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# Commanding a View: How “Expertise Forcing” Undermines the Unitary Executive and Statemanship in a Democratic Republic

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COMMANDING A VIEW

*How “Expertise Forcing” Undermines the Unitary Executive and Statesmanship in a Democratic Republic*

Daniel Shapiro

When right, I shall often be thought wrong by those whose positions will not command a view of the whole ground.<sup>1</sup>

It is by comparing a variety of information, we are frequently enable[d] to investigate facts, which were so intricate or hidden, that no single clue could have led to the knowledge of them in this point of view, intelligence becomes interesting, which from but its connection & collateral circumstances, would not be important.<sup>2</sup>

INTRODUCTION: Political Control of the Bureaucracy

Is political control over agency decisionmaking arbitrary and capricious?<sup>3</sup> A line of thought in academia and on the bench has concluded that political or presidential influence over agency decisions violates the Administrative Procedure Act (APA). This position holds that most executive policy determinations must be made by technical experts based on empirical evidence. To survive this standard, decisions of the highest political impact—birth control,<sup>4</sup> climate change,<sup>5</sup> assisted suicide,<sup>6</sup> wartime necessity<sup>7</sup>— must be made by expert

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<sup>1</sup> Jefferson’s First Inaugural Address, 33 Papers of Thomas Jefferson 134–52 (Barbara B. Oberg, ed. 2007) (Mar. 4, 1801).

<sup>2</sup> George Washington to James Lovell (Apr. 1, 1782).

<sup>3</sup> 5 U.S.C. § 706.

<sup>4</sup> *Tummino v. Torti*, 603 F. Supp. 2d 519, 545 (E.D.N.Y. 2009).

<sup>5</sup> *Massachusetts v. EPA*, 549 U.S. 497 (2007).

<sup>6</sup> *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006).

<sup>7</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 623 (2006).

bureaucrats rather than the President or his political appointees.<sup>8</sup> Courts have utilized *State Farm* review to hold that decisions based on political concerns emanating from the President rather than technical evidence found by expert bureaucrats are arbitrary and capricious under the APA. Professors Freeman and Vermeule term this type of *State Farm* review “expertise forcing.”<sup>9</sup>

There is tension in academia and on the bench over the concept of “expertise forcing.” Supreme Court decisions such as *Massachusetts v. EPA*, which seem to endorse “expertise forcing,” stand in contrast with decisions such as *FCC v. Fox Television Stations, Inc.*,<sup>10</sup> which accept a role for politics in agency decisionmaking.<sup>11</sup> This tension is also evident amongst and even within the lower courts. For a stark example, contrast the D.C. Circuit’s ringing endorsements of “political considerations” and the “presence of Presidential power” in *Sierra Club v. Costle*<sup>12</sup> with the D.C. District Court’s forthright condemnation of presidential “encroach[ment] upon the independence and expertise of EPA” in *Environmental Defense Fund v. Thomas*.<sup>13</sup>

This tension exploded over the course of President Trump’s administration. Never had the tension between presidential political control and judicial expertise forcing been greater. It is not exaggeration to recognize that the Executive Branch and Judiciary waged a

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<sup>8</sup> And creates incentives to politicize science. See Heidi Kitrosser, *Scientific Integrity: The Perils and Promise of White House Administration*, 79 Fordham L. Rev. 2395, 2424 (2011).

<sup>9</sup> Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 Sup. Ct. Rev. 51, 88 (2007) (“The inference [of *State Farm*] is that political influence is a source of danger rather than of accountability.”).

<sup>10</sup> *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

<sup>11</sup> Kathryn A. Watts, *Proposing A Place for Politics in Arbitrary and Capricious Review*, 119 Yale L.J. 2 (2009).

<sup>12</sup> *Sierra Club v. Costle*, 657 F.2d 298, 408 (D.C. Cir. 1981).

<sup>13</sup> *Envtl. Def. Fund v. Thomas*, 627 F. Supp. 566, 570 (D.D.C. 1986).

(not always centrally directed) war over control of the direction of policy. This conceptual conflict between political judgment and technocratic expertise has deep roots. It has manifested itself throughout American history—from the Founding to the modern American administrative state’s creation in the Progressive Era, and beyond.

The Constitution’s creation of a nationally elected unitary executive ensures that the President’s political judgment cannot be excluded from agency decisionmaking. The Constitution makes a politically accountable officer responsible for the entirety of the administrative power of the nation. The belief that politics can be separated from expertise is fundamentally flawed and in tension with the Constitution. The constitutional unitary executive ensures that supposedly expert decisions cannot be separated from political oversight.<sup>14</sup> Politics does not merely set the ends of bureaucratic expertise, it must control the execution as well. Politics naturally permeates human decisionmaking. Instead of creating an apolitical technocratic system, “expertise forcing” ensures that experts, who do not represent the deliberative will of the nation, are making political decisions. The Constitution vests control over administrative decisions in a politically accountable President and control over decisions involving rights and obligations to a politically accountable Congress.<sup>15</sup> Thus, to avoid infringing the President’s constitutional control over the bureaucracy, courts should

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<sup>14</sup> Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Rise of the Administrative State, 1889–1945*, 80 *Notre Dame L. Rev.* 1 (2008); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 *Yale L.J.* 541 (1994); *but see* Kitrosser, *supra* note 8 (“[T]he more deeply and ubiquitously that the OMB’s influence and that of high-level political appointees reach into the day-to-day work of agencies—including scientific research—the more difficult it can be for Congress, courts, or the public to discern the nature of that influence.”).

<sup>15</sup> This paper confines itself to decisions within the President’s control, and avoids considering the deeper question of the likely unconstitutional breadth of decisions Congress has delegated to the President. Additionally, this paper does not address the erosion of Article III standing doctrine and the public-private rights distinction that has allowed courts to assert jurisdiction over questions submitted to the final decision of the political branches.

construe the APA's requirement that agency decisions are not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," to allow for presidential control over agency decisionmaking.<sup>16</sup>

It is first necessary to hum a few bars about the scope of this project. The narrow question I seek to answer is whether it is ever appropriate for courts to hold that the inclusion of political considerations can render an executive action arbitrary and capricious. The long and short of my answer is "no." And this is a constitutionally grounded no—because the Constitution vests the President with an executive power that ensures political control over *all* executive decisionmaking, Congress cannot override this political control through the ordinary legislative process. This means that in reviewing regulatory decisionmaking, courts may never hold that the mere fact of political influence on a decision can render that decision arbitrary and capricious. Rather, to avoid interpreting statutes to displace the President's constitutionally-vested control of Executive Branch decisionmaking, courts should frankly accept a place for presidential control in arbitrary and capricious review and avoid mandating that agencies rely upon purely "scientific" or "expert" considerations. And if the plain meaning of a statute truly does preclude presidential control over an executive decision, it is simply unconstitutional.

Part I of this paper will demonstrate how courts use the APA's arbitrary and capricious standard to separate the President from bureaucratic decisionmaking. Part II will trace the roots of "expertise forcing" to the American Progressive Era and beyond. Part III will explore the historical and constitutional origins of political control over administration.

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<sup>16</sup> 5 U.S.C. § 706.

Part IV will argue that a “place for politics”<sup>17</sup> in *State Farm* review is both constitutionally mandated and necessary for good government. Agency expertise must be a continuation of politics by other means and cannot be separated from the political without unravelling the unitary executive, threatening both good government and individual liberty.<sup>18</sup>

I. “Expertise Forcing”

“Expertise forcing” refers to court’s use of *State Farm* review to hold agency decisions arbitrary and capricious if they do not rely on agency “scientific and technocratic judgments.”<sup>19</sup> Professors Freeman and Vermeule argue that the Supreme Court, in *Massachusetts v. EPA*,<sup>20</sup> effectively held the Environmental Protection Agency’s consideration of the President’s broader political agenda to be arbitrary and capricious.<sup>21</sup> The Court deemed White House interference, political control over an agency, an arbitrary and capricious interference with expertise. This interpretation of the arbitrary and capricious standard forces the EPA Administrator to form a judgment on the sole basis of scientific fact found by experts, independent of the President’s broader strategy in administering the law.<sup>22</sup> There is a tension simmering beneath the Court’s application of *State Farm* review. The Court may find political influence in expert decisionmaking to be arbitrary and capricious as

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<sup>17</sup> Watts, *supra* note 11.

<sup>18</sup> The Federalist No. 72 (Alexander Hamilton) (Charles Kesler ed., 2003); Morrison v. Olson, 487 U.S. 654 (1988) (Scalia, J. dissenting).

<sup>19</sup> Freeman & Vermeule, *supra* note 9, at 100.

<sup>20</sup> *Massachusetts v. EPA*, 549 U.S. at 533–34.

<sup>21</sup> Freeman & Vermeule, *supra* note 9, at 84 (citing *Massachusetts v. EPA*, 549 U.S. at 533–34). The President argued that regulation of greenhouse gasses was imprudent due to his comprehensive policy to administer environmental protection legislation which included foreign affairs, technology promotion, and traditional regulation. See Brief of for the Respondent, *Commonwealth of Massachusetts v. Environmental Protection Agency*, 2006 WL 3043970 (U.S.), 45.

<sup>22</sup> *Massachusetts v. EPA*, 549 U.S. at 533.

it did in *Massachusetts v. EPA*.<sup>23</sup> Alternatively, the Court indicated in *FCC v. Fox Television Stations, Inc.* that there is a “place for politics” in *State Farm* review.<sup>24</sup> This tension results in an inconsistent treatment of politics and executive influence in agency decisionmaking.<sup>25</sup>

Professors Freeman and Vermeule, do not explicitly define what they mean by “expertise.” It is clear they do not mean the political expertise of a statesman. Rather, they, and courts that rely on the concept of agency expertise, seem to be alluding to technical or scientific expertise that must be exercised by bureaucrats insulated from politically elected or appointed officers. When this paper refers to ‘expertise,’ it means decisions made by bureaucrats in a relatively scientific or technical manner based on ‘empirical’ evidence. When this paper refers to ‘politics’ it means decisions by the President or those appointed by the President exercising judgment based on factors beyond scientific, empirical, or technical evidence—generally involving a balance of social, moral, foreign policy, and economic concerns.<sup>26</sup> In the realm of administration, presidential control is synonymous with political control. Professors Watts and Mendelson distinguish this type of political concern from ‘low’ politics or “crass political horse trading.”<sup>27</sup> This type of political influence could be considered arbitrary and capricious in their view.<sup>28</sup> It is not clear, however, if there is a

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<sup>23</sup> *Id.*

<sup>24</sup> *Fox Television Stations, Inc.*, 556 U.S. 502; *see also* Watts, *supra* note 11, at 23.

<sup>25</sup> The tension is also apparent in *Chevron*’s dueling rationales of agency expertise and executive accountability. *See, e.g.*, Note, *Justifying the Chevron Doctrine: Insights from the Rule of Lenity*, 123 Harv. L. Rev. 2043, 2044 (2010).

<sup>26</sup> For a classic defense of political judgment against technocratic rationalism see Michael Oakeshott, “Reason and the Conduct of Political Life,” *in* RATIONALISM IN POLITICS AND OTHER ESSAYS 27 (1991) (“Rationalist politics . . . are the politics of the felt need, the felt need not qualified by a genuine, concrete knowledge of the permanent interests and direction of movement of a society, but interpreted by ‘reason’ and satisfied according to the technique of an ideology.”).

<sup>27</sup> Watts, *supra* note 11, at 54.

<sup>28</sup> *Id.*; Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 Mich. L. Rev. 1127 (2010).

principled distinction between high and low politics in a democratic system or if the courts are capable of making such a distinction.<sup>29</sup> Therefore, this paper will not attempt to distinguish ‘high’ from ‘low’ politics and will approach politics in its general sense, “warts and all,” encompassing the horse trading that democratic statesmen must often engage in when pursuing noble aims.<sup>30</sup>

#### A. Technocratic *State Farm* Review

The Supreme Court’s decision in *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*<sup>31</sup> is the modern genesis of “expertise forcing.” A decision is arbitrary and capricious if the Court finds that the agency has not relied upon technical evidence obtained through the rulemaking process.<sup>32</sup> Agency decisions must be a “product of agency expertise [of the technical variety].”<sup>33</sup> Justice Rehnquist’s concise concurrence/dissent is a powerful defense of the role of politics, represented by presidential influence, in agency decisionmaking:

The agency’s changed view of the standard seems to be related to the election of a new President of a different political party. It is readily apparent that the responsible members of one administration may consider public resistance and uncertainties to be more important than do their counterparts in a previous administration. A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal

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<sup>29</sup> Electoral concerns drove many of President Lincoln’s decisions and he certainly was not above trading horses in pursuit of noble goals. Democratic statesmen from Pericles to Churchill had to maneuver political reality. See generally Eliot A. Cohen, *SUPREME COMMAND: SOLDIERS, STATESMEN, AND LEADERSHIP IN WARTIME* (2003).

<sup>30</sup> For some of the most famous examples, see generally Doris Kearns Goodwin, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN* (2006); Carl Sandburg, *ABRAHAM LINCOLN: THE WAR YEARS* (1939).

<sup>31</sup> *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

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

<sup>33</sup> *Id.*



of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.<sup>34</sup>

*State Farm* is traditionally interpreted to force agencies to justify decisions in technocratic terms.<sup>35</sup> In *Massachusetts v. EPA*, the Court held an EPA denial of a rulemaking petition to be arbitrary and capricious because the EPA based its decision on factors that were supposedly outside of the EPA's statutory mandate.<sup>36</sup> The Court rejected the EPA's "balancing of the relevant discretionary [statutory] factors" because EPA's reasons for not acting were based on non-technocratic considerations such as economic harm, foreign affairs implications, capacity under the current statutory regime, and the President's overall "comprehensive approach" to address climate change.<sup>37</sup> Thus, the EPA could only make a judgment based upon "technocratic and scientific grounds, not political ones."<sup>38</sup> The President was not allowed to pursue a comprehensive and balanced strategy but was compelled to make decisions based upon narrow scientific findings rather than political judgment.<sup>39</sup> Politics thus ceases to direct expertise and the Court separates expert

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<sup>34</sup> *Id.* at 59 (Rehnquist, J. concurring in part, dissenting in part).

<sup>35</sup> Courts "deman[d] that the agency justify its decision in neutral, expertise-laden terms to the fullest extent possible." Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2381 (2001); *see also* Watts, *supra* note 11, at 6 ("Agencies today generally try to meet their reason-giving duties under *State Farm* by couching their decisions in technocratic, statutory, or scientific language, either failing to disclose or affirmatively hiding political factors that enter into the mix.").

<sup>36</sup> *Massachusetts v. EPA*, 549 U.S. at 533.

<sup>37</sup> *Id.*; Brief of for the Respondent, *Commonwealth of Massachusetts v. Environmental Protection Agency*, 2006 WL 3043970 (U.S.), 45.

<sup>38</sup> Freeman & Vermeule, *supra* note 9, at 80. "Expertise forcing" is not limited to *State Farm* Review. Professors Freeman and Vermeule identify a variety of cases in which the Court has attempted to prevent the President from asserting authority that disregards "established professional or bureaucratic practices and procedures." *Id.* at 94 (citing *Gonzales*, 546 U.S. 243; *Hamdan*, 548 U.S. 557).

<sup>39</sup> *Massachusetts v. EPA*, 549 U.S. at 533–34.

bureaucrats from political control. The Court effectively forces the executive branch to administer the law with “tunnel vision.”<sup>40</sup>

There are many modern justifications for court compelled “expertise forcing.” Perhaps exclusively technocratic decisionmaking is compelled by the APA rather than *State Farm’s* gloss.<sup>41</sup> Beyond the APA, scholars such as Professor Schiller argue that the roots of mandatory reliance upon expertise lie in the creation of agencies to administer the New Deal programs.<sup>42</sup> Modern justifications for “expertise forcing” also include rule of law values and norms such as the need to ensure that government action is not based merely upon the “dictates of the White House.”<sup>43</sup> It seems the very concept of an independent agency entails a clear Congressional intent to separate expert rulemaking from political control.<sup>44</sup> However, this reading of the APA and organic statutes should be avoided by courts because an alternative interpretation, one that accepts presidential control, would avoid constitutional

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<sup>40</sup> Steven G. Breyer, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 11 (1993). Justice Scalia vividly highlighted the dangers of tunnel vision in the prosecutorial context: “What would normally be regarded as a technical violation (there are no rules defining such things), may in his or her small world assume the proportions of an indictable offense. What would normally be regarded as an investigation that has reached the level of pursuing such picayune matters that it should be concluded, may to him or her be an investigation that ought to go on for another year.” *Morrison v. Olson*, 487 U.S. 654, 732 (1988) (Scalia, J., dissenting).

<sup>41</sup> See, e.g., Enrique Armijo, *Politics, Rulemaking, and Judicial Review: A Response to Professor Watts*, 62 *Admin. L. Rev.* 573 (2010).

<sup>42</sup> Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 *Mich. L. Rev.* 399, 415 (2007).

<sup>43</sup> Josh Blackman, *Presidential Maladministration*, (forthcoming *Ill. L. Rev.* 2018) (“Judicial deference for the decisions of an independent agency is heightened precisely because of its insulation from the political process. The pivotal structural protection—the President cannot remove the commissioners—provides courts with the confidence that the rules the commission reaches are not merely the dictates of the White House. Presidential intrusion frustrates those norms.”).

<sup>44</sup> Peter L. Strauss, *Presidential Rulemaking*, 72 *Chi.-Kent L. Rev.* 965, 970 (1997) (*Humphrey’s* compels independent agencies to act independent of political control).

questions. These modern justifications for “expertise forcing” provide a benevolent justification for a phenomenon that has pernicious roots.<sup>45</sup>

Most recently, a public interest group has attempted to operationalize “expertise forcing” to its fullest extent. Public Citizen’s challenge of President Trump’s ‘one in two out’ executive order represents a broad attempt to separate politics from expertise.<sup>46</sup> Citing *State Farm*, Public Citizen’s complaint alleges that it is arbitrary and capricious for agencies to rely upon an executive order when deciding to regulate.<sup>47</sup> Public Citizen’s challenge<sup>48</sup> attempts to utilize the concept of “expertise forcing” to undermine the centralized regulatory review process established by Executive Order 12866 and continued by Democratic and Republican presidents alike.<sup>49</sup> Emboldened by the Court’s acceptance of “expertise forcing,” a private party is seeking to utilize the courts to fragment “the executive Power.”

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<sup>45</sup> See *infra* notes 116–26 and accompanying text; see also Oakeshott, *supra* note 26, at 28 (“[I]t was not Machiavelli himself, but his followers, who believed in the sovereignty of technique, who believed that government was nothing more than ‘public administration’ and could be learned from a book.”).

<sup>46</sup> Public Citizen, Inc. et al v. Trump, Docket No. 1:17-cv-00253 (D.D.C. Feb. 8, 2017).

<sup>47</sup> *Id.* (“In the APA, Congress directed federal agencies to undertake reasoned and evidence-based decisionmaking when exercising their delegated authority to promulgate rules. An agency must consider the factors that Congress has directed it to consider and cannot ‘rel[y] on factors which Congress has not intended it to consider.” (quoting *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43)).

<sup>48</sup> Public Citizen, White Paper, Public Citizen v. Donald J. Trump, <http://www.citizen.org/documents/PC-v-Trump-lawsuit-QA.pdf> (“No federal statute authorizes an agency to consider, when deciding whether to issue a regulation intended to address identified harms to public safety, health, or other statutory objectives, whether it can offset the costs of the new rules by repealing two or more existing rules. The agencies cannot implement the Executive Order without violating the statutes from which they derive their rulemaking authority and the Administrative Procedure Act, which prohibits regulation that is arbitrary or in violation of the law.”).

<sup>49</sup> Exec. Order 12,866, 58 FR 51735 (Sept. 30, 1993); Curtis W. Copeland, *Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs*, Congressional Research Service (2009).

B. “A Place for Politics”

Justice Rehnquist’s exhortation to political control in *State Farm* was revived in *FCC v. Fox Television Stations, Inc.*<sup>50</sup> There the Supreme Court upheld the Federal Communications Commission’s change in policy that would open television networks to enforcement actions for the airing of fleeting expletives.<sup>51</sup> The Court upheld the change in policy over Justice Breyer’s dissent, which argued that the FCC’s decision was based purely on politics and divorced from empirical data.<sup>52</sup> In *Fox Television*, the Court did not demand the type of rigorous empirical evidence that it did in *Massachusetts v. EPA*.<sup>53</sup> Justice Scalia’s plurality opinion recognizes that agency action is not necessarily arbitrary and capricious if it is not “the product of agency expertise” that is “supported by empirical data.”<sup>54</sup> The Executive sometimes makes decisions based on “propositions for which scant empirical evidence can be marshaled.”<sup>55</sup> Requiring all decisions to be based upon empirical data would be arbitrary and capricious in itself as not everything is amenable to technocratic analysis.<sup>56</sup>

*Fox Television* is surprising considering the decision in *Massachusetts v. EPA* just two years earlier, especially considering the FCC’s status as an ‘independent’ agency. While it is possible to distinguish the cases cosmetically, the underlying principles of the rationales seem

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<sup>50</sup> *Fox Television Stations, Inc.*, 556 U.S. 502; see also Watts, *supra* note 11, at 22–23 (“The Court’s divided opinion in *Fox*, accordingly, might suggest that some cracks are forming in the foundation holding up the technocratic model despite the judiciary’s longstanding pattern of demanding technocratic decisionmaking.”).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 541.

<sup>53</sup> Compare *id.* at 519–20, with *Massachusetts v. EPA*, 549 U.S. at 533–34.

<sup>54</sup> *Fox Television Stations, Inc.*, 556 U.S. at 519. Justice Scalia’s reasoning in *Fox Television* is reminiscent of an article he wrote before ascending to the bench. Then-Chairman Scalia utilized “the last occasion on which . . . I will be provided this free space to hold forth upon subjects of my concern” to discuss the intersection of agency expertise and politics. Antonin Scalia, *Rulemaking as Politics*, 34 Admin. L. Rev. v, xi (1982).

<sup>55</sup> *Fox Television Stations, Inc.*, 556 U.S. at 519.

<sup>56</sup> See *id.*

to be in deep conflict. Justice Stevens’s *Fox Television* dissent demonstrates how “expertise forcing” is intertwined with the unitary executive. Citing to legislative history, he champions the idea that “broadcast regulation ‘should be as free from political influence or arbitrary control as possible’” and that Congress thereby may prevent the Commission’s regulations from being “subject to change at the President’s will.”<sup>57</sup> For Justice Stevens, the FCC’s consideration of non-empirical matters undermines the technocratic principles animating the creation of independent agencies.<sup>58</sup>

Justice Breyer’s principal dissent also goes to great lengths to link the concept of agency independence from the President with agency independence from politics: “That law grants those in charge of independent administrative agencies broad authority to determine relevant policy. But it does not permit them to make policy choices for purely political reasons nor to rest them primarily upon unexplained policy preferences.”<sup>59</sup> Instead, the Commissioners “enjoy an independence expressly designed to insulate them, to a degree, from ‘the exercise of political oversight.’”<sup>60</sup> As a corollary, Justice Breyer categorically concludes that “[a]n agency’s policy decisions must reflect the reasoned exercise of expert judgment.”<sup>61</sup> Note how both dissents assert that politics and administration must be separated to pass muster under *State Farm*. Note also that both dissents make only passing reference to constitutional considerations on their way to separating out administrative law as a category separate from the structural separation of powers.

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<sup>57</sup> *Id.* at 540.

<sup>58</sup> *Fox Television Stations, Inc.*, 556 U.S. at 540–41 (Stevens, J. dissenting).

<sup>59</sup> *Id.* at 547 (Breyer, J., dissenting).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

Agency independence is a method to “insulate” agencies from “political oversight.”<sup>62</sup> The *Fox Television* dissenters would hold that separating an agency from the President allows the agency to act in a technocratic manner by freeing it from political control. However, as *Fox Television* demonstrates, even independent agencies cannot truly be separated from political considerations. In reality, “expertise forcing” does not separate agencies from the political, it merely separates them from democratically accountable political control. Apart from undermining democratic legitimacy, it forces agencies to act with “tunnel vision” and separates them from the balance, judgment, tradeoffs, and accountability political control entails.<sup>63</sup>

*Fox Television*<sup>64</sup> demonstrates a fundamental problem of agency independence. Central to *Humphrey’s* rationale was its argument that the type of power exercised by an independent agency is purely technocratic and Congress must be allowed to create a “body of experts” free of political influence to perform these apolitical functions. *Fox Television* directly undercuts this rationale by demonstrating that at least some independent agencies have been assigned tasks not amenable to technocratic decisionmaking and may, perhaps must, consider political factors. Thus, an agency unmoored from political accountability is able to make political decisions affecting all of society. This frank recognition of the inherently political nature of independent agency decisionmaking is yet another strike against the legitimacy of such agencies. *Humphrey’s* rationale for independent agencies has thus been

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<sup>62</sup> *Id.*

<sup>63</sup> See Breyer, *supra* note 40, at 11.

<sup>64</sup> Justice Kennedy joins the entire majority opinion, except for the subsection where Justice Scalia rebuts the dissenters’ analysis of independent agencies. Justice Kennedy would hold that agency decisions that do not “rest[] upon principles that are rational, neutral, and in accord with the agency’s proper understating of its authority” are arbitrary and capricious. *Id.* at 536 (Kennedy, J., concurring).

seriously undermined by the *Fox Television* plurality’s frank acceptance of a “place for politics” in independent agency decisionmaking.<sup>65</sup>

### C. Tension in the Lower Courts

There was tension in the lower courts over “expertise forcing” long before Professors Freeman and Vermeule coined the term. Some courts have held that presidential influence is necessary and welcome in agency actions.<sup>66</sup> Other courts have attempted to force agencies to rely on technical expertise independent of presidential direction, even when dealing with high profile social issues.<sup>67</sup> Both positions can find support in Supreme Court precedent.<sup>68</sup>

#### a. “Expertise Forcing” in the Lower Courts

Expertise forcing has been alive and well in lower courts for decades. In *Environmental Defense Fund v. Thomas*,<sup>69</sup> to take a flagrant example, the United States District Court for the District of Columbia held that the President could not utilize the White House regulatory review process to “encroac[h] upon the independence and expertise of EPA.”<sup>70</sup> The case

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<sup>65</sup> See also *PHH Corp. v. CFPB*, 839 F.3d 1, 35 n.15 (D.C. Cir. 2016) (rehearing en banc granted Feb. 16, 2017) (noting criticism of *Humphrey’s* and its tension with more recent opinions such as *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010)).

<sup>66</sup> See, e.g., *UAW v. Chao*, 361 F.3d 249 (3d Cir. 2004); *Sierra Club*, 657 F.2d 298.

<sup>67</sup> See, e.g., *Envtl. Def. Fund*, 627 F. Supp. 566; *Tummino*, 603 F. Supp. 2d 519.

<sup>68</sup> Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 Iowa L. Rev. 849, 856 (2012) (“Although lower federal courts have only had a few opportunities to address the extent to which agencies can justify their policy decisions based on political reasons, they have expressed significant differences of opinion on the matter as well.”).

<sup>69</sup> *Envtl. Def. Fund*, 627 F. Supp. 566.

<sup>70</sup> *Id.* at 570. Strikingly, instead of relying upon the statutorily deadlines imposed by the Resource Conservation and Recovery Act, the court saw the need to explicitly preclude White House review under EO 12991. Rather than declaring that *EPA* cannot miss the *RCPA*’s deadlines, it instead declares that *EPA* cannot miss the statutory deadlines if it is the result of *White House* “interference”—demonstrating that it is

demonstrates how courts can identify presidential control of his agents with impermissible political influence.<sup>71</sup> Taken to its conclusion, *Environmental Defense Fund* and the “expertise forcing” it represents may threaten the theoretical underpinnings of the regulatory review process as a whole.<sup>72</sup>

The culmination of “expertise forcing” can be found in the Eastern District of New York’s decision in *Tummino v. Torti*.<sup>73</sup> *Tummino* concerns the Department of Health and Human Service’s regulation mandating that minors must have a prescription to purchase Plan B.<sup>74</sup> It is difficult to think of a more politically charged issue. However, Judge Korman held that the “mere existence of extraneous pressure from the White House or other political quarters would render [the agency’s] decision invalid.”<sup>75</sup> Because the HHS Secretary transmitted political concerns down the chain and influenced the decision of experts, the court held that the Plan B prescription requirement could not survive arbitrary and capricious review—it did not have a legitimate technocratic basis.<sup>76</sup>

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the need to preserve the “independence and expertise” of the EPA rather than fidelity to statutory deadlines that is driving the decision.

<sup>71</sup> For another example of expertise forcing in the courts of appeal, see *Pub. Citizen Health Research Grp. v. Chao*, 314 F.3d 143, 156 (3d Cir. 2002).

<sup>72</sup> Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, *Law & Contemp. Probs.*, AUTUMN 1991, at 127, 199 (“This decision [*Environmental Defense Fund v. Thomas*] illustrates the potentially serious threat that regulatory review poses to separation of powers principles. Aside from OMB’s implementation of the Paperwork Reduction Act, the regulatory review program is exclusively the product of the executive orders rather than of legislation.”); Robert V. Percival, *Who’s in Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?*, 79 *Fordham L. Rev.* 2487, 2505 (2011) (“The court implicitly rejected the notion that OMB had directive authority over EPA.”).

<sup>73</sup> *Tummino*, 603 F. Supp. 2d 519.

<sup>74</sup> Percival, *Who’s in Charge?*, *supra* note 74, at 2521.

<sup>75</sup> *Tummino*, 603 F. Supp. 2d at 545–46.

<sup>76</sup> *Id.* at 546 (“There is also evidence that the Commissioner transmitted this pressure down the chain of command at the FDA.”).



Judge Korman found that ignoring the policy recommendations of government “scientific review staff” and a private committee of scientific experts was arbitrary and capricious.<sup>77</sup> And Judge Korman does not even attempt locate any statutory authority precluding political considerations or White House influence. Judge Korman’s rationale also tracks Justice Breyer’s dissent in *FCC v. Fox Television*<sup>78</sup> by accepting the premise that even political decisions entrusted to agencies must be made through a purely empirical process by insulated experts and that presidential control of even the most obviously political determinations renders agency decisions arbitrary and capricious. The basis of legitimacy thus becomes technocratic rationalism rather than democratic accountability.

The Ninth Circuit has actually utilized *Fox Television* as support for “expertise forcing.” In *Organized Village of Kake v. Department of Agriculture*,<sup>79</sup> that court was confronted with a challenge to the Bush Administration’s reversal of a Clinton Administration finding regarding road building in national parks. The Bush Administration found that the application of a rule that limited road construction in national parks was “unnecessary to maintain the roadless values.”<sup>80</sup> Sitting en banc, the Ninth Circuit overturned the Bush Administration finding as arbitrary and capricious because it did not offer a “reasoned explanation for disregarding previous factual findings [made by the Clinton Administration].”<sup>81</sup> The Bush Administration’s rebalancing of concerns in light of the

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<sup>77</sup> *Id.* at 545.

<sup>78</sup> *Compare id., with Fox Television Stations, Inc.*, 556 U.S. at 541 (Breyer, J. dissenting).

<sup>79</sup> *Organized Vill. of Kake v. U.S. Dep’t of Agric.*, 795 F.3d 956, 979 (9th Cir. 2015), *cert. denied sub nom.* Alaska v. *Organized Vill. of Kake*, Alaska, 136 S. Ct. 1509 (2016).

<sup>80</sup> *Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska*, 68 FR 75136 (2003).

<sup>81</sup> *Vill. of Kake*, 795 F.3d at 969.

“philosophy of the administration”<sup>82</sup> was rejected as inadequately supported by empirical data. The Ninth Circuit relied on the technocratic view of the arbitrary and capricious standard:

There was a change in presidential administrations just days after the Roadless Rule was promulgated in 2001. Elections have policy consequences. But, *State Farm* teaches that even when reversing a policy after an election, an agency may not simply discard prior factual findings without a reasoned explanation.<sup>83</sup>

The dissenters would dismiss the case as a political question but Judge Smith’s principal dissent also recognized the role of politics in administration:

Elections have legal consequences. When a political leader from one party becomes president of the United States after a president from another party has occupied the White House for the previous term, the policies of the new president will occasionally clash with, and supplant, those of the previous president, often leading to changes in rules promulgated pursuant to the Administrative Procedure Act.

...

Inevitably, when the political pendulum swings and a different party takes control of the executive branch, the cycle begins anew. There is nothing improper about the political branches of the government carrying out such changes in policy. To the contrary, such policy changes are often how successful presidential candidates implement the very campaign promises that helped secure their election. That is simply the way the modern political process works.<sup>84</sup>

The dissent recognized the Department’s change of course as a clear case of conflicting administrative policies between presidents of different political parties. To support reversal of the environmentally friendlier Clinton rule, the Bush Administration cited “serious concerns about . . . economic and social hardships that application of the rule’s prohibitions would

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<sup>82</sup> *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 59 (Rehnquist, J. concurring in part, dissenting in part).

<sup>83</sup> *Vill. of Kake*, 795 F.3d at 968.

<sup>84</sup> *Id.* at 979–80 (Smith, J., dissenting).

cause in communities throughout Southeast Alaska” as well as the “significant effect on the amount of timber available for sale.”<sup>85</sup> While the majority viewed this as an insufficient factual finding, the dissent viewed it as a typical clash of policy balancing that could not be adjudicated by the courts, much less held arbitrary and capricious.<sup>86</sup>

The *Village of Kake* majority opinion may actually point to the proper place for politics. In briefing, the federal government did not argue based on a change in the “philosophy of the administration.”<sup>87</sup> Perhaps recognizing the ubiquity of the technocratic approach to *State Farm* review,<sup>88</sup> the government attempted to justify the policy change on new empirical factual findings.<sup>89</sup> The Ninth Circuit recognized that the “Department was entitled in 2003 to give more weight to socioeconomic concerns than it had in 2001.”<sup>90</sup> The problem was that the Administration “did not simply rebalance old facts to arrive at the new policy. Rather, it made factual findings directly contrary to the [2001 Clinton Administration

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<sup>85</sup> Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska, 68 FR 75136 (2003); Slide Ridge Timber Sale Environmental Impact Statement, 66 Fed. Reg. 58710 (2003).

<sup>86</sup> *Vill. of Kake*, 795 F.3d at 983 (Smith, J., dissenting) (“[T]he USDA carefully reconsidered the facts before it, going through a full notice-and-comment process before exempting the Tongass National Forest from the Roadless Rule. The USDA was not arbitrary and capricious in making this decision.”).

<sup>87</sup> The only party to cite Justice Rehnquist’s *State Farm* reasoning was the Attorney General of Alaska in the State’s certiorari petition. *See State of Alaska, Petition for Writ of Certiorari, State of Alaska v. Organized Village of Kake*, 2015 WL 6083501 (U.S.), 2 (“Even if the relevant facts remain unchanged, a new administration may—and is often expected to—change the policies of the previous administration based on the new administration’s different value judgments and priorities . . . the en banc Ninth Circuit purported to apply *Fox* but contravened its underlying principles.”).

<sup>88</sup> Professor Watts details the effects of technocratic *State Farm* review on agencies. *See Watts, supra* note 11, at 23–29 (“Given that courts generally apply arbitrary and capricious review in a way that calls on agencies to justify their decisions in technocratic terms, it should come as no surprise that agencies today generally couch their decisions in technocratic, statutory, or scientific language, either failing to disclose or affirmatively hiding political influences that factor into the mix.”).

<sup>89</sup> Examples abound in the government’s brief attempting to cloak the political reasons for the policy change in the language of expert fact finding. *See, e.g., Appellant’s Opening Brief, Organized Vill. of Kake v. U.S. Dep’t of Agric.*, 2011 WL 10069382 (C.A.9), 21. (“USDA also presented its expert opinion that the low harvest rates of federal timber in 2000-2002 are probably cyclical aberrations from historical levels.”).

<sup>90</sup> *Vill. of Kake*, 795 F.3d at 968 (citing *Nat’l Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1038 (D.C. Cir. 2012) (“*Fox* makes clear that this kind of reevaluation is well within an agency’s discretion.”)).

finding] and expressly relied on those findings to justify the policy change.”<sup>91</sup> Thus, perhaps the Department would have received more deference if it had frankly argued that it was making a political judgment in light of the new Administration’s philosophy rather than a technical factual finding.

b. “A Place for Politics” in the Lower Courts

The D.C. Circuit’s decision in *Sierra Club v. Costle*<sup>92</sup> represents a frank acceptance of the role of presidential and political involvement in agency decisionmaking. The 1977 amendments to the Clean Air Act delegated the President the ability to balance various environmental, economic, public health, and industry interests when setting source performance standards.<sup>93</sup> While the D.C. Circuit examined the technical justifications closely, it ultimately determined that the performance standards the EPA promulgated were based primarily upon political factors rather than scientific expertise.<sup>94</sup> This would be the end of the line for Judges following the “expertise forcing” model.<sup>95</sup> However, the D.C. Circuit instead defended the President’s constitutionally mandated power to control and direct the agency rulemaking process. The D.C. Circuit locates the President’s power to “monitor the consistency of executive agency regulations with Administration policy” in Article II’s

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<sup>91</sup> *Id.*

<sup>92</sup> *Sierra Club*, 657 F.2d 298.

<sup>93</sup> Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 Wash. U.L. Rev. 141, 167 (2012).

<sup>94</sup> *Sierra Club*, 657 F.2d at 339–40; Seidenfeld, *supra* note 95, at 167.

<sup>95</sup> See, e.g., *Massachusetts v. EPA*, 549 U.S. at 533–34; *Fox Television Stations, Inc.*, 556 U.S. at 541 (Breyer, J., dissenting); *Tummino*, 603 F. Supp. 2d at 545.

creation of a unitary executive.<sup>96</sup> The Court recognized two primary functional benefits of the unitary executive in the agency rulemaking process. First, accountability is “fixed on a single source” that the people can (and do)<sup>97</sup> hold accountable for regulatory decisionmaking.<sup>98</sup> Second, the decision to pursue regulatory activity requires balancing varied and changing circumstances and factors.<sup>99</sup> Costs and benefits must be weighed to produce effective rules. Agencies often have “tunnel vision,” which leads to bad policy:

Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive. Single mission agencies do not always have the answers to complex regulatory problems. An overworked administrator exposed on a 24-hour basis to a dedicated but zealous staff needs to know the arguments and ideas of policymakers in other agencies as well as in the White House.<sup>100</sup>

Arbitrary and capricious review does not allow courts to “convert informal rulemaking into a rarified technocratic process, unaffected by political considerations or the presence of Presidential power.”<sup>101</sup>

*UAW v. Chao*<sup>102</sup> represents another instance where the “expertise forcing” of *Massachusetts v. EPA* would lead to a different outcome than the “place for politics” hinted at

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<sup>96</sup> *Sierra Club*, 657 F.2d at 405 (citing U.S. CONST. art. II, § 1; *United States v. Nixon*, 418 U.S. 683, 706 (1974); *Myers v. United States*, 272 U.S. 52 (1926)).

<sup>97</sup> President’s Comm. on Admin. Mgmt., *Administrative Management in the Government of the United States* (1937) (hereinafter “Brownlow Committee”).

<sup>98</sup> *Sierra Club*, 657 F.2d at 405–06 (citing *The Federalist* No. 70 (Alexander Hamilton)).

<sup>99</sup> *Id.* at 406.

<sup>100</sup> *Id.*; see also Breyer, *supra* note 40, at 11 (detailing the problems of overzealous administrators and “the last 10 percent” problem—“Essentially the problem is that regulators do not know when to stop”); see also Eric J. Gouvin, *A Square Peg in a Vicious Circle: Stephen Breyer’s Optimistic Prescription for the Regulatory Mess*, 32 *Harv. J. Legis.* 473, 475 (1995).

<sup>101</sup> *Sierra Club*, 657 F.2d at 408. *Sierra Club* recognizes an important restraint on the political control principle where individual private rights are concerned. *Id.* at 407. For an examination of *Sierra Club*, see Richard J. Pierce, Jr., *Presidential Control Is Better Than the Alternatives*, 88 *Tex. L. Rev. See Also* 113, 123 (2010).

<sup>102</sup> *UAW*, 361 F.3d 249.

in *FCC v. Fox Television*.<sup>103</sup> *UAW* involved a decision by OSHA regarding the regulation of occupational exposure to metalworking fluids.<sup>104</sup> Under the Clinton Administration, in response to a rulemaking petition from UAW, OSHA designated the metalworking fluids as a high regulatory priority and created an advisory committee, which recommended that OSHA promulgate a rule limiting exposure to metalworking fluids.<sup>105</sup> Still under the Clinton administration, OSHA began work on promulgating a regulation.<sup>106</sup> By 2001, a standard was not yet issued and the Bush Administration denied UAW's rulemaking petition.<sup>107</sup> OSHA justified the seeming change in priorities as within the discretion granted by Congress and the need to balance various regulatory priorities.<sup>108</sup> UAW argued that OSHA's regulatory policies were "arbitrary because they were not selected on a rational, good faith basis . . . the result of an objective, deliberate, thoughtful, and comprehensive effort to rationalize its regulatory priorities."<sup>109</sup>

The Third Circuit's *UAW* opinion comes close to the frank acceptance of politics evident in *Sierra Club v. Costle*.<sup>110</sup> The majority does not explicitly reference the change in administration. It focused instead on the need for the agency to weigh various regulatory

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<sup>103</sup> *Id.*; see also Watts, *supra* note 11, at 20–21.

<sup>104</sup> Watts, *supra* note 11.

<sup>105</sup> *UAW*, 361 F.3d at 251–53.

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

<sup>107</sup> *Id.*; see also Watts, *supra* note 11, at 20–21.

<sup>108</sup> Brief for the Secretary of Labor, *UAW v. Chao*, 2003 WL 25295671 (C.A.3), 31 (Pub. Citizen Health Research Grp. v. Brock, 823 F.2d 626, 627 (D.C. Cir. 1987) (“[A]n agency’s limited resources may make impossible the rapid deployment of regulation on several fronts at once.”); *In re United Mine Workers of Am. Int’l Union*, 190 F.3d 545, 552 (D.C. Cir. 1999) (“To single out diesel exhaust gases and designate them for expedited treatment might well delay rulemaking for other contaminants that are at least as dangerous to the health of the nation’s miners.”).

<sup>109</sup> Brief for the Petitioners, *UAW v. Chao*, 2003 WL 25287583 (C.A.3), 39.

<sup>110</sup> *UAW*, 361 F.3d 249; see also *Pub. Citizen Health Research Grp. v. Brock*, 823 F.2d 626, 627 (D.C. Cir. 1987).

priorities, taking into account not only empirical scientific data but also resource allocation and expense.<sup>111</sup> It held that OSHA’s weighing of “scientific evidence” against “other regulatory priorities” was not arbitrary and capricious.<sup>112</sup>

Judge Pollak’s concurrence in *UAW v. Chao* is a full embrace of politics in agency decisionmaking. The concurrence explicitly adopts Justice Rehnquist’s concurrence/dissent in *State Farm* to argue that a change in administrations is a reasonable basis for a change in regulatory policy:

[W]hat is at issue in this case is a change in regulatory policy coincident with a change in administration. Counsel for respondents said as much on oral argument: “The metalworking fluids . . . were listed as a high priority only following the priority-setting process of a prior administration . . . and those priorities are different than the current ones.” There is nothing obscure, and nothing suspect, about this phenomenon. That’s one of the important things that elections are about.<sup>113</sup>

The debate over the relationship between politics and expertise is not new and not confined to law. The next two sections will attempt to demonstrate that this tension is rooted in fundamental questions about the nature of the American regime.

#### D. Expertise Forcing in the Trump Administration

Over the course of the Trump Administration, there has been a struggle between the presidency and judiciary. It is beyond the scope of this paper to discuss the myriad tools the President employed to ensure political accountability in the Executive Branch. Or the novel ways in which the judiciary has sought to assert primacy in policy making, including lax

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<sup>111</sup> *Id.* at 255–56.

<sup>112</sup> *Id.* at 255.

<sup>113</sup> *Id.* at 256–57 (Pollak, J. concurring) (citing *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 59 (Rehnquist, J. concurring in part, dissenting in part)).

enforcement of constitutionally-mandated standing requirements, erosion of the constitutionally-grounded principle that agency nonenforcement decisions cannot be challenged, and unprecedented use of mandatory, structural, and universal injunctions. What is clear is that the courts have once more sought to displace political primacy over quintessentially political issues ranging from immigration to foreign affairs.<sup>114</sup>

This struggle largely came to a head in the 2018 Census Case, *Department of Commerce v. New York*. The lower court opinion is a paean to expertise and rebuke of political control of the bureaucracy. It both chides the Administration for relying on substantive political concerns and for ignoring the ‘best expert advice’ of the bureaucracy. The court continuously faults “Secretary Ross’s departures from the Census Bureau’s well-established standards and practices.” *New York v. United States Dep’t of Commerce*, 351 F. Supp. 3d 502, 658 (S.D.N.Y. 2019). Indeed, the court would even require political branches to meet with “experts” as part of its promulgation. *Id.* at 659 (“CVAP data and reached out repeatedly to DOJ to set up a meeting between their respective experts. But DOJ rebuffed those requests.”). Indeed, so egregious was the Secretary’s failure to heed his (supposedly) inferior experts that his decision could only have been the result of pretext. *Id.* at 663 (“[A] decision-maker who was fairly and honestly considering the evidence before him would have been more likely to heed the legal obstacles in his path, including Sections 6(c) and 141(f), OMB’s Statistical Policy Directives, and the Census Bureau’s own pretesting requirements than Ross

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<sup>114</sup> See, e.g., *NAACP Legal Defense & Education Fund v. Barr*, No. 20-1132, 2020 U.S. Dist. LEXIS 203703 (D.D.C. Nov. 2, 2020) (police reform); *Tiktok Inc. v. Trump*, No. 20-658, 2020 U.S. Dist. LEXIS 177250 (D.D.C. Sep. 27, 2020), *appeal filed* (D.C. Cir. 20-5302) (foreign affairs); *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018) (sanctuary cities). Another tool that has come into vogue in the Trump era has been the expansion of the APA and relaxation of standing barriers to allow an unprecedented array of formerly nonjusticiable questions to come into court.



was; more likely to hesitate in the face of near uniform opposition to the request from stakeholders (notwithstanding an explicit effort to drum up support from outside groups); more likely to hit the pause button when experts at the Census Bureau warned that adding the question would increase the burden on respondents, harm the accuracy of the census count, and result in enormous extra costs, without providing as accurate and complete CVAP data as alternatives; and more likely to engage in, and encourage, dialogue with DOJ about whether there were other, less harmful ways to satisfy its purported needs. Secretary Ross's insistence on adding the question despite all of these obstacles and objections is strong evidence that he was unwilling or unable to rationally consider counterarguments to his plan once he had secured the request he felt he needed.”).

In the face of this extraordinary holding, the Administration petitioned the Court directly. The Court's holding can be summed up as a rhetorical victory, but practical disaster, for supporters of presidential control. On the positive side, the Court emphatically rejected the district court's expertise forcing and reaffirmed the President and his political appointees' primacy in Executive Branch policymaking:

Relatedly, a court may not set aside an agency's policymaking decision solely because it might have been influenced by political considerations or prompted by an Administration's priorities. Agency policymaking is not a “rarified technocratic process, unaffected by political considerations or the presence of Presidential power.” *Sierra Club v. Costle*, 657 F.2d 298, 408 (CA DC 1981). Such decisions are routinely informed by unstated considerations of politics, the legislative process, public relations, interest group relations, foreign relations, and national security concerns (among others).<sup>115</sup>

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<sup>115</sup> *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573 (2019).

The Court also explicitly rejects Justice Breyer’s attempt to “subordinat[e] the Secretary’s policymaking discretion to the Bureau’s technocratic expertise.”<sup>116</sup>

If the Court were to stop here, this *Dep’t of Commerce v. New York* would be the greatest victory for supporters of presidential control since *Myers*. But after exhausting all traditional legal and administrative law doctrines, the Court relies a new one to vacate the census question. Although it is typically forbidden for courts to “inquir[e] into ‘the mental processes of administrative decisionmakers,’” the Court holds it acceptable to do so “[o]n a ‘strong showing of bad faith or improper behavior.’”<sup>117</sup> This exception is so strong that it can even “justify extra-record discovery,” abrogating another longstanding (and constitutionally-grounded) administrative law doctrine.<sup>118</sup> Because the explanation given by the Administration and the Secretary’s rationale were not consistent, in the Court’s opinion, the census decision could not survive arbitrary and capricious review, even though the Court declined to hold it “substantively invalid.”<sup>119</sup>

It is tempting for supporters of presidential control to take the majority’s affirmation of political control as a win and chalk up the ultimate loss in this case to the “unusual circumstances” of the case. Perhaps in the future, political actors can comply with the rule of *Department of Commerce* simply by fully and frankly disclosing the political reasons for its

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<sup>116</sup> *Id.* at 2571. It is now clear that Justice Breyer’s statement in *Fox Television* that agency decisions can only survive arbitrary and capricious review if it reflects “expert judgment” rather than political balancing is not an accurate reflection of the Court’s contemporary precedent. It also goes a long way to adopting Justice Scalia’s *Massachusetts v. EPA* dissent as the majority position of the Court. *Cf. Massachusetts*, 549 U.S. at 552 (Scalia, J., dissenting) (“The reasons EPA gave are surely considerations executive agencies regularly take into account (and ought to take into account) when deciding whether to consider entering a new field: the impact such entry would have on other Executive Branch programs and on foreign policy.”).

<sup>117</sup> *Dep’t of Commerce*, 139 S. Ct. at 2573–74.

<sup>118</sup> *Id.* at 2574.

<sup>119</sup> *Id.* at 2576.

actions.<sup>120</sup> But this view ignores the reality that the reason the Executive Branch has to resort to technical explanations for rules contained in hundred page Federal Register notices and minimize the impact of political considerations is precisely because the “value” judgments inherent in good policymaking are often mowed down by courts applying the expertise forcing view of arbitrary and capricious review. The courts have effectively played a shell game with the Executive Branch, which can either disclose political reasons and its action will be held arbitrary and capricious for failure to rely on agency expertise. Or it can rely on exclusively ‘expert’ reasons and be vacated for pretext and open the Executive Branch to the probing view of judge-run civil discovery under Rule 26’s pro-disclosure standards. Not only does this undermine the independence of the Executive Branch—particularly as more and more formerly nonjusticiable questions are filtered through APA review—it is a one way ratchet to technocracy.

Justice Thomas’s dissent immediately recognizes that the Court’s decision has the potential to fundamentally transform administrative law:

The Court’s holding reflects an unprecedented departure from our deferential review of discretionary agency decisions. And, if taken seriously as a rule of decision, this holding would transform administrative law. It is not difficult for political opponents of executive actions to generate controversy with accusations of pretext, deceit, and illicit motives. Significant policy decisions are regularly criticized as products of partisan influence, interest-group pressure, corruption, and animus. Crediting these accusations on evidence as thin as the evidence here could lead judicial review of administrative proceedings to devolve into an endless morass of discovery and policy disputes not contemplated by the Administrative Procedure Act (APA).<sup>121</sup>

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<sup>120</sup> *Id.* (“If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case.”).

<sup>121</sup> *Id.* (Thomas, J., concurring in part and dissenting in part); *see also id.* at 2583 (“Now that the Court has opened up this avenue of attack, opponents of executive actions have strong incentives to craft narratives that would derail them. Moreover, even if the effort to invalidate the action is ultimately unsuccessful, the Court’s

Reflecting long experience in the practicalities of Executive Branch decisionmaking, Justice Thomas notes the dangers of opening the complex interagency review gauntlet, through which all major regulatory actions are funneled, to the prying eyes of courts and litigants. All that it takes is a plausible “narrative” in a civil complaint to open the Executive Branch’s most sensitive decisionmaking to judicial and private examination. And there are no FOIA exceptions for the Executive to hide behind.<sup>122</sup> As the dissent points out, the Court has created a serious constitutional problem by “enable[ing] judicial interference with the enforcement of the law.”<sup>123</sup>

After erecting the pretext avenue, the Court’s invalidation of the Administration’s DACA rescission revives the particularly strong form of hard look review represented by *State Farm* and *Massachusetts*. Although the Court feints at the Executive’s discretion,<sup>124</sup> it ultimately probes deeply into its rationale and vacates the rescission for failing to “consider” what the Court implies are the compelling policy justifications of the previous administration.<sup>125</sup> Even worse, the Administration attempted to comply with *Department of Commerce*’s exhortation to fully disclose reasons, but the Court entirely refuses to consider its attempt to frankly provide its reasons.

All is not lost at the Court, however, for supporters of presidential control. The Trump Administration scored a notable victory in *Little Sisters of the Poor v. Pennsylvania*.

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decision enables partisans to use the courts to harangue executive officers through depositions, discovery, delay, and distraction.”)

<sup>122</sup> *Id.* at 2583 (Thomas, J., concurring in part and dissenting in part).

<sup>123</sup> *Id.* at 2584 (Thomas, J., concurring in part and dissenting in part).

<sup>124</sup> *Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1915, 207 L. Ed. 2d 353 (2020) (“Agencies are not compelled to explore “every alternative device and thought conceivable by the mind of man.”).

<sup>125</sup> *Id.*

Although that case does not directly implicate expertise forcing, it does push back on an old tool that has been revived by courts to invalidate many of the Trump Administration’s key regulatory priorities—the selective application of heightened procedural requirements akin to the practice in the D.C. Circuit so emphatically rejected by the Court in *Vermont Yankee*.

Below, the Third Circuit attempted to foist an “open-mindedness” requirement upon agency decisionmaking.<sup>126</sup> The court declared that the Trump Administration failed to approach the issue of religious exceptions to the Contraceptive Mandate with a “flexible and open minded attitude,” its action was arbitrary and capricious.<sup>127</sup> Invoking *Vermont Yankee*, the Court emphatically rebuked this new “open-mindedness” requirement.<sup>128</sup>

The Court sowed the wind in the Trump Administration, it remains to be seen whether a future administration will reap the whirlwind—or if arbitrary and capricious review will return to its more deferential form.<sup>129</sup>

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The Court now seems divided into three competing conceptions of arbitrary and capricious review. First, Justices Thomas, Alito, Gorsuch, and Kavanaugh acknowledge the legitimacy presidential control and focus on the APA’s and organic statute’s textual limits on agency decisionmaking rather than substantive disagreements with policy choices. Second,

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<sup>126</sup> *Pennsylvania v. President United States*, 930 F.3d 543, 568 (3d Cir. 2019).

<sup>127</sup> *Id.*

<sup>128</sup> *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2385, 207 L. Ed. 2d 819 (2020)

<sup>129</sup> *Dep’t of Commerce*, 139 S. Ct. at 2583 (Thomas, J., concurring in part and dissenting in part) (“Opponents of future executive actions can be expected to make full use of the Court’s new approach. ... Under the malleable standard applied by the Court today, a serious case could be made that the Open Internet Order should have been invalidated as ‘pretextual,’ regardless of whether any ‘particular step in the process stands out as inappropriate or defective.’ It is enough, according to the Court, that a judge believes that the ultimate rationale ‘seems to have been contrived’ when the evidence is considered ‘as a whole.’”).

Justices Breyer, Sotomayor, and Kagan adhere to expertise forcing. Finally, the Chief Justice—although rhetorically committed to the unitary executive—invokes heightened procedural requirements in a manner that often achieves the results of expertise forcing. The remainder of this paper will describe that this conflict has deep roots and is not a mere squabble over technical administrative law requirements. Instead, expertise forcing conflicts with the original understanding of the constitutional separation of powers and with the Founders’ understanding of human nature and statesmanship.

## II. The Origins of “Expertise Forcing”

“Expertise forcing” is rooted in a technocratic conception of government.

Technocracy refers to government by experts insulated from democratic pressures utilizing scientific methods and empirical data to administer the government. Technocracy attempts to utilize the scientific method to solve social issues and structure the regime:

[T]he newly emerging industrial state and the corporate organization of production could be directed by man’s rationality to bring about a social reformation where poverty, injustice, superstition, and class conflict would be abolished.<sup>130</sup>

Administration must be kept separate from politics because generalist politicians cannot be trusted to address social ills that should be solved through a vigorous empirical process.<sup>131</sup>

Technocracy came to dominate American academia in the Progressive Era and eventually

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<sup>130</sup> William E. Akin, *TECHNOCRACY AND THE AMERICAN DREAM: THE TECHNOCRAT MOVEMENT, 1900-1941*, at ix-xi (1977).

<sup>131</sup> Daniel A. Crane, *Technocracy and Antitrust*, 86 *Tex. L. Rev.* 1159, 1162 (2008).

was reflected in American governance and law.<sup>132</sup> The fundamental premise of “expertise forcing” is the Progressive idea that the empirical methods utilized to study the physical world can be applied to study society accurately and proscribe policy for the common good.<sup>133</sup> This view has deep roots in Western political thought and is appealing on many levels. It serves to remove arbitrariness from governance. It attempts to produce the greatest material good for the greatest number. Perhaps most importantly, technocratic rationalism provides the “appearance of certainty.”<sup>134</sup> The scientific method has allowed humanity to go a long way to conquering the physical world—it could surely allow humanity to control itself.<sup>135</sup> This section will analyze the Progressive Era invasion of Continental ideas about technocracy and trace its development to the modern constitutional phenomenon of “expertise forcing.”

#### A. Continental Foundations

The idea of a technically proficient bureaucracy relying upon the scientific method dates at least to the Eighteenth Century reforms of Frederick the Great of Prussia and

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<sup>132</sup> The idea of impartial experts administering the government is pervasive. *See, e.g., id.* at 1162 (“Over time, ‘technocracy’ became associated not so much with how much governmental regulation there should be but with whom governmental powers should lie. In its contemporary sense, technocracy refers to the insulation of a governmental function from popular political pressures and its administration by experts rather than generalists.”).

<sup>133</sup> *See generally* Oakeshott, *supra* note 26, at 5–42; *see also id.* at 24 (rationalists hold that the only “genuine knowledge is technical knowledge”); *see also* Leo Strauss, “Introduction to Political Philosophy” (1965) (“[T]he stage in which science is predominant, there must be rule of the men of science as a kind of spiritual power belonging to the modern world.”).

<sup>134</sup> *Id.* at 15.

<sup>135</sup> *But see* Winston Churchill, “Fifty Years Hence” (1931) (“No material progress, even though it takes shapes we cannot now conceive, or however it may expand the faculties of man, can bring comfort to his soul.”); *see also* Leo Strauss, “Introduction to Political Philosophy” (1965) (“The questions which concern men most deeply, the most important questions, are beyond the competence of science.”).

Joseph II of Austria.<sup>136</sup> The German bureaucracy started as a response to absolutism and was promoted by liberal reformers.<sup>137</sup> A faceless, efficient bureaucracy grounded in technical concerns can serve as a check on the arbitrary will of an absolute, unaccountable monarch. Rather than an ideal, it was a response to a greater evil. What began as a means to lessen the effects of absolutist Continental regimes, became idealized by American Progressives who believed they could tame bureaucracy's hard edges and adapt it to American conditions.<sup>138</sup> The protections against arbitrariness in the Constitution could be supplanted by the checks against arbitrariness in the Continental bureaucratic model. However, the Continental model started from a weaker bargaining position. It was not a compact amongst free and equal citizens, but a subtle supplication to preserve some level of regularity under an absolute monarchy.<sup>139</sup> Individual rights under the German bureaucratic model are not absolute as they are supposed to be in the Anglo-American constitutional system.<sup>140</sup> Under the Continental model, rights are granted and revoked according to the needs of the State. This rationalist approach eventually traversed the Channel and then the Atlantic.

Continental progressive ideals of governance were popularized in the United States around the turn of the century by prominent academics like Frank Johnson Goodnow,

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<sup>136</sup> Michael W. Spicer, *Public Administration Under 'Enlightened Despotism' in Prussia: An Examination of Frederick the Great's Administrative Practice*, 20 *Admin. Theory Praxis* 23 (1998); P.G.M. Dickson, *Joseph II's Hungarian Land Survey*, 106 *Eng. Hist. Rev.* 611 (1991). The roots can be traced much deeper. Aristotle castigates a pre-Socratic philosopher, Hippodamus, for attempting to apply methods of rationalist urban planning and natural philosophy to politics. Aristotle, *Politics*. 2.8 (Carnes Lord, ed. 2013).

<sup>137</sup> Philip Hamburger, IS ADMINISTRATIVE LAW UNLAWFUL? 449–50 (2014).

<sup>138</sup> Or perhaps sought to adopt Americans to bureaucratic conditions. See Woodrow Wilson, "What is Progress?" (1912) (seeking to transform free and independent citizens into a "perfected, co-ordinated beehive"); see also Wilson, *The Study of Administration*.

<sup>139</sup> Hamburger, *supra* note 123.

<sup>140</sup> See, e.g., Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice" (1906) (balancing individual rights with efficiency).



Charles Beard, and Herbert Croly. Understandably no early Progressive captures the imagination like Woodrow Wilson. His earlier ideas remain particularly influential due to his later station and are also representative of the broader Progressive intellectual movement. Wilson made the hubristic declaration common amongst Progressive intellectuals that the “science” of administration was discovered only in the late Nineteenth Century: “No one wrote systematically of administration as a branch of the science of government until the present century had passed its first youth and had begun to put forth its characteristic flower of systematic knowledge.”<sup>141</sup> Wilson was too well-read to believe that no one had ever before attempted to systematically study the administration of government. He would have well known that such studies date to at least Aristotle, were embodied in famous parliamentary speeches and memoirs, and were particularly in vogue in the debates surrounding the nature of government during the late Eighteenth Century.<sup>142</sup>

What Wilson really means is that no one attempted to separate politics out of administration and treat the latter as a science independent of ‘crude’ politics:

The field of administration is a field of business. It is removed from the hurry and strife of politics; it at most points stands apart even from the debatable ground of constitutional study. It is a part of political life only as the methods of the counting-house are a part of the life of society; only as machinery is part of the manufactured product.<sup>143</sup>

Indeed, this technocracy was only raised “above the dull level of mere technical detail” because it was the means of advancing “the permanent truths of political progress.”<sup>144</sup> But

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<sup>141</sup> Wilson, the Study of Administration.

<sup>142</sup> See, e.g., Jacques Necker, *On the Executive Power in Great States* (Liberty Fund 2020) (1792).

<sup>143</sup> Wilson, the Study of Administration.

<sup>144</sup> Wilson, the Study of Administration.

lest one be deluded into thinking politics—even grand “permanent truths”—has any role to play in the day-to-day operation, Wilson rejoins:

Let me expand a little what I have said of the province of administration. Most important to be observed is the truth already so much and so fortunately insisted upon by our civil-service reformers; namely, that administration lies outside the proper sphere of politics. Administrative questions are not political questions. Although politics sets the tasks for administration, it should not be suffered to manipulate its offices.

This is distinction of high authority; eminent German writers insist upon it as of course.<sup>145</sup>

And finally, the key maneuver—Wilson frankly recognizes that from the separation of administration and politics must follow the separation of administration from the Constitution:

There is another distinction which must be worked into all our conclusions, which, though but another side of that between administration and politics, is not quite so easy to keep sight of: I mean the distinction between constitutional and administrative questions, between those governmental adjustments which are essential to constitutional principle and those which are merely instrumental to the possibly changing purposes of a wisely adapting convenience.<sup>146</sup>

As expertise forcing demonstrates,<sup>147</sup> it is the artificial cordoning off of administrative law questions from the Constitution that is key to the modern Administrative State. Wilson was willing to frankly recognize that political and constitutional control were synonymous enemies of expert administration.

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<sup>145</sup> Wilson, *the Study of Administration*.

<sup>146</sup> Wilson, *the Study of Administration*.

<sup>147</sup> Look again to the *Fox Television* dissents—Justice Stevens and Justice Breyer rely on this precise mode of reasoning to avoid confronting the structural constitutional questions that arise from viewing administrative law in a vacuum.

It is this artificial divorce of administrative law questions from the political control mandated by the Constitution that has allowed the distortions of the modern administrative state to flourish—a separate field of administrative law did not emerge until the turn of the Twentieth Century. Before that the study of administration was what it should be, an application of constitutional law and political prudence. It is only through the frank rejection of the core Progressive belief in separation of politics from administration that friends of constitutional governance can hope to regain the initiative.<sup>148</sup>

#### B. Expertise From *Humphrey's Executor* to *State Farm* and Beyond

Cases like *Humphrey's* and *State Farm* operationalized the Progressive Era belief in technocratic efficiency to the exclusion of a democratically accountable President. Reasoned decisionmaking about a particular issue may be infected by broader political concerns. The Court facilitated the rise of the technocratic state in three primary ways. First, the Court allowed Congress to separate administrative agencies from effective presidential control.<sup>149</sup> Second, the Court's refusal to enforce the Nondelegation Doctrine allowed Congress to delegate wide discretion to these unaccountable agencies.<sup>150</sup> Third, the Court allowed for the

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<sup>148</sup> For a critique of the artificial cordoning off of administrative law questions from the Constitution see James R. Conde, Michael S. Greve, Yakus *and the Administrative State*, 42 Harv. J.L. & Pub. Pol'y 807, 813 (2019) (“For those who entertain apprehensions about an ‘unlawful’ administrative state, [*Yakus*] suggests the same lesson in reverse: there may be little mileage in agitating for the revision of discrete doctrines unless one can somehow re-connect the constitutional pieces.”).

<sup>149</sup> *Humphrey's Ex'r*, 295 U.S. 602.

<sup>150</sup> See, e.g., *Am. Power & Light Co. v. SEC*, 329 U.S. 90 (1946). For a view on how the Nondelegation Doctrine and Unitary Executive intersect, see Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. Pa. J. Const. L. 251, 273 (2010). For the interplay between delegation and Congress as an institution, see Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. Rev. 1463 (2015).

expansion of the Commerce Clause beyond ascertainable limitation.<sup>151</sup> The result: an administrative state with immense discretion and scope that is not controlled by the politically accountable officer the Constitution entrusts with administering the law.<sup>152</sup> “Expertise forcing” is the next logical step in this progression as it seeks to shut out presidential control from even purely executive agencies such as the EPA. While the delegation and commerce pillars of the administrative state must be addressed as well, that is beyond the scope of this paper.<sup>153</sup> This subsection will focus on the executive branch part of the equation by tracing the continuity between *Humphrey’s Executor* and modern “expertise forcing” decisions such as *State Farm* and *Massachusetts v. EPA*.

*Humphrey’s* is in many ways the root of “expertise forcing” in the Court’s precedent.

By allowing Congress to insulate members of the Federal Trade Commission from

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<sup>151</sup> *Wickard v. Filburn*, 317 U.S. 111 (1942).

<sup>152</sup> Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1232 (1994); John Yoo, “Conclusion” in *LIBERTY’S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE* (Dean Reuter & John Yoo, eds. 2016).

<sup>153</sup> Given the Commerce Clause and delegation precedent supporting the administrative state, “expertise forcing” may be a “compensating institution,” “a form of constitutional damage control” because it creates an internal separation of powers within the executive branch. Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward A Constitutional Theory of the Second Best*, 80 Cornell L. Rev. 1, 2 (1994). If the executive wields all three powers of government, perhaps it is better for courts and Congress to create a functional separation of power to mitigate the dangers of absolutism. Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. Chi. L. Rev. 123, 128 (1994) (“[I]f we accept sweeping delegations of lawmaking power to the President, then to capture accurately the framers’ principles—principles that deserve our continuing adherence—we must also accept some (though not all) congressional efforts at regulating presidential lawmaking.”). However, as Judge Ginsburg and Professor Menashi demonstrate, fragmenting the executive encourages further delegation and removes the Constitution’s key check on delegation by allowing Congress to vest the power in entities not subject to the control of its institutional rival. *See* Ginsburg & Menashi, *supra* note 128, at 252 (“The idea seems ominous today because so many functions have been allocated to the now-fragmented executive branch that reuniting it under presidential leadership seems to the present generation both to enhance presidential authority unimaginably and to create an unmanageable administrative structure. We suggest the ‘unitary executive’ has fallen into ill repute and apparent obsolescence not because of an executive bent upon autocracy but because of a legislature freed from the constraints of the separation of powers.”).

presidential removal, it shuts out any meaningful role for democratic pressures.<sup>154</sup>

Presidential control would undermine the FTC's ability to act on the basis of expertise alone.<sup>155</sup> At core, *Humphrey's* is an appeal to necessity and efficiency.<sup>156</sup> The need for expert administrators outweighed the Constitution's creation of a unitary executive with removal power over executive officers<sup>157</sup> and allowed Congress,

to create a body of experts who shall gain experience by length of service; a body which shall be independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government.<sup>158</sup>

*Humphrey's* thus represents a major step toward technocratic governance and demonstrates the growing Progressive assumption that the rationalist scientific method is the only legitimate tool of decisionmaking.<sup>159</sup> However, separation from presidential removal did not remove democratic influence from non-independent agencies.<sup>160</sup> That task would be left to “expertise forcing” through the arbitrary and capricious standard.<sup>161</sup>

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<sup>154</sup> *Humphrey's Ex'r*, 295 U.S. at 626.

<sup>155</sup> *Id.*

<sup>156</sup> Hamburger, *supra* note 123, at 454–56.

<sup>157</sup> The unimpeachable reasoning of Chief Justice Taft's opinion in *Myers v. United States* forced Justice Sutherland to create an artificial distinction between pure executive officers and officers exercising quasi-legislative, quasi-judicial powers. By maneuvering around the removal power, Justice Sutherland candidly admits that it is constitutionally proper for Congress to delegate legislative and judicial power to bodies which are not Congress or Article III courts. *Compare Myers*, 272 U.S. 52, *with Humphrey's Ex'r*, 295 U.S. 602.

<sup>158</sup> *Humphrey's Ex'r*, 295 U.S. at 626.

<sup>159</sup> Daniel A. Crane, *Debunking Humphrey's Executor*, 83 *Geo. Wash. L. Rev.* 1835, 1838 (2015).

<sup>160</sup> Calabresi & Yoo, *supra* note 14, at 88.

<sup>161</sup> It is not a coincidence that this massive shift in power from the political branches occurred as the franchise was expanded. Progressives recognized that they could not have their cake and eat it too, they could not have a government both technocratic and popular. Hamburger, *supra* note 123, at 502–05 (“[The progressive knowledge class] tended to favor popular participation in voting but they also tended to support removal of much legislative power from legislatures. The almost paradoxical result has been to agonize over voting rights while blithely shifting legislative power to unelected administrators.”).

Post-*Humphrey*'s presidents sought to reassert political control over a bureaucracy that they would naturally be held accountable for by the public.<sup>162</sup> In the Brownlow Report, President Franklin Roosevelt's administration recognized that decisions like *Humphrey*'s authorized "a headless fourth branch of the Government, not contemplated by the Constitution, and not responsible administratively either to the President, to the Congress, or to the Courts."<sup>163</sup> President Roosevelt sowed the wind with the creation of a massive federal administrative apparatus but was not prepared to reap the inevitable whirlwind of reduced presidential control. Congress simply could not countenance the constitutionally mandated result of their unconstitutional expansion and delegation of federal power—a massive new federal apparatus administered by a unitary executive. President Roosevelt's attempts to gain control of the new administrative state were thus defeated in Congress.<sup>164</sup> Although Roosevelt ultimately failed to assert formal political control over the sprawling administrative machinery of the New Deal, his successful lobbying for the creation of the Executive Office of the President laid the groundwork for successive Presidents.<sup>165</sup>

Presidents Johnson and Nixon utilized various means through the Office of Management and Budget to coordinate and control the surging administrative state epitomized by the Great Society programs and the Environmental Protection Agency. To bring some modicum of control, President Reagan created the Office of Information and

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<sup>162</sup> Brownlow Committee, *supra* note 99; The Federalist No. 70 (Alexander Hamilton).

<sup>163</sup> Brownlow Committee, *supra* note 99.

<sup>164</sup> See Ginsburg & Menashi, *supra* note 128, at 268 ("Roosevelt may not have opposed the expansion of executive authority, in the form of delegations from the Congress, but he insisted that all executive activity should remain subject to presidential direction. The Congress, of course, did not agree to decolonize the executive.").

<sup>165</sup> Peri E. Arnold, MAKING THE MANAGERIAL PRESIDENCY: COMPREHENSIVE REORGANIZATION PLANNING 1905-1996 81-117 (1986).

Regulatory Affairs (OIRA) to weigh the costs and benefits of significant regulations.<sup>166</sup>

OIRA quickly became a powerful tool to ensure presidential control over administration and coherent regulatory policy. Although it has become impossible for presidents to control every executive decision as Washington did, EO 12,866 and OIRA at least keeps decisions regarding significant regulatory actions within the White House.<sup>167</sup>

This presidential control model was undermined by the Court’s decision in *State Farm*. *State Farm* review is grounded in a “belief in the power of technical expertise and of law to help generate solutions to regulatory problems.”<sup>168</sup> Taken with *Humphrey’s*, *State Farm* review is another step down the road to technocratic government, and further erodes of the unitary executive by limiting the President’s ability to impose the “philosophy of the administration” upon the administrative state.<sup>169</sup> Out of fear of low politics influencing decisionmaking, courts disable the President from applying political judgement to the administration of the government and execution of the laws and vests decisionmaking authority in bureaucrats, with rationalist technocracy as the only legitimate method of decisionmaking.<sup>170</sup> “Expertise

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<sup>166</sup> Exec. Order No. 12,291, 46 FR 13193 (Feb. 19, 1981).

<sup>167</sup> Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 455 (1987) (“The OMB process also serves some of the framers’ original purposes in creating a unitary executive branch. At the same time, OMB control ensures that the views of those close to the President inform value judgments and that the President’s positions about regulation thus remain in the forefront of the regulatory process . . . OMB review should be understood as an attempt to unite two fundamental, though seemingly antagonistic, aspirations of the New Deal—technical expertise and political accountability.”).

<sup>168</sup> *Id.*

<sup>169</sup> *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 59 (Rehnquist, J. concurring in part, dissenting in part).

<sup>170</sup> The Court’s pervasive insistence throughout the Twentieth Century on technocratic “expertise” rather than the natural law reasoning employed up until the Progressive Era can be seen far beyond its administrative precedents. Indeed, it is this belief in the exclusiveness of technocratic knowledge to the exclusion of the natural law principles expounded most prominently in the Declaration that led it to take an elaborate sociological approach in *Brown* rather than simply declaring that the self evident principle of natural law that “all men are created equal” operationalized by the Fourteenth Amendment is incompatible with segregation. See Clarence Thomas, *Toward a “Plain Reading” of the Constitution: The Declaration of Independence in Constitutional Interpretation*, 30 Howard L.J. 983 (1987); see also Leo Strauss, “Introduction to Political Philosophy” (1965) (“[T]he Supreme Court makes decisions on the basis of pronouncements of social

forcing” thus inherently disables both statesmanship and democratic accountability. It represents the culmination, in the courts, of the rationalism Oakeshott warned of:

Among other evidences of Rationalism in contemporary politics, may be counted the commonly admitted claim of the ‘scientist’ as such (the chemist, the physicist, the economist or the psychologist) to be heard in politics; because, though the knowledge involved in a science is always more than technical knowledge, what it has to offer to politics is never more than a technique. And under this influence, the intellect in politics ceases to be the critic of political habit and becomes a substitute for habit, and the life of a society loses its rhythm and continuity and is resolved into a succession of problems and crises . . . all sense of what Burke called the partnership between present and past is lost.<sup>171</sup>

### III. The Origins of Political Control

The need for political control of administration has deep roots in Western political philosophy.<sup>172</sup> The Constitution embodies this commitment to political control of administration by vesting directive authority in the President and the ability to structure and fund departments in Congress.<sup>173</sup> This part will demonstrate that political and presidential control are synonymous and agencies cannot be shielded from these pressures under the Constitution.

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science; then we see something of this kind. It is nominally referred to as the problem of technocracy, which, as technocracy, is not democracy.”).

<sup>171</sup> Oakeshott, *supra* note 26, at 27–28; *see also* Nasser Behnegar, Leo Strauss, Max Weber, and the Scientific Study of Politics (2003); Harvey C. Mansfield, *On Religion and Rational Control*, Hoover Institution (Nov. 3, 2008), <https://www.hoover.org/research/religion-and-rational-control>.

<sup>172</sup> Aristotle, *Nicomachean Ethics* 5.10 (Robert C. Bartlett & Susan D. Collins, eds. 2011) (“It [the political art] ordains what sciences there must be in cities and what kinds each person must learn and up to what point. We also see that even the most honored capacities—for example, generalship, household management, rhetoric—fall under the political art. Because it makes use of the remaining sciences and . . . legislates what one ought to do and what to abstain from, its end would encompass those of the others, with the result that this would be the human good.”).

<sup>173</sup> Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 *Case W. Res. L. Rev.* 1451 (1997).



While Congress maintains broad powers to structure administrative agencies,<sup>174</sup> the Constitution vests the entirety of the power to execute the law in the President. The President's visibility and singular responsibility to "take Care that the Laws be faithfully executed" along with his responsibility to appoint and commission officers ensure that the people have a singular point to hold accountable for the administration of the government. The President is the only nationally elected officer in the federal government. While Congress represents the political in the promulgation of law and structuring of the administrative state, the President represents the people in the law's execution.<sup>175</sup> Publius makes clear that the power to administer the laws falls within the executive power vested in the President:

The actual conduct of foreign negotiations, the preparatory plans of finance, the application and disbursement of the public moneys in conformity to the general appropriations of the legislature, the arrangement of the army and navy, the directions of the operations of war, these, and other matters of a like nature, constitute what seems to be most properly understood by the administration of government. The persons, therefore, to whose immediate management these different matters are committed, ought to be considered as the assistants or deputies of the chief magistrate, and on this account, they ought to derive their offices from his appointment, at least from his nomination, and ought to be subject to his superintendence.<sup>176</sup>

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<sup>174</sup> Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 Ala. L. Rev. 1205, 1251 (2014).

<sup>175</sup> Calabresi & Prakash, *supra* note 14, at 591 ("Congress does have the power to help carry into execution all of the federal government's powers including those of the other branches. But, it does not have the power to enact laws telling the other branches 'how they ought to carry into execution' one of their powers.").

<sup>176</sup> The Federalist No. 72 (Alexander Hamilton).

There is no distinction in the Constitution between executive and administrative power.<sup>177</sup> A nationally elected officer, purposefully subject to democratic accountability, is vested with the entirety of the power to administer the federal government.<sup>178</sup>

President Washington operationalized this constitutionally mandated political control of the Executive Branch. He was deeply involved with the administration of the government and utilized various mechanisms to ensure unity in the administration of the new government. With just a few thousand officers and limited domestic responsibilities, the President could personally review practically every action. And President Washington did just that—no detail was too small to escape his review and approval—even lighthouse contracts were not immune from the President’s control.<sup>179</sup> The President fostered debate amongst the cabinet to ensure that final decisions filtered up to him.<sup>180</sup> He carefully followed prosecutions, instituting and ceasing them upon his personal order.<sup>181</sup> He was also acutely aware of the power of geography and sought to keep his cabinet officials close.<sup>182</sup> For example, in the plans for the new federal city, Washington ensured that “a communication between the offices and the house of the president” was preserved by situating them closely

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<sup>177</sup> Professors Calabresi and Prakash draw upon Founding Era sources to demonstrate that the terms “administrate” and “execute” were used interchangeably. Calabresi & Prakash, *supra* note 14, at 614. Dr. Johnson defines ‘Administration’ as “the active or executive part of government.” Samuel Johnson, A General Dictionary of the English Language (1755), <https://archive.org/details/dictionaryofengl01johnuoft>.

<sup>178</sup> U.S. CONST. art. II, § 1; Saikrishna Bangalore Prakash, *Hail to the Chief Administrator: The Framers and the President’s Administrative Powers*, 102 Yale L.J. 991 (1993) (examining the Take Care Clause and Written Opinions Clause). Johnson’s Dictionary defines ‘superintend’ to mean “to oversee; to overlook; to take care of others with authority.” ‘Overlook’ is defined as “to view from a higher place; to view fully; to oversee; to review.”

<sup>179</sup> See, e.g., To George Washington from Alexander Hamilton, 12 March 1791.

<sup>180</sup> Leonard White, *THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY* 38–41 (1948).

<sup>181</sup> Steven G. Calabresi & Christopher S. Yoo, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 243 (2008) (hereinafter “Calabresi & Yoo, UNITARY EXECUTIVE”). <https://founders.archives.gov/documents/Washington/05-02-02-0278>.

<sup>182</sup> See White, *supra* at 38.

along President’s Square.<sup>183</sup> This reflected the President’s marrow-deep belief that he had the personal duty—imposed by his oath, the Take Care Clause, and Executive Vesting Clause—to ensure that his officers were executing the laws in a constitutional, legal, and prudent manner.

It was in the appointments power that President Washington made his greatest impact. President Washington imposed a litmus test on prospective officers—officers were evaluated based on their character, but would not be appointed if they did not demonstrate a fidelity to the principles of the new Union.<sup>184</sup> Additionally, Washington sought out officers who were not mere technocrats:

[A]s the Officer who is the head of [the War Department] is a branch of the Executive, and called to its Councils upon interesting questions of National importance he ought to be a man, not only of competent skill in the science of war, but possessing a general knowledge of political subjects, of known attachment to the Government we have chosen, and of proved integrity.<sup>185</sup>

Nothing seemed to escape the President’s attention:

Appointments, great and small, were of direct concern to Washington, and no collector of customs, captain of a cutter, keeper of a lighthouse, or surveyor of revenue was appointed except after specific consideration by the President. In signing contracts for the construction of a lighthouse the President took time to enjoin economy in the selection of materials.<sup>186</sup>

Washington repeatedly made clear that he would not commit “political Suicide” and “embarrass” the Administration by bringing “a man into any office, of consequence

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<sup>183</sup> David Ballie Warden, *A Chronological and Statistical Description of the District of Columbia* 36 (1816).

<sup>184</sup> Calabresi & Yoo, *UNITARY EXECUTIVE*, *supra* note 159.

<sup>185</sup> White, *supra* at 30 (quoting George Washington Jan. 22, 1794).

<sup>186</sup> White, *supra* at 106.

knowingly whose political tenets are adverse to the measures which the *general* government are pursuing.”<sup>187</sup>

Notably, Congress agreed with Washington’s approach. The Decision of 1789<sup>188</sup> is the most well-known congressional recognition of a unitary executive chain of command but the sentiment was not an isolated event. The consequences of the doctrine—political control of administration and law execution—was recognized by Founding Era representatives:

[T]he Executive, in conducting those concerns of the Government wherewith it is exclusively charged, and for the management of which it is solely responsible, should employ such persons as subordinate agents, as were known to agree with him in opinion about the right mode of conducting them. Was this anything so extraordinary? Was it not practiced by every man of common understanding in the management of his own private affairs.<sup>189</sup>

Congress also recognized the necessity of political considerations in the exercise of the president’s authority to remit certain fines and penalties. Representative Smith successfully argued that the remission determination was “essentially a political, and not a fiscal measure and regulation” and that it was left to the President alone, through the pardon power, to “judge of the extent of the mischiefs flowing from the violations of such political measures and regulations and how far considerations for the remission of fines, forfeitures, and penalties incurred by such violations may be listened to consistently with the public safety in relation to that power.”<sup>190</sup>

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<sup>187</sup> White, *supra* at 46 (quoting George Washington Sept. 27, 1795).

<sup>188</sup> See generally Myers, 272 U.S. 52; Saikrishna Prakash, *New Light on the Decision of 1789*, 91 Cornell L. Rev. 1021 (2006).

<sup>189</sup> 7 Annals of Cong. 874 (Jan. 19, 1798).

<sup>190</sup> 10 Annals of Cong. 1322 (Mar. 25, 1800).

Washington's principal deputy, Secretary Alexander Hamilton ensured that the new government would survive by engaging in the most technical aspects of administration.<sup>191</sup> Hamilton recognized that even the most minute details of the execution of federal powers could undermine the people's affection for the new government.<sup>192</sup>

Four examples from Secretary Hamilton's tenure running the Republic's first administrative agency serve to highlight the indivisibility of politics and administration in the Washington Administration. The first indication of pervasive control by political appointees is Hamilton's meticulous instructions to the captains of the newly formed Coast Guard. The Secretary went so far as to instruct the captains on how to manage their crews when intercepting and collecting revenues. Hamilton instructed captains to avoid the appearance of "haughtiness, rudeness or insult," understanding that the smallest gestures would contribute to the success or early collapse of the national government.<sup>193</sup> Second, Secretary Hamilton handled the "most vexing and delicate problems himself," such as town petitions, because he recognized the "political implications" of these seemingly insignificant matters.<sup>194</sup> Third, Secretary Hamilton did not leave scientific matters to the discretion of skilled collectors but instructed them in minute detail on the how they ought to use hydrometers to measure the proof of alcohol, recognizing the potential sensitivity of the seemingly minute matter.<sup>195</sup> Fourth, Hamilton understood that sometimes political considerations must trump

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<sup>191</sup> Hamburger, *supra* note 123, at 91–93.

<sup>192</sup> See generally Forrest McDonald, *ALEXANDER HAMILTON: A BIOGRAPHY* (1979).

<sup>193</sup> Treasury Dep't Circular to the Captains of the Revenue Cutters, June 4, 1791, *in* 8 *THE PAPERS OF ALEXANDER HAMILTON* 432 (Harold C. Syrett, ed. 1987).

<sup>194</sup> McDonald, *supra* at 218.

<sup>195</sup> For an early example of 'political meddling' in science one can look to Secretary Hamilton's excruciatingly detailed instructions to customs collectors on the use of Dycas's Hydrometer. Treasury Dep't Circular to the Collectors of the Customs, Dec. 18, 1790, *in* 7 *THE PAPERS OF ALEXANDER HAMILTON* 368 (Harold C.

expertise in a particular area. He instructed customs collectors to take the fiscally counterintuitive action of purchasing securities at the higher end of market price. Tunnel-visioned individual collectors were enraged and chafed under Hamilton's seemingly foolish instructions. Yet, the Secretary recognized that buying at the higher end, though fiscally imprudent in the short term, would engender confidence in the market and boost the nation's stability.<sup>196</sup> The Secretary recognized that no aspect of administration was too small to escape the need for political control.<sup>197</sup> He took to heart the President's concern with the particular: "Many things which appear of little importance in themselves at the beginning may have great and durable consequences from their having been established at the commencement of a new general government."<sup>198</sup>

President Washington and his deputies had to carefully balance the need for efficiency and revenue with the need to win the affection of the people. The President did so by maintaining the perspective afforded to the President and balancing the competing crises faced by the young nation. As the President later reflected: "[T]he more combined, and distant things are seen, the more likely they are to be turned to advantage."<sup>199</sup> Professor White captured Washington's "[p]erspective on distant goals and the combination of many

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Syrett, ed. 1987). Such seemingly insignificant technical matters were vital to maintaining allegiance to the new government.

<sup>196</sup> Alexander Hamilton to William Seton, Aug. 16, 1791; see also McDonald, *supra* note 170, at 217–22.

<sup>197</sup> These examples demonstrate that Hamilton was aware of the importance of the particular. Rightfully so, governments are often brought down by "small steps . . . even a small thing can be a cause of revolution. For once they abandon anything of what pertains to the regime, after this it is easier to effect another and slight greater change until they change the entire order." Aristotle, *Politics* 5.8 (Carnes Lord, ed. 2013).

Understanding iterative causation, Aristotle rebuts those who hold that it is possible to identify matters that do not have the potential to affect the regime—the "sophistical argument, 'if each is small, so are all.'" *Id.* This argument has been revived by expertise forcing, which purports to hold that some technical matters can be separated from the political.

<sup>198</sup> White, *supra* note 158, at 99 (quoting George Washington May 10, 1789).

<sup>199</sup> George Washington to James Anderson, Dec. 21, 1797.

things to their achievement.”<sup>200</sup> Washington thus avoided the rationalist “error of mistaking a part for the whole.”<sup>201</sup>

The power the Appointments Clause provided the Federalists was reversed when the people decided on a different course. In the first instance of an election having consequence, President Jefferson worked swiftly to gain political control over the burgeoning bureaucracy. “Jefferson’s patronage policy during the first term was as decisive as it was thoroughly partisan . . . removals in one form or another for purely political reasons constituted the backbone of this effort to break the Federalists’ power, particularly that party’s stranglehold on the sensitive and politically potent second level United States offices in the states.”<sup>202</sup> Or in Jefferson’s telling, he sought “to assemble a loyal crew for steering the sloop of state on a republican tack.”<sup>203</sup> This “Appointive power” allowed Jefferson to “recast the political complexion of the executive, bringing it into line with the dominant philosophy of his party.”<sup>204</sup> This approach famously continued throughout the Jeffersonian Era and into the Age of Jackson.

The Spoils System represents the apogee of the fusion of politics (in the crudest sense) with administration. The Civil Service reforms of the late Nineteenth Century actually represented a presidential assertion of power. The postbellum dominance of Congress meant that the Administrations were being staffed based primarily by congressional patronage

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<sup>200</sup> White, *supra* note 158, at 103.

<sup>201</sup> Oakeshott, *supra* note 26, at 16.

<sup>202</sup> Robert M.S. McDonald, *Thomas Jefferson’s Military Academy: Founding West Point* (2004).

<sup>203</sup> Forrest McDonald, *THE PRESIDENCY OF THOMAS JEFFERSON* 34 (1976).

<sup>204</sup> McDonald, *supra* note 180, at 113 (quoting Robert M. Johnstone Jr., *JEFFERSON AND THE PRESIDENCY: LEADERSHIP IN THE YOUNG REPUBLIC* (1978)).

rather than executive selection.<sup>205</sup> The Civil Service classification system was a way for the President to wrest the appointment power back from Congress.<sup>206</sup>

The fight for political control of the military dates to the early years of the Republic and further reflects the Founders emphasis on the importance of presidential control. The nature of the army was constant point of contention between Federalists and Jeffersonian Republicans.<sup>207</sup> The establishment of the United States Military Academy at West Point was a political act meant to purge Federalist elements and create an army versed in Jeffersonian Republican ideals. Samuel Watson has demonstrated that West Point sought to instill in cadets the principle of “serving civilian authority under the dictates of the Constitution; even when civilian direction ran counter to military good sense.”<sup>208</sup>

Although civilian control of the military is enshrined in the Constitution,<sup>209</sup> it is not ensured in practice. President Lincoln’s insistence on comprehensive control over the Civil War was met with resistance in an army that sometimes openly flouted his policies.<sup>210</sup> Lincoln acted swiftly in each instance to reassert his political control over professional officers who viewed him as a “rank amateur.”<sup>211</sup> President Franklin Roosevelt also had to resort to unconventional means to assert control over the military and largely succeeded in

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<sup>205</sup> Calabresi & Yoo, UNITARY EXECUTIVE, *supra* note 159, at 243.

<sup>206</sup> *Id.*

<sup>207</sup> Peter Maslowski, “To the Edge of Greatness: The United States, 1783-1865” in THE MAKING OF STRATEGY: RULERS, STATES, AND WAR 210 (Williamson Murray, Alvin Bernstein, MacGregor Knox, eds. 1996).

<sup>208</sup> Samuel Watson, “West Point and the Struggle to Render the Officer Corps Safe for America, 1802-1833” in THOMAS JEFFERSON’S MILITARY ACADEMY: FOUNDING WEST POINT 169 (Robert M.S. McDonald, ed. 2004).

<sup>209</sup> U.S. Const. art. II, § 2 (“The President shall be Commander in Chief of the Army and Navy of the United States”).

<sup>210</sup> Cohen, *supra* note 176, at 39-40.

<sup>211</sup> *Id.* at 15.



ensuring political control over the sprawling and increasingly permanent military establishment.<sup>212</sup> President Roosevelt learned how to manage the military establishment from methods he developed to control the administrative state that grew up around the New Deal in the late 1930s. The President diminished bureaucratic efficiency and expertise to maintain political directive authority.<sup>213</sup> President Roosevelt was less successful in assuring long term political control of the administrative state.<sup>214</sup>

It could be argued that military analogies are not relevant to administrative management, because the principle of civilian control is specifically enumerated in the Commander in Chief Clause. However, it appears unlikely that the Constitution creates different a different paradigm for military and other forms of administration. In Federalist 72, Publius places the “arrangement of the army and navy, the directions of the operations

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<sup>212</sup> To get around the institutional experts, both Presidents Franklin Roosevelt and George W. Bush resorted to consulting outside civilians. In both cases, these outside consultants provided an enormous positive boost to the war effort. See Arthur Herman, *FREEDOM’S FORGE: HOW AMERICAN BUSINESS PRODUCED VICTORY IN WORLD WAR II* (2013); Fred Kaplan, *THE INSURGENTS: DAVID PETRAEUS AND THE PLOT TO CHANGE THE AMERICAN WAY OF WAR 3* (2013). For the history of the Department of Defense’s administrative creation see Thomas D. Boettcher, *FIRST CALL: THE MAKING OF THE MODERN U.S. MILITARY* (1992).

<sup>213</sup> Judge Ginsburg and then-Professor Menashi detail how FDR maintained control of the administrative state. He “dominated his burgeoning bureaucracies by politicizing them, by placing trusted lieutenants in middle-level positions, and by encouraging overlapping of jurisdictions, proliferation of communication channels, and bureaucratic competition and conflict to force issues to the top, maximizing the President’s range of choice.” See Ginsburg & Menashi *supra* at 266-69 (quoting Richard K. Betts, *SOLDIERS, STATESMEN, AND COLD WAR CRISES* 33 (1977)). President Roosevelt utilized the same methods to control military decision-making the Second World War. JOHN C. RIES, *THE MANAGEMENT OF DEFENSE: ORGANIZATION AND CONTROL OF THE U.S. ARMED SERVICES* 64 (1964).

<sup>214</sup> President Roosevelt intensely lobbied Congress to pass the Brownlow Committee’s recommendations to ensure Presidents who followed would have the tools to control the branch. He explicitly appealed to the original understanding—“In spite of timid souls in 1787 who feared effective government the Presidency was established as a strong single Chief Executive office ... What I am placing before you is the request not for more power, but for the tools of management and the authority to distribute the work so that the President can effectively discharge those powers which the Constitution now places upon him.” Franklin D. Roosevelt, “A Recommendation for Legislation to Reorganize the Executive Branch of the Government” (Jan. 12, 1937), *in* 5 *Pub. Papers of FDR* 668, 670 (Samuel I. Rosenman ed., 1941). Congress refused the Committee’s recommendations due in part to lobbying by a “large numbe[r] of agency bureaucrats who feared that reorganization might cost them their power baes or even their jobs.” Calabresi & Yoo *supra* note 22, at 105.

of war” amongst the President’s *administrative* power which is granted by the Executive Vesting Clause.<sup>215</sup> Pacificus explicitly states that the Commander in Chief Clause is merely a designation of “particular cases of Executive Power” and not “derogating from the more comprehensive grant contained in the general clause.”<sup>216</sup> The Commander in Chief Clause may serve as a guide to the President’s directive authority over administration making the principles of civilian control of the military applicable to the President’s administrative powers.<sup>217</sup> The Constitution vests political responsibility for administration in the President and his agents.<sup>218</sup> Clausewitz demonstrates the irrationality of allowing the agent to make decisions autonomously without the possibility of direction from the principal.<sup>219</sup> “Expertise forcing” attempts to do just this— it attempts to base the administration of the law in ‘best bureaucratic’ advice. As in war, this “absurdly sacrifice[s] the end to the means.”<sup>220</sup>

In sum, “[t]he values of disinterestedness and independence did not animate the founding generation when it came to execution.”<sup>221</sup>

#### IV. The Constitutional “Place for Politics”

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<sup>215</sup> The Federalist No. 72 (C. Kesler ed. 2003).

<sup>216</sup> Alexander Hamilton, Letters of Pacificus No. 1 (June 29, 1793), in 4 The Works of Alexander Hamilton 432, 438 (Henry Cabot Lodge ed., 1904).

<sup>217</sup> The original public meaning of “the executive Power” was heavily influenced by General Washington’s actions as commander of the Continental Army. See Forrest McDonald, THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY (1994).

<sup>218</sup> See Brownlow Committee *supra* note 107 (“The President is a political leader—leader of a party, leader of the Congress, leader of a people.”)

<sup>219</sup> Clausewitz, *supra* note 1, at 400.

<sup>220</sup> Thomas Jefferson to John B. Colvin, Sept. 20, 1810.

<sup>221</sup> Calabresi & Prakash, *supra* note 14, at 665; cf. Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1 (1994).

Administration is inherently political. The apparent Progressive faith in impartial administration separated from politics has largely given way to the recognition that politics permeates all administration: administration is the extension of politics by other means.<sup>222</sup> The real question—who does the Constitution authorize to make political judgments? Interestingly, this increased understanding of the role of politics in administration has not been accompanied with an increased sensitivity to the need for elected political control over administration. Viewed in this light, “expertise forcing” takes a more sinister aspect. It attempts to vest political decisionmaking authority in officers who are not under the directive authority of the President. Functionally, in the era of unlimited federal power and unlimited Congressional power to delegate, perhaps this disconnect serves as a check on the President’s ability to exercise this enormous power.<sup>223</sup> However, the checks provided by the Constitution are superior to the alternative of fragmenting the executive power. The Framers recognized the need for a vigorous executive to preserve, protect, and defend the Constitution from external attack and internal revolt.<sup>224</sup> The safety and happiness of the Republic requires a vigorous and stable execution of the law.<sup>225</sup> Echoing Publius,<sup>226</sup>

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<sup>222</sup> See, e.g., Kagan, *supra* note 35, at 2248 (“[A]ctivity of the executive branch agencies [are] more and more an extension of the President’s own policy and political agenda.”); Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 Mich. L. Rev. 53 (2008); David S. Rubenstein, “Relative Checks”: *Towards Optimal Control of Administrative Power*, 51 Wm. & Mary L. Rev. 2169 (2010); Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 Yale L.J. 1395, 1399 (1975).

<sup>223</sup> See *supra* note 131. Publius rejects this line of thinking: “The idea of a council to the Executive, which has so generally obtained in the State constitutions, has been derived from that maxim of republican jealousy which considers power as safer in the hands of a number of men than of a single man.” The Federalist No. 72 (Alexander Hamilton).

<sup>224</sup> Cf. The Federalist No. 10 (James Madison) (“A Republican remedy for the diseases most incident to Republican Government.”); see also Harvey Mansfield, *TAMING THE PRINCE* (1989).

<sup>225</sup> Michael Stokes Paulsen, *The Constitution of Necessity*, 79 Notre Dame L. Rev. 1257 (2004).

<sup>226</sup> See *infra* note 195 and accompanying text.

President Franklin Roosevelt’s Brownlow Committee understood that constitutional execution requires the unity to execute the laws coherently and faithfully:

[T]he American Executive must be regarded as one of the very greatest contributions made by our Nation to the development of modern democracy—a unique institution the value of which is as evident in times of stress and strain as in periods of quiet . . . the President is a political leader. . . he is the head of the Nation in the ceremonial sense . . . [he] is the Chief Executive and administrator within the Federal system . . . [i]n many types of government these duties are divided or only in part combined, but in the United States they have always been united in one and the same person.<sup>227</sup>

While executive power is necessary to the survival of the Constitution, its enormous danger to individual rights is checked in one manner by vesting all the executive responsibility in one person who will naturally be the object of the people’s attention. The unitary executive is a mechanism to protect individual liberty.<sup>228</sup> First, it ensures accountability. Second, it creates a powerful disincentive to Congress to delegate legislative power to the President. If delegation must be to the President, and not an agency independent of the President, Congress may hesitate to aggrandize the power of the rival political branch.<sup>229</sup> Congress circumvents an institutional roadblock to delegation by vesting power in agencies that are not controlled by a political rival. Congressionally created independent agencies, and functionally independent agencies created by court “expertise forcing,” allows Congress to delegate to agencies, exclude presidential control, and create an opening for itself to collude, out of public view, in the execution of its delegation.<sup>230</sup> To

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<sup>227</sup> Brownlow Committee, *supra* note 99; *see also* The Federalist No. 70 (Alexander Hamilton).

<sup>228</sup> *Free Enterprise Fund*, 561 U.S. 477.

<sup>229</sup> The Federalist No. 51 (James Madison).

<sup>230</sup> Thereby undermining both the unitary executive and collective Congress. *See* Rao, *supra* note 128 (collective Congress); Ginsburg & Menashi, *supra* note 128 (unitary executive).

protect individual liberty and ensure good administration, the Framers vested all administrative power in a nationally elected unitary executive that the people can monitor, impeach or defund through their representatives, or vote out of office. “Expertise forcing” and the fragmentation it perpetuates makes Publius’s nightmare possible:

I clearly concur in opinion, in this particular, with a writer whom the celebrated Junius pronounces to be “deep, solid, and ingenious,” that “the executive power is more easily confined when it is ONE;” that it is far more safe there should be a single object for the jealousy and watchfulness of the people; and, in a word, that all multiplication of the Executive is rather dangerous than friendly to liberty.<sup>231</sup>

Individual liberty is further protected from the unitary executive through the requirement of Article III adjudication of private rights. The Constitution does not allow for an administrative agency to deprive an individual of private rights without an independent court.<sup>232</sup> However, the Progressive faith in independent expertise means that now even private rights are now subject to technocratic balancing by an independent ‘expert’ agency.

Decisions like *Massachusetts v. EPA* chip away at political control of the administrative state. “Expertise-forcing” is in deep tension with a government of, by, and for the people and with the Constitution’s vesting of executive power in a politically accountable unitary executive. The APA’s arbitrary and capricious standard should not be interpreted in a manner that conflicts with this constitutional guarantee of political control of administration. That such political control is worrisome should serve as impetus for Congress to delegate less discretionary decisionmaking authority to the President.

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<sup>231</sup> The Federalist No. 70 (Alexander Hamilton).

<sup>232</sup> Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559 (2007).

CONCLUSION

“Expertise forcing” undermines political control of the bureaucracy. Far from “commanding a view,” the President is unable to balance scientific expertise with factors such as foreign affairs, justice, resource allocation, and other policy concerns. Politics is thus subordinated to expertise, the President separated and subordinated to his agents, the people subordinated to a state that is not democratically accountable. Separating politically accountable actors from decisionmaking is foolish and unconstitutional. Either judgments are made without considering politics or politically unaccountable actors can make political judgments. Courts subvert ends to means and create friction with the constitutionally mandated unitary executive when they hold political influence over agency expertise to be arbitrary and capricious. Therefore, courts should avoid constitutional problems by holding that political control through the President and his appointees does not render agency actions arbitrary and capricious.

In practice, this would mean that courts, when reviewing executive actions under the APA’s arbitrary and capricious standard, should interpret legislative grants of discretion to agencies to allow for political considerations and White House direction to be employed by the agency for action or inaction. For example, the Energy Policy and Conservation Act directs the Secretary of Energy to set consumer goods energy efficiency standards using an economic justification standard that includes the authority to consider “other factors the Secretary considers relevant.” 42 U.S.C. § 6295(o)(2)(B)(i)(VII). To avoid interpreting EPCA as unconstitutionally divesting the President of control over Executive Branch policymaking,

this term must be read to allow for White House priorities to be considered as legitimate justifications of efficiency standards under arbitrary and capricious review.

Similarly, this mode constitutional avoidance provides a constitutional grounding further demonstrating why Justice Scalia was right and the majority wrong in *Massachusetts v. EPA*. The provisions of the Clean Air Act there were utterly silent on whether the Executive must make an endangerment finding regarding greenhouse gases. As Justice Scalia recognized, this silence authorized EPA to consider the “various ‘policy’ rationales” that the majority rejected because “[t]he reasons EPA gave are surely considerations executive agencies *regularly* take into account (and *ought* to take into account) when deciding whether to consider entering a new field: the impact such entry would have on other Executive Branch programs and on foreign policy.”<sup>233</sup> The President’s constitutionally-vested duty and attendant power to balance such considerations should inform judicial review of all delegations of regulatory authority under the APA’s arbitrary and capricious standard.

Although courts have allowed Congress to delegate away its lawmaking power, it should not allow it to delegate away the President’s constitutionally-vested executive duty. If courts continue to force technical expertise onto executive administration, the American experiment in balanced democratic statesmanship will be set back and Presidents left incapable of heeding President Eisenhower’s admonition:

Yet, in holding scientific research and discovery in respect, as we should, we must also be alert to the equal and opposite danger that public policy could itself become the captive of a scientific-technological elite. It is the task of statesmanship to mold, to balance, and to integrate these and other forces, new and old, within the principles of our democratic system—ever aiming toward the supreme goals of our free society . . . [E]ach proposal must be weighed in

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<sup>233</sup> *Massachusetts*, 549 U.S. at 552 (Scalia, J., dissenting).

light of a broader consideration; the need to maintain balance in and among national programs—balance between the private and the public economy, balance between the cost and hoped for advantages—balance between the clearly necessary and the comfortably desirable; balance between our essential requirements as a nation and the duties imposed by the nation upon the individual; balance between the actions of the moment and the national welfare of the future. Good judgment seeks balance and progress; lack of it eventually finds imbalance and frustration.<sup>234</sup>

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<sup>234</sup> Dwight D. Eisenhower, Farwell Address (Jan. 17, 1961).