. 16, 2020),

suggests that, at base, because functionalism is both focused on structure and not steered by clear or consistent public- or justice-oriented values, it may come to support “institutional dehumanization” just like formalism.⁶³

Overall, this essay seeks to move functionalists beyond their current focus on reacting to formalism toward greater self-awareness and self-critique, in order to begin a conversation about how to build a functionalism that is consistent with its own aims, maintains healthy limits to each branch’s power, and—perhaps unrelated to the functionalism’s conventional values—supports justice. (Not incidentally, this essay brings scholarship that center marginalized perspectives, such as work on immigration and criminal administration, into the fold of a conversation about the “fundamental” or “theoretical” foundations of structural constitutionalism and administrative law.)⁶⁴ In addition, it also offer some tentative solutions for encouraging a functionalism that is more consistent with its own commitments and that perhaps furthers the public good. Notably, this essay does not advocate for separation-of-powers formalism wholesale, given that this framework includes its own unchecked biases and normative preferences hidden behind claims of methodological objectivity and rigor. But it also does not advise adherence to mechanically applied functionalism, and acknowledges the value of formalist tools, depending on the motivation behind their use.

This first Part of this essay evaluates functionalism, and argue that three mechanisms of functionalism have flourished at odds with functionalism’s core commitments, at the expense of inter-branch balance, and to concerning ends. First, it engages the major questions doctrine. This anti-formalist doctrine of statutory interpretation allows the Supreme Court to determine the outer bounds of agencies’ policymaking authority.⁶⁵ But its de facto function is to support the Court’s own engagement in administration, which both is in tension with the functionalist instinct to enhance democratic policymaking and has led to arguably troubling outcomes for vulnerable people. In addition, this Part observes the flaws of congressional oversight. The fall of the legislative veto was a win for formalists and galvanized functionalist support for legislative intervention in agency action more broadly. But allowing a sitting legislature to have control over administration may inhibit both democratic representation and public participation in policymaking, and may negatively impact marginalized communities as well. Finally, this Part argues that perhaps the most important project of functionalists today—the broad defense of bureaucratic discretion

<https://www.yalejreg.com/nc/seeing-race-in-administrative-law-an-interdisciplinary-perspective-by-joy-milligan-and-karen-tani/> [<https://perma.cc/Z7FF-CR9A>].

⁶³ Cf. AUDRE LORDE, *SISTER OUTSIDER* 39 (1984) (noting the idea of institutional dehumanization of women in a patriarchal society). This concept is used here to mark institutional systems and values than devalue the human experience. *Id.*

⁶⁴ See Shah, *Critical Theory*, *supra* note 1, at 10 (arguing that the “inner circle of administrative law scholarship must expand their sense of which literature speaks to the fundamental”).

⁶⁵ *Id.*

against attacks from formalists interested in significantly constraining the administrative state—has led to bias and self-interest in administration and, as a result, to concerning outcomes for vulnerable communities subject to in criminal, immigration, national security, and social security administration.

The second Part of this essay considers how to respond to these flaws of functionalism. More specifically, this Part suggests the disentanglement of functionalism as it currently operates, in order to improve the opacity of judicial policymaking, contend with the perils of legislative oversight, and constrain the personal idiosyncrasies and biases that tarnish bureaucratic action. First, it argues that the Court should retain the major questions doctrine's connection to *Chevron* deference and improve its methodologies of statutory interpretation. This would help the Court limit the use of the major questions doctrine as a vehicle for judicial administration and aggrandizement, and ultimately support democratic and just policymaking. Alternatively, this Part suggests an explicit revival of the nondelegation doctrine, instead of using major questions as a poor proxy, and imagines progressive ways of doing so. Second, this Part notes that while agency independence from Congress may not be possible or even advisable, legislative oversight could be improved by the inclusion of a diversity of legislative perspectives, data, and public participation, or by administrative efforts to prioritize the mandates and expectations of enabling statutes. Third, this Part suggests shifts within administrative institutions, as well as an emphasis on certain forms of judicial review, to reduce and excise administrative bias and self-interest. The accountability-forcing nature of the suggested approaches could make functionalist dynamics more consistent with functionalism's own commitments, and perhaps also mitigate some of the injustice that functionalism has caused.

Finally, it bears noting that this essay purposefully excludes consideration of whether a functionalist approach to the separation of powers could include critical theorists' interest in equality as part of its own set of fundamental commitments. Note, however, that this is an inquiry worthy of consideration. As an initial matter, under a theory of liberty as non-domination, a functionalism devoid of equity- or justice-oriented values is perhaps not enough to achieve the framework's core goal of preserving and promoting liberty. In addition, one might legitimately rebuke functionalism's emphasis on the separation of powers above substantive values—in other words, by rejecting the extent to which functionalists recapitulate to proceduralism, or to political process, over concerns about equality and anti-subordination.

First, the structural constitutional provisions are oriented conventionally toward indeterminate or originalist conceptions of liberty, including the idea that liberty is accomplished by a diffusion of governmental power.⁶⁶ However, the “distribution of national powers” serves not only efficiency, but also “the need

⁶⁶ See, e.g., Manning, *supra* note 2, at 1959.

to diminish the risk of tyranny.”⁶⁷ Indeed, “republican democratic freedom” may be defined by “non-domination—that is, not as freedom from all power, but as a reason-demanding freedom from the potentially arbitrary exercise of power that fails to take relevant interests into account.”⁶⁸ More specifically, functionalists view branch cooperation, interdependence, and constraint as a means to manage governmental overreach,⁶⁹ a central virtue of the separation of powers. Therefore, from the perspective of liberty as non-domination, an emphasis on anti-subordination is important to achieving the anti-tyranny aims of the separation of powers, not the least of which because individual rights and liberty face the same dangers.⁷⁰ Arguably, a separation-of-powers framework in

⁶⁷ Sunstein, *supra* note 52, at 433 (“[A] checks-and-balances inquiry into the relationship of the three named bodies to the agencies and each other seems capable in itself . . . of preserving the framers’ vision of a government powerful enough to be efficient, yet sufficiently distracted by internal competition to avoid the threat of tyranny.”); Strauss, *supra* note 29, at 639.

⁶⁸ There is support for a theory of liberty as non-domination (as opposed to liberty as non-interference). Indeed, “republican democratic freedom” may be defined by “nondomination—that is, not as freedom from all power, but as a reason-demanding freedom from the potentially arbitrary exercise of power that fails to take relevant interests into account.” Bernstein & Rodríguez, *supra* note 35, at 1651–52 (citing Philip Pettit); *see also* PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 18 (1997); Ludvig Beckman & Jonas Hultin Rosenberg, *Freedom as Non-Domination and Democratic Inclusion*, 24 RES PUBLICA 181, 181 (2018); Hans Morten Haugen, *Participation and Decision-Making in Non-Dominant Communities: A Perspective from Civic Republicanism*, 23 INT’L J. ON MINORITY & GRP. RTS. 306, 306 (2016); Frank Lovett, *Non-Domination*, in THE OXFORD HANDBOOK OF FREEDOM 106, 108 (2016); *cf.* Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 GEO. L.J. 1411, 1411 (2008) (arguing that democratic process is impacted by illegitimate exercises of public power); K. Sabeel Rahman, *From Economic Inequality to Economic Freedom: Constitutional Political Economy in the Gilded Age*, 35 YALE L. & POL’Y REV. 321, 325 (2016) (noting that “a modern theory of domination must see the need for checks and balances” on the government); Philip Pettit, *Republican Freedom and Contestatory Democratization*, in DEMOCRACY’S VALUE (Shapiro & Hacker-Cardón eds., 1999). As I have suggested elsewhere: “[T]he separation of powers is properly understood as a doctrine designed to protect the rights of individuals.” Bijal Shah, *Deploying the Internal Separation of Powers Against Racial Tyranny*, 116 NW. U. L. REV. ONLINE 224, 251 (2021) (citations omitted).

⁶⁹ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 18–22 (2d ed. 1988); Brown, *supra* note 10, at 1527–29; Strauss, *supra* note 35, at 639 (“So long as separation of powers is maintained at the very apex of government, a checks-and-balances inquiry into the relationship of the three named bodies to the agencies and each other seems capable in itself . . . of preserving the framers’ vision of a government powerful enough to be efficient, yet sufficiently distracted by internal competition to avoid the threat of tyranny.”).

⁷⁰ “[T]he same sordid U.S. history and dynamics that have given way to individual-rights jurisprudence also materialize into tyranny. More broadly, the assumption that the divide between the separation of powers and equal protection is justified on its own terms, simply because these fields happened to develop along distinct paths, lacks a critical dimension.” Shah, *supra* note 60, at 251; *see also* Matthew B. Lawrence, *Subordination and Separation of Powers*, 131 YALE L.J. 78, 89 (2021) (suggesting that the inclusion of

holistic service of liberty must both manage branch aggrandizement and eliminate subordination caused by said aggrandizement in order to adequately accomplish its aims.⁷¹

Second, separation-of-powers functionalism may be unlikely—as it stands—“to dismantle the master’s house,”⁷² given its lack of a coherent, galvanizing normative stance;⁷³ its inattention to individual rights;⁷⁴ and its focus on democratic process ideals over the actual impact of administration on vulnerable and marginalized people.⁷⁵ Perhaps, functionalism should be reoriented explicitly toward the values and goals of critical theorists. In this vein, to paraphrase Scott Cummings, future work might ask how theories of the separation of powers, often deployed in service of “resolving political disputes,” can instead address “deep structures of subordination.”⁷⁶

II. CRITIQUING FUNCTIONALISM

Functionalists are understood to be the separation-of-powers camp in opposition to formalists.⁷⁷ Functionalists prefer, in theory, a restrained judiciary vis-à-vis the more politically accountable branches.⁷⁸ Functionalists are also committed to a framework that involves sharing power between the executive branch and Congress.⁷⁹ Relatedly, functionalism is the lens of choice for structural constitutionalists who place a high value on an operational, and ideally effective, government.⁸⁰ Indeed, many functionalists advocate for preserving and growing a healthy bureaucracy, in no small part these days as a

“antisubordination among the pantheon of values considered in separation-of-powers theory makes sense even from a traditional ‘structural’ perspective”).

⁷¹ See Shah, *supra* note 60, at 246–47 (defining and describing racial tyranny found in the separation of powers framework of the federal government).

⁷² Cf. LORDE, *supra* note 57, at 110–11 (suggesting that minority communities must take their differing perspectives and apply them to shift society, rather than relying on conventional views to dismantle oppression). This phrase is sometimes used to denote the assertion that a new set of tools, developed by marginalized perspectives, are required to shift and evolve society. See generally *id.*

⁷³ See *supra* notes 46–47 and accompanying text.

⁷⁴ See *supra* note 53 and accompanying text.

⁷⁵ See *supra* notes 48–52 and accompanying text.

⁷⁶ Cummings, *supra* note 46, at 1589. The Court has applied this approach, to some extent, in other doctrinal contexts. Aaron Tang, *Harm-Avoider Constitutionalism*, 109 CALIF. L. REV. 1847, 1847 (2021) (arguing that “[r]ather than relying on original meaning, precedent, or other common tools,” the Supreme Court has decided cases across “a range of doctrinal areas—such as Congress’s Article I power, equal protection, substantive due process, presidential immunity, and the dormant Commerce Clause” based on a second-order consideration of harm avoidance: “which group, if the Court rules against it, would be better able to avoid the harm it would suffer . . . ?”).

⁷⁷ See *supra* notes 2–3 and accompanying text.

⁷⁸ See *supra* note 25–27 and accompanying text.

⁷⁹ See *supra* notes 30–31 and accompanying text.

⁸⁰ See *supra* notes 32–34 and accompanying text.

defense against the formalist project of undoing the administrative state.⁸¹ In general, functionalists assume their institutional commitments are supported by their preferred approaches to interbranch relationships and by their preferred interpretive methods. Functionalism also appears to be more conducive to realizing justice than formalism.⁸²

This Part critiques functionalism. More specifically, it engages in a “functionalist” critical inquiry of separation-of-powers functionalism.⁸³ Part of what makes such an inquiry challenging, and interesting, is that it allows critical theoretical views to shape conversations about structural constitutionalism and administrative law.

Proponents of critical legal theories, including CLS and CRT, are concerned with how institutional structures construct identity and engender injustice.⁸⁴ CLS, as described by Roberto Mangabeira Unger, asserts that mainstream legal thought remains “one more variant of the perennial effort to restate power and preconception as right.”⁸⁵ Indeed, CLS “was the first radical legal theory that placed the conceptualization of domination and the imperative of its unmaking centerstage—where both ought to remain today.”⁸⁶

In order to prove the point that the law and its outcomes are socially constructed, as opposed to inevitable, CLS deconstructs the “criteria for valid theory,” question whether fundamental “neutral” principles are biased, and “reject[] past modes of legal analysis as self-legitimizing.”⁸⁷ “Epistemologically, this mode of analysis unearths factual circumstances, patterns, and connections to social context that judicial opinions tend to erase or

⁸¹ See *supra* note 41 and accompanying text.

⁸² See *supra* notes 43–45 and accompanying text.

⁸³ A “functionalist approach [to critical ideology] insist[s] that the meaning and significance of anything lay in the manner in which it operated in practice.” EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* 23 (1973) (“Meaning and importance lay in practical consequences, not in the logic of any rationalist system.”); *id.* at 23–24 (discussing functionalism in social sciences with its emphasis on “the things men actually did in society”). In Robert Gordon’s critique of legal functionalist theory, he explains that functionalism’s goal is “to peer behind and ultimately discard formalism’s abstractions in order to find, explain, and make law relevant to realities that lurk in the knowable world” Mark Fenster, *The Symbols of Governance: Thurman Arnold and Post-Realist Legal Theory*, 51 *BUFF. L. REV.* 1053, 1062 (2003); see also Robert W. Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 58, 64 (1984).

⁸⁴ See Samuel Moyn, *Reconstructing Critical Legal Studies* 4 (Aug. 4, 2023) (unpublished manuscript); Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 *UCLA L. REV.* 1215, 1217 (2002); Mark V. Tushnet, *Critical Legal Studies: A Political History*, 100 *YALE L.J.* 1515, 1525–26 (1991).

⁸⁵ Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 *HARV. L. REV.* 561, 674 (1983); see, e.g., ROBERTO MANGABEIRA UNGER, *FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY* 254 (1987); Gordon, *supra* note 3, at 58–59 (1984) (remarking on the importance of the tradition of legal functionalism).

⁸⁶ See Moyn, *supra* note 89 (manuscript at 4).

⁸⁷ Turley, *supra* note 46, at 594.

elide and, in doing so, generates new insights, both about law and about the lives that law touches.”⁸⁸ Methodologically, this approach can include everything from traditional analyses of law and policy to interdisciplinary and historical treatments.⁸⁹ In addition, “[o]ne of the most significant contributions the CLS movement made to contemporary legal thought was the theory of law’s inherent tendency towards indeterminacy.”⁹⁰ Based on a variety of tools, critical theories challenge society to reconsider the validity of its institutions and to question the assumptions on which those institutions are based.⁹¹

In this vein, this Part focuses on making explicit and evaluating assumptions that underpin the methods and moves of separation-of-powers functionalism. Notably, while some have criticized participants in new critical discourse for operating without a clear “theory,” others have questioned whether CLS itself has a defining theoretical lens or commitment and acknowledged the validity of theoretical pluralism in new critical work.⁹² Accordingly, this Part trades in “mid-level” legal concepts, rather than “high altitude” theory,⁹³ by offering “a

⁸⁸ Jasmine E. Harris, Karen M. Tani & Shira Wakschlag, *The Disability Docket*, 72 AM. U. L. REV. 1667, 1672 (2023) (“Legal scholars have long recognized the value in applying critical analytical lenses to judicial decision making.”).

⁸⁹ See, e.g., sources cited *supra* note 77.

⁹⁰ Akbar Rasulov, *What CLS Meant by the Indeterminacy Thesis*, LPE PROJECT (Mar. 27, 2023), <https://lpeproject.org/blog/what-cls-meant-by-the-indeterminacy-thesis/> [<https://perma.cc/7NW6-9S5V>] (discussing briefly the contention, in CLS, that “indeterminacy as an objective feature of the contemporary legal system”).

⁹¹ Harris, Tani & Wakschlag, *supra* note 81, at 1676–77.

⁹² Compare Samuel Moyn, *Does LPE Need Theory?*, LPE PROJECT (Sept. 4, 2023), <https://lpeproject.org/blog/does-lpe-need-theory/> [<https://perma.cc/JXD6-8JMF>] (asking of fellow legal and political economy scholars “[a]re we liberals or low-key Marxists?” and “what is our theory of” capitalism and the theory underlying our attack of it?) with Talha Syed, *Did CLS Have (Much Of) Any Theory?*, LPE PROJECT (Oct. 16, 2023), <https://lpeproject.org/blog/did-cls-have-much-of-any-theory/> [<https://perma.cc/YMQ4-PH85>] (suggesting that CLS did “little more than gesture[] toward a theory, [offering] few analytical tools or substantive contributions to one, either for an account of legal reasoning inside fields of law (‘legal theory’) or for an account of law’s relation to external social factors (‘social theory’)” (emphasis omitted)), and Jedediah Britton-Purdy, *In Defense of Theoretical Pluralism*, LPE PROJECT (Sept. 12, 2023), <https://lpeproject.org/blog/in-defense-of-theoretical-pluralism/> [<https://perma.cc/VQV3-5KVQ>] (“Because we need more theory than we have (in the sense of being able to answer deep questions decisively) and have more theories than we can deploy at once (because divergent competing theories abound), we should adopt a practice of theoretical pluralism, if not necessarily on the individual level, then at least on the collective plane.”).

⁹³ See Sanjukta Paul, *In Defense of Theoretical Quietism*, LPE PROJECT (Oct. 3, 2023), <https://lpeproject.org/blog/in-defense-of-theoretical-quietism/> [<https://perma.cc/3GX7-ETFF>] (asserting that the “real juice” can be found “a big step down from high-altitude social or legal theory,” by “contesting and clarifying the mid-level legal and economic concepts that actually have the most effect in the world is where (a lot of) the action is”).

situated critique of law” that takes its observations from how functionalist approaches to separation-of-powers are applied in practice.⁹⁴

More specifically, this Part argues functionalism does not always meet its own commitments and does not necessarily manifest good administration and results for marginalized and vulnerable people. In order to do so, this Part offers examples of how functionalist moves have undercut its objectives, and of concerning outcomes, resulting from three significant, perhaps counterintuitive, applications of functionalism. Each example also showcases branch aggrandizement, which both is at odds with the essential goal of the separation-of-powers framework—that is, a healthy balance of authority among the branches of government—and has led to worrisome ends.

The first example focuses on the growth of judicial power and resulting policy, based in the application of a functionalist major questions doctrine. The second is politicized legislative pressure in criminal administration that is inconsistent with the functionalist commitment to public participation in policymaking, resulting from congressional oversight of executive agencies. The third is the biased exercise of expansive administrative authority in enforcement and adjudication, which undercuts the functionalist commitment to effective government. In each of these contexts, functionalism’s dedication to judicial minimalism and to democratic representation in policymaking, as well as its capacity to manifest justice, is compromised.

A. Major Questions & Judicial Aggrandizement

The major questions doctrine, at least today, draws on a purposivist, separation-of-powers lens to curtail the operation of administrative agencies. The section argues that, despite its apparent functionalism, this doctrine reduces functionalism’s commitment to judicial restraint and to legislative primacy in the structuring of the administrative state.⁹⁵ In addition, the new doctrine inhibits policymaking that serves vulnerable communities with less political power. In any case, many have observed that the doctrine is indeterminate,⁹⁶ which is also of concern from a critical perspective.⁹⁷

The application of this doctrine was conventionally tied to the *Chevron* case. “[I]n *Chevron*, the [Supreme] Court held that courts must defer to interpretations of statutory ambiguities by the agency charged with implementing the statute if

⁹⁴ See Bernard E. Harcourt, *Critical Legal Theory & Radical Political Praxis*, LPE PROJECT (Oct. 19, 2023), <https://lpeproject.org/blog/critical-legal-theory-radical-political-praxis> [https://perma.cc/9BZS-9QY6] (supporting the ways in which critical legal theories’ “critiques of law operate at different levels (some at the surface, more instrumentally, and others at a deeper epistemological level) and have different focal points”).

⁹⁵ See *supra* notes 25–27 and accompanying text.

⁹⁶ Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1014 (2023) (citations omitted) (referring to the major questions doctrine as “radically indeterminate”).

⁹⁷ See *supra* note 96 and accompanying text.

the agency interpretation is reasonable.”⁹⁸ About a decade later, spanning from the mid-1990s to the mid-2000s, the Court began to apply an “extraordinary cases,”⁹⁹ or “major questions,” exception to *Chevron* by declining to defer to the agency’s interpretation of statute under the view that the Congress did not implicitly delegate to the agency broad authority to make policy effecting a major impact.¹⁰⁰ Notably, these earlier iterations of the major questions doctrine were rarely invoked by the Court.¹⁰¹ In addition, the doctrine was exercised not only to constrain agencies, but also to establish interpretations of statute suggesting that the agency at issue had underestimated its authority to regulate.¹⁰² In other words, sometimes, the judiciary would hold that the agency had *more* power than it purported to have.

The Court has been criticized in the past for using the major questions doctrine to achieve ideological ends.¹⁰³ Now, the new major questions approach has “altered the doctrine of judicial review of agency action in its method and content, in ways that will have momentous consequences,”¹⁰⁴ and threatens to displace *Chevron* deference.¹⁰⁵ More specifically, the major questions doctrine

⁹⁸ Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 269 (2022) (citing *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

⁹⁹ *See id.* at 298.

¹⁰⁰ *See id.* at 269–70 (discussing *MCI Telecommunications Corp. v. Am. Telephone & Telegraph Co.*, 512 U.S. 218 (1994); *FDA v. Brown & Williamson Tobacco Corp.* 529 U.S. 120 (2000); *Gonzales v. Oregon*, 546 U.S. 243 (2006)).

¹⁰¹ “The Supreme Court has made clear, in the five cases in which it has dealt with this issue before the end of the Trump Administration, that the major questions doctrine applies only in exceptional cases.” Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 217, 217 (2022) (illustrating the Court has gone from applying the doctrine sparingly to invoking it aggressively). Earlier in the doctrine’s usage, the Supreme Court applied the “extraordinary circumstances” or major questions exception only a handful of times over several years. *See, e.g.*, *King v. Burwell*, 576 U.S. 473, 485 (2015); *Massachusetts v. EPA*, 549 U.S. 497, 531 (2007); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 126 (2000).

¹⁰² “By focusing on the language of the statute [in *Massachusetts v. EPA*], the Court embraced textualism in order to find ‘capacious agency authorization’ under the statute.” Bijal Shah, *Statute-Focused Presidential Administration*, 90 GEO. WASH. L. REV. 1165, 1189 (2022). *See, e.g.*, *Massachusetts*, 549 U.S. at 517; *see also* *Am. Lung Ass’n v. EPA*, 985 F.3d 914, 958–59 (D.C. Cir. 2021). Notably, *Massachusetts v. EPA* took textualist approach to determining that the agency’s understanding of its power as limited under the Clean Air Act was incorrect.

¹⁰³ *See, e.g.*, Shah, *supra* note 102, at 1176; Ronald A. Cass, *Massachusetts v. EPA: The Inconvenient Truth About Precedent*, 93 VA. L. REV. BRIEF 75, 75 (2007) (“In their eagerness to promote government action to address global warming, the Justices stretch, twist, and torture administrative law doctrines to avoid the inconvenient truth that this is not a matter on which judges have any real role to play.”).

¹⁰⁴ Sohoni, *supra* note 98, at 262–63.

¹⁰⁵ Peter M. Shane, *Chevron Deference Is Superior to West Virginia Skepticism*, YALE J. ON REGUL.: NOTICE & COMMENT (2023), <https://www.yalejreg.com/nc/chevron-deference-is-superior-to-west-virginia-skepticism-by-peter-m-shane> [<https://perma.cc/JX55-AJC9>].

has become a “test” under which “the Court will not sustain a major regulatory action unless the statute contains a clear statement that the action is authorized.”¹⁰⁶

Under the [new major questions] doctrine, judges viewing agency actions must determine if a challenged agency initiative presents a “major question” by reviewing its novelty (or lack thereof) and political and economic significance. If an executive branch policy raises a “major question,” the agency must point to highly specific statutory authorization for its action” or the court will find it to be unauthorized by statute.¹⁰⁷

A “clear statement” rule such as this presumes that the agency is assuming too much power, since it requires an explicit grant of broad power and therefore is not applicable to situations where the agency claims to have less power than Congress in fact delegated to it. As a result, the Court has come to invoke the major questions doctrine only in order to restrict or eliminate regulatory initiatives.¹⁰⁸

The new major questions doctrine is arguably functionalist, in part because it employs purposivist statutory interpretation, to some degree. Overall, the “doctrine has been almost universally assailed on the right by scholars who argue that the doctrine is inconsistent with textualism and on the left by those who claim it is a recently invented, functionalist tool devised to reach anti-administrativist results.”¹⁰⁹ In fact, in both *FDA v. Brown & Williamson*, decided over twenty years ago and arguably the foundation of the major questions doctrine,¹¹⁰ and *West Virginia v. EPA*, decided just last year and the source of the doctrine’s current iteration,¹¹¹ the Court relied on purposivism to determine that certain policy decisions are outside the scope of agencies’ jurisdiction.¹¹²

¹⁰⁶ See Sohoni, *supra* note 98, at 264.

¹⁰⁷ Peter M. Shane, *Unforgiven: The Supreme Court and the Student Loan Conundrum*, WASH. MONTHLY (July 7, 2023), <https://washingtonmonthly.com/2023/07/07/unforgiven-the-supreme-court-and-the-student-loan-conundrum/> [https://perma.cc/BE6Q-BWPH].

¹⁰⁸ See, e.g., *West Virginia v. EPA* at 2616 (majority opinion) (invalidating the EPA’s Clean Power Plan); *Biden v. Missouri*, 142 S. Ct. 647, 654 (2022) (ending the Medicare/Medicaid providers vaccine mandate); *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 142 S. Ct. 661, 664–65 (2022) (terminating the OSHA’s vaccine mandate); *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (undermining the CDC’s eviction moratorium); see also Brunstein & Revesz, *supra* note 113, at 217 (“[D]uring its four years in office, the Trump Administration invoked the doctrine routinely in support of its deregulatory assault on the administrative state.”).

¹⁰⁹ Ilan Wurman, *Importance and Interpretive Questions*, 110 VA. L. REV. (forthcoming 2024) (manuscript at 1) (on file with the *Ohio State Law Journal*).

¹¹⁰ See generally *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

¹¹¹ See generally *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

¹¹² See Shah, *supra* note 102, at 1176 (“[I]n a few notable cases—including *West Virginia v. EPA*, decided this year and *FDA v. Brown & Williamson Tobacco Corp.*, decided

As to the new major questions doctrine and *West Virginia v. EPA*, in particular: “While the Supreme Court [in *West Virginia*] reversed the D.C. Circuit, it did so by employing a purposivist analysis like the D.C. Circuit did in the decision below.”¹¹³ At the very least, the Court did not rely on textualism in this case.¹¹⁴ More specifically, the Court applied the purposivist approach it took in *FDA v. Brown & Williamson*.¹¹⁵ Furthermore, the Court in *West Virginia v. EPA* seemed to espouse purposivism more generally, stating that “it is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”¹¹⁶

Also in *West Virginia v. EPA*, the Court “applied the major questions doctrine based on ‘both separation of powers principles and [the Court’s] practical understanding of legislative intent.’”¹¹⁷ One could understand the current major questions doctrine as a judicial tool forcing Congress to legislate more clearly, or risk judicial engagement in legislative policymaking. From this perspective, a common description of the doctrine is that it is a formalist attempt by the Supreme Court to impose a facsimile of a revived nondelegation doctrine.¹¹⁸ Notably, to the extent the clear-statement approach furthers a

over twenty years ago—the judiciary has condemned the results of presidential administration after engaging in a purposivist interpretation of statute.” (citations omitted)).

¹¹³ *Id.* at 1193 (citations omitted).

¹¹⁴ See *West Virginia*, 142 S. Ct. at 2641 (Kagan, J., dissenting) (describing the newest iteration of the major questions doctrine as a “get-out-of-text-free card”); Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL’Y 463, 465 (2021) (arguing that the major questions doctrine is inconsistent with textualism).

¹¹⁵ *West Virginia*, 142 S. Ct. at 2608–10 (citing *Brown & Williamson* for purposivist propositions including that statutory interpretation in major questions cases “must be ‘shaped, at least in some measure, by the nature of the question presented’—whether Congress *in fact meant* to confer the power the agency has asserted,” by the view that “‘Congress could not have *intended* to delegate’,” and by “*common sense* as to the manner in which Congress [would have been] likely to delegate” (alteration in original) (emphasis added)).

¹¹⁶ See *West Virginia*, 142 S. Ct. at 2607–08 (“Where the statute at issue is one that confers authority upon an administrative agency, that inquiry must be ‘shaped, at least in some measure, by the nature of the question presented’—whether Congress in fact meant to confer the power the agency has asserted.”).

¹¹⁷ Shah, *supra* note 102, at 1193 (quoting *West Virginia v. EPA*); see also Eric Berger, *Constitutional Conceits in Statutory Interpretation*, 75 ADMIN. L. REV. 479, 498 (2023) (suggesting that in “highly politicized cases” including *West Virginia v. EPA*, the Roberts Court has “brushed aside inconvenient statutory texts, focusing instead on background constitutional concerns”); Sohoni, *supra* note 98, at 262–63 (“[N]o one should mistake these cases for anything but what they are: separation of powers cases in the guise of disputes over statutory interpretation.”).

¹¹⁸ Sohoni, *supra* note 98, at 265–66 (“[A] sufficiently robust major questions doctrine greatly reduces the need to formally revive the nondelegation doctrine.”); see also *West Virginia*, 142 S. Ct. at 2624 (2022) (Gorsuch, J., concurring); Alison Gocke, *Chevron’s Next Chapter: A Fig Leaf for the Nondelegation Doctrine*, 55 U.C. DAVIS L. REV. 955, 955 (2022).

nondelegation canon, it is further in tension with textualism.¹¹⁹ In addition, the major questions doctrine could also be understood as employing “plain old pragmatism,”¹²⁰ a mechanism conventionally associated with functionalism,¹²¹ while others have acknowledged that it is anti-formalist, at least.¹²²

Characterizing the new major questions doctrine as purposivist is admittedly controversial, and perhaps a criticism leveled by those who view the doctrine as insufficiently textual.¹²³ The analysis in recent major questions doctrine cases may also be understood as purposivism done badly,¹²⁴ or “backdoor” purposivism,¹²⁵ that legitimizes the preferences of Justices that are otherwise textualists. But even—or perhaps especially—if recent major

¹¹⁹ Cass R. Sunstein, *Two Justifications for the Major Questions Doctrine*, FLA. L. REV. (forthcoming 2024) (manuscript at 2) (on file with the *Ohio State Law Journal*); see also Benjamin Eidelson & Matthew Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515, 517 (2023) (explaining that substantive canons are generally in tension with textualism).

¹¹⁹ Cass R. Sunstein, *Two Justifications for the Major Questions Doctrine*, FLA. L. REV. (forthcoming 2024) (manuscript at 2) (on file with the *Ohio State Law Journal*); see also Benjamin Eidelson & Matthew Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515, 517 (2023) (explaining that substantive canons are generally in tension with textualism).

¹²⁰ Anita Krishnakumar, *What the New Major Questions Is Not*, 92 GEO. WASH. L. REV. (forthcoming 2024) (manuscript at 43); see also *id.* at 46–47 (describing the new major questions doctrine as a “practical consequences” test with the clear statement rule “grafted” onto it to make it “appear more textualist”).

¹²¹ See *supra* notes 32–35 and accompanying text.

¹²² See, e.g., Deacon & Litman, *supra* note 96, at 1056–57 (arguing that the “focus in the new major questions doctrine on whether an agency policy is ‘politically controversial’ is one of the more anti-formalist elements of the doctrine”).

¹²³ See, e.g., Jed Handelsman Shugerman, *Biden v. Nebraska: The New State Standing and the (Old) Purposive Major Questions Doctrine*, 2023 CATO SUP. CT. REV. 209, 210 (arguing, in a publication aligned with conservatism, that the major questions doctrine is “pseudo-textualist”). Notably, the dissent in *Biden v. Nebraska*, written by textualist Justice Elena Kagan, argued that the majority ignored the full text of the statute and argued that the majority’s interpretation is flawed as a result. 143 S. Ct. at 2394 (Kagan, J., dissenting) (observing that “‘modify’ does not stand alone. It is one part of a couplet: ‘waive or modify’”). “The majority picks the statute apart piece by piece in an attempt to escape the meaning of the whole . . . and address[es] each segment of Congress’s authorization as if it had nothing to do with the others.” *Id.* at 2391, 2394 (Kagan, J., dissenting); see also Louise Seamster, Blake Emerson, Marshall Steinbaum, Ryann Liebenthal, Jonathan Glater, Persis Yu & Luke Herrine, *Seven Reactions to Biden v. Nebraska*, LPE PROJECT (July 10, 2023), <https://lpeproject.org/blog/seven-reactions-to-biden-v-nebraska/> [<https://perma.cc/CJD8-7P4Z>] (“[W]hen you’ve got a new rule that says agencies can’t do big stuff, fear not: textually explicit authority need not detain you!”).

¹²⁴ Krishnakumar, *supra* note 117 (manuscript at 27) (“[U]nlike good purposivism, the purpose and intent-based arguments invoked in the latest major questions cases lack any external tether or concrete evidence of the statute’s purpose beyond the Justices’ own intuitions.”).

¹²⁵ See Krishnakumar, *supra* note 30 at 1278.

questions decisions have employed “bad” purposivism, the doctrine should be acknowledged as engaging in a sort of purposivism, or at least pragmatism, that has been deployed to problematic effect.

This section proceeds as follows. First, it argues that the major questions doctrine serves a vehicle for judicial policymaking that allows the judicial branch to arrogate power. Second, it observes that the doctrine has emboldened politically powerful actors to leverage the Court in order to stymie policies that benefit vulnerable communities.

1. *Judicial Administration*

The new major questions doctrine has led to the aggrandizement of the judiciary.¹²⁶ “[W]hen Congress uses ‘expansive language’ to authorize agency action, courts generally may not ‘impos[e] limits on [the] agency’s discretion;’” Justice Kagan describes this as true “judicial modesty.”¹²⁷ And yet, in its recent application of the major questions doctrine, the Court has neglected to behave with restraint.¹²⁸

Therefore, this section argues, the doctrine is inconsistent with the functionalist commitment to a reserved judiciary that allows the Congress to animate the administrative state. More specifically, the major questions doctrine has intensified the presence of “judicial administration” that allows courts to engage in legislative policymaking.¹²⁹ As a result, the doctrine has come to

¹²⁶ K. Sabeel Rahman, *Building the Administrative State We Need*, YALE J. ON REGUL. NOTICE & COMMENT (June 29, 2023), <https://www.yalejreg.com/nc/building-the-administrative-state-we-need-by-k-sabeel-rahman> [<https://perma.cc/W6KE-A3U4>] (noting “the arrogation of authority to the courts through the so-called ‘major questions doctrine’”); Tom Merrill, *West Virginia v. EPA: Getting to Actual Delegation*, REASON (July 29, 2022), <https://reason.com/1028olokh/2022/07/29/west-virginia-v-epa-getting-to-actual-delegation> [<https://perma.cc/9FMF-2QP5>] (noting the declaration in *West Virginia v. EPA* “that only express delegations will do for major questions concentrates too much power in reviewing courts”).

¹²⁷ *West Virginia v. EPA*, 142 S. Ct. 2587, 2632–33 (2022) (Kagan, J., dissenting) (alterations in original); cf. Ryan D. Doerfler, *High-Stakes Interpretation*, 116 MICH. L. REV. 523, 523 (2018) (arguing that courts should be more cautious about asserting the meaning of a statute in high-stakes situations such as those that would render the statute as unconstitutional or unsettle the current implementation of that statute).

¹²⁸ See Deacon & Litman, *supra* note 96, at 1083 (suggesting that “the new major questions doctrine gives rise” only “to the appearance of judicial humility, as the Court purports to be adopting a minimalist, non-constitutional approach,” but does not in fact do so (emphasis added)).

¹²⁹ See Bijal Shah, *Judicial Administration*, 11 U.C. IRVINE L. REV. 1119, 1176–79 (2021); Thomas W. Merrill, *The Major Questions Doctrine: Right Diagnosis, Wrong Remedy 1* (May 3, 2023) (unpublished manuscript) (on file with the *Ohio State Law Journal*) (criticizing “aspects of the major question doctrine for asking courts to engage in a type of political punditry”).

inhibit the legislature's plenary authority to enable agencies.¹³⁰ As Justice Kagan scolds in dissent to a recent decision: "So the majority resorts, as is becoming the norm, to its so-called major-questions doctrine. And the majority again reveals that doctrine for what it is—a way for this Court to negate broad delegations Congress has approved, because they will have significant regulatory impacts."¹³¹ As a result, the new major questions doctrine allows the Court to decide "contested public policy issue[s] properly belonging to the politically accountable branches and the people they represent."¹³²

2. Anti-Democratic Policymaking

As to its impact on justice, the major questions doctrine empowers more powerful groups to spark judicial activism against disfavored administrative policies.¹³³ "[B]y shifting considerable discretionary power to the judiciary [and] exacerbating minority obstructionism in Congress," Jody Freeman and Matthew Stephenson declare, the current major questions doctrine is "far more likely to weaken democratic accountability than strengthen it."¹³⁴ More specifically, the doctrine arguably allows political parties and political movements to amend otherwise broad regulatory statutes outside of the formal legislative process and thereby "supplies an additional means for minority rule

¹³⁰ See David Froomkin, *The Death of Administrative Law* 4 (July 20, 2023) (unpublished manuscript) (on file with the *Ohio State Law Journal*) ("Although Congress chose administrative law as the device for keeping its agents accountable, the Court instead chooses [in the major questions doctrine] to substitute its own expectations, divorced from either the clear language of statutory delegations or the form of judicial review that Congress preferred."); David M. Driesen, *Does the Separation of Powers Justify the Major Questions Doctrine?* 2024 U. ILL. L. REV. (forthcoming 2024) (on file with the *Ohio State Law Journal*) (arguing that "[j]udicial resolution of major questions interferes with the prerogatives of the enacting Congress and does nothing to preserve the authority of current and future Congresses"); Brunstein & Revesz, *supra* note 113, at 217 (describe the recent use of the major questions doctrine as "weaponized"); Lisa Heinzerling, *How Government Ends*, BOS. REV. (Sept. 28, 2022), <https://www.bostonreview.net/articles/how-government-ends> [<https://perma.cc/2FY3-JUE6>] (noting that the Court's "clear statement" requirement of the new major questions doctrine is "a limit not just on agencies' power, but also on Congress's power").

¹³¹ *Biden v. Nebraska*, 143 S. Ct. 2355, 2391 (2023) (Kagan, J., dissenting).

¹³² *Nebraska*, 143 S. Ct. at 2400 (Kagan, J., dissenting); see also Edward Rubin, *A Major Answer to the Major Questions Doctrine*, JOTWELL (Jan. 25, 2023), <https://juris.jotwell.com/a-major-answer-to-the-major-questions-doctrine/> [<https://perma.cc/UP2T-QBBL>] (observing that the major questions doctrine takes a decision "away from the people's representatives and places it in the hands of a few judges with an instinctive but unjustified hostility to the" government).

¹³³ See Jody Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 SUP. CT. REV. 1, 2; Deacon & Litman, *supra* note 96, at 1083 (asserting that the major questions "doctrine operates as a powerful de-regulatory tool . . . in a more tailored and politically selective way").

¹³⁴ Freeman & Stephenson, *supra* note 133, at 47.

in a constitutional system that already skews toward minority rule.”¹³⁵ In so doing, the major questions doctrine favors “special interest groups that are at a comparative advantage in the political process.”¹³⁶ As a result, “the Court’s most aggressive [major questions] interventions have been taken against decisions that can be described as hyper-majoritarian.”¹³⁷

Accordingly, recent major questions cases have led to the Court hindering policies that further the public good. For instance, *West Virginia v. EPA* exacerbated “an oncoming environmental catastrophe that may require abandonment of our coastal cities or the construction of trillion dollar sea walls, devastate American agriculture, kill millions of people in escalating heat waves or apocalyptic storms and endanger the stability of our political system in the process.”¹³⁸ In addition, a number of cases decided on major questions grounds invalidated policies that protected many people, including the most vulnerable, from a variety of health and housing consequences of COVID-19.¹³⁹ And the Court’s most recent treatment of this doctrine, in *Biden v. Nebraska*,¹⁴⁰ came at the expense of minority communities facing financial burdens.¹⁴¹

B. Legislative Oversight & Undemocratic Administration

“[A]gencies can depart from the preferences of the Congress that enacted the legislation they are responsible for implementing, as well from the preferences of sitting Congresses.”¹⁴² Legislative oversight is considered to a way to hold agencies accountable.¹⁴³ In general, legislative oversight

¹³⁵ Deacon & Litman, *supra* note 96, at 1015.

¹³⁶ *See id.* at 1064.

¹³⁷ Rubin, *supra* note 132.

¹³⁸ *Id.*

¹³⁹ *See, e.g., Biden v. Missouri*, 142 S. Ct. 647, 654 (2022) (ending the Medicare/Medicaid providers vaccine mandate); *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 142 S. Ct. 661, 664–65 (2022) (terminating the OSHA’s vaccine mandate); *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2490 (2021) (undermining the CDC’s eviction moratorium).

¹⁴⁰ *See generally* 143 S. Ct. 2355 (2023) (asserting that the Biden Administration’s student loan forgiveness plan fails under the major questions doctrine).

¹⁴¹ Amna A. Akbar, *Justice from Below*, N+1 (2023), <https://www.nplusonemag.com/issue-46/politics/justice-from-below/> [<https://perma.cc/BNX9-7BNM>] (noting the particular import of *Biden v. Nebraska* for the young, Black community, who “called on the Court to recognize the legality” of President Biden’s student loan cancellation order); *infra* notes 331–332 and accompanying text.

¹⁴² Shah, *Administrative Subordination*, *supra* note 1 (manuscript at 51).

¹⁴³ *See* Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 176 (1984); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 792 (1983).

functionally complements a permissive nondelegation doctrine,¹⁴⁴ by allowing Congress to oversee the substantial policymaking discretion that it has authorized agencies to exercise. This section evaluates whether the mechanism of legislative oversight meets functionalism's commitment to democratic policymaking,¹⁴⁵ and also considers whether such oversight leads to just administration.

Legislative oversight consists of a set of functional “tools—such as hearings, investigations, ex parte contacts including letters or phone calls, etc.—used by federal legislators and their staffs to gather information from or to influence decisions made by agency officials,”¹⁴⁶ in order to hold agencies to account.¹⁴⁷ It also once included the legislative veto,¹⁴⁸ and now includes the Congressional Review Act (CRA).¹⁴⁹

Both the legislative veto and the CRA are mechanisms by which the legislature can overrule or revoke agency action after the passage of enabling legislation. The legislative veto was provision once written into many laws that allowed a congressional resolution (passed by Congress in some manner, but not signed by the President) to nullify a rulemaking or other action taken by an executive agency.¹⁵⁰ As a result of *INS v. Chadha*, a formalist Supreme Court case, the legislative veto was deemed an unconstitutional congressional encroachment on the executive branch¹⁵¹ and eliminated the veto across all legislation.¹⁵² In this way, *Chadha* cemented limits to the extent to which the legislature may involve itself in executive and administrative action after the

¹⁴⁴ See *supra* notes 26–29 and accompanying text.

¹⁴⁵ See *supra* notes 22, 35 and accompanying text.

¹⁴⁶ See Jamelle C. Sharpe, *Judging Congressional Oversight*, 65 ADMIN. L. REV. 183, 184 n.4 (2013).

¹⁴⁷ See Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 176 (1984); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 792 (1983).

¹⁴⁸ Sargentich, *supra* note 2, at 469.

¹⁴⁹ Congressional Review Act of 1996, Pub. L. No. 104-121, 110 Stat. 868 (codified at 5 U.S.C. §§ 801–808 (2012)); Christopher J. Walker, *A Congressional Review Act for the Major Questions Doctrine*, 45 HARV. J.L. & PUB. POL'Y 773, 779 (2023) (“In effect, the CRA creates a means through which Congress can police an agency’s exercise of its delegated authority.”).

¹⁵⁰ See generally, Joseph R. Biden, Jr., *Who Needs the Legislative Veto?*, 35 SYRACUSE L. REV. 685 (1984).

¹⁵¹ *INS v. Chadha*, 462 U.S. 919, 959 (1983); see also Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 520–21 (2003); Sargentich, *supra* note 2, at 469; E. Donald Elliott, *INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 126; Peter L. Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court’s Legislative Veto Decision*, 1983 DUKE L.J. 789, 794.

¹⁵² The decision was “a shattering blow to legislative power.” Biden, *supra* note 180, at 686 (“The immediate reaction to *Chadha* in Washington was near panic.”).

passage of enabling legislation.¹⁵³ In the wake of this decision, functionalist scholars rose to defend the legislative veto as a way to allow Congress to better oversee the vast system of administrative action and discretion that it has created.¹⁵⁴

Functionalists based their advocacy for the veto in a purposivist reading of the Constitution,¹⁵⁵ and also argued that the veto was democratically representative.¹⁵⁶ Functionalist support for the legislative veto was consistent with functionalism's preferred separation-of-powers framework as well.¹⁵⁷ Furthermore, Judge White, who wrote the dissent in the *INS v. Chadha* case, argued more generally that "'demonstrated social benefits' should prevail over 'wholly chimerical' scenarios of threats to the separation of powers."¹⁵⁸ And at least one scholar also asserted that maintaining the veto via a functionalist approach to the separation between the political branches would have been no more indeterminate than eliminating it as the result of a formalist lens was,¹⁵⁹ which is also of note from a critical perspective.¹⁶⁰

¹⁵³ See *Chadha*, 462 U.S. at 959; see also Sharpe, *supra* note 144, at 184–85.

¹⁵⁴ See, e.g., Stephen Breyer, *The Legislative Veto After Chadha*, 72 GEO. L.J. 785, 793–94 (1984); Girardeau A. Spann, *Spinning the Legislative Veto*, 72 GEO. L.J. 813, 813 (1984); see also Cass R. Sunstein, *Justice Breyer's Pragmatic Constitutionalism*, 115 YALE L.J. 1719, 1720 (2006) (implying that Justice Breyer took a critical theory approach to administrative law and the legislative veto).

¹⁵⁵ See Sunstein, *supra* note 52, at 496 ("A functional approach maintains, for example, that the constitutionality of the legislative veto should not have been resolved solely by reference to the text.").

¹⁵⁶ Girardeau A. Spann, *Deconstructing the Legislative Veto*, 68 MINN. L. REV. 473, 519 (1984) ("All legislative vetoes are authorized by duly enacted statutes, approved by all pertinent constituencies after exposure to all checks and balances. Accordingly, the veto exercised in *Chadha* . . . represents the will of the people . . ."); Strauss, *supra* note 154, at 789 (arguing in favor of the legislative veto as a political/inter-governmental check); see also Bowie & Renan, *supra* note 27, at 2118–19 (2022) (critiquing the *Chadha* decision as juristocratic); Sargentich, *supra* note 2, at 472.

¹⁵⁷ See Elliott, *supra* note 154, at 128, 175 (suggesting that the legislative veto is consistent with the Necessary and Proper Clause).

¹⁵⁸ Kathleen M. Sullivan, *Dueling Sovereignities: U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78, 94 (1995) (citing *Bowsher v. Synar*, 478 U.S. 714, 774 (1986) (White, J., dissenting)).

¹⁵⁹ See Spann, *supra* note 160, at 521–24 (identifying subjectivity in the majority decision, Justice Powell's concurrence, and Justice White's dissent in *Chadha*); see also *id.* at 528–29 ("Reasonable people can differ on what advances separation of powers in the same way that they can differ on what advances justice, and the language used to formulate a doctrinal principle cannot alone be relied upon to prevent those differences from being resolved on the basis of mere subjective preference."). But see Stephen L. Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821, 864–65 (1985) (suggesting that the *Chadha* decision is defensible because it concerns "more determinate provisions" than others of the "political Constitution").

¹⁶⁰ See *supra* note 96 and accompanying text.

Currently, an approximation of the veto is the CRA, which “requires agencies to report the issuance of ‘rules’ to Congress and provides Congress with special procedures, in the form of a joint resolution of disapproval, under which to consider legislation to overturn rules.”¹⁶¹ Essentially, “the CRA creates an expedited process for considering joint resolutions to overturn agency regulations.”¹⁶² It seems the CRA is supported by functionalists,¹⁶³ as well as by formalists,¹⁶⁴ although today’s formalism seems to be in tension with the 1980s formalism that underpinned *INS v. Chadha*.¹⁶⁵ Since its passage, the CRA has been leveraged by the George W. Bush Administration to revoke one regulation, by the Trump Administration to rescind sixteen Obama-era rules, and the Biden Administration to roll back three Trump-era policies (so far).¹⁶⁶

The section continues as follows. First, it notes that *ad hoc* legislative intervention, including via mechanisms like the legislative veto and CRA, may allow sitting Congresses both to sway agencies away from their statutory mandates and to overwhelm rulemaking processes that render agencies democratically accountable. In addition, this section questions the “social benefits” of legislative oversight, by observing that it has the potential to influence administrators to harm politically powerless communities.

1. Legislative Intervention Without Safeguards

Legislative oversight, including tools like the veto and the CRA, allows politically powerful legislative factions to influence agency action with minimal public/procedural safeguards. As a result, this section suggests, such oversight both makes administration less democratically accountable and opens the door to governance that harms vulnerable people.

First, the legislative veto in *Chadha* would have overturned the Attorney General’s suspension of deportation for a noncitizen after only an unfair and inadequate legislative deliberation,¹⁶⁷ and one that was particularly bereft of process as compared to the promulgation of new legislation. As Lisa Bressman

¹⁶¹ MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., IF10023, THE CONGRESSIONAL REVIEW ACT: A BRIEF OVERVIEW 1 (2023).

¹⁶² Walker, *supra* note 147, at 779.

¹⁶³ See, e.g., Jody Freeman & Matthew C. Stephenson, *The Untapped Potential of the Congressional Review Act*, 59 HARV. J. ON LEGIS. 279, 279 (2022).

¹⁶⁴ See, e.g., Walker, *supra* note 147, at 779.

¹⁶⁵ Formalists in the 1980s came out against post-statutory legislative involvement in administration. See *Chadha*, 462 U.S. at 959. In contrast, today’s formalism calls for Congress to be more involved in policymaking. See Krotoszynski, Jr., *supra* note 22, at 1546. An example of this position today is found in formalist/conservative support for the “REINS Act, which would effectively strip executive agencies of their rulemaking authority, requiring that they submit rule proposals to Congress for approval or rejection.” See Bijal Shah, *Interagency Transfers of Adjudication Authority*, 34 YALE J. ON REG. 279, 336 n.263 (2017).

¹⁶⁶ Carey & Davis, *supra* note 150.

¹⁶⁷ *Chadha*, 462 U.S. at 925–27.

notes, the legislative veto “does not even have the benefits of concerted action that the Constitution typically demands for legislative action, which mutes the influence of private groups.”¹⁶⁸ For this reason, the veto had the “vice of determining individual rights without procedural safeguards and without binding more than the party to the ruling. Thus, it furnished no basis on which to assess fair application in a particular case or promote predictable and consistent application in future cases—that is, to prevent arbitrariness.”¹⁶⁹

Second, the legislative veto also allowed Congress to trample on a variety of administrative values. As Harold Bruff and Ernest Gelhorn argue, “a general legislative veto is unlikely to increase the overall efficiency of the administrative process, may impede the achievement of reasoned decisionmaking based on a record, and may encourage violation of . . . emerging concepts of due process in administrative law.”¹⁷⁰ Likewise, Bressman notes that the legislative veto allows Congress to assert a form of control that does not benefit from criteria—including “participation, transparency, and rationality”—that otherwise legitimizes and infuses accountability into administrative action.¹⁷¹

A comparison between rulemaking and the CRA illustrates how veto-like legislative oversight can render policymaking less democratic. Rulemaking requires consistent procedure and public participation under most circumstances, as dictated by the Administrative Procedure Act (APA) provisions defining the notice-and-comment process.¹⁷² In contrast, exercising the CRA allows for the reactionary legislative revocation of rules, despite the fact that they were promulgated as the result of a democratic and participatory process.

Arguably, the CRA is therefore an anti-democratic tool that also has been used to revoke policies that protect people and the environment from violence. More specifically, the Trump Administration, in particular, revoked rules that benefitted from full notice-and-comment procedures, including regulations on poaching wildlife on wildlife refuges,¹⁷³ protecting streams from pollution,¹⁷⁴

¹⁶⁸ Bressman, *supra* note 154, at 520.

¹⁶⁹ *Id.* at 520–21 (suggesting the legislative veto is an arbitrary exercise of power, particularly as compared to the administrative action it reverses).

¹⁷⁰ Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1369 (1977).

¹⁷¹ Bressman, *supra* note 154, at 520 (“A legislative veto may be exercised without public hearing, report, or statement of reasons, and may be passed without recorded vote. Thus, it clearly does not have the qualities of the administrative action it reverses such as participation, transparency, and rationality.”) (footnote omitted).

¹⁷² 5 U.S.C. § 553.

¹⁷³ Act of Apr. 3, 2017, Pub. L. No. 115-20, 131 Stat. 86 (disapproving the final rule of the Department of the Interior relating to “Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska”).

¹⁷⁴ Act of Feb. 16, 2017, Pub. L. No. 115-5, 131 Stat. 10 (disapproving the rule submitted by the Department of the Interior known as the Stream Protection Rule).

reporting by the government on the mental health of gun purchasers,¹⁷⁵ and nullifying employers' requirement to keep track of workplace injuries and deaths,¹⁷⁶ as well as resolutions repealing rules to bring transparency to and reduce discrimination in the operation of businesses.¹⁷⁷

2. Legislative Self-Interest

A governing Congress also expect agencies to pursue its own interests,¹⁷⁸ and this expectation drives legislative oversight.¹⁷⁹ Indeed, the incentives driving sitting legislatures to oversee agencies are particularly self-interested, even compared to those that drive Congress to legislate.¹⁸⁰ In addition, a sitting Congress may encourage administrative policies that send a signal that pleases voters.¹⁸¹ And at the very least, congresspeople today are mired in politics, partisanship, and their interest in re-election, which makes it difficult for them to hold the executive branch to just and effective standards.¹⁸²

This section argues, legislative oversight is a mechanism by which Congress may force agencies to implement policies that benefit legislators' interests and political standing, even at the expense of vulnerable communities. As a result, legislative oversight can influence agencies to prioritize the goals of a sitting legislature at the expense of both protective statutory mandates and more humanist policymaking.

¹⁷⁵ Act of Feb. 28, 2017, Pub. L. No. 115-8, 131 Stat. 15 (disapproving the rule submitted by the Social Security Administration relating to Implementation of the NICS Improvement Amendments Act of 2007).

¹⁷⁶ Act of Apr. 3, 2017, Pub. L. No. 115-21, 131 Stat. 87 (disapproving the rule submitted by the Department of Labor relating to "Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness").

¹⁷⁷ See, e.g., Act of May 21, 2018, Pub. L. No. 115-172, 132 Stat. 1290 (disapproving the rule submitted by Bureau of Consumer Financial Protection relating to Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act).

¹⁷⁸ Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1711 (2012) ("Congressional monitoring, through oversight hearings and less formal communications between congressional and agency staff, allows influential members of Congress to convey their preferences to agencies regarding particular rulemaking initiatives."); Nicholas Almendares & Catherine Hafer, *Beyond Citizens United*, FORDHAM L. REV. 2755, 2792 (2016) ("Direct congressional control over an issue often amounts to control by a limited number of legislators with relatively small constituencies and who are tied to specific interests.").

¹⁷⁹ *Id.* at 1711–13.

¹⁸⁰ See Shah, *supra* note 165, at 316.

¹⁸¹ See Neal Devins, *Party Polarization and Congressional Committee Consideration of Constitutional Questions*, 105 NW. U. L. REV. 737, 758 (2011) (citing C. Lawrence Evans, *Committees, Leaders, and Message Politics*, in CONGRESS RECONSIDERED 220 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 7th ed. 2001)) (defining "message politics," as the use of "the legislative process to make symbolic statements to voters and other constituents").

¹⁸² See Shah, *supra* note 165, at 316.

One the one hand, legislative oversight “is costly, requiring both time and resources.”¹⁸³ In addition, “Congress frequently lacks the information necessary to assess whether agencies have selected policies that diverge from the ones that it would have chosen.”¹⁸⁴ On the other hand, an overseeing legislative body is likely to get regulatory concessions more easily than may be obtained by Congress while drafting legislation.¹⁸⁵ Moreover, “Congressional oversight committees acknowledge few restrictions on their power to force agencies to take actions that may or may not be consistent with the statutes enacted by prior Congresses.”¹⁸⁶ Legislative oversight also makes agencies less “responsive to the beneficiaries of regulatory programs,”¹⁸⁷ by fostering administrative loyalty to Congress.

“[T]he story of American criminal law is a story of tacit cooperation between prosecutors and legislators, each of whom benefits from” the legislative designation of “more and broader crimes.”¹⁸⁸ Given that “legislatures control crime definition,” criminal law is highly politicized.¹⁸⁹ Indeed, the criminal sentencing context is so highly politicized that even agencies designed to be independent are unable to fulfill their mandate to temper the “tough-on-crime” impulses of the legislature.¹⁹⁰

As a result, legislatively-influenced administrative “prosecutorial discretion” is driven “toward harsher sentences,” regardless of the “partisan tilt of the relevant actors.”¹⁹¹ In the federal sentencing context, Rachel Barkow observes that Congress has greatly interfered with administrative efforts to temper the trend toward increasingly longer sentences,¹⁹² even when reducing the length of sentences could improve the biased impact that criminal sentencing has on people of color, because doing so would undercut political support.¹⁹³ It is possible that, even without legislative oversight in place, prosecutorial

¹⁸³ Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1768 (2007).

¹⁸⁴ *Id.*

¹⁸⁵ See, e.g., Richard L. Revesz, *Regulation and Distribution*, 93 N.Y.U L. REV. 1489, 1498–1500 (2018).

¹⁸⁶ McGarity, *supra* note 170, at 1711 (citing J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1500 (2003)).

¹⁸⁷ McGarity, *supra* note 170, at 1757.

¹⁸⁸ William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 510 (2001).

¹⁸⁹ *Id.*

¹⁹⁰ Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 733–34 (2005).

¹⁹¹ Stuntz, *supra* note 187, at 510.

¹⁹² Barkow, *supra* note 189, at 800 (“Time and again, and regardless of the agency’s structure, legislatures have increased sentences and passed mandatory minimum sentences even with opposition from their commissions.”).

¹⁹³ See *id.* at 767–69 (“The two biggest policy initiatives by the [Sentencing] Commission—lessening the disparity between crack and powder cocaine sentences and eliminating mandatory minimums—were political disasters . . .”).

discretion would coalesce around increasingly punitive law enforcement.¹⁹⁴ But “[t]he bottom line,” Barkow notes, “is that it is largely up to legislatures to determine how much influence sentencing commissions will have” and legislative involvement leads to more punitive outcomes.¹⁹⁵

In the national security and post-9/11 contexts, the Department of Homeland Security (DHS) was designed by Congress as a means to further legislators’ political interest in appearing to defend the country from terrorists.¹⁹⁶ Furthermore, legislative oversight of the DHS impeded coordination between the subcomponent agencies newly placed within DHS, despite the fact that governmental coordination was assumed to be an essential reason for the creation of DHS.¹⁹⁷ As a result, the complex humanitarian missions of the agency’s subcomponents, such as the Federal Emergency Management Agency and U.S. Citizenship and Immigration Services, have been overrun by a singular national security mandate.¹⁹⁸ Similarly, Aziz Huq argues that the political pressure that Congress faces is especially strong when it comes to counterterrorism, and that this moves elected officials away from optimal policies.¹⁹⁹ More specifically, he observes, legislators tend to be more pro-security than pro-liberty, and some politicians run campaigns on their capacity to harness agencies to invade individual rights as a signal that they are tough on terror.²⁰⁰

Finally, it is important to note that, theoretically, legislative oversight could be responsive to unjust bureaucracy by keeping reactionary or expansive agencies like DHS in check. However, a Congress both able to engage in collective action and somewhat free of the current, political emphasis on “law and order”²⁰¹ seems requisite to transforming the CRA and legislative oversight more generally into valuable tools in support of democratic and just policymaking. Consider, for example, the immigration context. In the *Chadha* case itself, the veto interfered with the Attorney General’s discretion to suspend deportation.²⁰² But in another day and age, a veto-like mechanism could feasibly hold the executive branch accountable to a more democratically responsive and

¹⁹⁴ See Girardeau A. Spann, *Simple Justice*, 73 GEO. L.J. 1041, 1078 (1985) (arguing that, even without a legislative veto, many judges are unlikely to exercise discretion to overturn convictions).

¹⁹⁵ Barkow, *supra* note 190, at 800.

¹⁹⁶ See Dara Kay Cohen, Mariano-Florentino Cuéllar & Barry R. Weingast, *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673, 719–20 (2006).

¹⁹⁷ *Id.* at 719.

¹⁹⁸ See Shah, *Administrative Subordination*, *supra* note 1 (manuscript at 34).

¹⁹⁹ See Aziz Z. Huq, *Structural Constitutionalism as Counterterrorism*, 100 CALIF. L. REV. 887, 918–21 (2012).

²⁰⁰ *Id.* at 921–24.

²⁰¹ See *supra* notes 193–195 and accompanying text.

²⁰² See *supra* notes 171–172 and accompanying text.

less punitive iteration of immigration than it would implement if left to its own devices.

C. Idiosyncratic Administrative Policy and Decisionmaking

Functionalists contend that government agencies play a legitimate and indispensable role as policymakers, particularly “in areas where Congress has neither the time nor expertise to micromanage policy decisions.”²⁰³ Accordingly, functionalism endorses a permissive nondelegation doctrine,²⁰⁴ and expansive agency policymaking discretion.²⁰⁵ Complementarily, functionalists advocate for agencies to exercise their policymaking power in a manner that is insulated from political influence.²⁰⁶ More specifically, functionalists promote the preservation of decisional independence in the administrative state via for-cause removal protections for independent agency commissions and limits to constitutional appointment requirements for administrative adjudicators, in order to enhance expertise and nonpartisanship in agency decisionmaking.²⁰⁷

Overall, functionalism’s doctrinal and scholarly exhortation of administrative discretion and decisional independence in administrative decisionmaking flows, in part, from the conviction that the administrative state engages in defensible choices while enforcing the law.²⁰⁸ Indeed, functionalism has come to be characterized primarily by its posture in defense of administrative agencies against “anti-administrativists,” who are deeply distrustful of the administrative state.²⁰⁹

This section argues that agencies sometimes operate in ways both that are inconsistent with functionalists’ emphasis on effective government,²¹⁰ and that cast doubt on whether an expansive bureaucracy furthers justice. The

²⁰³ Epstein & O’Halloran, *supra* note 22, at 701.

²⁰⁴ See *supra* notes 26–29 and accompanying text.

²⁰⁵ See *supra* notes 32–34 and accompanying text.

²⁰⁶ See Shah, *supra* note 20, at 524–36 (arguing that the President has siphoned the legislature’s constitutional and directive power over agencies).

²⁰⁷ See *id.* at 543–46.

²⁰⁸ See Bijal Shah, *Acknowledging Values in Administration*, YALE J. ON REGUL.: NOTICE & COMMENT (Nov. 15, 2022), <https://www.yalejreg.com/nc/symposium-stiglitz-reasoning-state-03/> [<https://perma.cc/Y4XS-A4BJ>].

²⁰⁹ See, e.g., Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. (SUP. CT. 2016 TERM) 1, 3–4 (2017) (describing “strong rhetorical condemnation of administrative government” as “anti-administrativism”); Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 3 (2019) (“This judicial skepticism of administrative government, which I have elsewhere labeled “anti-administrativism,” is heavily constitutional, marked by a formalist and originalist approach to the separation of powers, a deep distrust of bureaucracy, and a strong turn to the courts to protect individuals against administrative excess and restore the original constitutional order.”).

²¹⁰ See *supra* notes 32–35 and accompanying text.

functionalist view that expansive agency power is defensible, or even preferable, must also contend with the ways in which the exercise of administrative discretion incorporates idiosyncrasies and value judgments beyond those coded in the law itself.²¹¹ As a result, flexible administration is sometimes inconsistent with statutory expectations.²¹² Moreover, agencies have the potential to apply the law arbitrarily, and in a discriminatory manner, under the guise of exercising discretion.²¹³ Arguably, functionalism's current emphasis on expanding the authority and autonomy of the administrative state not only neglects "consistent normative theory" but also "allows decisionmakers to rationalize any result,"²¹⁴ rendering it indeterminate.²¹⁵

This section progresses as follows. First, it suggests that agencies exercise discretionary authority in a biased manner, which alters the scope and quality of administration enforcement. Second, it observes that agencies engage in discrimination while adjudicating. Third, it posits that agencies expand their discretionary power to the detriment of adequate process for vulnerable communities. This section centers its critiques on immigration, criminal administration, national security, and social security administration, regulatory areas that are perhaps "canaries in the coal mine"²¹⁶ for cross-cutting problems associated with administrative functionalism.

1. *Discrimination in Agency Enforcement*

Recent work illustrates that American institutions and agencies have subordinated the wellbeing of minorities to the interests of the bureaucracy.²¹⁷

²¹¹ Shah, *supra* note 208.

²¹² See generally Shah, *supra* note 129, at 1135–36.

²¹³ Shirin Sinnar, *Separate and Unequal: The Law of "Domestic" and "International" Terrorism*, 117 MICH. L. REV. 1333, 1397 (2019). As Justice Jackson has argued, "laws of general applicability protect against the political temptation to target minorities for unfavorable treatment." *Id.* (citing *Ry. Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring)). In contrast, he notes, "nothing opens the door to arbitrary action so effectively as to allow officials to pick and choose only a few to whom they will apply legislation." *Id.* (quoting *Ry. Express Agency*, 336 U.S. at 112 (Jackson, J., concurring)).

²¹⁴ Turley, *supra* note 46, at 602.

²¹⁵ Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1014 (2023) (citations omitted) (referring to the major questions doctrine as "radically indeterminate"); see also *supra* note 96 and accompanying text (noting CLS concern with indeterminacy).

²¹⁶ Cf. LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* (2003) (arguing that issues of race point to underlying problems in society that ultimately affect everyone).

²¹⁷ See generally Shah, *Administrative Subordination*, *supra* note 1; Emily R. Chertoff, *Violence in the Administrative State*, 112 CALIF. L. REV. (forthcoming 2024) (on file with the *Ohio State Law Journal*).

Agencies can engage in discrimination as well,²¹⁸ including by furthering “practices that enforce the inferior social status of historically oppressed groups.”²¹⁹ Furthermore, certain agencies and institutions have historically, and may continue, to engage in explicitly discriminatory or biased behavior.²²⁰ This section illustrates how agencies sometimes exercise their vast discretionary power in biased ways that harm vulnerable minorities.

In criminal administration, the Federal Bureau of Investigation (FBI) uses “predictive models and patterns of behavior” to target crime.²²¹ Notably, the FBI’s efforts do not require the legislative delegation of additional power;²²² rather, the agency acts on the basis of discretion alone.²²³ This approach allows the FBI to engage in more aggressive intelligence collection and law enforcement.²²⁴ Studies suggest that these FBI investigatory tactics, which are

²¹⁸ See *Symposium on Racism in Administrative Law*, YALE J. ON REGUL.: NOTICE & COMMENT, <https://www.yalejreg.com/topic/racism-in-administrative-law-symposium/page/2/> [<https://perma.cc/RS2E-KVNW>]; *Race and Regulation Lecture Series*, PENN PROGRAM ON REGUL., <https://www.pennreg.org/race-and-regulation/> [<https://perma.cc/A9NU-DWFQ>]; *Symposium on Inclusion, Exclusion, and the Administrative State*, DUKE L.J. (2017), https://scholarship.law.duke.edu/dlj_admin_law_symposium/2017/ [<https://perma.cc/RMN3-GNMK>].

²¹⁹ Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1472–73 (2004); cf. Abigail Nurse, *Anti-Subordination in the Equal Protection Clause: A Case Study*, 89 N.Y.U. L. REV. 293, 318 (2014) (suggesting that context provides a better understanding of antisubordination). See generally Shah, *Administrative Subordination*, *supra* note 1.

²²⁰ See, e.g., RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 20–21 (2017) (discussing how institutional practice led the Public Works Administration to reinforce housing segregation while implementing New Deal housing programs); Joy Milligan, *Remembering: The Constitution and Federally Funded Apartheid*, 89 U. CHI. L. REV. 65, 67 (2022) (discussing a case against the Department of Housing and Urban Development); Karen M. Tani, *Administrative Constitutionalism at the “Borders of Belonging”: Drawing on History to Expand the Archive and Change the Lens*, 167 U. PA. L. REV. 1603, 1612–16 (2019) (discussing the impact of labor decisions made by the War Department: the Bureau of Refugees, Freedmen, and Abandoned Lands); Joy Milligan, *Subsidizing Segregation*, 104 VA. L. REV. 847, 849 (2018) [hereinafter Milligan, *Subsidizing Segregation*] (examining segregation in the Department of Education); Joy Milligan, *Protecting Disfavored Minorities: Toward Institutional Realism*, 63 UCLA L. REV. 894, 940–48 (2016) [hereinafter Milligan, *Protecting Disfavored Minorities*] (examining segregation in the U.S. Department of Agriculture).

²²¹ Lara Jakes Jordan, *Racial Profiling Eyed for Terror Probes*, ASSOCIATED PRESS (July 2, 2008), <https://www.brennancenter.org/sites/default/files/legacy/Justice/20080702.ABC.-Racial-Profiling.Eyed.for.Terror.Probes.pdf> [<https://perma.cc/YAW2-GQUS>]; see also Emily Berman, *Regulating Domestic Intelligence Collection*, 71 WASH. & LEE L. REV. 3, 17–18 (2014).

²²² See Jordan, *supra* note 221.

²²³ FED. BUREAU OF INVESTIGATION, DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE § 2.4.1 (2016).

²²⁴ See Jordan, *supra* note 221.

bolstered by the Attorney General's amendments to guidelines outlining and enhancing the FBI's "aggressive intelligence-collection role,"²²⁵ discriminate against ethnic and religious minorities.²²⁶ Simply put, the FBI engages in racial profiling.²²⁷ As a result, these intelligence-collection tactics disproportionately burden particular minorities.²²⁸

Immigration agencies also draw on the excuse of criminal and national security interests to expand the scope of their discretion in ways that impact communities of color.²²⁹ In general, "[w]hether looking at the earliest stages of an immigrant's admission, adjustment to permanent residence, or naturalization, an aspiring American's fate rests in an administrative review process governed by personal discretion vulnerable to racial animus,"²³⁰ particularly in the wake of 9/11.²³¹ For instance, the extensive rejection of noncitizens who omit information about minor criminal activity on their applications "has an outsized effect on communities of color who are subject to greater policing, compounding the discriminatory impacts of" these denials.²³² Likewise, the reliance of immigration enforcement on arrest records (notwithstanding convictions) "exacerbate the racial and class-based dynamics that undergird arrest decisions."²³³

In the national security context, Shirin Sinnar notes that the "disproportionate federal treatment of international terrorism unequally exposes defendants to a severe federal terrorism sentencing enhancement that treats even first-time offenders charged with nonviolent offenses like defendants with the

²²⁵ See Berman, *supra* note 221, at 17–18 (noting that the amended 2008 Mukasey Guidelines "declare that '[t]he FBI is an intelligence agency as well as a law enforcement agency . . . [whose] functions accordingly extend beyond limited investigations of discrete matters'" (alterations in original). The guidelines "also expanded the Bureau's collection powers to further its preventive mission—both with respect to what information it is permitted to collect and what tactics it may employ in that collection." *Id.* at 18.

²²⁶ See *id.* at 23–27.

²²⁷ See *id.* at 26. Racial profiling, whereby police assume that Black or brown bodies are more likely to have committed crimes, is discriminatory. Mathias Risse & Richard Zeckhauser, *Racial Profiling*, 32 PHIL. & PUB. AFFS. 131, 151 (2004); Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1415 (2002).

²²⁸ See Berman, *supra* note 221, at 24.

²²⁹ Nermeen Saba Arastu, *Aspiring Americans Thrown Out in the Cold: The Discriminatory Use of False Testimony Allegations to Deny Naturalization*, 66 UCLA L. REV. 1078, 1103–05 (2019).

²³⁰ *Id.* at 1137; cf. Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185, 1199 (2002) (noting that "immigration law . . . exerts a gravitational force that weakens the constitutional rights that subordinated communities may use to countervail the exercise of governmental power").

²³¹ Ashar, *supra* 234, at 1188–90 (providing first-person case studies illustrating this phenomenon).

²³² Arastu, *supra* note 229, at 1114.

²³³ Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 860 (2015).

most serious criminal histories.”²³⁴ Furthermore, the government’s discretionary treatment of “international: terrorism leads to more severe punishments against certain racial, ethnic, and religious minorities than those faced by “domestic” terrorists.²³⁵ Notably, “legal differences do not account for all observed disparities between the treatment of Muslim suspects and those of other identities and ideologies. Even where certain laws apply to both domestic and international terrorism, law enforcement officials sometimes apply them differentially to Muslim individuals.”²³⁶ In other words, allowing bureaucrats to tailor punishment based on discretionary determinations of the terrorist’s international or domestic status leads to discriminatory applications of the law. Ultimately, this biased administration also exacerbates “[p]rocesses of ‘othering’ immigrant and nonwhite communities.”²³⁷

2. Bias in Administrative Adjudication

The exercise of discretion in administrative adjudication is not uniform.²³⁸ In addition, the impact of adjudication is particularly individualized.²³⁹ This section argues that decisional independence and unfettered discretion in administrative adjudication may lead to the inconsistent or even biased application of law.

As an initial matter, in informal adjudication (as opposed to adjudication that is defined as formal under the APA), the nuances of due process are left to the discretion of administrators and adjudicators, resulting in procedures that are highly variable.²⁴⁰ Therefore, there is variation in immigration and other administrative adjudication that may harm noncitizens and other petitioners.²⁴¹

²³⁴ Sinnar, *supra* note 213, at 1339.

²³⁵ *Id.* at 1395.

²³⁶ *Id.*

²³⁷ *Id.* at 1341.

²³⁸ See Kent Barnett, *Regulating Impartiality in Agency Adjudication*, 69 DUKE L.J. 1695, 1747 (2020) (observing that “contrary to the strong pull of uniformity for agency rulemaking and judicial review of agency action, ‘the governing norm in adjudication is exceptionalism’”) (citation omitted); see also Stephen H. Legomsky, *Learning to Live with Unequal Justice: Asylum and the Limits to Consistency*, 60 STAN. L. REV. 413, 421–23 (2007) (acknowledging and discussing the importance of inconsistency in asylum adjudication). See generally Barnett, *supra* (considering the variation in process across the Social Security Administration, Patent Trial and Appeal Board, Executive Office of Immigration Review, Equal Employment Opportunity Commission, Department of Agriculture, and Board of Veterans’ Appeals).

²³⁹ See Emily S. Bremer, *Reckoning with Adjudication’s Exceptionalism Norm*, 69 DUKE L.J. 1749, 1777 (2020) (“A defining characteristic of an adjudication is that it produces orders that are not generally applicable but rather affect the rights or interests of a particular person or entity.”).

²⁴⁰ Shah, *Administrative Subordination*, *supra* note 1 (manuscript at 22–23).

²⁴¹ Fatma Marouf, Michael Kagan & Rebecca Gill, *Justice on the Fly: The Danger of Errant Deportations*, 75 OHIO ST. L.J. 337, 342, 360–61 (2014) (showing significant

For instance, “the arbitrary assignment of a[n immigration] judge can increase or decrease an immigrant’s chance of being deported by up to forty percentage points.”²⁴² Furthermore, inconsistencies in immigration and other administrative adjudication have been found to track administrative judges’ personal characteristics and regional preferences.²⁴³ Shoba Wadhia and Christopher Walker argue outright that “agency expertise [and] deliberative process” collapse “in the immigration adjudication context.”²⁴⁴ The potential

variations in the rate of stays granted by immigration courts); Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 296 (2007) (noting “amazing disparities in [asylum adjudication] grant rates, even when different adjudicators in the same office each considered large numbers of applications from nationals of the same country”); see, e.g., David Hausman, *The Failure of Immigration Appeals*, 164 U. PENN. L. REV. 1177, 1177 (2016) (confirming that disparities across immigration judges reflect more than case assignment and tracking those disparities on appeal); see also David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155, 1185–86 (2016) (finding no statistically significant differences in government win rates across administrative law judges at the Securities and Exchange Commission, but noting the extremely high win rate for the government overall).

²⁴² Hausman, *supra* note 241, at 1178. “These disparities are large not only in absolute terms, but also relative to other well-known judicial disparities. For example, disparities in rates of deportation are three times larger, on average, than disparities in federal judges’ decisions about whether to incarcerate criminals.” *Id.* at 1778–79; Marouf, Kagan & Gill, *supra* note 241, at 342.

²⁴³ See JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLTZ & PHILIP G. SCHRAG, *REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM* 20–22 (2009); Ramji-Nogales, Schoenholtz & Schrag, *supra* note 312, at 296 (noting “amazing disparities in [asylum adjudication] grant rates, even when different adjudicators in the same office each considered large numbers of applications from nationals of the same country” and showing that “the chance of winning asylum was strongly affected not only by the random assignment of a case to a particular immigration judge, but also in very large measure by the quality of an applicant’s legal representation, by the gender of the immigration judge, and by the immigration judge’s work experience prior to appointment”); see also JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS*, at xxii (1983) (voicing the concern that “the outcome of [social security disability] cases depends more on who decides the case” than on underlying facts or objective legal analysis); Cole D. Taratoot & Robert M. Howard, *The Labor of Judging: Examining Administrative Law Judge Decisions*, 39 AM. POLS. RSCH. 832, 847–48 (2011) (finding that administrative law judges exercise considerable discretion, and that the exercise of that discretion reflects their political ideology); Douglas Lichtman, *Rethinking Prosecution History Estoppel*, 71 U. CHI. L. REV. 151, 151 (2004) (arguing that patent adjudicators treat “similar applications in dissimilar ways, not because of differences on the merits, but instead because of the personal characteristics of the examiners involved and because of differences inherent to the types of technology at issue”).

²⁴⁴ Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against Chevron Deference in Immigration Adjudication*, 70 DUKE L.J. 1197, 1197 (2021); see also Michael Kagan, *Chevron’s Asylum: Judicial Deference in Refugee Cases*, 58 HOUS. L. REV. 1119, 1168 (2021) (arguing that arbitrary-and-capricious review should limit *Chevron* deference for immigration adjudication, in order to “push[] toward stability and against the turbulence of highly politicized policymaking”).

hardship for noncitizens caused by inconsistent decisionmaking also leaves open the question of whether immigration “discretion is serving its proper purposes.”²⁴⁵

Moreover, adjudicators left to their own devices engage in bias.²⁴⁶ The discretion inherent in the administrative review of citizenship applications and petitions for “national security review” has, in fact, resulted in systematic bias against Muslim applicants.²⁴⁷ The U.S. Government Accountability Office (GAO) found a striking, inexplicable disparity between favorable outcomes from Black and white Social Security Administration (SSA) claimants; the disparity was even more pronounced among claimants with high education levels.²⁴⁸ Interestingly, the SSA protested the GAO’s methodology on the basis of the dubious claim that “the GAO’s methodology failed to account sufficiently for the propensity of blacks to apply for benefits despite having less severe impairments than white claimants.”²⁴⁹ Furthermore, SSA administrative law judges (ALJs) appear to hold bias against non-English speakers as well, particularly those from the Latinx community.²⁵⁰

After surveying “SSA ALJs, members of the SSA Office of Hearings and Appeals, and claimant representatives,” as well as disability transcripts, the Ninth Circuit Gender Bias Task Force found anti-women bias as well, particularly in ALJ credibility determinations.²⁵¹ Several instances of ALJ discrimination against women were identified, some (but not all) of which were based in “a poor understanding of women’s health issues among the medical

²⁴⁵ See Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 633 (2006); see also Shoba Sivaprasad Wadhia, *Darkside Discretion in Immigration Cases*, 72 ADMIN. L. REV. 367, 367 (2020) (suggesting that official policies shaping immigration discretion systematically displace and exclude noncitizens to a degree that is neither required nor intended by statute).

²⁴⁶ See Jerry L. Anderson, *Devil in the Details: Structural Racism in Administrative Hearings*, YALE J. ON REGUL.: NOTICE & COMMENT (July 14, 2020), <https://www.yalejreg.com/nc/devil-in-the-details-structural-racism-in-administrative-hearings-by-jerry-l-anderson/> [<https://perma.cc/75W2-AN8D>] (discussing environmental racism); Jason D. Vendel, *General Bias and Administrative Law Judges: Is There a Remedy for Social Security Disability Claimants?*, 90 CORNELL L. REV. 769, 777, 782 (2005) (presenting two cases studies illustrating racial and other bias in SSA ALJs); Elaine Golin, *Solving the Problem of Gender and Racial Bias in Administrative Adjudication*, 95 COLUM. L. REV. 1532, 1533 (1995).

²⁴⁷ Arastu, *supra* note 229, at 1103–08.

²⁴⁸ Golin, *supra* note 246, at 1546–48 (“At the ALJ level, the largely unexplained racial difference in allowance rates *calls into question the equity of treatment between black and white appellants* under the [disability insurance] and [social security insurance] programs.”) (quoting U.S. GOV’T ACCOUNTABILITY OFF., GAO-92-56, SOCIAL SECURITY: RACIAL DIFFERENCE IN DISABILITY DECISIONS WARRANTS FURTHER INVESTIGATION 47 (1992)).

²⁴⁹ *Id.* at 1548.

²⁵⁰ *Id.* at 1548–49.

²⁵¹ *Id.* at 1544–45 (citing *Final Report of the Ninth Circuit Gender Bias Task Force: The Effects of Gender in the Federal Courts*, 67 S. CAL. L. REV. 731 (1994)).

and legal professions and stereotypical views about women's working lives.”²⁵² Another study found bias against women in SSA adjudications as well, some of which reflected derogatory views about the depth and authenticity of women's pain.²⁵³ Overall, racial and gender-based discrimination may be exacerbated by the fact that women and people of color make up a small percentage of the SSA ALJ corps.²⁵⁴

3. *Inadequate Process by Discretion*

In general, agencies exercise their authority for self-interested reasons. This includes to protect their turf or otherwise “look after their own interests in mutual competition for power,”²⁵⁵ work together to intensify their resources,²⁵⁶ cede responsibility to improve their resources,²⁵⁷ or increase their power vis-à-vis other institutional actors.²⁵⁸ Administrative due process, in particular, is flexible depending on the circumstances and generally under the agency's own control. As a result of the *Mathews v. Eldridge* case, the agency itself is allowed the discretion to adapt procedures based on its own balancing of petitioner's interest in procedure, the benefits of procedure to the quality of the decision, and, importantly, the agency's interest in reducing the burden of additional procedures on itself.²⁵⁹ This case has effectively replaced another that once guaranteed more robust administrative due process.²⁶⁰

This section suggests that agencies seek to expand the scope of their discretion in ways that reduce process for vulnerable communities. For example, agencies are interested in “maximizing administrative discretion to deport or reducing procedural protections in immigration proceedings,” motivated in part “by a desire to create a broad discretionary system of immigration enforcement across the civil and criminal law.”²⁶¹ Indeed, “[a]s the criminal system has taken on the screening function of the immigration agency,” the immigration agency's discretionary role within the criminal prosecution has expanded.²⁶² This has

²⁵² Golin, *supra* note 250, at 1545.

²⁵³ *Id.* at 1546 (asserting that “the overt evidence of bias in several of the transcripts studied suggests that bias is neither infrequent nor particularly difficult to detect”).

²⁵⁴ *Id.* at 1549–50.

²⁵⁵ Sullivan, *supra* note 163, at 94; see Bijal Shah, *Executive (Agency) Administration*, 72 STAN. L. REV. 641, 704–05 (2020) (discussing how agencies sue each other to maintain their turf).

²⁵⁶ See Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 806 (2015).

²⁵⁷ See Shah, *supra* note 165, at 284–85 (discussing shirking among agency adjudicators).

²⁵⁸ See Bijal Shah, *Toward an Intra-Agency Separation of Powers*, 92 N.Y.U. L. REV. 1, 6–7 (2017).

²⁵⁹ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

²⁶⁰ *Goldberg v. Kelly*, 397 U.S. 254, 264–66 (1970).

²⁶¹ *Id.* at 1342.

²⁶² *Id.* at 1349.

been exacerbated by the fact that immigration tends to operate “independently from the constraints of an external [administrative] review process,” including in contexts that overlap with criminal enforcement.²⁶³

In this way, actions and decisions subject to agency discretion characterize every aspect of the “crimmigration” system in ways that undercut adequate procedure and lead to less equitable applications of the law. For instance, constitutional and statutory “[p]rotections against unreasonable searches and coercive interrogations can be undermined through diluted agency standards.”²⁶⁴ In addition, “the civil immigration law can funnel cases into the criminal system in ways that loosen the procedural rules that ordinarily would restrict police behavior.”²⁶⁵ As a result, noncitizens’ “bail hearings are erased, plea bargaining is placed on a fast-track timetable, and adjudication is often funneled into a magistrate court system that lacks the safeguards of Article III and is designed for expediency.”²⁶⁶ The outcome of this subpar procedure is that noncitizens accused of crimes may be ineligible for bail due to immigration detainers, are more vulnerable to accepting deals resulting from prosecutors’ threats of additional sanctions, and may be forced to accept immigration consequences/deportation as a mandatory term of plea agreements.²⁶⁷

Finally, while functionalists advocate for more agency discretion in the implementation of administrative due process,²⁶⁸ there are strong institutional incentives that may drive agencies to engage in self-interested due process calculations, which may lead to or exacerbate deprivations of process. More specifically, agencies’ due process calculations have come to prioritize reducing the institutional burden of procedure above the other *Mathews* criteria,²⁶⁹ particularly when the test involves cases bearing on national security.²⁷⁰ In addition, under the *Mathews* framework, discretionary decisions to suspend

²⁶³ *Id.* at 1320.

²⁶⁴ *Id.* at 1337.

²⁶⁵ *Id.* at 1343.

²⁶⁶ Goldberg, 397 U.S. at 264-66.

²⁶⁷ *Id.* at 1302-03.

²⁶⁸ For instance, one scholar has suggested that courts should defer to agencies’ assessments of administrative due process under *Mathews*. Adrian Vermeule, *Deference and Due Process*, 129 HARV. L. REV. 1890, 1893 (2016) (arguing that courts should defer to agencies’ views of how much administrative process is due). Another academic responds that while perhaps the idea of extending *Chevron* deference to agencies’ determinations of what process is due is perhaps impractical, courts might nonetheless limit their intervention in administrative due process to the margins, even as a matter of constitutional law. Ronald M. Levin, *Administrative Procedure and Judicial Restraint*, 129 HARV. L. REV. F. 338, 346 (2016) (arguing that despite a potential lack of bureaucratic capacity and the presence of administrative self-dealing, courts should read the constitutional due process clauses with restraint).

²⁶⁹ See *supra* note 259 and accompanying text.

²⁷⁰ See Shah, *Administrative Subordination*, *supra* note 1 (manuscript at 7 & 23) (arguing that in national security cases, noncitizens have suffered as a result of inadequate administrative due process).

deportation are likely to favor the government over the noncitizen, and may also be characterized by a lack of due process protections.²⁷¹ “[E]ven if individual agencies seek in good faith to tailor adjudication procedures appropriately to suit unique programmatic needs, they may still end up omitting important and necessary procedural elements.”²⁷²

III. ENCOURAGING A CONSISTENT AND JUST FUNCTIONALISM

Functionalism is ostensibly a democracy-oriented method of interpreting the law, often translated in the separation-of-powers setting as governmental pragmatism.²⁷³ The previous Part illustrated that, at times, functionalist dynamics are inconsistent with functionalism’s own institutional preferences and perhaps even with just governance as well. The instant Part considers some ideas for encouraging a functional government that is more consistent with functionalist aims, with an eye toward the values of critical theory. Notably, critical theorists hold the view that identifying a problem is an ample contribution in and of itself.²⁷⁴ That having been said, this Part begins a conversation about prescriptions. The thorny question of feasibility, both political and technical, is set aside in favor of imagining a few possibilities.

A superficial response to critiques of functionalism is a reversion to today’s formalism—for instance, a turn to overwhelming judicial involvement in administrative statutory interpretation and implementation, painfully clear boundaries between the political branches, tighter presidential constraints on agency discretion, and the transfer of administrative adjudication to Article III courts. Arguably, however, formalism is not wholesale the right approach to counter the failures of functionalism. For instance, the goals of infusing separation-of-powers functionalism with greater consistency and orienting administrative agencies toward the public good will not be accomplished by the formalist call to dismantle, in part or whole, the administrative state. Furthermore, from a critical perspective, rigidly formalist interpretive methodology is not only unrealistic, but also undesirable.²⁷⁵ That having been said, this Part does not apply a cleanly functionalist approach either, given this essay’s overall focus on functionalism’s flaws.

²⁷¹ See Neuman, *supra* note 249, at 639–40.

²⁷² Bremer, *supra* note 243, at 1778; see also Taratoot & Howard, *supra* note 315, at 844–47.

²⁷³ See *supra* notes 32–35 and accompanying text.

²⁷⁴ See, e.g., Amna Akbar, *A Horizon Beyond Legalism: On Non-Reformist Reforms*, LPE PROJECT (Nov. 13, 2023), <https://lpeproject.org/blog/a-horizon-beyond-legalism-on-non-reformist-reforms/> [<https://perma.cc/MNJ2-RSYU>] (arguing that offering a solution would “blunt [the author’s] critique in service of [her] authority”); Fanna Gamal, *What Does Critical Race Theory Teach Us About Non-Reformist Reforms?*, LPE PROJECT (Nov. 29, 2023), <https://lpeproject.org/blog/crt-non-reformist-reforms/> [<https://perma.cc/XP2F-HZEH>] (describing suggests for reform as a “half-solution”).

²⁷⁵ See Shah, *supra* note 18 (manuscript at 6).

The general critical reflection that institutions can benefit from disentanglement, be it piecemeal or systematic, and improved pathways of accountability, is loosely applied here. This idea draws from Roberto Unger's "destabilization rights" concept, an approach that seeks to break down entrenched arrangements²⁷⁶—in this case, pathological functionalist dynamics among the branches of government. This approach may require deploying certain functional tools to improve the failures of others, while recognizing that functionalism is inadequate in some contexts. For instance, while relying on expertise to reduce bias in administration may be successful in some cases, this does not mean that expertise (for instance, in the form of benefit-cost analysis) should be allowed to rule the roost at the expense of statutory (or other) values. Alternatively, destabilization may benefit from the application of formalism, in some instances, but driven by incentives distinct from those that motivate many formalists.²⁷⁷ For example, this Part advocates for some limits to administrative discretion based not in the contention that agencies engage in the unconstitutional exercise of power,²⁷⁸ but rather, motivated by an interest in reducing the bias baked into the administration of law.

This Part explores options for shaping a government that operates more consistently with functionalism's aims and perhaps for furthering the public good, for each of the functional practices critiqued in the previous Part. First, as to the matter of major questions, this Part advocates for transparency in the Supreme Court's efforts to arrogate power, in order to institute some constraints on the judiciary's ad hoc policymaking and limits to the Court's negative impact on under-resourced communities. Second, as to legislative oversight, this Part considers how to reduce the politicized impact of a sitting Congress on agencies, advocates for diversifying political influence, and urges agencies to emphasize statutory mandates, in order to improve accountability in legislative oversight and to mitigate legislative self-interest that may result in harsher administration. Third, as for biased and self-interested exercises of administration discretion, this Part suggests engaging institutional design and shoring up judicial review of agency adjudication to encourage more accountable administrative decisionmaking. Overall, these approaches could also improve functionalism's capacity to meet its own aims while also maintaining meaningful constraints on

²⁷⁶ See generally UNGER, *supra* note 78. Destabilization rights include the "rights to disentrench an institution that has systematically failed to meet its obligations." Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1016 (2004) (applying this approach in the public law context); see also Cass R. Sunstein, *Routine and Revolution*, 81 NW. U. L. REV. 869, 871 (1987) (discussing Unger's ideas for how to "break down entrenched arrangements" and "disturb settled systems").

²⁷⁷ Other scholars have explored the potentially progressive dimensions of formalism. See, e.g., Andrea Scoseria Katz, *The Lost Promise of Progressive Formalism*, 99 TEX. L. REV. 679 (2021); cf. Jessica A. Clarke, *Sex Discrimination Formalism*, 109 VA. L. REV. 1699 (2023) (arguing that civil rights advocates should consider the benefits of formalism).

²⁷⁸ See Shah, *supra* note 20, at 502.

each branch of government. Eventually, these approaches could also evolve into a clear-eyed application of structural constitutionalism that benefits the goals of critical theory.

A. Restraining Judicial Administration

The major questions doctrine, despite its apparent functionalism, has buoyed anti-majoritarian judicial policymaking. This section proposes a few ways to reconcile the major questions doctrine with a functional commitment to judicial restraint, as well as with a critical interest in furthering just policy. First, it suggests that the major questions doctrine be confined to its previous role as an unusual exception to *Chevron*. Second, it argues that the Court improve its statutory interpretation, be it purposivist or textualist. In doing so, the Court might both better highlight true limitations to legislative delegation of authority to agencies and show respect for democratic policymaking, rather than substituting its own judgment for that of Congress by engaging in judicial administration. If the Court eschews restraint and prefers intervention in Congress's plenary power to animate administrative agencies, this section suggests that the Court could revive the nondelegation doctrine explicitly, instead of relying on the major questions doctrine as a sloppy proxy, and offers thoughts on a progressive approach to narrowing what qualifies as an intelligible principle.

1. Returning Major Questions to *Chevron*

This section suggests that the major questions doctrine should be folded back into the *Chevron* framework, which has maintained a check on the judicial administration to some extent.²⁷⁹ Even within *Chevron*, opportunities for the judiciary to impose its policymaking preferences abound.²⁸⁰ Nonetheless, understanding major questions as part and parcel of the judicial inquiry at Step One (or Step Zero) would be both clarifying and could possibly force the Courts to justify its application of the major questions exception within a defined framework, such that the Court invokes the major questions doctrine less often than it otherwise might. Even if *Chevron* is overturned in the near future, the essential point is that the major questions doctrine should be applied with clarity and restraint.

²⁷⁹ See Shah, *supra* note 153, at 1165.

²⁸⁰ *Chevron* Step Zero (the “*Mead* doctrine”), whereby the judiciary can choose not to apply *Chevron* in the first place and instead reserve the right to impose its own statutory interpretation on the agency, has long encouraged judicial policymaking. Shah, *supra* note 153, at 1176–79. The application of *Chevron* Step One, whereby the court decides if the statutory provision at issue is ambiguous such that the court must defer to the agency's reasonable interpretation, is also a moment where the Court seizes policymaking authority. See *id.* at 1179–81.

2. Improving Statutory Interpretation

This section argues that the Court might display better restraint by improving the quality of its statutory interpretation. In addition, either better purposivism or ideologically-neutral textualism could promote the public good. First, if the Court continues to engage functionalist interpretive methodology, it should not be “bad purposivism.” Good purposivism emphasizes “the ‘aims,’ ‘demands,’ ‘purpose,’ and thrust of a statute, and the set of goals it was passed to accomplish, as determined in relation to the particular legislation and subject matter at issue.”²⁸¹ However, those of us who advocate for purposivism should acknowledge that “good” purposivism is both difficult to practice and perhaps rarely employed by the judiciary; examining how purposivism actually operates, including in cases where purposivism may have been done well; and shoring up purposivist methodology, so that it is no longer as vulnerable to being co-opted for instrumental purposes.

To this end, scholars have recently highlighted how purposivism was better, if not perfect, during previous iterations of the major questions doctrine. For instance, Anita Krishnakumar notes that in older major questions cases, including *FDA v. Brown & Williamson*, “the Court relied on [agency] testimony provided at congressional hearings [and on] historical accounts in academic books . . . to establish legislative intent or the statute’s goals,” as opposed to merely “the Justices’ own intuitions.”²⁸² Likewise, Mila Sohoni highlights early major questions doctrine cases, including *FDA v. Brown & Williamson*, that took a seemingly more nuanced approach to purposivism.²⁸³ The contention that older major questions doctrine cases display “good” purposivism is not irrefutable. Even to the extent it was more careful with sources twenty years ago than today, the Court arguably got the legislature’s intention wrong in *FDA v. Brown & Williamson*,²⁸⁴ given Congress’s subsequent legislation authorizing the FDA to regulate tobacco.²⁸⁵ Nonetheless, it appears to have displayed better purposivism than more recent major questions doctrine cases,²⁸⁶ and serve as a model for improving purposivism in this context.

Second, the Court could instead reestablish its purported commitment to formalist interpretive methodology—namely, textualism. The concurrence in the most recent major questions doctrine case striking down the Biden Administration’s student loan forgiveness plan raises this possibility.²⁸⁷ Textualism has the potential to be instrumental and used to ideologically

²⁸¹ See Shah, *supra* note 114, at 1175.

²⁸² Krishnakumar, *supra* note 120, at 33.

²⁸³ See Sohoni, *supra* note 98, at 269–70.

²⁸⁴ See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).

²⁸⁵ See Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009).

²⁸⁶ See *supra* notes 122–125 and accompanying text.

²⁸⁷ See *Biden v. Nebraska*, 143 S. Ct. 2355, 2376–77 (2023) (Barrett, J., concurring).

problematic ends.²⁸⁸ However, textualism could also guard judicial restraint in the application of the major questions doctrine and better preserve the legislature's prerogative to empower administrative agencies. In at least one traditional major questions doctrine case, *Massachusetts v. EPA*, the Court relied on textualism to find that the agency in fact had more authority under the Clean Air Act than it claimed to have.²⁸⁹

Textualist methodology could also lead to policymaking that is more democratic and responsive to the public good, even in instances where the Court disagrees with the agency's interpretation of statute. For example, the textualist, major questions decision in *Massachusetts v. EPA* "added to a sense of urgency that a federal law to cut greenhouse gas emissions is necessary because the problem of climate change is so serious, and because the [Clean Air Act], as currently written, is a less than-ideal vehicle for addressing it."²⁹⁰ As a result, Jody Freeman and Adrian Vermeule argue, this case had "a democracy-forcing aspect because, by airing out the issues, it reinforced the need for a comprehensive new legislative approach."²⁹¹ Also, by "engaging the broader aims of a statute,"²⁹² the decision in *Massachusetts v. EPA* encouraged "the possibility of pro-environmental protection policies that the Clean Air Act did not explicitly anticipate but that uphold its core intent," as supported by a textualist reading of the statute.²⁹³

3. A Progressive Nondelegation Doctrine

Scholars argue convincingly that the major question doctrine lacks efficacy as a replacement for the nondelegation doctrine.²⁹⁴ As a result, it allows the

²⁸⁸ See generally Shah, *supra* note 18.

²⁸⁹ See *supra* note 114 and accompanying text.

²⁹⁰ Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 108.

²⁹¹ *Id.*

²⁹² Shah, *supra* note 114, at 1176.

²⁹³ *Id.* (arguing, as well, that a textual reading of the Public Health Service Act could allow agencies to grapple with "novel challenges concerning communicable diseases").

²⁹⁴ See Deacon & Litman, *supra* note 96, at 1046–47 (noting that while the major questions doctrine imposes "a significant practical limit on agencies' authority," it "does not avoid constitutional issues with broad or open-ended delegations to agencies"). More to the point:

the major questions doctrine is both an underinclusive and overinclusive mechanism for enforcing the nondelegation doctrine. It is underinclusive because it allows legislative delegations of significant power to administrative agencies so long as Congress is explicit about its intention to delegate such power to the agency; and it is overinclusive because it rejects agency actions/interpretations that regulate matters of "vast economic and political significance" even if those interpretations are adopted pursuant to a delegation that is not broad enough to

Court to cherry-picking situations in which to limit administrative policymaking authority by way of major questions. Indeed, it is possible that the new major questions doctrine signals the Court's intention to more continually obstruct the legislative delegation of policymaking authority²⁹⁵ in an effort to force Congress to legislate more cautiously, notwithstanding that limits to this strategy for overcoming congressional dysfunction.²⁹⁶ This section plays with the idea that the Court might, instead, issue a clear holding reinvigorating the nondelegation doctrine. To accomplish this, the Court would have to grapple head-on with the issues posed by a revitalized nondelegation doctrine by engaging, as J. Skelly Wright advised half a century ago, in "some systematic thinking about the degree to which various categories of problems are subject to prospective congressional control."²⁹⁷ Ideally, a revived nondelegation doctrine would be shaped by functionalist or even critical values—or put another way, by an emphasis on the benefits of administration.

Consider a common refrain from advocates of a stricter nondelegation doctrine—the view that intelligible principles are vague, and that this leads to the over-delegation of policymaking authority—from the perspective of an interest in systems of delegation that support affirmative administrative policymaking and foster justice. Many statutory requirements include language such as “in the public interest,” “to the extent feasible,” and so on, which suggest that Congress intends for agencies to maximize benefits alone.²⁹⁸ But in light of

violate the nondelegation doctrine (but also is not specific enough to explicitly authorize the particular agency action at issue).

Krishnakumar, *supra* note 120 (manuscript at 10–11).

²⁹⁵ See *supra* note 113 and accompanying text.

²⁹⁶ See, e.g., Daniel E. Walters & Elliott Ash, *If We Build It, Will They Legislate? Empirically Testing the Nondelegation Doctrine to Curb Congressional “Abdication,”* 108 CORNELL L. REV. 401, 413 (2023) (arguing that judicial doctrine cannot predictably or consistently nudge congressional drafting or productivity); Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L.J. 465, 471 (2023).

²⁹⁷ J. Skelly Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 587 (1972) (book review).

There are severe problems involved in the development of a coherent, principled, and meaningful theory of delegation . . . As [Kenneth Culp] Davis points out, some decisions, by their very nature, are more subject to control by prospective rules and standards than others . . . [Accordingly and] ironically, the courts may have to work out the precise contours of the requirement of prospective standards on an empirical, case-by-case basis

Id. at 586–87.

²⁹⁸ See, e.g., *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 205–08 (1943) (recognizing a delegation of policymaking authority to the agency in the statutory language “in the public interest”); *Indus. Union Dep't v. Am. Petroleum Inst. (Benzene Case)*, 448 U.S. 607, 607 (1980) (recognizing a delegation of policymaking authority to the agency in the statutory language “most adequately assures, to the extent feasible”); see also *Touby v.*

their concern about the impotence of the intelligible principle, courts have overcorrected by anchoring the intelligible principle in quantitative standards,²⁹⁹ and modern presidents have likewise consistently imposed cost/benefit analysis requirements on administration.³⁰⁰

This has oriented agencies toward policies focused on avoiding costs, instead of maximizing benefits.³⁰¹ As Jodi Short observes, “agencies rarely consider what might be characterized as ‘common good’ or ‘community’ values in their public interest analyses” and “tend to discount such considerations even when statutorily required.”³⁰² All of this suggests that a way to revive the nondelegation doctrine in a manner that benefits the public good would be for courts (or the president) to promote intelligible principles that emphasize the benefits of legislation, as Congress likely intends in many instances, while reducing the longstanding judicial and administrative emphasis on cost reduction. Even if cost-benefit analysis endures as a constraint on administrative policymaking, it might nonetheless be evolved to emphasize distributional consequences and equity.³⁰³

B. *Fostering Accountable & Diverse Legislative Oversight*

Extra-statutory legislative intervention in administration can be anti-democratic and self-interested. This section suggests fostering agency independence from and transparency vis-à-vis sitting Congresses. But it also

United States, 500 U.S. 160, 166 (1991) (recognizing a delegation of policymaking authority to the agency in the statutory language “necessary” to avoid “imminent hazard”); *Am. Power & Light Co. v. Sec. & Exch. Comm’n*, 329 U.S. 90, 97 (1946) (recognizing a delegation of policymaking authority to the agency in the statutory language “unduly or unnecessarily complicated”).

²⁹⁹ See, e.g., *Benzene Case*, 448 U.S. at 719–20 (Marshall, J., dissenting) (explaining that the plurality ties the legitimacy of a delegation of authority to the agency to a cost-benefit requirement and a quantitative risk assessment even though the statutory text lacked these requirements).

³⁰⁰ See Shah, *supra* note 114, at 1209.

³⁰¹ See Jodi L. Short, *In Search of the Public Interest*, 40 YALE J. ON REGUL. 759, 759 (2023) (arguing that “economic arguments are the most-raised and most-accepted justifications for why a particular outcome is in the public interest”).

³⁰² *Id.*

³⁰³ See Zachary Liscow & Cass R. Sunstein, *Efficiency vs. Welfare in Benefit-Cost Analysis: The Case of Government Funding 1* (Oct. 5, 2023) (unpublished manuscript) (on file with the *Ohio State Law Journal*); Daniel Hemel, *Regulation and Redistribution with Lives in the Balance*, 89 U. CHI. L. REV. 649, 666 (2022); Revesz, *supra* note 175, at 1511–18; Rahman, *supra* note 126. In addition, President Biden’s executive order on “Modernizing Regulatory Review,” and the accompanying proposed revisions to the White House Office of Management and Budget Circular A-4, offer some opportunities for updating benefit-cost analysis in this manner. See Exec. Order No. 14094, 88 Fed. Reg. 21879 (Apr. 11, 2023); OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, PROPOSED CIRCULAR A-4, REGULATORY ANALYSIS (Apr. 2023), <https://www.whitehouse.gov/wp-content/uploads/2023/04/DraftCircularA-4.pdf> [<https://perma.cc/32N5-938R>].

(perhaps counterintuitively) concedes the benefits of real-time legislative oversight and influence in certain contexts, particularly if that oversight is legitimized by data, diverse perspectives, and public participation. This section also suggests a “statute-focused” approach to better align administration with the goals of legislation itself, as opposed to with the politics of the current legislature.³⁰⁴

1. *Agency Independence from a Sitting Congress*

One scholar has argued for the abolishment of legislative supremacy over the exercise of administration (particularly in regard to criminal prosecution).³⁰⁵ In this and other contexts, this section notes, Congress could legislate independence from future Congresses by giving agencies some financial independence from the annual budget-setting process; instituting statutory ex parte communication bans that are “extended to members of Congress and their staff”; and increasing the transparency of interactions between agencies and Congress.³⁰⁶ In addition, more restrained use of the CRA³⁰⁷ by a sitting Congress could ensure that a fewer number of regulations, which tend to benefit from participatory process, are subject to ad hoc revocation.

2. *Democratizing Legislative Oversight*

Independence from the governing legislature is not a perfect approach to neutralizing the influence of a sitting Congress on administration. First, insulation from the legislature may not be possible.³⁰⁸ Unlike protections from political removal or structural independence from the president concretized in statute, legislators can use any manner of carrots and sticks to persuade an agency, executive or independent, to do their bidding,³⁰⁹ and legislation tends not to protect agencies from congressional pressure.³¹⁰ Notably, sentencing commissions are particularly susceptible and responsive to legislative influence.³¹¹

³⁰⁴ See Shah, *supra* note 114, at 1239 (arguing that agencies should engage in “statute-focused administration” instead of administration that prioritizes the president’s aims at the expense of legislative directives).

³⁰⁵ See Stuntz, *supra* note 188, at 587.

³⁰⁶ McGarity, *supra* note 178, at 1753–55.

³⁰⁷ See *supra* notes 196–201 and accompanying text.

³⁰⁸ See Barkow, *supra* note 190, at 813 (“Truly independent agencies are not possible in the current political climate.”).

³⁰⁹ See generally Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992).

³¹⁰ See *id.* at 252 (explaining Congress’s initial practice of delegating provisional authority to agencies subject to several forms of a legislative veto).

³¹¹ See Barkow, *supra* note 190, at 732–34.

Second, insulation from Congress may in fact render agency decisionmaking less effective. The argument here is one that mirrors the unitary executive credo, which finds virtue in political accountability. For instance, Rachel Barkow asserts that the “value of structural agency independence, at least in the context of criminal sentencing and perhaps in other areas as well, has been overestimated.”³¹² While “[t]he common view is that more independence translates into more power over policy decisions,” in fact “the story is much more complicated.”³¹³ More specifically, agencies exercise control over policy “not merely through structural features of independence,” but also by leveraging strong political connections to achieve particular ends.³¹⁴ In any case, Barkow argues, the “successful use of agencies in criminal justice requires that the agencies be designed to operate successfully in the highly politicized world of criminal justice.”³¹⁵

This section suggests mitigating self-interested legislative oversight and enhancing its benefits to agencies by infusing oversight with forms of accountability. One approach is to shape legislative preferences by “using impact statements and cost data to bring an element of rationality and long-term thinking” into the fray.³¹⁶ Another is to encourage connections between agencies and a variety or committee of legislators, as opposed to a single law maker, so that the agency can stave off single-minded legislative influence and benefit from a range of political views. In some cases, inviting political actors to play key roles in policymaking could also allow agencies to grapple with political interests directly and out in the open.³¹⁷ And, agencies might be better oriented toward the public interest if Congress subsidizes public participation in legislative oversight.³¹⁸ Each of these strategies could restrain partisanship in legislative oversight and imbue oversight with accountability resulting from data/expertise and a diversity of perspectives that could ultimately improve administration.

³¹² *Id.* at 814.

³¹³ *Id.* at 799 (“[A]lthough traditional agency theory suggests that making guidelines effective without legislative approval would give sentencing commissions more power vis-à-vis commissions that must have their guidelines affirmatively passed by the legislature, the actual experience of the federal and state commissions suggests there is no consistent relationship.”).

³¹⁴ *See id.* at 814.

³¹⁵ *Id.* at 813.

³¹⁶ *Id.* at 813.

³¹⁷ McGarity, *supra* note 178, at 1757–58.

³¹⁸ *Id.* at 1757 (suggesting that Congress subsidize public participation “in ‘specific rulemakings in which certain sets of interests, such as those representing the diffuse public, will be otherwise underrepresented’” (citing Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1416 (2010))).

3. Statute-Focused Administration

Administrative responsiveness to the immediate goals of legislators may be in tension with the aims of agencies' governing legislation. For this reason, this section notes, agencies facing political pressure from a sitting Congress to apply the law in problematic ways might endeavor to better adhere to the relevant statutory scheme.³¹⁹ Arguably, this approach is more justified when an agency's enabling legislation emphasizes normative commitments that have been overshadowed by political considerations. In other, more difficult cases, the statutory scheme may itself be riddled with institutional biases,³²⁰ and may require revision in order to stave off harm to vulnerable communities.

C. Improving Administrative Discretion

While an expansive bureaucracy is required for a functional government, agency officials and adjudicators sometimes act in ways that indulge in personal biases or exercise their discretion in an expansive manner that reduces access to process for vulnerable petitioners.³²¹ Biased administration has been flourished, perhaps, because the relationship between administrative law and equal protection doctrine is an uneasy one at best. Arguably, "reining in [administrative] discretion requires tools that the legal system does not have."³²² For instance, there has long been jurisprudential disconnect that has rendered the law governing administrative agencies less effective for purposes of weeding out administrative bias against or discriminatory impact on marginalized communities.³²³ When the APA was created, the (all-white) American Bar Association was interested in ensuring that agencies did not violate civil liberties, as opposed to civil rights.³²⁴ Since then, the federal government has succeeded at using the APA's exceptions for process and oversight to keep racial justice claims out of the courts,³²⁵ and those claims that have made it to judges have been channeled into and subsequently ousted by decisions based in Title VI of the Civil Rights Act.³²⁶ In addition, agencies are

³¹⁹ See Shah, *supra* note 104, at 1233–44 (advocating and offering solutions for improved agency adherence to the law in the face of political pressure from the president).

³²⁰ See Bijal Shah, *Congress's Agency Coordination*, 103 MINN. L. REV. 1961, 2040 (2019).

³²¹ See *supra* Part II.C.

³²² Stuntz, *supra* note 188, at 579, 581 (noting that one way to solve the problem of the ever-expanding reach of criminal prosecution is to regulate administrative discretion).

³²³ See, e.g., Ceballos, Freeman & Ho, *supra* note 63, at 430.

³²⁴ See Lee, *supra* note 54, at 166.

³²⁵ See *id.* at 167–69 (noting that in the 1960s and 70s, racial justice advocates breathed new life into the notice-and-comment provisions of agency rulemaking).

³²⁶ See Ceballos, Freeman & Ho, *supra* note 63, at 403 ("Over time, Title VI was interpreted as applying to state, local, and even private entities that receive federal funds, but not to federal agencies."); see also Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 600,

not prohibited by the Constitution from engaging in discrimination (although a few scholars are shedding light on agencies' role in equal protection violations³²⁷). As a result, it is difficult to sue agencies for discrimination, let alone disparate impact;³²⁸ furthermore, there is no analogue to Title VI for agencies themselves.³²⁹

This section suggests shifts to institutional structure and narrow judicial review to reduce bias in administration and improve administrative process. There might appear to be a tension between suggesting reduced legislative intervention in administration, as in the previous section, and advocating for a cabined administrative state. However, context and specificity are important. Part III.B advised limits to the oversight of agencies only in instances where such intervention lends itself to policy that is less democratically responsive and more politicized than policy produced via administrative processes like notice-and-comment rulemaking. Complementarily, the instant section seeks to constrain administrative discretion in response to a different set of problems—bias and expanding agency discretion—and to do so primarily through judicial review and changes in institutional structure, as opposed to political pressure from a sitting Congress.

1. *Institutional Change to Reduce Discrimination*

According to formalist Philip Hamburger, “if you are inclined to defund oppression, defund the administrative state.”³³⁰ But attempts to eliminate the administrative state are, at best, a blunt tool for excising bias in governance.

601, 78 Stat. 252 (codified at 42 U.S.C. §§ 2000(d)) (Title VI) (prohibiting discrimination in any program that receives federal funds, but not in federal agencies themselves).

³²⁷ See, e.g., Milligan, *Subsidizing Segregation*, *supra* note 223, at 850; Bertrall L. Ross II, *Administering Suspect Classes*, 66 DUKE L.J. 1807, 1838–39 (2017).

³²⁸ See *Alexander v. Sandoval*, 532 U.S. 275, 279 (2001) (finding no private right of action for disparate impact claims pertaining to actions by the Environmental Protection Agency).

³²⁹ See Milligan, *Subsidizing Segregation*, *supra* note 220, at 923–24. This is not to say that Title VI does not hold promise for institutional racism. See *id.* at 856 n.24 (“A number of subsequent statutes extended Title VI’s bar on race and national origin discrimination in federally funded programs to other protected classifications, providing an even broader basis for administrative implementation of equal protection norms.”); see, e.g., Rachel Calvert, *Reviving the Environmental Justice Potential of Title VI Through Heightened Judicial Review*, 90 U. COLO. L. REV. 867, 874 (2019); M. Gregg Bloche, *Race and Discretion in American Medicine*, 1 YALE J. HEALTH POL’Y, L. & ETHICS 95, 111 (2001). Rather, the point here is that Title VI only constrains private recipients of public funding, not agencies themselves.

³³⁰ Philip Hamburger, *Administrative Discrimination*, AM. MIND (Sept. 11, 2020), <https://americanmind.org/memo/administrative-discrimination/> [https://perma.cc/99UZ-7ZA5] (arguing that discrimination—in particular, against “religious Americans” and those exercising First Amendment rights—in the administrative state should be solved by dismantling it).

This section proposes, instead, that shifts to agency structure could help improve institutional dynamics and reduce incentives that lead to the enforcement of law in inconsistent and biased ways. More specifically, it offers ways to indirectly influence administrative discretion for the better, reduce bureaucratic self-interest, and enhance agency responsiveness to the public.

William Stuntz suggests that the “most important factor in determining how law enforcers exercise their discretion is neither the law nor the existence of formal review mechanisms. The legal culture . . . matter[s] much more.”³³¹ To this end, formalists argue for ever-increasing political control over agency heads.³³² However, greater accountability to the president may lead to administrative action, particularly adjudication, that prioritizes political interests in problematic ways.³³³

Perhaps the best-known form of preserving a legal culture in an agency involves the legislative decision to create an independent agency structure.³³⁴ This functionalist solution to politicized behavior by the bureaucracy, in contrast to the formalist judicial inclination to install a more unitary executive,³³⁵ is the insulation of agencies from “raw political power exercised by elected officials and special interests.”³³⁶ “So insulated,” the conventional view asserts, agencies “might pursue statutory objectives, and therefore one hopes the public interest.”³³⁷ But while decisional independence benefits administration, it does not solve the problem of agencies abusing their independent exercises of discretion.³³⁸ This rest of this section considers ideas for constraining bureaucratic bias beyond administrative independence.

³³¹ Stuntz, *supra* note 188, at 581.

³³² See Shah, *supra* note 20, at 524–36.

³³³ See *id.* at 527–28 (arguing that presidential influence over administrative adjudication can lead to deregulation, reduced decisional independence, and less accuracy in technical decisions); Bijal Shah, *Civil Servant Alarm*, 94 CHI.-KENT L. REV. 627, 648 (2019) (illustrating how presidents have influenced immigration adjudication to problematic ends). Note, for instance, some results of decisional independence tarnished by presidentialism, including biased decisions made by the BIA and immigration judges under the influence of Presidents Bush II and Trump. *Id.* at 640; Catherine Y. Kim, *The President’s Immigration Courts*, 68 EMORY L.J. 1, 14–15 (2018).

³³⁴ See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2273–74 (2001) (noting “Congress’s creation of independent agencies—that is, agencies whose heads the President may not remove at will”); Shah, *supra* note 328, at 645–47 (noting several distinctions between independent and executive agencies).

³³⁵ See generally Shah *supra* note 20.

³³⁶ EDWARD H. STIGLITZ, *THE REASONING STATE* 290 (2022).

³³⁷ *Id.*

³³⁸ *Id.* (“Bureaucrats are no angels” and acknowledging that, despite insulation from political pressure, “it will still be the case that agencies will be tempted by . . . favoritism toward insiders.”).

In recent years, scholars have shown enthusiasm for “new administrative forms.”³³⁹ In general terms, institutional design, or redesign, could be engineered to improve the impact of agency discretion on regulatory outcomes for minority, vulnerable or underserved communities. “From the perspective of institutional design, the optimal bureaucratic structure depends on the ends to be achieved.”³⁴⁰ Improvements to agency design—via either via top-down improvement from the legislature as a result of statutory modification or bottom-up, structural change from within the executive branch—could be harnessed for various purposes that link “agency design structure to the individuals that exercise legal discretion.”³⁴¹ Intentional efforts could counteract both pre-existing institutional design that has led to biased administrative enforcement,³⁴² as well as the political ideologies and influence on agency behavior.³⁴³

Regarding the goals of either bottom-up or top-down institutional change, of institutional change, one could be to reduce misalignment between bureaucratic and protective legislative aims. Another might involve institutional shifts could be to rectify previous agency (mis)behavior/historically unequal application of the law. A third incentive could be to dilute bureaucratic self-interest that motivates “administrative subordination.”³⁴⁴ A fourth goal could be to encourage the presidential administration of statutes in ways in ways that improve justice.³⁴⁵

Regarding the mechanisms of top-down shifts in particular, one potentially useful device of congressional control involves legislation aimed toward the specifics of administrative process, which may be designed to “make it more likely that the agencies will please some constituencies and less likely that they

³³⁹ Christopher R. Berry & Jacob E. Gersen, *Agency Design and Political Control*, 126 YALE L.J. 1002, 1006 (2017) (observing that “we are in the midst of something of an agency design renaissance—a period of fundamental change with respect to the federal bureaucracy—deriving mainly, if not exclusively, from the emergence of new administrative forms”); see also Jon D. Michaels, *Separation of Powers and Centripetal Forces: Implications for the Institutional Design and Constitutionality of Our National-Security State*, 83 U. CHI. L. REV. 199, 201 (2016) (advocating for careful attention to agency design to ensure constraints on executive power).

³⁴⁰ Jacob E. Gersen, *Designing Agencies*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333, 334 (Daniel A. Farber & Anne Joseph O’Connell eds., 2010).

³⁴¹ Berry & Gersen, *supra* note 339, at 1013.

³⁴² See, e.g., Milligan, *Protecting Disfavored Minorities*, *supra* note 220, at 915–17 (asserting that the design of an agency can contribute to political dependence, narrow mandates, and a lack of judicial oversight).

³⁴³ See, e.g., Stuntz, *supra* note 188, at 510 (arguing that the reason criminal codes continue to expand “involves not the politics of ideology and public opinion, but the politics of institutional design and incentives”).

³⁴⁴ Shah, *Administrative Subordination*, *supra* note 1 (manuscript at 7).

³⁴⁵ *Id.* (manuscript at 50–51); see, e.g., Wadhia, *supra* note 316, at 414 (arguing that, in the immigration context, “Congress or the Executive Branch [could] craft a regulation that creates a rebuttable presumption of discretion in favor of the noncitizen”).

will please others.”³⁴⁶ Likewise, “Congress can ‘stack the deck,’ increasing the likelihood that agencies will reflect the preferences of its constituents without any further intervention.”³⁴⁷

As to tools of change from within the executive branch, the White House could foster more permanent change by directing “inter-agency administrative coordination, more detailed regulatory action, the issuance of agency guidance, the prioritized enforcement of the law, and other policies that expand administrative capacities to improve fair engagement and outcomes;” requiring “agencies themselves to identify, investigate, and discontinue administrative policies that render participation inaccessible to certain individuals”; empowering “offices within agencies, such as offices of civil rights . . . to improve regulatory processes and distributional consequences”; and appointing “policymakers that encourage the proliferation of civil servants with an interest in furthering equitable administrative policies.”³⁴⁸ As to appointing such policymakers, “agency packing,” which involves “putting more political appointees in the upper echelons of agency management,” is a “direct mechanism to influence agency decision making.”³⁴⁹ Agencies themselves could also supply standards guiding and limiting their own policymaking discretion.³⁵⁰

Institutional shifts could constrain expansions in bureaucratic discretion that impact administrative due process. As a general matter, progressive scholars champion agency responsiveness to the public, more diverse inclusion in administrative processes, and the expansion of public control over government action.³⁵¹ As Anya Bernstein and Cristina Rodríguez note, “responsiveness is essential to ensuring that government actions take account of the interests of governed publics.”³⁵² Likewise, another scholar prescribes stronger

³⁴⁶ Jason A. MacDonald, *The U.S. Congress and the Institutional Design of Agencies*, 32 LEGIS. STUDS. Q. 395, 396 (citing Terry M. Moe, *The Politics of Bureaucratic Structure*, in CAN THE GOVERNMENT GOVERN? (1989)) (noting that one device of congressional control involves legislation aimed toward the specifics of administrative process, which may be designed to “make it more likely that the agencies will please some constituencies and less likely that they will please others”).

³⁴⁷ Bressman, *supra* note 224, at 1770.

³⁴⁸ Bijal Shah, *Beyond OIRA for Equity in Regulatory Process*, REGUL. REV. (Mar. 16, 2022), <https://www.theregreview.org/2022/03/16/shah-beyond-oira/> [<https://perma.cc/AQT9-QVUG>] (advocating for a bottom-up approach to changing agency behavior).

³⁴⁹ Berry & Gersen, *supra* note 339, at 1013 (emphasis omitted).

³⁵⁰ Lisa Schultz Bressman, *Disciplining Delegation After Whitman v. American Trucking Ass’ns*, 87 CORNELL L. REV. 452, 452–53 (2002).

³⁵¹ See Shah, *Administrative Subordination*, *supra* note 1 (manuscript at 37) (discussing that agency responsiveness to the public and diverse inclusion is a remedy to administrative neglect of public interests); McGarity, *supra* note 178, at 1757.

³⁵² Bernstein & Rodríguez, *supra* note 35, at 1651, 1666 (advocating for responsiveness by pushing back against the idea that “elections and political control” lead to agency accountability).

relationships between agencies and the people potentially affected by administrative action;³⁵³ this could be fostered by improvements to “agenc[ies]’ reaction to feedback from affected publics,” and to “officials’ appreciation of the real-world contexts and consequences of agency action.”³⁵⁴

More specifically, one expert commentator has suggested “redesigning the immigration adjudicatory system to more closely resemble the criminal justice system with respect to institutional checks and individual rights.”³⁵⁵ This might reduce the possibility that the expansion and overlap of criminal and immigration enforcement continues to results in process so lacking that it leads to consistently poor outcomes for noncitizens embroiled in the “crimmigration” system.³⁵⁶ In addition, reformulating the *Mathews* calculation³⁵⁷ to require additional administrative procedures that benefit private interests in due process³⁵⁸—which, if initiated by agencies themselves, would not run afoul of *Vermont Yankee*³⁵⁹—could improve process and outcomes as well, particularly in regulatory matters at the intersection of immigration and national security.³⁶⁰ One more suggestion for improving procedure in agency adjudication is government-provided counsel in administrative law cases;³⁶¹ this has been suggested by immigration advocates and could apply to other regulatory contexts (for instance, social security administration) as well. Finally, it is worth considering whether idiosyncratic adjudication is a systemic issue that suggests to functionalists that “agencies need more rigorous principles for identifying matters that ought [not] to be handled through . . . adjudication.”³⁶²

2. Systems of Review to Excise Bias

Intra-agency and judicial oversight could root out discriminatory behavior, and eventually motivate administrators to act with less institutional inconsistency and personal bias. This section advocates for improving internal agency oversight of administrative adjudication and for the complementary

³⁵³ Christopher S. Havasy, *Relational Fairness in the Administrative State*, 109 VA. L. REV. 749, 833 (2023).

³⁵⁴ Bernstein & Rodríguez, *supra* note 35, at 1650–51.

³⁵⁵ Nicole Hallett, *Rethinking Prosecutorial Discretion in Immigration Enforcement*, 42 CARDOZO L. REV. 1765, 1814 (2021).

³⁵⁶ See *supra* notes 263–270 and accompanying text.

³⁵⁷ See *supra* notes 271–275 and accompanying text.

³⁵⁸ See Hausman, *supra* note 245, at 1215 (suggesting this in the immigration context without recommending specific procedures).

³⁵⁹ *Vt. Yankee Nuclear Power Corp. v. Nat’l Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978). The Supreme Court restated *Vermont Yankee* in a later case by declaring “that the judicial augmentation of rulemaking requirements ‘imposes on agencies an obligation beyond the [APA]’s maximum procedural requirements.” Shah, *supra* note 129, at 1124 (citing *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92 (2015)).

³⁶⁰ See *supra* notes 277–278 and accompanying text.

³⁶¹ Hausman, *supra* note 245, at 1212–13.

³⁶² David A. Super, *Against Flexibility*, 96 CORNELL L. REV. 1375, 1456 (2011).

approach of bolstering judicial review of administrative adjudication. As to judicial review in particular, this section suggests that some that courts might draw on the accountability-forcing features of the arbitrary and capricious review to reduce the idiosyncrasies inherent in administrative adjudication. In addition, it illustrates how judges might also apply the substantial evidence review and proposes renewing the abuse of discretion standard to limit administrative adjudication based in adjudicators' personal biases. Even if conventional social security and immigration appeals tend to allow harsh judges to evade effective judicial review,³⁶³ these other forms of Article III oversight could be more successful. Notably, judicial restraint in applying the major questions doctrine, as suggested in Part III.A, is consistent with the instant section's prescription for judicial review. The previous section advises that courts, particularly the Supreme Court, refrain from engaging in broadscale policymaking,³⁶⁴ while the instant section suggests that the judiciary could employ particularized, narrow standards of review to review, individually, egregious exercises of administrative discretion.

Intra-agency appeals processes do not necessarily limit inconsistencies among administrative adjudicators; rather, they seem to reinforce adjudicators that favor the agency's interests over those of the claimant. In the social security context, Social Security Appeals Council reverses "more generous" ALJs more often, while SSA "ALJs barely change their behavior in the aftermath of remands, if at all."³⁶⁵ Gerald Neuman notes that the Department of Justice Board of Immigration Appeals (BIA) is not "in a position to promote consistency in the decentralized exercise of discretionary authority by Immigration Judges of widely varying temperaments and tastes."³⁶⁶ In addition, "when the government appeals . . . the BIA more often reverses the decisions of generous judges than those of harsher judges."³⁶⁷ Overall, neither immigration adjudication—nor Social Security disability adjudication,³⁶⁸ for that matter—is uniform, and intra-agency appeals and judicial review fail to moderate disparities across adjudicators in both contexts.³⁶⁹

However, there may be ways to improve the outcomes of intra-agency appeals. For instance, "discretion-limiting systems of review" within agencies could be redesigned in order to emphasize "three distinctive features": first, that litigants are encouraged to "more often appeal from the decisions of adjudicators

³⁶³ See *infra* notes 365–367 and accompanying text.

³⁶⁴ See *supra* Part III.A.

³⁶⁵ David K. Hausman, *Reviewing Administrative Review*, 38 YALE J. ON REGUL. 1059, 1061 (2021).

³⁶⁶ Neuman, *supra* note 249, at 633; see also RAMJI-NOGALES, SCHOENHOLTZ & SCHRAG, *supra* note 247, at 20–22; Ramji-Nogales, Schoenholtz & Schrag, *supra* note 312, at 296; Hausman, *supra* note 245, at 1180 (confirming that disparities across immigration judges reflect more than case assignment and tracking those disparities on appeal).

³⁶⁷ Hausman, *supra* note 245, at 1180.

³⁶⁸ Hausman, *supra* note 356, at 1059–60.

³⁶⁹ *Id.*; Hausman, *supra* note 245, at 1177.

who are systematically hostile to their claims”; second, that hostile “adjudicators’ decisions are more likely to be reversed”; and third, adjudicators “respond to remands [from intra-agency reviewers] by at least temporarily avoiding decisions that might lead to similar appeals.”³⁷⁰ In the immigration context, these goals might be better met, to some extent, by simply increasing the number of cases reviewed under the administrative appeals process.³⁷¹

As to judicial review, the circuit courts are also less “likely to reverse the decisions of harsher judges when immigrants appeal.”³⁷² While harshness may or may not be based in bias, it seems likely that bias will lead to harshness, in which case the inability of appeals to mitigate harshness also suggests an inability to ameliorate bias in immigration adjudication. Also, immigration courts prevent noncitizens from finding counsel and “immigrants without lawyers almost never appeal,” which means that some harsh judges evade judicial review.³⁷³

That having been said, circuit courts are nonetheless concerned that “the adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice.”³⁷⁴ Accordingly, and consistent with its interest in constraining administrative power,³⁷⁵ the judiciary should be empowered, narrowly, to oversee the exercise of administrative discretion. By applying the APA’s arbitrary and capricious standard and substantial evidence review, as well as reviewing for abuse of discretion, courts could force agencies to provide reasons for their decisions,³⁷⁶ and therefore persuade administrative adjudicators to behave more consistently and with less bias over time.

³⁷⁰ *See id.* at 1115.

³⁷¹ Hausman, *supra* note 245, at 1208–09, 1211.

³⁷² *Id.* at 1180. Harsh judges are defined as “immigration judges who deport more immigrants than their court’s average.” *Id.* at 1179.

³⁷³ *Id.*

³⁷⁴ *Benslimane v. Gonzales*, 430 F.3d 828, 829–830 (7th Cir. 2005) (citing *Dawoud v. Gonzales*, 424 F.3d 608, 610 (7th Cir. 2005) (suggesting that “the [immigration judge’s] opinion is riddled with inappropriate and extraneous comments”) (alterations in original)); *see also* *Wang v. Att’y Gen.*, 423 F.3d 260, 269 (3d Cir. 2005) (“The tone, the tenor, the disparagement, and the sarcasm of the [immigration judge] seem more appropriate to a court television show than a federal court proceeding.”); *Chen v. U.S. Dep’t of Just.*, 426 F.3d 104, 115 (2d Cir. 2005) (finding that the immigration judge’s opinion was “grounded solely on speculation and conjecture”); *Fiadjoe v. Att’y Gen.*, 411 F.3d 135, 154–55 (3d Cir. 2005) (finding that the immigration judge’s “hostile,” “extraordinarily abusive,” and “by itself would require a rejection of his credibility finding”); *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1054 (9th Cir. 2005) (noting that “the [immigration judge’s] assessment of Petitioner’s credibility was skewed by prejudgment, personal speculation, bias, and conjecture”); *Korytnyuk v. Ashcroft*, 396 F.3d 272, 292 (3d Cir. 2005) (declaring that “it is the [immigration judge’s] conclusion, not [the petitioner’s] testimony, that ‘strains credulity’”).

³⁷⁵ *See supra* Part II.A.

³⁷⁶ STIGLITZ, *supra* note 331, at 290 (arguing that “reason-giving effectively discipline[s] bureaucratic] behavior”).

First, the arbitrary and capricious standard could be harnessed to grapple with unjust administration, with or without a formal tie-in to the tiers of scrutiny analysis incorporated into civil rights law.³⁷⁷ Scholars have recently highlighted how administrative law has “erased” anti-discrimination principles, particularly in the sense that the arbitrary and capricious standard excludes claims from protected classes.³⁷⁸ However, other scholars have highlighted the accountability-forcing potential of arbitrary and capricious review in a few recent immigration cases,³⁷⁹ and noted that this standard if review could help courts “censure [administrative] policy motivated by the president’s discriminatory impulses or racial animus” in the immigrants’ rights context.³⁸⁰ Arbitrary and capricious review could also, more generally, encourage expertise in administration that could be harnessed for more just outcomes.³⁸¹

Second, courts have already relied on substantial evidence review to root out problematic exercises of discretion and bias in administrative adjudication, and could do so more often. For example, federal courts have applied or considered applying the substantial evidence standard to grapple with prejudice in decisions made by Social Security ALJs.³⁸² In one case, the Ninth Circuit found that an ALJ “improperly rejected the medical opinion” of a Social Security claimant’s treating physician and “erroneously discounting her symptom testimony.”³⁸³ As a result, the court of appeals reversed, holding that the ALJ erred in failing to discuss her explanation for failing to fill her prescription due to a lack of insurance and because she could not otherwise afford it.³⁸⁴ More specifically, the court found that the ALJ gave no reason for not accepting the explanation which, if true, would have been a legitimate answer to why she did not fill the prescription.³⁸⁵ In this situation, the court evaluated the ALJ’s personal skepticism as inconsistent with a reasoned decision, and compelled the ALJ to act with more impartiality. As a result, the court declares that the ALJ did not offer “specific and legitimate” reasons for rejecting” the physician’s opinion.³⁸⁶ By reversing the judgment below “with

³⁷⁷ See Ceballos, Freeman & Ho, *supra* note 63, at 370 (noting this disconnect).

³⁷⁸ *Id.*

³⁷⁹ See Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1748 (2021).

³⁸⁰ Shah, *supra* note 114, at 1262. *But see* Jennifer M. Chacón, *The Inside-Out Constitution: Department of Commerce v. New York*, 2019 SUP. CT. REV. 231, 266 (2019) (arguing that Justice Robert’s “opinion in the Census 2020 Case is absolutely not articulating any sort of commitment to protecting historically disfavored groups from the actual effects of the Trump administration’s harmful racial discrimination”).

³⁸¹ See Shah, *supra* note 129, at 1152–65.

³⁸² See, e.g., *Pronti v. Barnhart*, 339 F. Supp. 2d 480, 497 (W.D.N.Y. 2004); *Grant v. Comm’r, Soc. Sec. Admin.*, 111 F. Supp. 2d 556, 570 (M.D. Pa. 2000); *see also* Vendel, *supra* note 250, at 777–86 (discussing these cases).

³⁸³ *Trevizo v. Berryhill*, 871 F.3d 664, 668 (9th Cir. 2017).

³⁸⁴ *Id.* at 680–81.

³⁸⁵ *Id.* at 682–83.

³⁸⁶ *Id.* at 676.

instructions to remand to the ALJ for the calculation and award of benefits,”³⁸⁷ the court weeded out the ALJ’s personal views on the legitimacy of the claim and forced a less biased assessment.

In at least one case, a court of appeals finds that a decision by an immigration judge (IJ) was not based on substantial evidence and indicates discontent with the IJ’s exercise of discretion.³⁸⁸ More specifically, the Second Circuit noted with incredulity a decision by an immigration judge (IJ), on remand from the court of appeals, in which the IJ made an adverse credibility determination.³⁸⁹ Among the court’s observations include noting that the judge’s finding rested on his memory of the noncitizen applicant’s demeanor from four years earlier and that “the record indicates that the IJ was unsure whether the petitioner was an adult or a child.”³⁹⁰ While “[t]he poor quality of adjudication has caused this case to chew up the time of the Second Circuit, as well as leaving the applicant’s immigration status in limbo for over eight years,” the case was ultimately resolved in the noncitizen’s favor.³⁹¹

Finally, recent insights suggest that administrative adjudication would benefit from more incisive abuse of discretion review.³⁹² Abuse of discretion was, traditionally, one of the most deferential standards of review,³⁹³ and it appears to have fallen out of favor in some contexts.³⁹⁴ Nonetheless, courts continue to rely on it in some circumstances, including when it comes to the choice of agency procedure in policymaking,³⁹⁵ and it could feasibly be applied to rebuke administrators whose adjudications reflect bias.

One critique of the judicial approach might be that courts are not necessarily more effective in achieving justice than agencies. Even if turns out to be wholly true (and equal rights doctrine suggests that perhaps it is not), increasing the judiciary’s role in checking agencies is at least unlikely to exacerbate injustice. At worst, review under deferential standards such as the arbitrary and capricious standard, abuse of discretion review, and substantial evidence review offer

³⁸⁷ *Id.* at 683.

³⁸⁸ See generally *Hu v. Holder*, 579 F.3d 155 (2d Cir. 2009).

³⁸⁹ *Id.* at 159–60.

³⁹⁰ *Id.* at 158.

³⁹¹ Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541, 588 (2011).

³⁹² See Hausman, *supra* note 356, at 1091 (suggesting that “harsher ALJs are more likely to make legal errors and factual findings that harm the claimant’s chances, and that harsher ALJs are more likely to abuse their discretion in that direction”); *id.* at 1092 (finding, counterintuitively, that the “higher the ALJ’s allowance rate, the higher his or her reversal rate”).

³⁹³ See Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1492 (1983).

³⁹⁴ For instance, Gerald Neuman notes that, in the immigration context, the BIA is not in a position to promote consistency among IJs “of widely varying temperaments and tastes. Nor has that task been transferred to the courts, which are forbidden in most contexts to review for abuse of discretion.” Neuman, *supra* note 249, at 633.

³⁹⁵ See Magill, *supra* note 23, at 1408.

additional, if relatively weak, mechanisms for holding administrative adjudicators accountable.

IV. CONCLUSION

Critiques of separation-of-powers functionalism by its own proponents have stagnated. This essay is an effort both to open an avenue of discourse about functionalism and to begin the integration of critical perspectives into structural constitutionalism and administrative law. More specifically, this essay questions whether functionalist mechanisms and methodologies in fact accomplish functionalism's own aims, let alone further just administration and the public good.

To begin this conversation, this essay identifies both some problems for functionalist's own commitments and potential harm to vulnerable communities resulting from instances of separation-of-powers functionalism. These include the fallout of recent judicial administration based in purposivist or pragmatic interpretative methodology, a flexible relationship between the political branches, and blanket support for the administrative state. In light of its concerns, this essay proposes some critical adjustments to the relationships between the branches of government that encourage complementary forms of restraint in the judiciary, in Congress, and among administrative agencies.

Overall, this essay is a call to functionalists to reduce our focus on decrying conservative formalism, and instead, to turn inward. This work is driven as well by the recognition that because critical legal theory exists outside the usual formalist/functionalist interpretive framing and is not part of the conventional toolbox of administrative and institutional analysis, this tradition has the potential to reinvigorate core separation-of-powers debates. By doing so, we may find either that functionalism has abdicated its commitments and/or that we need a new functionalism in service of our goals and normative vision of government.