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ARTICLE

THE SOUND AND FURY OF REGULATING ARTIFICIAL INTELLIGENCE IN THE WORKPLACE

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ABSTRACT

New technologies, including those driven by artificial intelligence ("AI"), have transformed the workplace. When designed and executed well, these innovations have the potential to assist companies seeking to enhance operational efficiency, mitigate human bias, prevent discrimination and harassment, and improve worker health and safety. However, the use of AI simultaneously presents labor and employment law risks, including introducing or proliferating bias or unlawful discrimination in hiring decisions, wage and hour violations, and other compliance challenges.

Growing concerns over these and other potential negative outcomes—in addition to uncertainty regarding the challenges and implications already presented by AI tools and technologies—have provoked a myriad of legislative proposals at the federal, state, and local levels to regulate certain applications of AI in employment. Well-intentioned as proponents may be, the measures have failed to implement effective solutions to the problems they purport to address and have suffered from mistakes of haste from the outset. For instance, the same day the Colorado governor signed the state AI Act into law, he urged the legislature to "fine tune" certain problematic provisions. Shortly thereafter, he, the state's attorney general, and state senate majority leader sent a letter to businesses to "provide additional clarity" to address problematic aspects of the law and committed to "engage in a process to revise the new law" to "minimize unintended consequences" of its hasty enactment.

Local efforts to regulate AI have also fallen short. Notably, in 2023, New York City became the first American jurisdiction to regulate the use of AI in employment decisions—efforts some have characterized as "a toothless flop" and a "bust." The New York City Department of Consumer and Worker Protection, the city agency tasked with enforcing the AI law, lacks the authority to initiate investigations and reported no complaints as of 2024.

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In the absence of congressional action, federal labor and employment agencies have attempted to fill the void with various initiatives and measures. None moved the needle. Instead, these efforts consist of high-level, broad statements that do little more than confirm the obvious: existing laws apply to AI tools and devices used to make employment decisions. Federal agencies have failed to provide meaningful substantive guidance regarding how longstanding labor and employment laws and regulations apply. Moreover, the vehicles themselves—chosen by the agencies—undermined the potential value and effectiveness of the message. Worse, by eschewing the benefits of notice and comment procedures intended for formal rulemaking, agencies turned their backs on a wealth of knowledge and experience that would have been especially helpful in the context of rapidly developing technology and capabilities such as AI. Few employment agencies boast any (much less cutting edge) technical or practical experience with AI.

This Article argues that the federal, state, and local governments have focused on messaging and signaling, as opposed to actionable, concrete regulatory substance and action. In doing so, regulators have been shrewdly walking the line by being very vocal in their support for regulating AI, while simultaneously not pushing for aggressive regulations that would risk the ire of businesses and employers. Finally, this Article concludes that alternative approaches may provide the best path forward for addressing the risks associated with AI in the workplace.

I. INTRODUCTION

New technologies and tools powered by artificial intelligence ("AI") are

increasingly utilized in the workplace to facilitate the employment relationship.[1] From facilitating job postings to screening applications, measuring employee productivity to preventing theft, the potential efficiencies of AI devices or technologies may alter the ways in which employers and employees interact.[2] If properly designed and executed, these innovations could enhance operational effectiveness, fence off human bias from employment decision making, reduce or prevent unlawful discrimination and harassment, and improve worker health and safety.[3] Like any tool, however, devices or technologies that use AI present concomitant risks of exacerbating or proliferating bias or discrimination in employment decisions, as well as complicating employers' ability to maintain compliance with wage and hour law and other legal frameworks.[4] Employers must be proactive and diligent in the development, selection, application, and review of such technologies so that the efficiencies and other benefits are not subsumed by risk and liability.[5]

Growing concerns regarding potential uses and outcomes of AI tools in the workplace have been compounded by fears of both known and unknown challenges presented by these technologies.[6] Together, they have provoked political responses at the federal, state, and local levels in the United States, as well as in Europe.[7] Indeed, in recent years, there have been myriad legislative and regulatory proposals that seek to control certain ways in which employers use AI in the workplace.[8]

At the federal level, the Biden administration primarily emphasized symbolic measures—such as coordination efforts, studies, and warnings—rather than imposing substantive regulatory frameworks for AI governance.[9] This constituted vague gestures and messaging to the same obvious point: existing federal law and regulations apply to AI, just like any other tool.[10] Memoranda,

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[1] See Bradford J. Kelley, *Belaboring the Algorithm: Artificial Intelligence and Labor Unions*, 41 YALE J. ON REG. BULL. 88, 89 (2024).

[2] *Id*.

[3] See Bradford J. Kelley, *All Along the New Watchtower: Artificial Intelligence, Workplace Monitoring, Automation, and the National Labor Relations Act*, 107 MARQ. L. REV. 195, 197–98 (2023).

[4] *See* Kelley, *supra* note 1, at 104–05.

[5] *See* Bradford J. Kelley, Mike Skidgel & Alice Wang, *Considerations for Artificial Intelligence Policies in the Workplace*, LITTLER MENDELSON P.C. (Mar. 10, 2025), https://www.littler.com/publication-press/publication/considerations-artificial-intelligence-policies-workplace [perma.cc/3FPN-FRZL].

[6] *See* Kelley, *supra* note 1, at 102.

[7] *See generally* Keith E. Sonderling, Bradford J. Kelley & Lance Casimir, *The Promise and the Peril: Artificial Intelligence and Employment Discrimination*, 77 U. MIAMI. L. REV. 1 (2022) (exploring the legal landscape in the United States and globally); *see also* Zach Williams, *Unions Keep Pressure on Statehouses to Regulate AI, Protect Jobs*, BLOOMBERG L. (Sept. 18, 2023), https://news.bloomberglaw.com/artificial-intelligence/unions-keep-pressure-on-statehouses-to-regulate-ai-protect-jobs [perma.cc/XWY4-YVJ6].

[8] *See id.*

[9] *See* Kelley, *supra* note 1, at 92. Congress has yet to enact any legislation regulating the use of AI technology or devices in the workplace which has largely left administrative agencies to fill the void.

[10] *See Artificial Intelligence for the American People*, TRUMP WHITE HOUSE ARCHIVES,

initiatives, and general statements tabled serious practical discussions regarding tangible uses (and potential abuses) of AI employment devices and technology.[11] This approach mollified some calling for federal action regarding use of AI in the workplace while simultaneously failing to advance any substantive limitations that might have provoked opposition from businesses and employers.[12]

During the Biden administration, the U.S. Department of Labor ("DOL"), the Equal Employment Opportunity Commission ("EEOC"), and the National Labor Relations Board ("NLRB") announced various joint and independent efforts to address certain uses of AI in the workplace.[13] These accomplished little. They neither provided tangible protections for workers nor practical guidance for employers.[14] First, the output of federal labor and employment agencies regarding AI failed to clarify how existing laws and regulations applied to AI technologies and tools with any semblance of consistency. The EEOC and the NLRB had not released any AI guidance in over two years despite continued rapid development and advancement of AI technology. Second, the AI-related output of these agencies eschewed the benefits of notice and comment—input that is especially valuable when the subject of government action is a new technology that is both complex and rapidly evolving.[15] Engagement of stakeholders at every stage of the development and use of AI devices and technology is important to ensure that new regulations—or new applications of existing regulations—benefit from a comprehensive and sophisticated understanding of the technologies.[16] When regulators proceed without such a foundation, they undermine (if not negate entirely) the efficacy of their work, to the detriment of workers and employers.

Most substantive AI regulatory efforts have occurred at the state level.[17] In contrast to advisory federal efforts, several of these measures purport to

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https://trumpwhitehouse.archives.gov/ai/ [perma.cc/83C4-GW77] (last visited Oct. 25, 2025); *see also* Will Henshall, *Why Biden's AI Executive Order Only Goes So Far*, TIME (Nov. 1, 2023), https://time.com/6330652/biden-ai-order/ [perma.cc/L5K7-7P7M] (noting that the Biden administration's approach "left questions unanswered about how it could work in practice.").

[11] For instance, the Biden administration engaged with the CEOs of major tech companies to promote voluntary commitments and responsible AI development—an approach that appeased calls for federal involvement without imposing binding regulatory constraints likely to face resistance from industry stakeholders. *See* Press Release, The White House, Readout of White House Listening Session with Union Leaders on Advancing Responsible Artificial Intelligence Innovation (July 3, 2023) https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2023/07/03/readout-of-white-house-listening-session-with-union-leaders-on-advancing-responsible-artificial-intelligence-innovation/ [perma.cc/SQE6-KA2A].

[12] *See* Kelley, *supra* note 1, at 105.

[13] *Id.* at 91, 93, 103.

[14] *Id.*

[15] *See id.* at 97–98, 103.

[16] *Id.* at 89, 91, 102.

[17] *See Artificial Intelligence 2025 Legislation*, NAT'L CONF. OF ST. LEGISLATURES (July 10, 2025), https://www.ncsl.org/technology-and-communication/artificial-intelligence-2025-legislation [perma.cc/DT9A-JER4] (noting that in the 2025 legislative session, all 50 states, along with Puerto Rico, the U.S. Virgin Islands, and Washington, DC, introduced AI-related legislation, with 38 states adopting or enacting approximately 100 measures).

impose limitations on employers' use of AI during various stages of the employment process.[18] However, many are poorly drafted or were hurriedly enacted or promulgated.[19] The rush simply to "do something," especially through legislation or regulation, is often counterproductive—and recent state-level AI measures are no exception. The rush to show action to constituents prevented thoughtful consideration of the subject matter, resulting in inconsistent and flawed regulatory frameworks. For example, some of these measures lack basic, elemental components. They fail to define "AI," "AI analysis," and other operative terms that the statute purports to regulate.[20] This injects facial ambiguity that undercuts the efficacy of the statute and other benefits, just like any law that aims to regulate a subject it does not define.[21]

A recent law in Colorado highlights the pitfalls of proceeding too quickly when regulating a rapidly evolving technology. Deficiencies of the Colorado AI Act were apparent and acknowledged even before it was enacted.[22] Indeed, on the same day he signed the Colorado AI Act into law, the governor wrote to the Colorado General Assembly enumerating several "reservations" about the law.[23] He urged the legislature to "fine tune" certain provisions.[24] Not content to wait for these critical adjustments, the governor, state attorney general, and state senate majority leader, wrote an open letter to affected employers to "provide additional clarity" while promising to "engage in a process to revise the new law" to "minimize unintended consequences associated with its implementation."[25] As a result, the structure and key provisions of the Colorado AI Act will likely be amended before the effective date. With the law in limbo, Colorado state agencies remain in a compromised enforcement position, forced to take a "wait and see" approach. Unfortunately, other states may model their

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[18] *See* Kelley, *supra* note 3, at 195, 210.

[19] *See id.* at 209–10 (discussing how the then-NLRB General Counsel proposed an AI framework that was based on three brief sentences contained in a short symposium journal article and the proposal lacked both analytical support and practical detail, rendering the proposal speculative and undeveloped at best).

[20] *See* Madyson Fitzgerald, *What is Artificial Intelligence? Legislators Are Still Looking for a Definition*, STATELINE (Oct. 5, 2023), https://stateline.org/2023/10/05/what-is-artificial-intelligence-legislators-are-still-looking-for-a-definition/ [perma.cc/7WDS-JY2H].

[21] *See id.* (noting that the language of "AI" and "artificial intelligence" can imply a range of systems which are capable of anything from machine learning to automated decision-making).

[22] *See* Ed Sealover, *"With Reservations," Polis Signs Landmark AI Regulation Bill*, SUM & SUBSTANCE (May 21, 2024), https://tsscolorado.com/with-reservations-polis-signs-landmark-ai-regulation-bill/ [perma.cc/XR22-ZES8].

[23] *See* Letter from Jared Polis, Governor, State of Colo., to Colo. Gen. Assemb. (May 17, 2024), https://www.dwt.com/-/media/files/blogs/artificial-intelligence-law-advisor/2024/05/sb24205-signing-statement.pdf?rev=a902184eafe046cfb615bb047484e11c&hash=213F4C6CDFF52A876011290C24406E7F [perma.cc/4KDY-3JC6].

[24] *Id.*

[25] Letter from Jared Polis, Governor, State of Colo., Phil Weiser, Att'y Gen., State of Colo. & Robert Rodriguez, Majority Leader, State of Colo. Senate, to Innovators, Consumers, and All Those Interested in the AI Space (June 13, 2024), https://newspack-coloradosun.s3.amazonaws.com/wp-content/uploads/2024/06/FINAL-DRAFT-AI-Statement-6-12-24-JP-PW-and-RR-Sig.pdf [perma.cc/4Y42-YFUD].

own measures after the Colorado statute, warts and all.[26]

Meanwhile, some states have applied amorphous legal standards and concepts that are burdensome and likely to be ineffective to achieve some of the stated objectives of their proponents.[27] As noted above, existing labor and employment laws obviously apply AI tools in the workplace just as they do to traditional employment tools.[28] Anti-discrimination laws prohibit employers from discriminating against applicants and employees because of certain protected characteristics.[29] Liability attaches for unlawful discrimination regardless of whether the discriminatory act was performed by a human employee or sophisticated AI.[30] In this sense, new legal provisions may not be necessary to establish the basic point—antidiscrimination requirements clearly apply to AI technologies and tools used to make or assist in employment decisions in the workplace. Even so, AI's potential efficiencies of scale in employment decision making have provoked longstanding concerns that AI might multiply discriminatory motivations and decisions, resulting in unlawful discrimination at scale.

Attempts to regulate AI at a local level have fared no better. In 2021, New York City passed what purported to be the broadest AI employment law in the United States.[31] It imposes requirements on employers' use of AI tools for hiring and promotion decisions in New York City.[32] According to civil rights groups, key provisions during its development were "introduced and rammed through in a rushed process that excluded workers, civil rights groups, and other stakeholders from providing any input."[33] As demonstrated in Colorado, haste to pass a law that can be touted as limiting AI confines the law's effectiveness. Practitioners have criticized the law because it leaves too many unanswered questions regarding the nature of the required audit, the AI tools, or processes that fall under (or outside) the law's mandate, as well as even the most basic questions regarding coverage.[34]

Since it became effective in July 2023, the law has been widely panned as "a toothless flop," a "bust," and completely "ineffective."[35] The New York City Department of Consumer and Worker Protection, which enforces the AI

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[26] *See* Alex Siegal & Ivan Garcia, *A Deep Dive into Colorado's Artificial Intelligence Act*, NAT'L ASS'N OF ATT'YS GEN. (Oct. 26, 2024), https://www.naag.org/attorney-general-journal/a-deep-dive-into-colorados-artificial-intelligence-act/ [perma.cc/9N64-3P57].

[27] *See* Amanda Ottaway, *'Everyone Ignores' New York City's Workplace AI Law*, LAW360 (Mar. 1, 2024), https://www.law360.com/employment-authority/articles/1808951 [perma.cc/3NYN-QKB6].

[28] *See* Kelley, *supra* note 3, at 198.

[29] *See* Sonderling, Kelley & Casimir, *supra* note 7, at 6.

[30] *See id.* at 5.

[31] *See id.* at 47.

[32] *See id.*

[33] *See* Matt Scherer & Ridhi Shetty, *NY City Council Rams Through Once-Promising but Deeply Flawed Bill on AI Hiring Tools*, CTR. FOR DEMOCRACY & TECH. (Nov. 12, 2021), https://cdt.org/insights/ny-city-council-rams-through-once-promising-but-deeply-flawed-bill-on-ai-hiring-tools/ [perma.cc/S8HH-9ZYB].

[34] *See* Sonderling, Kelley & Casimir, *supra* note 7, at 48.

[35] *See* Ottaway, *supra* note 27.

law, lacks the authority to initiate investigations.[36] Further, the Department has stated that the agency has not received a single complaint since it began enforcing the law in July of 2023, a predictable development given the lack of evidence that employers were using AI tools in hiring and promotions.[37] A Cornell University study published in early 2024 concluded that most employers in New York City have simply opted out of complying with the new law.[38]

While a handful of other states and localities have enacted measures to regulate the use of AI tools in employment, many have not. The resulting patchwork of laws makes compliance difficult for employers operating nationally, and even within certain regions.[39] Federal inaction with respect to the broad regulation of AI technology has led some to infer that Congress has ceded the field, at least for the present.[40] The few federal endeavors have only exacerbated the burdens imposed by the patchwork. Not surprisingly, the rapidly proliferating federal, state, and local legislation and regulation in the AI arena already poses compliance challenges.

Although uncertainty with the overall regulatory scheme surrounding AI may vex lawyers and compliance personnel, private initiatives have stepped into the void, embracing responsible self-restraint (or, as some charitably describe it, "self-regulation") to foster responsible AI development and deployment.[41] Thus the current state of affairs—a nascent legal and regulatory landscape combined with private action—has created a workable environment facilitating the development of AI technologies with respect to the workplace.[42]

Part II of this Article explores the federal regulatory landscape. This Part also examines the various joint and independent initiatives and measures that federal agencies have taken to address the misuse of AI in the workplace in the absence of regulations. Part III discusses specific proposals that have been considered in recent years that illustrate deficient state efforts to regulate AI in employment. This Part also examines legislative efforts and proposals that some states have introduced, highlighting potential issues with their design and

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[36] The Department of Consumer and Worker Protection encourages reporting of suspected violations of Local Law 144's audit and notice requirements, in lieu of a mechanism for initiating investigations. *See* Niloy Ray, Monica Sislak & Eli Freedberg, *NYC Department of Consumer and Worker Protection Issues Guidance on AI Regulations*, LITTLER MENDELSON P.C. (July 5, 2023), https://www.littler.com/news-analysis/asap/nyc-department-consumer-and-worker-protection-issues-guidance-ai-regulations [perma.cc/58QE-Z73Q]; Ottaway, *supra* note 27.

[37] *See* Ottaway, *supra* note 27.

[38] *See id.*

[39] *See* Roy Maurer, *AI Employment Regulations Make Compliance 'Very Complicated'*, SHRM (Nov. 26, 2024), https://www.shrm.org/topics-tools/employment-law-compliance/ai-employment-regulations-compliance-complicated [perma.cc/AV33-744S].

[40] *See* Joy C. Rosenquist, Bradford Kelley, Deborah Margolis & Alice Wang, *Divergent Paths on Regulating Artificial Intelligence*, LITTLER MENDELSON P.C. (Apr. 1, 2024), https://www.littler.com/news-analysis/asap/divergent-paths-regulating-artificial-intelligence [perma.cc/3BT9-DHZG].

[41] *See* Ottaway, *supra* note 27.

[42] *See* Vin Gurrieri, *NYC AI Bias Bill May Be Compliance Headache for Employers*, LAW360 (Dec. 3, 2021), https://www.law360.com/employment-authority/articles/1445563 [perma.cc/83Z3-FRVV].

challenges of effective implementation. Many of these state-level initiatives have been poorly drafted and lack thoughtful consideration, threatening to exacerbate and extend the mistakes of early efforts to regulate AI in employment. Part IV analyzes various proposals introduced by local jurisdictions, focusing on the challenges and shortcomings of these local efforts. As set forth below, many of these local-level proposals have been poorly developed. Finally, Part V briefly looks at various international efforts and explains why it is important to track international AI developments. Against the backdrop of the overall regulatory uncertainty, this Article concludes in Part VI by outlining several recommendations.

II. THE FEDERAL LANDSCAPE

This Part of the Article explores the general federal regulatory landscape surrounding workplace AI, emphasizing executive orders and other agency actions during the Biden administration. It also covers specific regulatory efforts aimed at governing AI, highlighting the short-sighted initiatives undertaken by agencies to manage AI's impact on employment.

A. Executive Actions

The Biden administration's approach to AI centered on public displays of broad government interest, concern, and study, highlighting concerns with AI technologies raised by labor unions.[43] For instance, the White House hosted a listening session in June of 2023 with several high-profile union leaders to discuss the impact of AI on members, job quality, and civil rights.[44] The Biden administration also relied on executive actions including a Blueprint for an "AI Bill of Rights" as well as requests for information.[45] In October 2021, the White House's Office of Science and Technology Policy ("OSTP") began a series of listening sessions and related events to form the groundwork for an AI "Bill of Rights" allegedly "to guard against the powerful technologies we have created."[46] The original premise for the document was the presumption by OSTP that basic civil rights protections are routinely violated by AI.[47] Certain advocacy groups in the technology space supported this effort and lobbied for its release, which was delayed until October 2022 when, under new leadership,

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[43] *See* The White House, *supra* note 11.

[44] *See id.*

[45] *See Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People*, THE WHITE HOUSE, https://bidenwhitehouse.archives.gov/ostp/ai-bill-of-rights/ [perma.cc/4FNL-WTS7] (last visited Oct. 25, 2025); *see Executive Order on Advancing United States Leadership in Artificial Intelligence Infrastructure*, THE WHITE HOUSE (Jan. 14, 2025), https://bidenwhitehouse.archives.gov/briefing-room/presidential-actions/2025/01/14/executive-order-on-advancing-united-states-leadership-in-artificial-intelligence-infrastructure/ [perma.cc/9AK3-2J3J].

[46] *See* Eric Lander & Alondra Nelson, *ICYMI: WIRED (Opinion): Americans Need a Bill of Rights for an AI-Powered World*, THE WHITE HOUSE (Oct. 22, 2021), https://bidenwhitehouse.archives.gov/ostp/news-updates/2021/10/22/icymi-wired-opinion-americans-need-a-bill-of-rights-for-an-ai-powered-world/ [perma.cc/TC7K-277B].

[47] *See id.*

OSTP released a "Blueprint for an AI Bill of Rights."[48] Instead of the anticipated "Bill of Rights" the "Blueprint" simply reiterated basic principles of privacy, transparency, and protections from discrimination.[49] As the "Blueprint" was not the promised and anticipated output, it has been criticized as "toothless" and "insufficient."[50] In addition, critics noted that some of the goals included in a AI "Blueprint" would require the government to take aggressive steps to regulate and enforce AI restrictions, potentially hampering innovation.[51]

In October 2023, President Biden signed a comprehensive executive order directing numerous federal agencies to take broad actions related to AI.[52] At least one researcher construed the order to '"empower[] federal agencies to push the boundaries of their amorphous authority over advanced computational systems."[53] Whatever the actual intent, the practical impact was far less grand than expansion of the regulatory frontier. Indeed, some of the directives were never implemented. For instance, the AI Executive Order directed DOL to issue a report on how the government can support workers displaced by AI by the end of April of 2024, but DOL never issued the report.[54]

B. Interagency and Intra-Agency Agreements

The Biden administration also focused on interagency and intra-agency agreements, known as Memoranda of Understanding ("MOUs").[55] MOUs are generally agreements between agencies that outline the ways in which they will work together or share information, or conduct investigations, training, enforcement, and other informal arrangements.[56] Some MOUs have existed with minor modifications for extended periods. Others that are more substantively partisan often are casualties with each change of administration. Collectively, MOUs function as a network of interagency agreements intended to promote coordination across the administrative state and to streamline investigations and enforcement efforts targeting a wide range of employer practices.[57]

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[48] *See* Ellen Glover, *AI Bill of Rights: What You Should Know*, BUILT IN (Mar. 19, 2024) https://builtin.com/artificial-intelligence/ai-bill-of-rights [perma.cc/9YGV-G3D4].

[49] *See id.*

[50] *See* Sonderling, Kelley & Casimir, *supra* note 7, at 42.

[51] *See id.*

[52] Exec. Order No. 14,110, 88 Fed. Reg. 75191 (Nov. 1, 2023) (rescinded by Exec. Order No. 14,148, 90 Fed. Reg. 8237 (Jan. 28, 2025)); *see* Kelley, *supra* note 1, at 92–93.

[53] *See* Adam Thierer, *Why the End of Chevron Deference is Largely Meaningless for AI Policy, Part 2*, MEDIUM (July 2, 2024), https://medium.com/@AdamThierer/why-the-end-of-chevron-deference-is-largely-meaningless-for-ai-policy-part-2-ba9276bc272f [perma.cc/Z7PX-P7R2].

[54] *See* Bradford J. Kelley & Alice Wang, *Artificial Intelligence Executive Order WHD and OFCCP Guidance Issued*, LITTLER MENDELSON P.C. (May 1, 2024), https://www.littler.com/news-analysis/asap/artificial-intelligence-executive-order-whd-and-ofccp-guidance-issued [perma.cc/9U3A-4R6D].

[55] *See* Kelley, *supra* note 1, at 94–96.

[56] *See id.*

[57] *See id.* Done well, MOUs minimize government waste and duplication of efforts. But sharing of information can operate as an end-run around enforcement powers given to—and withheld from—a particular agency by Congress.

Despite their benefits, certain applications of MOUs—especially the more partisan varieties—may raise several concerns. Connecting the investigatory powers Congress afforded (or withheld from) separate agencies may be used to end-run statutory limitations. Such information sharing may raise confidentiality concerns. Oftentimes, when data is shared or complaints are referred between agencies, the receiving agency lacks the same level of familiarity with the applicable confidentiality protections.[58] Some critics of these interagency agreements contend that agencies should focus more on offering compliance assistance to the general public, enabling the regulated community to better understand and meet legal requirements.[59]

The risk of abuse inherent in agency information sharing agreements was taken to new heights in the Biden administration, as media reports demonstrated that at least one federal department entered into agreements to share information collected by the government with private law firms.[60] Specifically, news reports indicated that DOL may have entered into a "common interest agreement" with a private plaintiffs' law firm, Cohen Milstein Sellers & Toll PLLC.[61] If true, this arrangement "suggests a new link between federal benefits enforcement action and private-sector litigation brought by plaintiffs' firms." Even more troubling, a federal magistrate judge warned that such a pact would allow regulators to "litigate in the shadows"—a deeply unsettling prospect given the potential funneling of confidential regulatory information into private litigation.[62]

C. Federal Agencies

Despite the growing integration of AI tools into the workplace, federal labor and employment agencies during the Biden administration failed to provide clear, consistent, or technically sound guidance.[63] Neither the EEOC nor the NLRB issued meaningful guidance explaining which uses of AI are permissible and which violate the law. This silence was particularly striking given AI's rapid adoption across the employment lifecycle—from hiring and promotion to discipline and termination. The fact that the EEOC and other agencies struggled to keep pace with the details of AI technology limited their ability to provide meaningful guidance or impose effective regulatory limitations.[64] The failure to use existing authorities cuts against contentions that additional powers or flexibilities are necessary or likely to achieve better

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[58] *See id. at 96.*

[59] *See id.*

[60] *See* Austin R. Ramsey, *Lawmakers Probe DOL Data Sharing Pact with Plaintiffs' Firm*, BLOOMBERG L. (Nov. 21, 2024), https://news.bloomberglaw.com/daily-labor-report/lawmakers-probe-dol-enforcement-data-pact-with-plaintiffs-firm [perma.cc/SGY6-Q7E8].

[61] *Id.*

[62] *Id.*

[63] See Bradford J. Kelley, *All the Regulatory Light We Cannot See: The Impact of Loper Bright on Regulating Artificial Intelligence in the Workplace*, 49 SETON HALL J. LEGIS. & PUB. POL'Y 708, 714 (2025).

[64] *Id.*

results.[65] No agency will be in a position to exercise additional or broader authority—to protect workers or to offer compliance assistance to employers—until it understands the technology it seeks to regulate.[66] Armed with such expertise, agencies would be better positioned to more effectively marshal the tools and powers they already possess, both to provide guidance and enforce federal civil rights protections.

Much of the guidance issued during the Biden era came in non-binding formats, especially technical assistance documents, none of which were subject to public notice and comment.[67] These procedures, often required before agencies may promulgate regulations, are not required for the technical assistance and other guidance that merely restates, explains, and clarifies, existing regulations or requirements.[68] However, given AI's rapid evolution and expansion, participation and input from those closest to the development, evolution, and growth of that technology would aid the utility and efficacy of regulations.[69] In doing so, agencies turned aside the very information and expertise that might have strengthened both their guidance and position to regulate AI.[70] But agencies in the Biden administration took a different approach, deciding to move forward alone.

Agencies opted to regulate in isolation rather than draw upon the practical expertise necessary to craft workable standards. Labor and employment agencies did not engage key stakeholders during the Biden administration, even outside the rulemaking context.[71] Notably, the EEOC has not held any public hearings on workplace AI technologies since January 2023, and the sole hearing conducted—non-technical in nature—did not feature a single AI vendor actively involved in developing such tools.[72] The work product produced by these agencies during the Biden administration lends support to criticisms that agencies lack not only technical expertise in AI, but also interest in developing it. Instead, most agency AI technical assistance retreated to broad assertions of uncontroversial principles that did little to help employers identify uses of AI that are permissible and the line where the uses run afoul of antidiscrimination statutes. These milquetoast efforts unreasonably chilled bona fide uses of AI technology by employers, even in ways that are likely to reduce unlawful discrimination.

Federal agencies have frequently overlooked how AI technologies are procured and deployed in the workplace. A prime example is DOL's Wage and Hour Division which issued a Field Assistance Bulletin in 2024 to address wage

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[65] *See* Bradford J. Kelley, *Wage Against the Machine: Artificial Intelligence and the Fair Labor Standards Act*, 34 STAN. L. & POL'Y REV. 261, 269 (2023).

[66] *See id.*

[67] *See* Kelley, *supra* note 1, at 95.

[68] *Id.* at 103.

[69] *Id.* at 104.

[70] *Id.* at 104–05.

[71] *See* Kelley, *supra* note 63, at 714–15.

[72] *See* Keith E. Sonderling & Bradford J. Kelley, *Filling the Void: Artificial Intelligence and Private Initiatives*, 24 N.C. J. L. & TECH. 153, 161 (2023).

and hour risks associated with AI.[73] Yet it failed to account for the reality that most employers rely on third-party vendors for AI tools.[74] Employers rarely build their own AI technologies from scratch. Instead, they frequently engage third-party software vendors that develop and sell AI-powered tools, which are then used to perform a wide variety of employment tasks.[75] By disregarding the vendor-employer dynamic, the 2024 guidance overlooked practical implementation concerns, highlighting the need for robust stakeholder input before issuing such directives. This disconnect was mirrored in other agency actions. For example, the NLRB General Counsel's October 2022 Memorandum introduced a skeletal AI regulatory framework with no meaningful analysis of how such tools are actually used in employment settings.[76] The lack of grounding in real-world implementation reflects a broader trend of agencies attempting to regulate AI without the necessary technical understanding or consultation with affected parties.

In some cases, agencies compounded the problem by failing to substantiate their positions. The April 2024 Field Assistance Bulletin, for instance, cited no evidence to support its assertions about how employers use AI.[77] Even when agencies cite their sources, they often reveal a flawed foundation. For instance, the former NLRB General Counsel's memorandum establishing an AI framework relied on just three brief sentences from a short 2018 symposium journal article.[78] The article offers no substantive explanation of how the proposed framework would function in practice, and the relevant statements are entirely unsupported.[79] Unsurprisingly, the NLRB general counsel's memorandum similarly lacks practical detail.[80] Notably, the article's author acknowledges in a footnote that "[t]he proposal is laid out here only briefly, to be elaborated in future work,"—a follow-up work that was never published.[81]

These shortcomings were exacerbated by the EEOC's failure to involve the full Commission in critical decision-making. Throughout the Biden administration, all AI-related guidance was issued solely by the Chair without a vote by the Commission.[82] This unilateral approach lacked transparency and suggested a partisan orientation in what had previously been a nonpartisan space. Rather than reflecting balanced, deliberative policymaking, the agency's actions appeared crafted to promote one view of the regulatory debate while

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[73] *See Field Assistance Bulletin 2024-1*, U.S. DEP'T OF LAB. (Apr. 29, 2024), https://www.millercanfield.com/assets/htmldocuments/fab2024_1.pdf [perma.cc/5ZYK-JF89]; Kelley & Wang, *supra* note 54. The Wage and Hour Division withdrew FAB 2024-1 shortly after Executive Order 14110, on which it was based and predicated, was revoked by Executive Order 14148.

[74] *See* Kelley & Wang, *supra* note 54.

[75] *See id.*

[76] *See* Kelley, *supra* note 3, at 199.

[77] *See* Kelley, *supra* note 63, at 715.

[78] *See* Kelley, *supra* note 3, at 221.

[79] *Id.* at 221–22.

[80] *See id.*

[81] *Id.* at 222.

[82] *See* Kelley, *supra* note 63, at 714.

sidelining opposing ones. This perceived lack of neutrality is well illustrated by the EEOC's entanglement with the Center for Democracy & Technology ("CDT"), a progressive nonprofit that has long advocated for more aggressive AI regulation.[83] During her tenure, the EEOC's then–Legal Counsel—who was directly responsible for drafting agency policy and guidance—simultaneously served on the advisory committee for CDT's "Project on Disability Rights & Algorithmic Fairness." CDT's website prominently listed both the EEOC and her official title while the organization actively lobbied the agency on AI policy.[84] This overlap raises serious conflict-of-interest concerns and casts doubt on the impartiality of AI-related guidance documents issued under her leadership. The appearance of favoritism was further reinforced by the EEOC's public hearings on AI, where groups like CDT and other civil rights organizations were prominently featured, while employer-affiliated stakeholders were largely excluded.

During the Biden administration, the EEOC also took inconsistent positions on AI vendor liability, with its amicus briefs pointing in one direction and its public training materials in another. In litigation, the EEOC filed amicus briefs supporting a broad view of vendor liability, explicitly arguing that vendors may be held responsible for discriminatory outcomes caused by their AI tools.[85] Yet in its public trainings, the agency sent the opposite message. For example, a March 2024 training entitled "Artificial Intelligence in the Workplace: Real Life Examples of the Risks to Employers," the EEOC instructed that "if your company uses software, computer systems, etc., created by someone else that discriminates, you will be on the hook, not the vendor."[86] A separate slide titled "Lessons Learned" reinforced the point, stating that while a "vendor may not be liable" for discriminatory software, employers "will be!"[87] This stark contrast highlights an unresolved and confusing inconsistency: while the EEOC tells courts that vendors may face liability, it tells employers in training sessions that vendors will not.

In the end, the shortcomings in the federal response to AI in the workplace may help explain why a federal district court opinion neither cited nor acknowledged an amicus brief the EEOC filed in an employment discrimination case involving AI decisions.[88] The court's complete disregard of the EEOC's amicus brief may suggest that courts are already becoming less willing to defer

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[83] *Id.*; *see also* Sonderling & Kelley, *supra* note 72, at 184.

[84] *See* Kelley, *supra* note 63, at 714.

[85] *Id.* at 716–17.

[86] Steven A. Wagner, EEOC Training Inst. Presentation on Artificial Intelligence in the Workplace: Real Life Examples of the Risks to Employers 8–10 (Mar. 28, 2024) (on file with authors).

[87] *Id.*

[88] *See* Kelley, *supra* note 63, at 717. While courts often afford little or no weight to amicus briefs—especially in an era characterized by sharp and frequent policy reversals—the court's disregard of this particular brief is noteworthy. Unlike other areas subject to such "wild flip-flops," the brief addressed a relatively stable and emerging domain of law where the EEOC's views would reasonably be expected to carry persuasive value. *See* Keith E. Sonderling & Bradford J. Kelley, *The Sword and the Shield: The Benefits of Opinion Letters by Employment and Labor Agencies*, 86 MO. L. REV. 1171, 1201–02 (2021) (noting courts' increasing skepticism toward agency amicus briefs).

to agency interpretations on complex and technical matters like AI because they lack a reliable, substantive comprehension of the technology on which they opine.[89] Not only does the decision signal a disinclination to follow agency interpretations, but it also demonstrates that at least one court does not feel any obligation to even explain why it chose to ignore the EEOC's position.

Even though Biden's EEOC did not focus on public-facing AI guidance, the agency attempted to influence the AI regulatory landscape through more unofficial methods, such as press releases, settlement agreements, and training materials.[90] These channels allowed the agency to shape narratives around AI and discrimination without undergoing formal rulemaking or engaging with stakeholders through notice-and-comment procedures.

In 2023, the EEOC issued a press release announcing a conciliation agreement with DHI Group, Inc., a company that operates a job-search website for technology professionals.[91] The agreement resolved multiple national origin discrimination charges stemming from allegations that DHI permitted certain customers to post job listings that explicitly excluded U.S. workers based on national origin.[92] The EEOC found reasonable cause to believe that this practice violated Title VII, which prohibits job advertisements that express a preference or impose limitations based on national origin.[93] As part of the settlement, DHI agreed to provide monetary relief to the estate of the original complainant and to modify its platform's programming to detect and flag potentially discriminatory phrases—such as "OPT," "H1B," or "Visa"—when used alongside restrictive language like "only" or "must." In the EEOC's press release, the EEOC's Miami District Systemic Coordinator noted "DHI's use of programming to 'scrape' for potentially discriminatory postings illustrates a beneficial use of artificial intelligence in combatting employment discrimination."[94]

Later that year, the EEOC announced a settlement in what has been described as the agency's first-ever AI discrimination case.[95] The lawsuit involved iTutor Group and related entities, which hired thousands of U.S.-based

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[89] *See id.*

[90] *See* Press Release, Equal Emp. Opportunity Comm'n, DHI Group, Inc. Conciliates EEOC National Origin Discrimination Finding (Mar. 20, 2023), https://www.eeoc.gov/newsroom/dhi-group-inc-conciliates-eeoc-national-origin-discrimination-finding [perma.cc/QK6K-VCDZ]; *see* Press Release, Equal Emp. Opportunity Comm'n, EEOC Hearing Explores Potential Benefits and Harms of Artificial Intelligence and other Automated Systems in Employment Decisions (Jan. 31, 2023), https://www.eeoc.gov/newsroom/eeoc-hearing-explores-potential-benefits-and-harms-artificial-intelligence-and-other [perma.cc/9C7C-YX2Q].

[91] *See* Press Release, Equal Emp. Opportunity Comm'n, DHI Group, Inc. Conciliates EEOC National Origin Discrimination Finding, *supra* note 90.

[92] *See id.*

[93] *See id.*

[94] *Id.*

[95] *See* Press Release, Equal Emp. Opportunity Comm'n, iTutorGroup to Pay $365,000 to Settle EEOC Discriminatory Hiring Suit (Sept. 11, 2023), [perma.cc/E38B-CQXQ]; *see* Annelise Levy, *EEOC Settles First-of-Its-Kind AI Bias in Hiring Lawsuit*, DAILY LAB. REP. (Aug. 10, 2023), https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/X4ER6U4000000 [perma.cc/UK8Z-D5QY].

online tutors.[96] The EEOC alleged that the employer's online application system automatically rejected female applicants aged 55 or older and male applicants aged 60 or older.[97] While multiple media reports have characterized the EEOC's iTutor lawsuit as a case involving AI, the actual complaint only alleged that the online job application system requested dates of birth and was programmed to automatically screen out female applicants aged fifty-five or older and male applicants aged sixty or older.[98] While the EEOC's complaint and proposed consent decree did not expressly reference AI or machine learning, the EEOC's press release linked the case to its Artificial Intelligence and Algorithmic Fairness Initiative as an example of the types of technologies that the EEOC is interested in pursuing.[99] This framing appeared designed to link the lawsuit to broader concerns about algorithmic bias, despite the lack of any allegations regarding AI in the legal filings.

Taken together, these actions illustrate the EEOC's strategy of advancing AI enforcement goals indirectly—through enforcement mechanisms and public messaging rather than formal regulatory pathways. While these efforts reflect a growing interest in addressing algorithmic harms, they also raise concerns about transparency and the coherence of the agency's approach to emerging technologies.

Perhaps recognizing their own lack of readiness to regulate AI effectively, federal labor and employment agencies under the Biden administration turned to non-government organizations to fill the regulatory void.[100] A notable example was the DOL's announcement on September 24, 2024, of the release of its "AI & Inclusive Hiring Framework," described as a new tool designed to promote the inclusive use of AI in hiring technologies and improve employment outcomes for individuals with disabilities.[101] However, the new framework was not issued by the DOL itself. Instead it was published by the Partnership on Employment & Accessible Technology ("PEAT"), a nonprofit initiative funded by the DOL's Office of Disability Employment Policy ("ODEP") and operated by a private contractor.[102] Despite receiving federal funds, PEAT maintains independence, and its website clearly states that its materials "do not necessarily reflect the views or policies of" ODEP or DOL, nor are they endorsed by the federal government.[103] According to DOL's press release, the framework was developed with input from disability advocates, AI

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[96] *See* Press Release, Equal Emp. Opportunity Comm'n, *supra* note 95.

[97] *See id.*

[98] *See id.*; Levy, *supra* note 95.

[99] *See* Press Release, Equal Emp. Opportunity Comm'n, *supra* note 95.

[100] *See* Press Release, U.S. Dep't of Lab., US Department of Labor Announces Framework to Help Employers Promote Inclusive Hiring as AI-Powered Recruitment Tools' Use Grows (Sept. 24, 2024), https://www.dol.gov/newsroom/releases/odep/odep20240924 [perma.cc/B2TZ-Z6YP].

[101] *See* Bradford J. Kelley, Alice H. Wang & Sean P. O'Brien, *DOL Issues "AI & Inclusive Hiring Framework" Through Non-Governmental Organization*, LITTLER (Sept. 25, 2024), https://www.littler.com/news-analysis/asap/dol-issues-ai-inclusive-hiring-framework-through-non-governmental-organization [perma.cc/E6F4-2EWK].

[102] *See* Press Release, U.S. Dep't of Lab., *supra* note 100.

[103] *See* Kelly et al., *supra* note 101.

experts, government officials, industry leaders, and members of the public.[104] The process stemmed from a virtual think tank hosted by DOL and PEAT on April 17, 2023, which included participants from federal agencies, civil rights groups, disability organizations, and technology companies.[105] Notably absent from this gathering were employers—even though the framework's stated primary audience is employers deploying AI hiring tools.[106] Although employer viewpoints were solicited during broader stakeholder engagement sessions, they were not given the opportunity to provide direct feedback on the draft guidance.[107] This omission raises concerns about whether the final framework adequately reflects the practical challenges and operational realities employers face in striving to deploy accessible and inclusive AI technologies.[108] In short, the process sacrificed balance—namely, a fair consideration of stakeholder interests, legal constraints, and implementation realities—and practical utility in favor of symbolic progress, potentially weakening the framework's effectiveness and credibility.

Even without imposing sweeping substantive regulations, the Biden administration managed to create unnecessary burdens through piecemeal, ill-conceived AI initiatives. A clear example came in August 2023, when the Office of Management and Budget approved DOL's Office of Federal Contract Compliance Programs ("OFCCP") request to revise its "Itemized Listing" for federal contractor audits.[109] The revised listing added a new requirement—"Item 21"—obligating contractors to disclose information and documentation about any policies, practices, or systems used to recruit, screen, and hire, including those involving "artificial intelligence, algorithms, automated systems, or other technology-based selection procedures."[110]

This requirement illustrates the harms of the administration's regulatory approach. First, OFCCP offered no definition of "artificial intelligence," while simultaneously expanding its reach to "algorithms" and "other technology-based selection procedures."[111] The result was breathtakingly overbroad, sweeping in even basic tools like online intake forms or database search functions that have nothing to do with AI.[112] Second, the requirement imposed heavy compliance costs on contractors, who were tasked with cataloging technologies that are often

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[104] *See* Press Release, U.S. Dep't of Lab., *supra* note 100.

[105] *See* Press Release, U.S. Dep't of Lab., Readout: Department of Labor Gathered Experts, Stakeholders To Ensure More Inclusive Hiring As Automated Technology Affects Decision-Making (Apr. 17, 2023), https://www.dol.gov/newsroom/releases/odep/odep20230417 [perma.cc/63EL-HMSR].

[106] *See* Kelley et al.*, supra* note 101.

[107] Id.

[108] See id.

[109] *See* Bradford J. Kelley, Chris Gokturk, David Goldstein & Niloy Ray, *OFCCP Preparing to Scrutinize Federal Contractors' Use of AI Hiring Tools and Other Technology-based Selection Procedures*, LITTLER (Sept. 7, 2023), https://www.littler.com/news-analysis/asap/ofccp-preparing-scrutinize-federal-contractors-use-ai-hiring-tools-and-other [perma.cc/U2YD-EQX5].

[110] *Id.*

[111] *Id.*

[112] *Id.*

integrated across multiple platforms, not always visible to end users, and, in many cases, proprietary to third-party vendors. Contractors were thus forced into an impossible position—either attempt to describe systems they did not build and cannot access, or risk noncompliance with OFCCP audits.[113]

Equally troubling, the new disclosure obligation lacked any clear purpose or benefit. OFCCP did not explain how the information would be used, or why existing enforcement tools were insufficient. If no adverse impact is revealed, the agency has no basis for further inquiry; if impact is detected, OFCCP already had authority to investigate whether AI was a contributing factor. In other words, the requirement added bureaucratic burden without enhancing enforcement or worker protections.

This episode underscores the broader issues of the Biden administration's AI regulatory posture: ambiguous mandates, poorly targeted obligations, and costly compliance exercises untethered from meaningful outcomes. Rather than offering clarity or protection, these efforts increased uncertainty, drained employer resources, and highlighted the federal government's lack of preparedness to regulate AI responsibly.

D. Congressional Inaction

Although members of Congress have expressed interest in regulating certain aspects and uses of AI, the body has yet to take meaningful action. In recent years, Democratic lawmakers have reintroduced the Algorithmic Accountability Act, a bill that would grant the Federal Trade Commission authority to promulgate regulations mandating that large companies assess their AI tools for potential unlawful bias.[114] Specifically, the bill would require all large companies to perform a so-called bias impact assessment of any automated system that makes critical decisions in a variety of sectors, including employment, financial services, healthcare, housing, and legal services.[115] However, the bill has been strongly criticized for its perceived overreach, lack of definitional clarity, insufficient direction to the FTC, and several other shortcomings—making its passage into law highly unlikely.[116]

More broadly, Congress has not expressly delegated authority to any labor and employment agency to regulate AI. In the absence of such authority, any agency attempting to regulate AI in the labor and employment context risks overstepping its jurisdiction, making its rules and guidance vulnerable to legal challenges for exceeding the scope of the agency's authority.

III. STATE AI LAWS

This Part of the Article analyzes how states have approached the regulation of AI to address potential risks. As explicated in greater detail below, many of these state-level initiatives have been poorly drafted and lack thoughtful

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[113] *Id.*

[114] *See* Algorithmic Accountability Act of 2022, H.R. 6580, 117th Cong. (2022).

[115] See id.

[116] *See* Furkan Gursoy, Ryan Kennedy & Ioannis A. Kakadiaris, *A Critical Assessment of the Algorithmic Accountability Act of 2022*, (2022) (manuscript at 4–6), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4193199 [perma.cc/R6CG-KMPP].

consideration, resulting in inconsistent and flawed regulatory frameworks.

A. AI Video Interview Laws

The COVID-19 pandemic reshaped not only how people work but also how some companies hire. With government restrictions limiting onsite operations, employers rapidly expanded remote work arrangements, which in turn accelerated the adoption of AI-driven hiring tools—most notably video interview platforms.[117] A 2020 survey found that 86% of employers were using virtual interview technology to support remote hiring.[118] This rapid shift prompted several states to enact laws specifically aimed at regulating the use of AI in video interviewing.[119]

The Illinois Artificial Intelligence Video Interview Act stands as one of the earliest state-level attempts.[120] The law requires employers to provide applicants with advance notice if AI-driven video interview technologies will be used, including an explanation of how the AI functions and what general traits or characteristics it will assess.[121] The advance notice must explicitly inform applicants that "artificial intelligence analysis" may be used in evaluating the interview.[122] Additionally, the law gives applicants limited control over their data by allowing them to request deletion of their video interview, including all backup copies, within thirty days of the request.[123]

Despite its pioneering intent, the Illinois law is deeply flawed and may ultimately create more confusion and compliance challenges for employers than it resolves. Most notably, the statute fails to include essential definitional clarity—it does not define key terms such as "artificial intelligence," "AI analysis," or other operative language central to its regulatory scope.[124] This omission introduces significant legal ambiguity and undermines the law's enforceability, particularly given the wide range of technologies that might or might not fall within its purview.[125]

Moreover, the statute's notice requirements are vague, providing only a general outline of what the notice must include without specifying the level of detail required.[126] The law is also conspicuously silent on critical enforcement mechanisms—it provides no guidance on penalties for noncompliance, fails to establish a private right of action, and lacks a designated enforcement authority.[127] These omissions significantly weaken the law's deterrent power and raise questions about its practical effectiveness.[128] As a result, many

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[117] *See* Kelley, *supra* note 65, at 269.
[118] *See* Sonderling, Kelley & Casimir, *supra* note 7, at 42.
[119] *Id.*
[120] *See id.*
[121] *See* 820 ILL. COMP. STAT. ANN. 42/5 (West 2020).
[122] *See* Sonderling, Kelley & Casimir, *supra* note 7, at 45.
[123] *See* 820 ILL. COMP. STAT. ANN. 42/5 (West 2020).
[124] *See* Sonderling, Kelley & Casimir, *supra* note 7, at 42.
[125] *Id.*
[126] *See id.* at 46.
[127] *See id.*
[128] *Id.* at 45–46.

common uses of AI in the video interviewing and remote hiring context may inadvertently escape coverage, leaving both employers and applicants in a state of uncertainty.[129]

Jurisdictional ambiguity adds another layer of complexity. The law purports to protect applicants "based in Illinois," but it does not clarify whether it applies to out-of-state employers, particularly when hiring for roles located outside of Illinois.[130] Nor does it address whether an employer can legally reject applicants who decline to consent to the use of AI-driven video interviews, leaving a notable gap in both applicant protections and employer obligations.[131]

A similar law enacted by Maryland in 2020 also reflects these regulatory shortcomings. Maryland's statute prohibits the use of facial recognition technology during pre-employment interviews unless the applicant provides written consent via a specific waiver.[132] This waiver must include the applicant's name, the date of the interview, an acknowledgment of consent to facial recognition, and confirmation that the applicant has read the waiver.[133] While Maryland's law includes definitions for terms like "facial template" and "facial recognition services," those definitions remain vague and insufficiently detailed, creating interpretive challenges that complicate employer compliance and raise enforcement concerns.[134]

Together, these early state efforts reflect a broader pattern: while well-intentioned, current AI employment regulations are often underdeveloped, inconsistently drafted, and legally ambiguous—raising serious questions about their utility as models for broader policymaking in this rapidly evolving area.

B. The Colorado AI Act

In 2024, the Colorado enacted state Senate Bill 24-205, entitled "Concerning Consumer Protections in Interactions with Artificial Intelligence Systems" (commonly referred to as the "Colorado AI Act").[135] The Colorado AI Act, which will not go into effect until 2026 at the earliest, aims to regulate the private-sector use of AI systems, and, specifically, the risk of algorithmic discrimination arising from the use of "high-risk" AI systems.[136]

The legislative history of the Colorado AI Act casts a damning light on the law.[137] It was rammed through the legislative process so that it would be

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[129] *Id.*

[130] *Id.* at 46.

[131] *See id.*

[132] *See* MD. CODE ANN. LAB. & EMPL. § 3-717 (West 2020).

[133] *See id.*

[134] *See* Sonderling, Kelley & Casimir, *supra* note 7, at 46.

[135] *See* COLO. REV. STAT. § 6-1-1701 *et seq.* (2024).

[136] *See id.* (explaining that the Colorado AI Act addresses, among other things, the risk of algorithmic discrimination arising from the intended and contracted uses of "high-risk artificial intelligence system[s].").

[137] *See* Jake Parker, *Misgivings Cloud First-in-Nation Colorado AI Law: Implications and Considerations for the Security Industry*, SEC. INDUS. ASS'N (May 28, 2024), https://www.securityindustry.org/2024/05/28/misgivings-cloud-first-in-nation-colorado-ai-law-implications-and-considerations-for-the-security-industry/ [perma.cc/Y2WG-LVV8].

enacted before the EU's Artificial Intelligence Act.[138] Hasty drafting and expedited consideration came at the cost of quality. On the same day he signed the Colorado AI Act into law, the Colorado governor wrote to the Colorado General Assembly stating that he had "reservations" about the law.[139] He urged the legislature to "fine tune" certain provisions.[140] Shortly thereafter, the governor, state attorney general, and state senate majority leader authored an open letter to the business community to "provide additional clarity" and committed to "engage in a process to revise the new law" and "minimize unintended consequences associated with its implementation."[141] Thus, the structure and key provisions of the Colorado AI Act will likely be amended before the effective date. Consequently, Colorado state agencies are now forced to take a "wait and see" position in the event the law is amended.[142] This will also effectively limit any available time for any notice-and-comment for any proposed rules. Meanwhile, employers cannot effectively prepare to comply with a comprehensive new law with novel requirements while waiting for the state government to fix a law that was defective from the start.

One might reasonably expect that a government enacting a sweeping statute to regulate a new, growing, and rapidly evolving technology would resolve important and fundamental aspects of the regulatory regime before it passes. At the very least, one might reasonably accuse Colorado of recklessness for charging ahead with an admittedly facially deficient law, based on vague intentions to pass subsequent amendments. Particularly with respect to a new technology in a rapidly evolving area, it behooves the government to get it right the first time.

Although the Colorado AI Act directs the state attorney general to promulgate rules to implement and enforce the law and permits other state agencies to issue related guidance and regulations, Colorado state courts will not be required to defer to the agencies' interpretations of those rules.[143] Critically, Colorado courts explicitly do not defer to agency interpretations.[144] Most notably, in 2021, the Colorado Supreme Court expressly declined to defer to a state agency's interpretation of a statute in Nieto v. Clark's Market, Inc.[145] In that case, the Colorado Supreme Court emphasized that it would consider agency interpretations to be "persuasive evidence" for Colorado courts to factor into their determinations.[146] The court further noted that it was "unwilling to adopt a rigid approach to agency deference that would require courts to defer to a reasonable agency interpretation of an ambiguous statute even if a better

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[138] *See id.*

[139] *See* Letter from Jared Polis et al., *supra* note 25.

[140] *See id.*

[141] *Id.*

[142] *See* Tamara Chuang, *Governor, Lawmakers Are Already Planning Big Revisions to Colorado's First-in-the Nation Artificial Intelligence Law*, COLO. SUN (June 14, 2024), https://coloradosun.com/2024/06/14/colorado-ai-bill-revisions/ [perma.cc/K5UV-VTRF].

[143] *See* Kelley, *supra* note 63, at 718.

[144] *See id.*

[145] *See* Nieto v. Clark's Market, Inc., 488 P.3d 1140, 1149 (Colo. 2021).

[146] *Id.*

interpretation is available."[147]

C. California AI Laws and Regulations

In 2024, the Civil Rights Council, a branch of California's Civil Rights Division, issued proposed regulations for employers' use of AI and automated decision-making systems.[148] While the Civil Rights Council positioned these rules as a necessary step toward protecting civil rights in the digital age, the proposed regulations were riddled with serious flaws that undermine their credibility and legal viability.[149] First, the proposed regulations were based on studies, reports, and feedback from 2021.[150] In the years since then, the AI landscape has undergone significant transformation, particularly with the rapid advancement of generative AI technologies.[151] Remarkably, the proposed regulations failed to even mention generative AI, despite its growing prevalence in hiring, performance evaluation, and workplace management systems.[152] Second, the Civil Rights Council's authority to issue these regulations is itself questionable because it lacks clear statutory authorization to do so and appears to be stretching its mandate by framing the regulation of emerging technologies as an extension of its anti-discrimination mission.[153] Third, several commenters—including the U.S. Chamber of Commerce—criticized the Council for disregarding stakeholder concerns about the potential for a dramatic surge in litigation targeting vendors and developers of automated decision-making tools.[154] The U.S. Chamber of Commerce argued that "the proposed regulations could impose significant, disproportionate costs on innovation and not survive legal challenges, leaving the business community without necessary

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[147] *Id.*

[148] *See* Press Release, Cal. C.R. Dep't, Civil Rights Council Releases Proposed Regulations to Protect Against Employment Discrimination in Automated Decision-Making Systems (May 17, 2024), https://calcivilrights.ca.gov/2024/05/17/civil-rights-council-releases-proposed-regulations-to-protect-against-employment-discrimination-in-automated-decision-making-systems/ [perma.cc/SMD4-MLWE].

[149] *See id.*

[150] *See id.* (noting the 2021 hearing). *See also* Cal. C.R. Dep't, Civil Rights Council Final Statement of Reasons 35, https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2025/06/Final-Statement-of-Reasons-regulations-automated-employment-decision-systems.pdfutm [perma.cc/ZB3X-ZKRL] (recognizing comment criticism that the Civil Rights Council "based these proposed regulations on studies, reports and feedback from three years ago, in 2021").

[151] *See* Kelley, *supra* note 65, at 275–78 (noting that generative AI tools like ChatGPT have ushered in a sea of change in multiple industries, including the legal and medical industries).

[152] *See* Press Release, *supra* note 148.

[153] *See* Letter from Michael Richards, Senior Director, U.S. Chamber of Com., to Rachael Langston, Assistant Chief Couns., Cal. C.R. Couns. (Oct. 17, 2024), https://www.uschamber.com/technology/u-s-chamber-letter-to-california-civil-rights-council-on-artificial-intelligence [perma.cc/C4AW-R834] (noting that one of the "deficiencies in the Council's rulemaking approach" was the lack of "clarity on its legal authority to expand the scope of regulations without expressed legislative authorization to do so").

[154] *See id.*

certainty."[155] The U.S. Chamber of Commerce further stated, "[w]e believe until these matters are fully addressed, that [the Council] should stop any further movement of the proposed rules."[156]

Left unchecked, California's proliferating AI regulations could pose an existential threat to businesses that are unable to modify their operations to comply or those businesses that will suffer a serious competitive disadvantage as a result of its compliance with the state's regulatory regime.

IV. LOCAL AI LAWS: THE NEW YORK CITY AI LAW

This Part of the Article explores how one local government has sought to regulate AI to mitigate its risks, analyzing a New York City AI law and focusing on the challenges and shortcomings of it. Like several of the efforts discussed above, the measure was poorly constructed and inadequately considered, leading to a fragmented and ineffective approach to AI regulation.

In 2021, New York City enacted what purported to be the broadest AI employment law in the United States, which ostensibly curtails employers' use of AI tools for hiring and promotion decisions in New York City.[157] As noted above, it remains unclear whether employers in New York City were broadly using AI technology in hiring and promotion decisions before the law was enacted. But despite lacking a clear need for regulation, much less such a heavy-handed one, the city government pressed ahead.

Like the Colorado AI Act, the legislative history of the NYC AI law illuminates the shortcomings associated with an expedited legislative process. Despite the law's pro-employee intentions, a large number of civil rights groups, including the National Employment Law Project, the New York Civil Liberties Union, and the NAACP Legal Defense and Education Fund, condemned the measure as vague and ineffective, contending that it will actually "rubber-stamp" the very discrimination it seeks to prevent.[158] Other groups similarly argued that the ordinance's key provisions were "introduced and rammed through in a rushed process that excluded workers, civil rights groups, and other stakeholders from providing any input."[159] Practitioners criticized the law because "it leaves too many unanswered questions regarding the nature of the required audit, the AI tools, or processes that fall under (or outside of) the law's mandate, as well as basic coverage."[160] Practitioners further argued that "[t]he law's poor construction creates an HR nightmare for employers seeking to staff up."[161] A former EEOC Commissioner and his staff lamented that "the New York City law could have been a model for jurisdictions around the country to follow, but instead it typifies a missed opportunity and leaves important forms of discrimination unaddressed."[162]

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[155] *Id.*
[156] *Id.*
[157] *See* Sonderling, Kelley & Casimir, *supra* note 7, at 47–48.
[158] *Id.* at 48.
[159] *Id.*
[160] *See id.*
[161] *Id.* at 48–49.
[162] *Id.* at 49.

The New York City law has accomplished little since it went into effect in July of 2023. A Law360 article entitled, "'Everyone Ignores' New York City's Workplace AI Law" explains that most practitioners have concluded that the law has been a "toothless flop" and highly ineffective.[163] Similarly, the Society for Human Resource Management, the world's largest professional association dedicated to the practice of human resource management, published an article titled "New York City AI Law is a Bust."[164] Since enforcement began in 2023, the New York City Department of Consumer and Worker Protection—which is responsible for enforcing the law but lacks the authority to initiate investigations independently—has not received any complaints to date.[165] The law also permits employers to opt out if a human is involved in the decision-making process where the tool is used. Not surprisingly, a Cornell University study published in early 2024 found that the overwhelming majority of employers in New York City chose not to comply.[166] Of the 391 employers surveyed, only eighteen had posted the required audit reports on their websites, and just thirteen published notices informing applicants that an automated employment decision tool was being used in their evaluation.[167]

However, despite the number of businesses that are blatantly refusing to comply with the law's requirements, there are countless other businesses that have invested substantial amounts of time and money into evaluating existing or anticipated uses of AI systems in their operations and taking steps to try and ensure compliance with the law's requirements. These businesses are incurring significant costs to consult with vendors, lawyers, and consultants in order 1) to assess whether specific uses of AI are covered by the NYC AI law, 2) for those uses that are covered, to develop and implement new or modified policies and procedures to ensure that those uses of AI remain lawful and compliant, and 3) to perform or obtain bias audits of any AI systems covered by the law. As a result, the NYC AI law is impacting employers operating within city limits in differing ways, but it has largely failed to address the actual or perceived harms to employees that can flow from the use of AI systems.

Local jurisdictions have not only failed to support employers in navigating the challenges posed by AI; they have, in some cases, actively exacerbated them. A striking example occurred in October 2023, when New York City launched an AI-powered chatbot intended to assist small business owners.[168] Instead of offering reliable guidance, the chatbot delivered bizarre

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[163] *See* Ottaway, *supra* note 27.

[164] *See* Roy Maurer, *New York City AI Law Is a Bust*, SHRM (Feb. 18, 2024), https://www.shrm.org/topics-tools/news/technology/new-york-city-ai-law [perma.cc/EQN6-3M2U].

[165] See id.

[166] See id.

[167] *See* Lucas Wright, Roxana Mika Muenster, Briana Vecchione, Tianyao Qu, Pika (Senhuang) Cai, Alan Smith, Comm 2450 Student Investigators, Jacob Metcalf, & J. Nathan Matias, *Null Compliance: NYC Local Law 144 and the Challenges of Algorithm Accountability* (June 2024), https://dl.acm.org/doi/fullHtml/10.1145/3630106.3658998 [perma.cc/L2GY-SZH7].

[168] *See* Jake Offenhartz, *NYC's AI Chatbot Was Caught Telling Businesses to Break the*

responses, misrepresented city policies, and even advised employers to break the law.[169] For instance, the chatbot falsely claimed it was legal to fire an employee for reporting sexual harassment, failing to disclose a pregnancy, or refusing to cut their dreadlocks.[170] In another troubling exchange, it responded to a question about whether a restaurant could serve cheese that had been nibbled on by a rodent by stating, "Yes, you can still serve the cheese to customers if it has rat bites," advising the user to assess the "extent of the damage" and to "inform customers about the situation."[171] While the chatbot included a disclaimer that it may "occasionally produce incorrect, harmful or biased" information along with a warning that its responses do not constitute legal advice, these caveats do little to excuse its dangerous and misleading outputs. The incident underscores how ill-equipped some local jurisdictions are to responsibly regulate or deploy advanced AI technologies.[172]

V. INTERNATIONAL APPROACHES

In stark contrast to the United States, many countries—particularly in Europe—have embraced a far more prescriptive and heavy-handed approach to regulating AI.[173] This aggressive regulatory posture is epitomized by the European Union's AI Act, a sweeping framework that imposes extensive compliance obligations on developers and users of AI technologies.[174] While some U.S. lawmakers are beginning to view the EU model as a potential template—evident in the drafting of the Colorado AI Act, which draws heavily from the EU AI Act's regulatory structure—there are significant concerns about the impact of this approach on hampering innovation and economic dynamism.

Rather than fostering responsible innovation, the European regulatory model has created substantial barriers to entry, especially for startups and smaller enterprises.[175] The costs and complexities of compliance under the EU AI Act threaten to stifle competition, consolidate market power among a few large players, and discourage new entrants from developing and deploying cutting-edge AI solutions.[176] These structural burdens have contributed to Europe's lag in cultivating global tech giants. Unlike the United States, which is home to most of the tech industry-leading companies, Europe has failed to

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Law. The City Isn't Taking It Down, AP (Apr. 3, 2024), https://apnews.com/article/new-york-city-chatbot-misinformation-6ebc71db5b770b9969c906a7ee4fae21 [perma.cc/3BC4-HDTZ].

[169] Id.

[170] Id.

[171] Id.

[172] Id.

[173] *See* Sonderling, Kelley & Casimir, *supra* note 7, at 49–50; *see also* Sonderling & Kelley, *supra* note 72, at 199.

[174] *See* Sonderling & Kelley, *supra* note 72, at 199.

[175] *See id.* at 191.

[176] *See, e.g.*, *id.* (noting that the European regulatory model creates unnecessary barriers to entry).

produce comparable powerhouses in the digital and AI sectors.[177]

This disparity is no coincidence. Europe's regulatory-first mindset, largely characterized by precaution rather than innovation, has often placed risk aversion above technological advancement.[178] As the U.S. considers its regulatory future, policymakers must be cautious not to replicate a framework that, while well-intentioned, may ultimately hinder growth, suppress innovation, and erode the competitive advantages that have made the American tech sector a global leader.

VI. RECOMMENDATIONS

This Part examines recommendations that can help reduce the risks associated with AI, reduce uncertainty, and protect employees without hampering innovation. These recommendations aim to promote a balanced regulatory framework that encourages responsible AI adoption and use while ensuring fairness, transparency, and accountability in the workplace.

A. Federal Preemption

The increasing patchwork of state and local AI-related laws, which often impose overlapping and conflicting requirements, has created significant compliance challenges for employers. Conflicting government compliance requirements impose a complex web of challenges for employers, employees, and unions alike, with far-reaching consequences for job security, workplace conditions, and even effective union representation and advocacy for their members at the bargaining table.[179] As such, Congress must seriously consider establishing a national standard that streamlines regulatory compliance and preempts conflicting state and local frameworks. Given the complexity and national scope of AI regulation, Congress is well suited to weigh the competing interests, policies, and values inherent in such policy judgments through a comprehensive bona fide legislative process. Although such comprehensive legislative treatment has been less common in recent years, it remains the best way to confront the weighty questions posed by AI technology and its impact in so many industries and aspects of life. This is especially critical for employers operating across states or countries, as the proliferation of state and local laws threatens to create countless, often inconsistent—and potentially conflicting—compliance obligations.[180]

Federal preemption would resolve some of the concerns that are emerging at the state level. In fact, in the letter that the Colorado governor, the state's attorney general, and the senate majority leader sent to businesses to "provide

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[177] *See id* at 191. (explaining that the "heavy-handed regulatory approach seen in the EU where there are no European counterparts of Silicon Valley-based companies such as Google, Facebook, or Apple" is "the antithesis of a laboratory of the technological innovation framework").

[178] *See, e.g.*, *id.* at 163 (discussing the European Union's establishment of strict safeguards for AI systems).

[179] *See* Kelley, *supra* note 1, at 103–04.

[180] *See id.* at 105.

additional clarity," the Colorado political leaders strongly criticized the state-by-state patchwork of regulation and advocated for federal preemption.[181] A state-by-state patchwork of regulation poses significant challenges to the cultivation of a strong technology sector. This Colorado letter signals to federal policymakers the interest among state leaders in establishing a national regulatory framework for AI, rather than an intent to create one of 50 distinct regulatory frameworks. Similarly, regulatory harmonization across regulatory states would reduce the burdens of navigating a patchwork of compliance requirements—burdens that often deter investment and disproportionately hinder small technology firms.[182]

B. Moratorium on Federal and State AI Laws

A more measured alternative to preemption would be for Congress to enact a time-limited moratorium on new federal, state, and local AI-specific laws. Such a moratorium would establish a defined "learning period" designed to prevent the proliferation of inconsistent and burdensome mandates while avoiding the immediate creation of a patchwork regulatory landscape.[183] By pausing new legislation, Congress would provide "breathing space" for algorithmic innovation, giving lawmakers, agencies, and researchers the opportunity to study emerging technologies and identify the areas that most warrant scrutiny and potential regulation.[184] In doing so, this approach would allow for evidence-based regulations that are simultaneously more targeted and comprehensive and would close the real gaps in existing laws without hindering technological progress. Importantly, this approach would not be deregulatory. Existing federal and state statutes already apply to AI, and a moratorium would allow federal agencies to assess how their current authorities can be used to address misuse of AI in the workplace and beyond.[185] In effect, the moratorium would balance innovation with oversight, ensuring that future regulation is grounded in evidence and tailored to real risks rather than speculative concerns.[186]

In theory, a moratorium would offer a dual benefit: it would halt the proliferation of state and local AI laws while also discouraging Congress from rushing to enact federal legislation driven primarily by the fear of a regulatory patchwork.[187] By freezing the state regulatory landscape, lawmakers would gain the time to evaluate whether the existing statutes, such as Title VII, the Americans with Disabilities Act, and related statutes, are sufficient to address

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[181] Letter from Jared Polis et al., *supra* note 25.

[182] *Id.* at 2.

[183] *See* Adam Thierer, *Getting AI Policy Right Through a Learning Period Moratorium*, R STREET (May 29, 2024), https://www.rstreet.org/commentary/getting-ai-policy-right-through-a-learning-period-moratorium/ [perma.cc/H3F8-ZK49]. *See generally* Evangelos Razis & James C. Cooper, *The Federalist's Dilemma: State AI Regulation & Pathways Forward*, HARV. J.L. & PUB. POL'Y (forthcoming 2025).

[184] Thierer, *supra* note 183.

[185] *See* Razis & Cooper, *supra* note 183, at 49–50.

[186] *Id.* at 50–51.

[187] *Id.*

the risks of AI-driven discrimination in hiring and employment.[188] If those laws prove adequate, the moratorium will have prevented unnecessary federal overreach adopted merely to block state action. Conversely, if genuine gaps in existing protection emerge, Congress will be able to craft targeted legislation focused specifically on unaddressed employment-related harms, avoiding the sweeping, ill-fitting mandates that often accompany premature regulation of emerging technologies.[189]

While a moratorium offers the promise of regulatory "breathing room," it carries significant drawbacks. First, it risks delaying necessary protections for workers and consumers by freezing legislative responses precisely when AI technologies are evolving most rapidly.[190] Second, it could entrench harmful practices by allowing problematic uses of AI to spread unchecked during the pause. Third, if drafted too broadly, a moratorium could be used to weaken or block both proposed and existing protections for children and vulnerable consumers who are more susceptible to AI-related harms.[191] Fourth, it may be criticized as federal overreach, undermining state authority and preventing states from serving as "laboratories of democracy." Finally, critics warn that such a pause would amount to "AI amnesty" for big technology companies—giving powerful companies years of unregulated growth and dominance.[192] And once the moratorium expires, lawmakers may face heightened political pressure to act quickly, increasing the likelihood of rushed or overly broad regulation—ironically creating the very problem the moratorium was designed to avoid, but at a stage when the harms are more deeply entrenched.

C. Choice of Law Framework

Another possible transformative solution moving forward is the implementation of a "choice of law" framework. Under a "choice of law" framework, parties have the autonomy to select the legal regime that governs their relationship at the time of contracting.[193] This approach not only sidesteps contentious debates about federal preemption of state AI regulations but also fosters a healthy, market-driven form of regulatory competition among states.[194] Rather than imposing a one-size-fits-all federal mandate that risks stifling innovation or disregarding regional priorities, a choice-of-law framework empowers states to serve as regulatory laboratories, offering diverse models of

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[188] *Id.*; *see also* Thierer, *supra* note 183.

[189] *See* Razis & Cooper, *supra* note 183, at 50–51.

[190] *See* Ali Swenson, *How a GOP Rift Over Tech Regulation Doomed a Ban on State AI Laws in Trump's Tax Bill*, ASSOCIATED PRESS (July 3, 2025), https://apnews.com/article/artificial-intelligence-republicans-trump-tax-bill-97d700da09cac62aa510eb4411bab24e [perma.cc/9DE3-TCZC].

[191] *Id.*

[192] *Id.*

[193] *See* Memorandum from Logan Kolas, Four Options to Tame the A.I. Patchwork, Am. Consumer Inst. for Citizen Rsch. (July 1, 2024), https://www.theamericanconsumer.org/wp-content/uploads/2024/07/AI-Policy-Memo-ACI-1.pdf [perma.cc/A9SK-NWJ2]; *see* Razis & Cooper, *supra* note 185.

[194] *See* Razis & Cooper, *supra* note 183, at 3–4.

AI governance.[195] In turn, businesses and workers would be able to align themselves with the jurisdiction whose legal standards best reflect their needs, values, and risk tolerance.[196] This system would preserve state autonomy, encourage innovation in legal frameworks, and offer stakeholders meaningful choice in how AI is regulated in the employment context and beyond.[197]

D. Self-Restraint and Reasonable Conduct

Given the morass of current regulatory efforts, many organizations are wisely charting their own path forward without waiting on relevant governmental entities to try and catch up to the rapidly developing field of AI.[198] In the absence of AI regulations, private initiatives have charted a restrained and reasonable course using AI technology in the workplace to foster responsible AI development and deployment.[199] These private initiatives aim to harness the advantages of AI and minimize collateral negative outcomes that might incur liability.[200] In recent years, many major companies have adopted and published their own AI principles as well as creating resources like templates and policies for responsible AI use. To expand their impact, they have formed partnerships, while universities and civil rights groups have also developed ethical guidelines for AI design and deployment.[201]

These private initiatives are important to the technological and legal developments surrounding AI for several reasons. First, specific industries have first-hand expertise in AI development but lack any legislative body or governmental agency.[202] Since certain industries lead efforts to fund, develop, deploy, and implement AI, private initiatives are often better positioned than government regulators to address the unique challenges that arise.[203] Following Loper Bright, courts may be more willing to recognize and give weight to the technical expertise and practical experience of businesses in interpreting AI-related regulations, particularly where agency interpretations lack clear statutory grounding or domain-specific knowledge. Government mandates often have a much broader impact than their initial target, while regulatory efforts often are not necessarily designed with the specific industries that use AI in mind.[204] Second, private sector initiatives can play a vital role in building a culture of trust, transparency, and accountability in the development and use of AI

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[195] *Id.* at 59–62.

[196] *Id.*

[197] *See id.*

[198] *See* Sonderling & Kelley, *supra* note 72, at 156.

[199] *See id.*

[200] *See id.* at 156–57.

[201] *See id.* at 173–77.

[202] *See* Sonderling & Kelley, *supra* note 72, at 157. *See also* William Magnuson, *Artificial Financial Intelligence*, 10 HARV. BUS. L. REV. 337, 373 (2020).

[203] *See* Magnuson, *supra* note 202, at 373–74 (using the example of role of AI in the financial industry and arguing that "it is likely that self-regulation will be significantly more effective at cabining artificial intelligence's risks than regulatory enforcement actions could ever be").

[204] *See* Sonderling & Kelley, *supra* note 72, at 157.

technologies.[205] Third, because companies using AI are facing a constellation of legislation and various proposals at federal, state, and local levels (not to mention the international measures), many of them with differing requirements, companies need alternative compliance approaches. Responsible initiatives can help position entire industries to proactively adapt to future regulations while also mitigating potential risks associated with their AI tools and systems.[206] Further, effective principles may be used as models for future governmental regulations, to the significant benefit of businesses.

The federal government actively encourages employers to adopt responsible AI practices, recognizing that the effectiveness of several key federal laws depends on voluntary compliance from the private sector.[207] U.S. antidiscrimination laws, such as Title VII, are prime examples. These laws rely heavily on employers' efforts to voluntarily comply, monitor, and self-correct in the absence of constant regulatory oversight.[208] In response to the rapid integration of AI in employment and business practices, multiple federal agencies—including the Federal Trade Commission, EEOC, and DOL—have issued initial guidance that emphasizes self-governance as a foundational step.[209] These agencies promote voluntary compliance not as a regulatory afterthought but as a critical mechanism for addressing the evolving risks and ethical challenges posed by AI. By aligning internal practices with agency recommendations, organizations can not only mitigate legal risk but also demonstrate proactive leadership in building trustworthy and equitable AI systems.[210]

VII. CONCLUSION

In the years ahead, the continued integration of AI and automation in the employment arena will likely lead to an increasing wave of regulatory and legislative activity at both the federal and state levels. As lawmakers and agencies continue to grapple with how best to address the opportunities and risks posed by AI, it is essential that regulatory efforts avoid becoming overly burdensome or counterproductive. Poorly designed rules—especially those that are vague, duplicative, or impractical—risk stifling innovation, deterring investment, and impeding the very technological advances that drive productivity and economic growth.

To be effective, any future AI regulations must strike a careful balance between protecting workers' rights and promoting fairness, while also maintaining the flexibility needed to foster responsible innovation. This balance

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[205] *See* Kristen E. Egger, Artificial Intelligence in the Workplace: Exploring Liability Under the Americans with Disabilities Act and Regulatory Solutions, 60 WASHBURN L.J. 527, 556 (2021).

[206] *See generally* Magnuson, *supra* note 202.

[207] *See* Sonderling & Kelley, *supra* note 72, at 192–93.

[208] *See id.*

[209] *See id.*

[210] Magnuson, *supra* note 202, at 374 ("In the end, these sorts of private sector endeavors are essential to ensure that artificial financial intelligence leads to fair, efficient, and stable outcomes.").

can only be achieved through collaborative policymaking that includes input from a broad spectrum of stakeholders—employers, employees, vendors, civil rights advocates, and others. Regulations should offer clear, workable guidance that reflects the rapidly evolving nature of AI technology, while providing enough consistency to allow companies to plan and adapt with confidence.

For employers, this shifting landscape demands vigilance and adaptability. Staying informed about regulatory developments at all levels of government is not just advisable—it is essential. As the legal framework around workplace AI becomes more fragmented and jurisdiction-specific, companies must develop nuanced legal strategies and technological solutions tailored to where they operate. Proactive compliance measures, such as conducting internal audits, updating internal policies, and implementing ethical AI review processes, will become increasingly important for mitigating legal and business risks.

Furthermore, as regulatory standards continue to rapidly evolve, employers should establish key mechanisms for regular reassessment of their AI-related practices and policies. This includes revisiting vendor agreements, updating training programs, and engaging with legal counsel to evaluate new obligations. In a multi-jurisdictional environment, where divergent rules are likely to arise, the ability to maintain a coherent yet flexible compliance framework will be a key differentiator for responsible and resilient organizations.

POLICY ESSAY

THE RETREAT OF COOPERATIVE FEDERALISM: WATER RIGHTS IN A FRAGMENTED REGULATORY ERA

U.S. REPRESENTATIVE HILLARY J. SCHOLTEN*

ABSTRACT

Before Congress stepped in to protect America's waters, pollution in our rivers and wetlands poisoned humans and wildlife alike. After the Supreme Court's decision in Sackett v. Environmental Protection Agency*, Congress is at another turning point. This article draws on the principles of cooperative federalism embedded in the Clean Water Act ("CWA") to argue that a strong federal regulatory floor is essential to address the inherently interstate and interconnected nature of water resources. It points out the areas in which the CWA has strayed from federal-state collaboration and made enforcement challenging, arguably contributing to the growing trend we see now—a retreat of the courts and Congress from maintaining baseline environmental protections. In response, this article argues that Congress must draft clear laws to reassert that federal floor while also involving states more directly in regulation to overcome the difficulties posed by the post-*Sackett *environment.*

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I. INTRODUCTION

Before Congress stepped in to protect our waters, America's rivers burned, our lakes died, and our drinking water ran brown. The Cuyahoga River in Ohio caught fire at least a dozen times because it was so saturated with industrial waste that flames leapt from the surface.[1] For locals, the burning river was nothing new. Ohioans knew that the river was coated in oil, so much so that the Smithsonian has described how the river "bubbled like a deadly stew," adding that "sometimes rats floated by, their corpses so bloated they were practically the size of dogs."[2] Images of the fires became symbols of ecological destruction.[3] Cleveland was not alone in facing environmental degradation, and so the images resonated and prompted a national push to protect the country's waterways.

Does that sound like fearmongering, or tales from a bygone era? Let's consider how this happened. At the heart of the problem, allowing the Cuyahoga to catch fire and Lake Erie to be declared dead was a perfect storm—a nonexistent regulatory system and industry ramping up toxic discharge in major cities. Prior to the enactment of the Clean Water Act ("CWA") of 1972,[4] regulating water pollution resulting from industrial processes was largely seen as a state and local issue.[5] The Federal Water Pollution Control Act of 1948 was the first statement of national interest in protecting water quality.[6] The statute provided state and local governments with funding to address the issues, but the federal government did not oversee any overarching objectives or limits. Rather, the federal government remained strictly focused on interstate waters and only with the consent of the states where the pollution originated. Over the course of the next two decades, Congress amended the 1948 statute, slowly expanding federal jurisdiction over navigable intrastate waters.[7] However, the added enforcement mechanisms were disjointed and ineffective,[8] with burdensome procedures to hold violators accountable. Specifically, programs were merely directed at point source pollution, or wastes discharged by industrial or

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[1] *See* Lorraine Boissoneault, *The Cuyahoga River Caught Fire at Least a Dozen Times, but No One Cared Until 1969*, SMITHSONIAN MAG. (June 19, 2019), https://www.smithsonianmag.com/history/cuyahoga-river-caught-fire-least-dozen-times-no-one-cared-until-1969-180972444/ [https://perma.cc/NM29-Y3BU].

[2] *Id.*

[3] *See* Michael Rotman, *Cuyahoga River Fire*, CLEV. HIST. (Sep 22, 2010) https://clevelandhistorical.org/items/show/63 [https://perma.cc/6W82-3S6D].

[4] The Act did not officially use the name "Clean Water Act" until amended as the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (Dec. 27, 1977). This article will use the term "Clean Water Act" ("CWA") to differentiate the post-1972 Act from the pre-1972 Federal Water Pollution Control Act.

[5] *See* LAURA GATZ, CONG. RSCH. SERV., RL30030, CLEAN WATER ACT: A SUMMARY OF THE LAW 2 (2016).

[6] *See id.*

[7] *See id.*

[8] *See* William L. Andreen, *The Evolution of Water Pollution Control in the United States - State, Local, and Federal Efforts, 1789-1972: Part II*, 22 STAN. ENVTL. L. J. 145, 200 (2003).

municipal operations.[9][10] Under the initial framework, states were encouraged to address pollution, and the federal government could only preempt state law if the polluter was a federal installation.

In September 1962, Rachel Carson published *Silent Spring,* igniting a public-led environmental movement.[10] The book "inspired the environmental movement; spurred the development of the multidisciplinary field of environmental sciences; and led to the development of the Environmental Protection Agency, sweeping in changes in the laws affecting air, land, and water."[11] Americans did not want to be poisoned and looked to their government to act accordingly for public and environmental health.

At the same time, American cities were growing, and industrial waste discharge was ramping up. In 1968, industrial waste accounted for 80 percent of all pollutants in U.S. waters compared to 40 percent in 1900.[12] Within a couple of years, industries were producing 22 billion gallons of wastewater, and less than 30 percent received treatment.[13] By the early 1970s, coast to coast, Americans lived with the daily consequences of untreated waste, corporate dumping, and the total absence of an enforceable national standard.[14]

In response to growing public outcry, Congress passed the CWA in 1972.[15] The law established a strong federal floor for water protection backed by science, supported by bipartisan consensus, and driven by the simple truth that water is not severable by state lines. Rather than being simply an isolated federal law, the CWA implemented the strategy of cooperative federalism to achieve its ends, bringing in state and local governments to help keep our national waters clean. The law was a monumental achievement, and it worked; since enactment, the law has funded 35,000 wastewater projects to the tune of $650 billion, supporting water quality efforts across the nation.[16] Each year, this law prevents 700 billion pounds of pollutants from entering our waters.[17]

The CWA was effective in large part because it replaced a fractured, state-based regulatory environment with one that relied on cooperative federalism, defined by collaborative yet distinct responsibilities of state governments and the federal government to achieve a shared purpose. The federal government sets the floor for minimum protections and works with state and local governments to meet those minimum standards through science-backed standards, monitoring requirements, providing money for infrastructure improvements, and, importantly, enforcement. Our Founding Fathers clearly saw the value in legislative and regulatory powers being held at both the state

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[9] *See* GATZ, *supra* note 5, at 3–4.
[10] Russ Bahorsky, *The Long Echo of "Silent Spring,"* UNIV. OF VA. (Sep. 15, 2022), https://as.virginia.edu/long-echo-silent-spring [https://perma.cc/2VJU-ZURY].
[11] *Id.*
[12] *See* Andreen, *supra* note 8, at 197.
[13] *See id.*
[14] *See id.* at 198.
[15] *See* GATZ, *supra* note 5, at 2.
[16] *See Clean Water Act,* NAT'L WILDLIFE FED'N, https://www.nwf.org/Our-Work/Waters/Clean-Water-Act [https://perma.cc/S7BN-9ZD2] (last visited Oct. 24, 2025).
[17] *See id.*

and federal levels,[18] and the CWA leveraged this structure to protect America's waters and wetlands.

The CWA aims to protect "navigable waters," defined in statute as "waters of the United States" (WOTUS).[19] Even as effective as the CWA has been at cleaning up our waterways and reducing the loss of our wetlands, it is facing incredible challenges to maintain its effectiveness. First, the regulatory framework for the CWA has become layered and overly complex in the 50 years since the CWA's passage.[20][21] After the CWA's passage, the Executive Branch was left to develop regulations to implement the law. As the CWA has not received a wholesale update from Congress for modern circumstances, the Executive has filled in the blanks, resulting in a maze of regulations. This has made compliance nearly impossible—both due to difficulty in understanding the law and enforcing the law. The result is a weakened and ineffective law that has become vulnerable to attacks. In the past decade, the attacks have been fast and furious. In May 2023, the Supreme Court severely limited the definition of WOTUS in *Sackett v. Environmental Protection Agency.*[21]

As the Representative of Michigan's Third Congressional District, I carry the responsibility of protecting miles of Lake Michigan shoreline. Further, as the Vice Ranking Member of the Committee on Transportation and Infrastructure's Water Resources and Environment Subcommittee, I have had the opportunity to solicit testimony from experts, debate with my colleagues, and develop legislation with the input of constituents and stakeholders.[22] The focus of this work is on water resource development and conservation, water pollution control, hazardous waste cleanup, and providing for the economic vitality of our essential waterways. Back home, our waters are essential to our way of life, as well as our economy. My role as Vice Ranking Member is critical to maintaining the Great Lakes, which provide drinking water for over 40 million people, generate upwards of 1.5 million jobs, and produce approximately $60 billion in wages annually.[23]

The weakening of cooperative federalism that has underpinned the CWA for more than fifty years is a devastating blow to our nation's waterways, but it is not the end of the story. While *Sackett* undercut the regulatory framework

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[18] *See, e.g.*, Mary Hallock Morris, *Cooperative Federalism*, CTR. FOR THE STUDY OF FEDERALISM (2006), https://federalism.org/encyclopedia/no-topic/cooperative-federalism/ [https://perma.cc/JRK8-J4KD]; Louis W. Koenig, *Federal and State Cooperation Under the Constitution*, 36 MICH. L. REV. 752, 755–56 (1938).

[19] Clean Water Act of 1972, 33 U.S.C. §§ 1251, 1271–72, 1321–22, 1341.

[20] *See The Next Fifty Years of the Clean Water Act: Examining the Law and Infrastructure Project Completion: Hearing Before the Subcomm. On Water Resources and Environment of the House Comm. on Transportation & Infrastructure*, 118th Cong. 4 (2023) (statement of the Nat'l Mining Ass'n, submitted for the record by Hon. David Rouzer).

[21] 598 U.S. 651 (2023).

[22] *See America Builds: Clean Water Act Permitting and Projecting Delivery: Hearing Before the Subcomm. on Water Resources and Environment of the House Comm. on Transportation and Infrastructure*, 119th Cong. 3–4, 28 (2025) (statement of Rep. Hillary Scholten).

[23] *About the Lakes*, GREAT LAKES COMM'N, https://www.glc.org/lakes/ [https://perma.cc/5ML7-RKZF] (last visited Oct. 25, 2025).

developed around the CWA, it left more questions than answers in its place.[24] A new framework must be formed that is consistent, clear, and reliable in its protection of the waters of the United States. It must also be nimble in its delivery or denial of permits to our farmers, ranchers, business and property owners, and developers alike. This article will draw on the principles of cooperative federalism embedded in the CWA to argue that a strong federal regulatory floor is essential to address the inherently interstate and interconnected nature of water resources. The article will also point out the areas in which the CWA has strayed from its collaborative federal approach and made enforcement impossible, leading to the growing trend we see now—a retreat of the Courts and Congress from maintaining baseline environmental protections. Finally, this article will argue that Congress must draft clear laws that are not overly reliant on the whims of the Executive or the regulatory process. We need a comprehensible and easy-to-enforce law that allows development to proceed on time and protects our water. We can do both, and Congress must actualize this goal now.

II. THE STRUCTURE AND PURPOSE OF THE CLEAN WATER ACT

A. Legislative Intention

It is essential to revisit the structure and purpose of the CWA to understand the threat that *Sackett*, additional Supreme Court decisions, and counterproductive legislative efforts pose to water quality across the country. Before its enactment, the regulation of water pollution in our nation's waterways was largely left to the states.[25] We do not need to imagine the consequences of a lack of federal protections—we have already seen how the decentralized approach failed our country. For example, prior to the CWA, the City of Cleveland lacked the resources and intergovernmental support to conduct effective or meaningful pollution abatement for the Cuyahoga River, so much so that the river was characterized as "a completely unregulated sewer."[26] Beyond the Cuyahoga River, a number of historic disasters that plagued the country were thought to be avoidable had the CWA approach been enacted at the time. Lake Erie was pronounced "dead" by Time Magazine in the 1960s due to pollution,[27] and in 1965, President Lyndon B. Johnson called the Potomac River a "national disgrace."[28] President Johnson's declaration was a reflection

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[24] *See* Sackett v. EPA, 598 U.S. 651, 727 (2023) (Kavanaugh, J., concurring).
[25] *See* GATZ, *supra* note 5, at 2.
[26] Scott Neuman, *The Cuyahoga River Was So Polluted, It Used to Catch Fire. Now It's Making a Comeback*, NAT'L PUB. RADIO (Oct. 12, 2024), https://www.npr.org/2024/10/12/nx-s1-5123532/cuyahoga-river-cleanup-sturgeon-cleveland-ohio [https://perma.cc/794E-FPUV].
[27] *Environment: Comeback for the Great Lakes*, TIME (Dec. 3, 1979), https://content.time.com/time/subscriber/article/0,33009,948661,00.html [https://perma.cc/QL3A-WDB3].
[28] Naomi Greenberg, *A Dive into Dolphin Data: The History of Bottlenose Dolphins in the*

of the large amounts of pollution (from sewage, algae, and trash) in the Potomac River,[29] which made it "unsafe for swimming" in 1957.[30] Each of these incidents underscored the urgent need to develop an expansive structure to prevent pollution.

In the 1972 Act, Congress explicitly rejected the idea that only navigable or commerce-linked waters should be protected with the passage of the CWA. Instead, Congress defined "navigable waters" broadly as "the waters of the United States," a phrase intentionally meant to encompass all waters within Congress's full authority under the Commerce Clause.[31] An amicus brief filed by 167 Members of Congress in *Sackett* confirms that this language was chosen to provide "the broadest possible constitutional interpretation" of federal jurisdiction.[32] Congress was fully aware that limiting protection to traditionally navigable waters would leave critical aquatic ecosystems—particularly wetlands and tributaries—vulnerable to pollution and degradation. Beyond the legitimate environmental concerns, Congress additionally understood that water is everywhere and can travel anywhere, rendering the regulations within the federal government's purview as an interstate activity.

The CWA left the definition of WOTUS ambiguous, and Congress's intent regarding the definition of WOTUS has been subject to litigation for over four decades.[33] In response to this litigation, several presidential administrations have sought to define WOTUS through agency regulation. Recent examples include President Barack Obama's 2015 Clean Water Rule and President Donald Trump's 2020 Navigable Waters Protection Rule.[34] Further, in January 2023, President Joe Biden's United States Army Corps of Engineers and EPA issued a rule redefining WOTUS.[35] Through this rulemaking, USACE and EPA defined WOTUS more narrowly than the 2015 rule, but more broadly than the 2020 rule. This rule took effect in March 2023 and was immediately challenged.[36]

Rather than merely preserving water for economic functions, this law is rooted in the holistic understanding that water quality impacts our environment and public health. The CWA's preamble clearly outlines the law's objective: "to restore and maintain the chemical, physical, and biological integrity of the

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Potomac River, SMITHSONIAN NAT'L MUSEUM NAT. HIST. (Oct. 2023), https://ocean.si.edu/ocean-life/marine-mammals/dive-dolphin-data-history-bottlenose-dolphins-potomac-river [https://perma.cc/EK5T-UGGD].

[29] *See id.*

[30] *A Watershed Moment for Swimming in the District's Waters*, INTERSTATE COMM'N ON THE POTOMAC RIVER BASIN (Jul. 26, 2022), https://www.potomacriver.org/news/a-watershed-moment-for-swimming-in-the-districts-waters/ [https://perma.cc/NJ24-5VC4].

[31] 33 U.S.C. § 1362.

[32] Brief for 167 U.S. Members of Congress as Amici Curiae Supporting Respondents, Sackett v. EPA, 598 U.S. 651 (2023) (No. 21-454).

[33] *See infra* Part III.

[34] Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37054 (Jun. 29, 2015); The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22250 (Apr. 21, 2020).

[35] Revised Definition of "Waters of the United States," 88 Fed. Reg. 3004 (Jan. 18, 2023).

[36] *See* Complaint and Petition for Review, Texas v. EPA, No. 3:23-cv-00017 (S.D. Tex. Jan. 18, 2023).

Nation's waters."[37] This provision reveals the CWA's broad environmental protection ambitions, extending beyond navigability or commercial use to encompass the ecological health and sustainability of all water bodies in the United States.

Floor debate in 1972 underscored Congress's intent. Democratic Senator Edmund Muskie—the bill's sponsor—warned that "[t]oday, the rivers of this country serve as little more than sewers to the seas. Wastes from cities and towns, from farms and forests, from mining and manufacturing, foul the streams, poison the estuaries, and threaten the life of the ocean depths. The danger to health, the environmental damage, the economic loss can be anywhere."[38] On the other side of the aisle, Republican Senator Howard Baker focused on the cultural impact water has on our society: "As I have talked with thousands of Tennesseans, I have found that the kind of natural environment we bequeath to our children and grandchildren is of paramount importance [. . .] If we cannot swim in our lakes and rivers, if we cannot breathe the air God has given us, what other comforts can life offer us?"[39] Congress agreed on a bipartisan basis that it was incumbent on the body to safeguard our waters to preserve our nation's public health, environment, economy, and way of life.

The CWA reflects congressional intent for a shared authority within a federal framework.[40] It established a vision of environmental governance that integrates federal leadership with state partnership—an approach that underpinned the CWA for over fifty years and should remain integral to today's regulatory landscape.

B. The Cooperative Federalist Structure of the CWA

When the regulation was left solely to the states, with some federal guidance under the Federal Water Pollution Control Act of 1948 but no enforceable federal minimum standard, many states stalled or did not submit the Congressionally required standards. States need oversight and the threat of consequences. The Senate Committee on Public Works described the lack of progress states had made in setting the water quality standards that Congress established in 1965.[41] In 1971, four years after the deadline to submit standards, the Committee wrote, "Of the 54 jurisdictions covered by the water pollution control program—the figure includes the 50 States, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands—only 27 have fully approved standards."[42] Thus, by 1972, Congress looked for ways to ensure enforcement

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[37] Clean Water Act, 33 U.S.C. § 1251(a).
[38] 117 CONG. REC. 38797 (Nov. 2, 1971) (statement of Sen. Edmund Muskie on the Federal Water Pollution Control Act Amendments of 1971).
[39] 118 CONG. REC. 36872 (Oct. 17, 1972) (statement of Sen. Howard Baker on the Federal Water Pollution Control Act Amendments of 1972).
[40] *See* Brief for 167 U.S. Members of Congress as Amici Curiae Supporting Respondents, Sackett v. EPA, 598 U.S. 651 (2023) (No. 21-454).
[41] *See* ROBIN KUNDIS CRAIG, THE CLEAN WATER ACT AND THE CONSTITUTION 23 (2d ed. 2009).
[42] S. REP. NO. 92-414, at 4 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3671.

and cooperation, leading to the CWA.[43]

Section 1251 of the CWA serves as a guiding principle for interpreting all subsequent provisions of the Act.[44] The provision reinforces the federal government's responsibility to establish baseline protections while allowing states to enforce stricter standards. The CWA, in the sections highlighting the purpose and goal of the Act, emphasizes Congress's recognition of the need to protect the rights of states:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.[45]

Rather than choosing to have the federal government take full control of the water pollution regulation, Congress ensured that, alongside federal requirements, states would have primary authority over waters exclusively located within their borders.[46] The Section codifies the cooperative federalist system in the balance between state and federal authorities. In doing so, it affirms that cooperative federalism is the framework for the CWA to prioritize environmental integrity across jurisdictions.

Additionally, Congress intended the CWA to operate as a federal "floor," not a ceiling. Section 1370 of the CWA honed in on the cooperative federalist structure by expressly allowing states to impose "any standard or limitation respecting discharges of pollutants" more stringent than the federal baseline.[47] This Section preserved federal uniformity while enabling states to establish systems to enforce stricter standards, but not less stringent regulations.[48] This statutory language underscores the Act's balance: federal leadership to ensure

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[43] *See* CRAIG, *supra* note 41, at 23.
[44] 33 U.S.C. § 1251(a).
[45] 33 U.S.C. § 1251(b).
[46] *See* CRAIG, *supra* note 41, at 10.
[47] 33 U.S.C. § 1370.
[48] *See id.*

national standards, coupled with state flexibility to innovate. Whereas Section 1251 recognizes the need for states to have flexibility, this Section acknowledges that, because of the interstate nature of water, there must be baseline protections across the federal government.

The cooperative federalist structure stemmed from the establishment of the federal floor as seen in Sections 1251 and 1370, as well as the creation of two permitting programs.[49] Under this framework, the CWA prohibited the discharge of pollutants from a point source into navigable waters without a permit. This was made possible through two essential regulatory mechanisms: the National Pollutant Discharge Elimination System (NPDES) and the Section 404 permitting program. NPDES was authorized through the EPA to control the discharge of pollutants into navigable waters, setting limits on pollutants and requiring monitoring and reporting.[50] Section 404 provided the issuance of permits for dredge-and-fill activities, regulating the discharge of materials into wetlands, rivers, and streams.[51] Coupled together, these sections form the core of the CWA's federal permitting structure, ensuring that pollutant discharges and environmental disruptions are controlled to protect water quality and aquatic ecosystems across the United States.

Throughout the text of the CWA, the importance of the cooperative federalist model is clear. Outside of the text, legislative intent reveals the same. Even decades later, members of Congress still emphasize the CWA's role in balancing state and federal authorities. A 2023 amicus brief filed by 167 House Representatives and Senators explained the legislative intent of ensuring the Clean Water Act is based on the cooperative federalist structure: "The [CWA] is also a strongly federalizing law, setting ambitious antipollution and antidegradation goals. Congress set protective minimum federal floors, while allowing states to do more to protect their waters and citizens, to govern water allocations, and to operate permit programs under cooperative federalism structures."[52]

For decades, judicial precedent also supported the need for federal and state authorities. In *United States v. Riverside Bayview Homes*,[53] the Supreme Court unanimously upheld federal jurisdiction over wetlands adjacent to navigable waters, citing their ecological importance.[54] This balance began to shift, however, in the 2000s, as federal jurisdiction over certain waters came under further judicial scrutiny.

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[49] *See* CRAIG, *supra* note 41, at 22.
[50] *See NPDES Permit Basics*, ENVTL. PROT. AGENCY (June 3, 2025), https://www.epa.gov/npdes/npdes-permit-basics [https://perma.cc/F45N-9WKB].
[51] *See Permit Program Under CWA Section 404*, ENVTL. PROT. AGENCY (Feb. 26, 2025), https://www.epa.gov/cwa-404/permit-program-under-cwa-section-404 [https://perma.cc/V6DC-BP3E].
[52] Brief for 167 U.S. Members of Congress as Amici Curiae Supporting Respondents at 4, Sackett v. EPA, 598 U.S. 651 (2023) (No. 21-454).
[53] 474 U.S. 121 (1985).
[54] *See id.* at 134.

III. *SACKETT* AND THE WEAKENING OF FEDERAL WETLANDS JURISDICTION

A. Weakening of Federal Wetlands Jurisdiction

The judicial shift began in 2001 with the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*).[55] Before this decision, the scope of the CWA over wetlands was based on scientific criteria, including whether an area had the hydrology, soils, and vegetation in compliance with federal delineation standards. In essence, if the wetland functioned ecologically as part of a water system, it was subject to protection. The Court held that the CWA does not extend federal jurisdiction to isolated, non-navigable, intrastate ponds solely because they serve as habitat for migratory birds.[56] The Court's ruling reframed the issue: The key question became whether the Corps and EPA had the constitutional authority under the Commerce Clause to regulate certain waters at all.[57] This case marked the first consideration of the question of whether the CWA applies to certain non-navigable waters based on this Clause. This opened the door to a broader reconsideration of the legal foundations of the CWA and sparked an era of judicial skepticism toward federal water protections.

Congress intended the CWA's jurisdiction to reach the outer limits of its constitutional authority.[58] However, *SWANCC* narrowed that reach, introducing legal uncertainty and beginning a series of rulings that significantly constrained the cooperative federalist structure of the CWA by limiting the federal government's ability to regulate certain types of waters. Despite the CWA's text—which Congress, in 1972, deliberately designed to regulate waters "to the fullest extent possible under the [C]ommerce [C]lause"[59]—the Court has read that authority increasingly narrowly.

Within a few years of the *SWANCC* decision, *Rapanos v. United States*[60] further narrowed the reach of the CWA and the role of the federal government when the Supreme Court addressed the scope of federal regulatory authority under the CWA, specifically over wetlands.[61] While the case did not yield a clear majority, it significantly weakened the Act by creating confusion over which waters are federally protected.[62]

The facts involved two Michigan property owners who had filled wetlands

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[55] 531 U.S. 159 (2001).
[56] *See id.* at 174.
[57] *See id.* at 166.
[58] *See* Brief for 167 U.S. Members of Congress as Amici Curiae Supporting Respondents at 7, Sackett v. EPA, 598 U.S. 651 (2023) (No. 21-454) (citing William W. Sapp, et al., *From the Fields of Runnymede to the Waters of the United States: A Historical Review of the Clean Water Act and the Term* "*Navigable Waters*," 36 ENVTL. L. REP. 10190, 10195-96, 10200-03 (2006)).
[59] Quivira Mining Co. v. EPA, 765 F.2d 126, 130 (10th Cir. 1985).
[60] 547 U.S. 715 (2006) (plurality op.).
[61] *See id.* at 739, 757.
[62] *See* Kristen Clark, *Navigating Through the Confusion Left in the Wake of* Rapanos*: Why a Rule Clarifying and Broadening Jurisdiction Under the Clean Water Act is Necessary*, 39 WM. & MARY ENVTL. L. & POL'Y REV. 295, 297 (2014).

without permits, arguing that the wetlands were not subject to federal jurisdiction because they lacked a continuous surface connection to traditionally navigable waters.[63] Justice Scalia's plurality opinion endorsed this view, proposing a restrictive test under which wetlands must have a continuous surface water connection to "waters of the United States" to be regulated under the CWA.[64] This approach emphasized a narrow, textual reading of the statute and largely ignored the scientific and ecological connectivity of wetlands to broader water systems.

Justice Kennedy's concurring opinion introduced a more expansive "significant nexus" test.[65] Under this standard, wetlands could be regulated if they significantly affected the chemical, physical, or biological integrity of navigable waters–an approach grounded in ecological science.[66] For years, courts and agencies used Kennedy's test as a controlling standard.[67]

Nonetheless, the fragmented nature of *Rapanos* left lower courts and regulators without clear guidance. It opened the door for regulated parties to challenge EPA authority more aggressively and constrained the EPA's ability to protect isolated or ephemeral waters, further eroding the collaboration of federal and state authorities necessary for cooperative federalism to function. Following the decision, agencies and courts struggled in choosing whether to apply Justice Kennedy's "significant nexus" test or Justice Scalia's narrower plurality standard, often reaching conflicting results. For example, in *Northern California River Watch v. City of Healdsburg*, the Ninth Circuit applied the "significant nexus" test to uphold jurisdiction and concluded that this test is applicable most of the time.[68] However, the Eleventh Circuit held that only the "significant nexus" test may establish the Act's coverage at all times.[69] Meanwhile, the Sixth Circuit suggested it was unclear which test applied and refused to decide the question.[70]

In an attempt to resolve regulatory uncertainty, the EPA released an "Interpretive Statement" in 2019 to explain the scope of the CWA's point source pollution permitting program.[71] Yet, despite the published guidance, the Supreme Court declined to defer to the agency just one year later in *County of Maui v. Hawaii Wildlife Fund*.[72] There, the Court held that the CWA requires a

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[63] *See Rapanos*, 547 U.S. at 719–21.
[64] *Id.* at 757.
[65] *Id.* at 779 (Kennedy, J., concurring).
[66] *See id.*
[67] *See, e.g.*, United States v. Gerke Excavating, Inc., 464 F.3d 723, 725 (7th Cir. 2006) (per curiam); N. Cal. River Watch v. City of Healdsburg, 496 F.3d 993, 999–1000 (9th Cir. 2007); United States v. Robison, 505 F.3d 1208, 1221–22 (11th Cir. 2008); *see also* United States v. Johnson, 467 F.3d 56, 60 (1st Cir. 2006) (either Kennedy or plurality test); United States v. Bailey, 571 F.3d 791, 799 (8th Cir. 2009) (same). *But see* United States v. Chevron Pipe Line Co., 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006) (plurality test).
[68] *See N. Cal. River Watch*, 496 F.3d at 999.
[69] *See Robison*, 505 F.3d at 1219–22.
[70] United States v. Cundiff, 555 F.3d 200, 210 (6th Cir. 2009).
[71] *Interpretive Statement on the Releases of Pollutants from a Point Source to Groundwater*, 84 Fed. Reg. 16,810. (Apr. 23, 2019) (codified at 40 C.F.R. Part 122).
[72] 590 U.S. 165 (2020).

permit when "there is a direct discharge from a point source into navigable waters or when there is the *functional equivalent of a direct discharge*."[73] This line of cases illustrates how courts, agencies, and regulated parties navigated the fractured terrain created by *Rapanos*. Each ruling further limited, or at least complicated, the reach of the CWA, setting the stage for future rollbacks and culminating in the *Sackett* litigation.

B. Culmination of the Sackett *Decision*

In *Sackett v. Environmental Protection Agency*, in a 5–4 decision, the Court formally rejected the standard that had guided courts and regulators for nearly two decades—Justice Kennedy's "significant nexus" test—and adopted the far narrower test articulated by Justice Scalia's *Rapanos* plurality.[74] Under this standard, only wetlands with a "continuous surface connection" to traditionally navigable waters fall under the jurisdiction of the CWA.[75]

This shift radically contracted the definition of WOTUS by excluding vast swaths of wetlands, ephemeral streams, and intermittent waterways from federal protection. The environmental, economic, and public health consequences are far-reaching. The decision also undermined interstate efforts to maintain water quality. Water pollution does not respect state boundaries, and with fewer tools available at the federal level, states are forced to shoulder more of the burden of pollution control—yet many are ill-equipped to do so.

While some states have responded by asserting their own authority to regulate formerly protected waters, others have moved in the opposite direction. In states with "no-more-stringent" laws, legislatures have actively restricted state environmental agencies from going beyond weakened federal standards.[76] This contradicts the claim often made by industry groups that state law will simply fill the regulatory gap left by the Court, an assertion that fails to reflect political and practical realities on the ground.

As a Michigander, the Great Lakes and water are essential to our way of life. Thankfully, since 1979, Michigan is one of two states to have been granted authority by the federal government to administer its own wetland program.[77] However, Michigan is not the only state that borders our Great Lakes. Indiana,

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[73] *Id.* at 183 (emphasis in original).
[74] *See* Sackett v. EPA, 598 U.S. 651, 671 (2023).
[75] *Id.* at 678.
[76] *See* John Flesher and Michael Phillis, *States at the Forefront of Fights over Wetlands Protections after Justices Slash Federal Rules*, ASSOCIATED PRESS (Aug. 30, 2024), https://apnews.com/article/wetlands-supreme-court-state-rules-development-4917c6df50c0cd15da2915fc12f9445e [https://perma.cc/DF7U-4ZNU] (discussing how North Carolina legislature disallowed adopting state protection standards following federal rollbacks).
[77] *See, e.g.*, Press Release, Mich. Dep't of Env't, Great Lakes, and Energy, Wetlands Regulation Stable in Michigan Despite Supreme Court Ruling Changing Federal Definition (June 22, 2023), https://www.michigan.gov/egle/newsroom/mi-environment/2023/06/22/wetlands-regulation-stable-in-michigan-despite-supreme-court-ruling-changing-federal-definition [https://perma.cc/BSB2-WDUW].

which shares part of the shoreline of Lake Michigan, was ranked fourth among states with the largest loss of wetlands due to the *Sackett* ruling.[78] The state legislature recently passed a bill[91] to further reduce wetland protections by changing what is included in the definition of Class III wetlands.[79]

Meanwhile, some states are racing to codify laws to protect wetlands that were once included in the CWA. A bipartisan effort in Colorado, the first state to take action after *Sackett,* led to the passage of a bill that protects thousands of acres of wetlands and miles of streams by requiring state permits for dredging or filling wetlands, streams, and rivers—mirroring the CWA's previous protections.[80]

Ultimately, *Sackett* shifted the cost of pollution from polluters to the public by increasing water treatment expenses, risking public health, heightening vulnerability to environmental disasters, and overall weakening one of the nation's foundational environmental laws.

C. Shortcomings of the CWA and Sackett

In the *Sackett* case itself, the EPA prevented Michael and Chantell Sackett from building a home on their property in Idaho due to the proximity of wetlands it deemed protected under the CWA. In 2008, the Sacketts filed a lawsuit challenging the EPA's jurisdiction, leading to a broader legal debate over the limitations of federal power. Fourteen years later, in a 5-4 decision, the Court decided in the Sacketts' favor, rejecting the longstanding Kennedy "significant nexus" test and depriving the federal government of the ability to regulate wetlands and streams based on their ecological connection to navigable waters.[81] Instead, the Court embraced a far narrower interpretation of WOTUS that excludes wetlands or any land other than that which is adjacent to navigable waters. Only wetlands with a "continuous surface connection" to navigable waters qualify as WOTUS, significantly narrowing federal jurisdiction under the CWA.[82]

The Sacketts' case reveals a legitimate shortcoming of the CWA: namely, the time-consuming nature of the regulatory state. After initially notifying the Sacketts that they needed a permit to fill the wetlands on their property, it took the EPA seven months to send the couple an administrative order, which then instructed the couple to remove the fill and restore the wetlands or risk federal

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[78] *See* Brian Vigue, *HB 1383 Signed into Law, Further Eroding Wetlands Protections in Indiana*, NAT'L AUDUBON SOC'Y, https://gl.audubon.org/news/hb-1383-signed-law-further-eroding-wetlands-protections-indiana [https://perma.cc/L7KU-92HD] (last visited Sep. 9, 2025).

[79] *See id.*; *Actions for House Bill 1383*, IND. GEN. ASSEMBLY, https://iga.in.gov/legislative/2024/bills/house/1383/actions [https://perma.cc/ZK4R-JEN3] (last visited Sept. 11, 2025).

[80] *See* COLO. REV. STAT. § 25-8-205 (2025); Jerd Smith, *Colorado to Shield Thousands of Acres of Wetlands, Miles of Streams After U.S. Supreme Court Left Them Vulnerable*, COLO. SUN (May 9, 2024), https://coloradosun.com/2024/05/09/colorado-law-protecting-wetlands-supreme-court/ [https://perma.cc/8DTR-W5VS].

[81] *See* Sackett v. EPA, 598 U.S. 651, 678 (2023).

[82] *See id.*

fines.[83]

The attacks did not stop with the *Sackett* decision. The Supreme Court's decision to significantly narrow the definition of the WOTUS under the CWA runs counter to congressional intent and left a dangerous regulatory vacuum that threatens water quality, public health, and environmental sustainability across the country. As costs and political tensions rise across America, many states lack the financial capability, political will, or incentive to protect downstream or interstate interests.[84]

In a continued erosion of the CWA and the administrative state generally, the Court overruled the longstanding *Chevron* doctrine just a year after the *Sackett* decision in *Loper Bright Enterprises v. Raimondo*.[85] The *Chevron* doctrine required courts to defer to federal agency interpretations where the statute was ambiguous if the interpretations were reasonable.[86] However, the *Loper Bright* decision eliminated *Chevron*'s agency deference and now requires courts to determine the meaning of the statutory text for themselves.[87] As with other agencies, *Loper Bright* opened the floodgates for more litigation against the EPA.

Perhaps if the Sacketts had received an answer sooner regarding whether they needed an EPA permit to build their house, the couple would not have sued, and the courts may have been less sympathetic. Perhaps if Congress had drafted a more explicit CWA, *Loper Bright* would not have hamstrung the administrative state. I believe bringing states closer to the administration, monitoring, and tracking of water permits could expedite these processes and avoid extraneous litigation. Meanwhile, the federal government needs the tools to enforce these regulations.

IV. LEGISLATIVE ACTION AND INACTION: THE POST-*SACKETT* RESPONSE

Following the *Sackett* decision, Congress had a choice to address the underlying regulatory challenges at the center of the case. Rather than resolving the legitimate issues with our federal water regulations, such as an overly complicated permitting process, Congress allowed its authority to protect our waterways to erode further. We must do more than throw money at the problem—we need to restructure how we regulate our waters in addition to equipping local, state, and federal enforcers with the resources necessary to safeguard public health and the environment.

In parallel with the Supreme Court's disastrous rulings, my Republican colleagues advanced measures that weakened the CWA's scope. This is not something the GOP has done with a clear mandate—House Republicans

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[83] *See* Nina Totenberg, *When Property Rights, Environmental Laws Collide*, NAT'L PUB. RADIO (Jan. 7, 2012), https://www.npr.org/2012/01/07/144797552/when-property-rights-environmental-laws-collide [https://perma.cc/CYP3-BCLB].
[84] *See* Vigue, *supra* note 78 (Indiana example).
[85] *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024).
[86] *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 865 (1984).
[87] *See Loper Bright*, 603 U.S. at 395.

currently hold the majority by only four seats. Regardless of their slim majority, the GOP maintains that the tragedies of 50 years ago that compelled Congress to act are somehow now implausible. During testimony before the House Rules Committee, the Chair of the House Transportation and Infrastructure Subcommittee on Water Resources and Environment noted that his colleagues "often talk about rivers catching on fire as a reason for needing a heavy-handed federal government," characterizing this example as a "50-year-old scare [story]."[88] It is not a coincidence that the Cuyahoga River has not been engulfed in flames in over five decades. The CWA was enacted 50 years ago, and its protections have served the river well.

A. The IIJA and the Democratic Response

At every turn, congressional Democrats have fought back against the GOP's efforts, including amassing over 160 cosigners to an amicus brief submitted to the Supreme Court in *Sackett*.[89] While in the majority during the 117th Congress, House Democrats sought to improve upon the CWA and reassert congressional authority on federal water regulations—which proved to be politically challenging. Rather than modernizing the CWA's underlying framework, Democrats championed our nation's most significant investment in infrastructure through the bipartisan Infrastructure Investment and Jobs Act ("IIJA").[90] This bill redirected the federal government's focus toward critical clean water infrastructure and provided unprecedented support, allocating $23.4 billion for the Clean Water State Revolving Fund and the Safe Drinking Water State Revolving Fund, $15 billion for lead service line replacement, and $10 billion for the removal of per- and polyfluoroalkyl substances (PFAS).[91] Through the IIJA, Michigan alone has received over $213 million for water treatment projects. In my home district, the City of Muskegon was awarded $5.6 million through the IIJA's investments in the Drinking Water State Revolving Fund.[92] These dollars—only made possible by bipartisan, federal investment—aim to replace water mains and lead service lines to provide more reliable drinking water infrastructure. This example in West Michigan is just one of countless investments made by the federal government through the IIJA.

All the while, the Democratic Caucus remained steadfast in fighting against attempts to gut the CWA in the 118th Congress. Transportation and Infrastructure Committee Republicans sought to clear a Congressional Review

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[88] *Hearing on H.R. 3486, 3898, H.J. Res. 104, 105, and 106 Before the H. Rules Comm.*, 119th Cong. (2025) (statement of Rep. Mike Collins).

[89] Brief of Amici Curiae 167 U.S. Members of Congress in Support of Respondents, Sackett v. EPA, 598 U.S. 651 (2023) (No. 21-454).

[90] Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021).

[91] *See id.* §§ 50210, 50102, 50105, 135 Stat. at 1169, 1137–40, 1140–42.

[92] *See Infrastructure Investment Tracker*, STATE OF MICH.: OFF. OF GOVERNOR, https://www.michigan.gov/whitmer/issues/michigan-infrastructure-office/michigan-infrastructure-technical-assistance-center/outcomes-dashboard-power-bi [https://perma.cc/FS5V-DKYG].

Act (CRA) measure to nullify a Corps and EPA rule titled Revised Definition of "Waters of the United States," and the measure cleared the House Floor by a vote of 227–196.[93] Fortunately, then-President Joe Biden vetoed this CRA, and Democrats worked together to block the GOP's attempt to override the veto.[94] Meanwhile, in the 119th Congress, under a Republican majority, my counterparts across the aisle led legislation to cut corners around Section 401 CWA permitting, roll back protections around the use of pesticides in or near navigable waters, and ease water quality criteria with the Promoting Efficient Review for Modern Infrastructure Today ("PERMIT") Act.[95] While my Democratic colleagues have made significant investments in water infrastructure, both parties have failed to improve, follow, or enforce a regulatory framework to protect our waters.

B. The Republican Response: The PERMIT Act

With Republicans holding power in the House of Representatives, Senate, and White House during the 119th Congress, the GOP has doubled down on attacking what remains of the CWA. Republicans pushed the PERMIT Act through the House Transportation and Infrastructure Committee, a bill which my colleagues touted would cut red tape for permitting processes.[96] However, the PERMIT Act—a package of fifteen standalone bills rolled into one—is not about efficiency, but rather is designed to further weaken protections over U.S. rivers, lakes, streams, and wetlands.[97]

Section 2 of the legislation, the Water Quality Standards Attainability Act, undermines the purpose of the CWA by creating a new exemption with a new "cost effectiveness" test for sewage discharges, preventing the implementation of such requirements if they are deemed too expensive.[98] The CWA established a framework for setting minimum pollution control standards for municipal wastewater infrastructure. Presently, these sewage treatment requirements must be followed, but the use of long-term control plans grants flexibility on how the

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[93] H.R.J. Res. 27, 118th Cong. (2023); House Roll Call Vote 187, 118th Cong. (2023).

[94] *Message to the House of Representatives — President's Veto of H.J. Res 27*, THE WHITE HOUSE (Apr. 6, 2023), https://bidenwhitehouse.archives.gov/briefing-room/presidential-actions/2023/04/06/message-to-the-house-of-representatives-presidents-veto-of-h-j-res-27/ [https://perma.cc/3DRS-8HZZ]; *See* Chuck Abbott, *House Will Try to Override Biden on Protecting Wetlands*, SUCCESSFUL FARMING (Apr. 17, 2023), https://www.agriculture.com/news/business/house-will-try-to-override-biden-on-protecting-wetlands [https://perma.cc/2UEK-GK2N].

[95] *See* PERMIT Act, H.R. 3898, 119th Cong. (2025).

[96] *See* Miranda Willson, *GOP Water Permitting Bill Sails Through Committee*, POLITICO PRO: E&E DAILY (June 26, 2025 06:28 AM), https://subscriber.politicopro.com/article/eenews/2025/06/26/republican-water-permitting-bill-sails-through-committee-00424170 [https://perma.cc/F6XX-RKDH].

[97] *See* Caitlin Looby & Madeline Heim, *New Bill Would Gut Protections of Clean Water Act in Name of Growth*, MILWAUKEE J. SENTINEL (Dec. 18, 2025, 11:20 AM), https://www.jsonline.com/story/news/environment/2025/12/18/new-bill-may-speed-permitting-weaken-clean-water-act-protections/87799020007/ [https://perma.cc/WD4V-CTD4].

[98] PERMIT Act, H.R. 3898, 119th Cong. § 2 (2025).

requirements must be adopted to address human and environmental health impacts from overflows of raw or partially treated sewage. However, Section 2 would effectively prevent states from carrying out sewage treatment requirements should the EPA Administrator deem them to be too expensive. Coupled with the current administration's proposed cuts to clean water infrastructure, as evidenced in the Fiscal Year 2026 Presidential Budget Request, this provision may leave economically disadvantaged communities with limited resources to address untreated sewage.[99]

Section 3 of the PERMIT Act, which is the Water Quality Criteria Development and Transparency Act, takes aim at water quality criteria. Under current law, the EPA is tasked with developing water quality criteria through an informal regulatory process. These criteria serve as baselines to which the EPA and states can refer in determining if the quality of a given waterbody could harm aquatic life, wildlife, or human health.[100] Section 3, however, would require the EPA to utilize a formal rulemaking process to develop quality criteria and, therefore, determine the health of a water body.[101] Rather than streamlining federal processes, this shift would complicate and delay the issuance of new criteria, as well as hinder the EPA and states from swiftly responding to new or evolving pollutant challenges.

The Improving Water Quality Certifications and American Energy Infrastructure Act, included as Section 5 of the PERMIT Act, directly undermines states' authorities under Section 401 of the CWA. Section 401 enables states to enforce water quality standards and "other appropriate requirements of state law" on any project or activity carried out in the state that requires a federal license or permit.[102] Section 5 significantly narrows the scope of projects that states are required to approve, restricts states from imposing requirements or conditions on a project, and restricts the time allotted to states to certify or condition a project. This provision represents perhaps the most glaring attack on cooperative federalism by significantly curtailing the role that state governments play in the federal permitting process.[103]

Sections 9, 10, and 11 of the PERMIT Act work in tandem to exempt the

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[99] *See* Letter from Russell T. Vought, Dir., Off. of Mgmt. & Budget, to Sen. Susan Collins, Chair, S. Comm. on Appropriations (May 2, 2025), https://www.whitehouse.gov/wp-content/uploads/2025/05/Fiscal-Year-2026-Discretionary-Budget-Request.pdf [https://perma.cc/U6S3-3B8Z] (describing a nearly $2.5 billion decrease in funding to the Clean and Drinking Water State Revolving Loan Funds program).

[100] *See Basic Information on Water Quality Criteria*, U.S. ENVTL. PROT. AGENCY (Sep. 25, 2025), https://www.epa.gov/wqc/basic-information-water-quality-criteria [https://perma.cc/T4HG-A3B6].

[101] *See* PERMIT Act, H.R. 3898, 119th Cong. § 3 (2025).

[102] *Id.* § 5.

[103] *See* South Yuba River Citizens League, *The PERMIT Act: A Direct Threat to Clean Water and State Authority*, HYDROPOWER REFORM COAL. (Sep. 2, 2025), https://hydroreform.org/2025/09/the-permit-act-a-direct-threat-to-clean-water-and-state-authority/ [https://perma.cc/72ET-95F5] (criticizing Section 5 of the PERMIT Act and noting that it would "drastically limit the ability of states and tribes to review and condition federally licensed projects that affect water quality").

discharge of toxic pesticides, contaminated stormwater, and fire suppressants from the CWA permitting requirement. Specifically, Section 9, or the Forest Protection and Wildland Fire Safety Act, exempts the discharge of fire retardants from the permitting requirements of the CWA.[104] Presently, the CWA prohibits the discharge of any pollutant into protected waterbodies and tasks the EPA or approved states to issue permits from point sources.[105] Section 10 of the PERMIT Act entirely exempts agricultural stormwater runoff, as defined by Section 402 of the CWA point-source permitting regulators.[106] While the CWA presently exempts agricultural stormwater from the CWA's statutory definition of a point source, this provision expands that definition by including discharge or pollution from agricultural lands, as well as adjacent lands necessary for agricultural activities.[107] Section 11, or the Reducing Regulatory Burdens Act, exempts the discharge of pesticides into U.S. waters from the CWA's permitting requirements.[108] The CWA prohibited the discharge of pollutants into protected waters without a permit. The aforementioned permits may be issued by the EPA or an approved state under Section 403 of the CWA.[109] In tandem, these provisions weaken the CWA's permitting requirements and roll back the federal government's—and in some cases state governments'—ability to regulate in the water space.

The Reducing Permitting Uncertainty Act, included as Section 12 of the PERMIT Act, significantly reduces the EPA's oversight authority over the U.S.

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[104] *See* PERMIT Act, H.R. 3898, 119th Cong. § 9 (2025).

[105] *See, e.g.*, *Forest Serv. Emps. For Env't Ethics v. U.S. Forest Serv.*, No. 9:22-cv-00168-DLC, 2023 WL 3647424, at *14 (D. Mont. May 26, 2023) (holding that the aerial discharge of fire suppressants into protected waters without a CWA permit was a de facto violation of the law). The judge stayed this ruling to enable federal agencies to develop a general permit for aerial spraying of fire retardants under the CWA. *See id.*

[106] *See* PERMIT Act, H.R. 3898, 119th Cong. § 10 (2025).

[107] This legislation differs from the existing "normal farming" practice statutory exemption in Section 404 of the CWA, which exempts all normal farming activities—including plowing, seeding, cultivating, and harvesting—from a wetlands-related permit. *See* 33 U.S.C. § 1344(f).

[108] *See* PERMIT Act, H.R. 3898, 119th Cong. § 11 (2025).

[109] The EPA first issued a Pesticide General Permit ("PGP") on October 31, 2011, in response to *National Cotton Council of America v. EPA*, which vacated a prior EPA rule that generally exempted pesticide application from the CWA's permitting requirement. *See Pesticide General Permit (PGP) for Discharges from the Application of Pesticides*, U.S. ENV'T PROT. AGENCY (Oct. 31, 2011), https://www.epa.gov/sites/default/files/2015-09/documents/final_pgp.pdf [https://perma.cc/KB83-S6PB]; Nat'l Cotton Council of Am. v. EPA, 553 F.3d 927 (6th Cir. 2009). The U.S. Geological Survey's ("USGS") 2009 findings on reductions in pesticide contamination from 2003 to 2007 provide important context for the EPA's 2011 PGP. The report documented that declines in pesticide use were associated with corresponding declines in contamination, suggesting that reducing pesticide applications can effectively improve water quality. *See* CONNIE A. LOPER, KEVIN J. BREEN, TAMMY M. ZIMMERMAN & JOHN W. CLUNE, U.S. GEOLOGICAL SURV., PESTICIDES IN GROUND WATER IN SELECTED AGRICULTURAL LAND-USE AREAS AND HYDROGEOLOGIC SETTINGS IN PENNSYLVANIA, 2003–2007 (2009), https://pubs.usgs.gov/sir/2009/5139/sir2009-5139.pdf [https://perma.cc/4S7Q-ZRHC]. Since the EPA issued the PGP in 2011—and renewed in 2016 and 2021—there has been little to no adverse impact on pesticide applicators or agricultural interests, as well as no adverse effect on human health through the outbreak of pest-borne illnesses.

Army Corps of Engineers (USACE) permitting program. Specifically, this provision restricts the timeframe during which the EPA may take action to block projects with an "unacceptable adverse effect" on drinking water, recreational areas, or fish and wildlife.[110] The new timeline proposed in the language—which would require the EPA to take action between when an applicant "submits all the information required to complete the application" and when the USACE issues a permit—creates legal uncertainty as to when the EPA may act in the permit review process.[111] Additionally, this provision does not obligate the USACE to share application information with the EPA. This section additionally limits the EPA's review of dredge and fill activities of the USACE that are not undertaken pursuant to a CWA permit.[112] If enacted, this provision would hinder the EPA's authority to regulate water permitting: a necessary function for the Agency to participate in cooperative federalism.

Similarly, Section 13 of the PERMIT Act, the Nationwide Permitting Improvement Act, hamstrings the USACE's ability to develop, approve, or renew nationwide permits.[113] Section 404 of the CWA grants the USACE or approved states the ability to issue permits for activities that result in the discharge of dredged or fill materials into protected waters.[114] Section 13 would significantly amend the process by which the USACE grants nationwide permits. Section 13 also codifies the availability of a nationwide permit for linear infrastructure projects, or projects that cross a waterbody more than once in separate and distant locations.[115] That would preclude legal challenges to existing regulatory linear nationwide permits, violating the CWA requirement that authorized activities only have minimal impact on the environment. Further, this language would enable an increased use of the nationwide permits' expedited review and approval process for potentially contentious projects. Finally, Section 13 prohibits the USACE from modifying nationwide permit requirements for linear projects to assess the cumulative environmental impacts of individual waterbody crossings for an individual project.[116] Yet again, this language undermines federal review on the scope, scale, and overall impact of potentially harmful projects.

V. EXACERBATED UNCERTAINTY IN PERMIT REFORM

On June 25, 2025, the House Committee on Transportation and

[110] *See* PERMIT Act, H.R. 3898, 119th Cong. § 12 (2025).
[111] *See id.*
[112] *See id.*
[113] *See* PERMIT Act, H.R. 3898, 119th Cong. § 13 (2025).
[114] *See* 33 U.S.C. § 1344.
[115] *See* Rebecca Higgins, *House Passes Broad Clean Water Act Changes*, ENO CTR. FOR TRANSP. (Dec. 12, 2025), https://enotrans.org/article/house-passes-broad-clean-water-act-changes/ [https://perma.cc/T7MP-X4L2].
[116] *See* Drew Silton, Erika Spanton & Andrew Womack, *House Approves Sweeping Clean Water Act Reforms*, BEVERIDGE & DIAMOND (Dec. 17, 2025), https://www.bdlaw.com/publications/house-approves-sweeping-clean-water-act-reforms/ [https://perma.cc/V9BP-4FJQ] (noting that the "secretary of the Army's ability to modify certain permit terms and conditions in the future would be more limited").

Infrastructure convened to markup the PERMIT Act. My Democratic colleagues and I offered several amendments in an attempt to restore the integrity of the CWA and, specifically, the federal government's role in protecting our waters. My amendment sought to require a Section 402 permit under the CWA to be issued to discharge pollutants that may adversely impact the health and well-being of pregnant women and children.[117] In my remarks, I argued that this amendment was a commonsense approach to ensuring that our most vulnerable–expecting mothers and children–were safe from harmful pollutants. However, upon a requested recorded vote, my colleagues rejected the amendment by a vote of 34 Nays to 30 Yeas along party lines.[118]

As the PERMIT Act progressed through the legislative process, I was honored to testify against the measure before the House Rules Committee on behalf of Transportation and Infrastructure Democrats.[119] In an effort to level set, I argued that "the Supreme Court has time and time again chipped away at this bedrock law [the CWA]," and noted that "we have seen federal protections slashed for over half of our wetlands and up to 70% of our streams."[120] Turning to the PERMIT Act, I testified that "on top of these disastrous rulings, H.R. 3898 will gut federal investments and take a final blow at [the CWA] protections" by "[trampling] on states' rights to regulate the waters that make our communities unique, [saddling] everyday taxpayers with the cost of dirty water, rather than holding polluters . . . accountable[,] . . . [risking] the health of American families, and [failing] to meaningfully reform our permitting processes."[121]

To be clear: the CWA is not perfect. Congress can and should build upon the law to provide greater legal clarity, faster project deployment, and increase public health and environmental benefits. Throughout my testimony, I challenged my colleagues—regardless of political affiliation—to "envision a world in which we can both expedite permitting and protect access to clean water."[122] I share the desire of my Republican colleagues to streamline and clarify permitting processes under the CWA. However, the legal uncertainty created within the PERMIT Act, as outlined above, could make way for increased litigation and project delays, ultimately undermining the bill's proclaimed goal. While failing to clarify permitting processes and thus expediting decision-making and project timelines, the PERMIT Act exacerbates the Supreme Court's erosion of cooperative federalism at the crux of the CWA.

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[117] *See* Amendment to the Amendment in the Nature of a Substitute to H.R. 3898, 118th Cong. (as proposed in markup before the H. Comm. on Transp. & Infrastructure, June 25, 2025, and not adopted), https://transportation.house.gov/uploadedfiles/scholt_027_xml_anonymous.pdf [https://perma.cc/CL6V-WAND].

[118] *See Markup of Markup of an Amendment in the Nature of a Substitute to H.R. 3898, the Promoting Efficient Review for Modern Infrastructure Today Act (PERMIT Act); and Other Matters Cleared for Consideration: Hearing Before the H. Comm. on Transp. & Infrastructure*, 119th Cong. (2025), https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=118391 [https://perma.cc/7HDD-597T] (voting tally on Amend. 027).

[119] *See Hearing on H.R. 3486, 3898, H.J. Res. 104, 105, and 106 Before the H. Rules Comm.,* 119th Cong. (2025) (statement of Rep. Hillary Scholten).

[120] *Id.*

[121] *Id.*

[122] *Id.*

As such, it became clear to me that I could not support a bill that would threaten Michigan's most precious resource, as well as the need to develop a new solution to a decades-long problem. That is why I proudly voted against the measure when it came to the House Floor, as well as managed debate in opposition to the bill.

VI. CONCLUSION: THE NEED TO REASSERT THE FEDERAL FLOOR THROUGH LEGISLATION

The CWA, even in its pre-*Sackett* state, was far from a perfect piece of legislation. If we care about protecting our waters—and I have yet to find a colleague who does not enjoy clean water to drink and use—then we need to defend this vulnerable law, before it is too late. Families and industry alike deserve clear and timely water permit determinations. If a permit is denied due to environmental or community concerns, developers ought to be able to adjust projects accordingly in a timely fashion to minimize impact and maximize innovation. But these problems are not rooted in the CWA's federalism structure. The federal government's floor is, in fact, critical to the most successful elements. I suggest that Congress maximize collaboration between federal and local governments via pointed grant programs; ensure the business community can effectively and efficiently navigate permitting processes; and leverage a whole-of-government approach to ensure maximum capacity.

With an acknowledgement of the current political landscape, I am proud to champion the Federal-State Partnership for Clean Water Act.[123] While this bill will not wholly address the damage done to the CWA's cooperative federalism structure, the legislation aims to support states, tribes, and municipalities that wish to oversee their day-to-day wetland operations. Under the CWA, states may assume responsibility over Section 404 permitting. Presently, only Michigan and New Jersey maintain programs to protect, manage, or restore wetlands. This measure would authorize federal dollars to the tune of $300 million over Fiscal Years 2026 through 2030 to support the establishment of these state- or local-level wetland programs. This bill doubles down on the CWA's cooperative federalism structure and gives it new life. If Congress does not yet have the political will to restore the role of the federal government in cooperative federalism, we should at least empower states that wish to uphold strong wetlands protections to do so themselves. Should this bill become law, we would see yet again how the federal government and local entities can work together to actualize shared goals.

In addition to investing in state and federal programs to protect waters, Congress must ensure the business community's concerns with the CWA are addressed. To provide project developers with quick and clear answers without limiting the filing of legitimate lawsuits against a given project, Congress should consider establishing specialized courts or review boards to process permits. Such a court or board may focus on permits under the CWA, as well as other

[123] Federal-State Partnership for Clean Water Act of 2025, H.R. 5445, 119th Cong. (2025).

bedrock laws, like NEPA. Increased capacity will protect the ability for public scrutiny while preventing courts from being bogged down and, therefore, delaying water permit decisions. In the absence of specialized courts, putting time limits on current courts, but increasing capacity and clarity of the law to enhance judicial review, is the answer.

Given the cooperative federalism roots of the CWA, Congress should additionally foster greater interagency coordination and capacity building. With several federal and state agencies involved in water permitting, Congress should incentivize information and data sharing regarding water permits on a single, online resource similar to the Federal Permitting Improvement Steering Council's Permitting Dashboard.[124] Moreover, increased staffing and resources at the federal and state levels are critical to boosting transparency, communication, and expediency. Unfortunately, the current Administration has cut the staff that administers permits necessary for water projects. For example, the USACE's three senior-most experts have left the agency in the past year, and regulatory staff has been gutted by an estimated fifteen to thirty percent.[125] Rather than requiring agencies to do more with less, Congress must invest in skilled personnel to oversee these critical permits.

To restore this critical federal-state partnership, Congress must, on a bipartisan basis, expedite our permitting processes while restoring the federal floor to protect our waters. We can do both: expand federal protections and simultaneously ensure that businesses have clear, fair rules in place to invest in communities. By reinforcing this balance, we uphold the principle of cooperative federalism at the heart of the CWA, providing strong national standards while preserving state flexibility to meet local needs. In this way, restoring the federal floor and streamlining permitting strengthens the federal-state partnership that has long guided our water protections and ensures it remains central to our regulatory framework. Ultimately, a cooperative effort can only be successful if all parties are appropriately equipped with the authority, staff, and regulatory framework. Congress must bring parity to state and federal responsibilities and capabilities to make the best decisions as quickly and safely as possible. To that end, I am committed to working with stakeholders from the transportation, agricultural, environmental, manufacturing, and health care sectors, as well as my colleagues in Congress and in the administration, to revitalize our nation's water regulatory framework.

The urgency of acting to protect our wetlands cannot be overstated. The United States has lost over half of its wetlands since European settlers came to America.[126] We cannot make more water. We can pollute it, we can poison it,

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[124] *See* Federal Permitting Improvement Steering Council, *Permitting Dashboard: Federal Infrastructure Projects*, PERMITTING DASHBOARD, https://www.permits.performance.gov/ [https://perma.cc/GWM9-A9PV].

[125] 171 CONG. REC. H5785 (daily ed. Dec. 11, 2025) (statement of Rep. Hillary Scholten).

[126] *See* Press Release, U.S. Fish & Wildlife Serv., Continued Decline of Wetlands Documented in New U.S. Fish and Wildlife Service Report (Mar. 22, 2024), https://www.fws.gov/press-release/2024-03/continued-decline-wetlands-documented-new-us-fish-and-wildlife-service-report [https://perma.cc/8RM5-PBNM].

we can drain it, but we cannot replace it. That is the simple, terrifying truth. It is time for Congress to act with the urgency that this situation demands. Without a clear and easy-to-follow federal floor for protecting our waterways, unscrupulous and unintentional polluters alike will reduce our waterways to the toxic landfills of pre-CWA blight. We can have a system that is easy to understand and administer, and cooperative federalism—with our state and local partners at the table—can once again realize our shared goals of clean and healthy water for all, from sea to shining sea.

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ARTICLE

STATUTORY HAMMERS: LEGISLATIVE DRAFTING IN AN AGE OF CYNICAL LITIGATION

BRAD LIPTON*

ABSTRACT

Over the past decade, cynical litigation in our federal courts has fundamentally altered the operation of the administrative state. Agency rulemaking now unfolds against a backdrop of forum shopping and activist judging that often derails regulation from ever taking effect. This Article argues that Congress should respond to this dynamic by deploying strong statutory default provisions—"hammers"—that take effect absent timely agency action. While prior scholarship has treated hammers primarily as deadline-enforcement tools for administrative agencies, this Article emphasizes their structural function in this era of cynical litigation: hammers reshape incentives for agencies, regulated entities, and judges, channeling disputes out of court and into a productive rulemaking process. A comparative case study of mortgage lending and debit-card interchange-fee regulation under the Dodd-Frank Act illustrates how legislative design can determine whether Congress's intent gets reflected in policy or instead is an empty gesture. Finally, the presence of statutory hammers in existing law should affect the calculus of regulators in crafting regulations and other stakeholders, such as public interest groups, in choosing rules to challenge.

I. INTRODUCTION

Over the past decade, cynical litigation in our federal courts has fundamentally altered the operation of the administrative state. Regulated parties now possess unprecedented power to delay, derail, or eliminate agency rules. Meanwhile, participation in notice-and-comment rulemaking increasingly serves not to shape policy, but to preserve "gotchas" for judicial review. The

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threat of forum-shopped litigation now looms over even long-settled regulations.[1]

This essay argues that Congress should respond to these developments through an underappreciated tool: strong statutory default rules, also known as "hammers,"[2] that take effect after some period of time in the absence of timely agency action. While prior scholarship has explored the costs and benefits of hammer provisions primarily as deadline-enforcement mechanisms for administrative agencies, this essay advances a different claim. In an era of cynical litigation, statutory hammers reshape the incentives of agencies, regulated parties, and judges—channeling policy choices and debates out of court and back into the rulemaking process, discouraging obstructionist litigation, and producing more durable and democratically legitimate regulatory outcomes.

It is undoubtedly often easier for Congress to delegate the details of legislation to the Executive Branch than to come to agreement on strong statutory default rules. Agencies have a wealth of valuable technical expertise, and deferring to an agency can push off political disagreements. But whatever merits this legislative strategy has had, we must recognize that things have changed. In the current litigation environment, delegating important decisions to the Executive Branch is often closer to not legislating at all. New laws receive celebratory bill-signings and rosy press releases, but they often accomplish very little because courts block their implementation.

Statutory hammers fundamentally shift the baseline for regulation in a particular area. Hammers allow Congress to delegate the details of policy to the Executive Branch but, crucially, ensure that the baseline outcome will not be no rule at all. Hammers give agencies leverage to elicit good-faith engagement from industry during an actually meaningful rulemaking process. Hammers also productively shift incentives for litigation. Instead of a lawsuit challenging a rule having nothing but upside for industry trade associations, hammers require industry to seriously consider whether the regulation is worse than the statutory baseline. Hammers may also split the incentives of trade association members, forcing them to consider trade-offs before suing, rather than bringing a case just because they have nothing to lose.

And hammers discourage judicial activism. Without a hammer, nearly any agency action can cynically be portrayed by litigants and willing judges as executive overreach. In contrast, a hammer makes Congress's rough intent clear, so that there is a yardstick by which to assess the agency rule. Without hammers, striking down an agency rule may appear neutral, like it just preserves the status quo. In reality, it often undermines congressional intent to regulate and serves an ideological preference for government inaction. If instead a statutory default rule will spring into effect, no disingenuously "neutral" option is available.

The use of this drafting strategy has wide-ranging significance in a number

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[1] *See infra* notes 18–19 and accompanying text.

[2] *See* M. Elizabeth Magill, *Congressional Control over Agency Rulemaking: The Nutrition Labeling and Education Act's Hammer Provisions*, 50 FOOD & DRUG L.J. 149, 150 (1995).

of domains. Although statutory hammers have been used here and there in various contexts, Congress has not consistently incorporated them into the law.[3] That needs to change. As Congress continues to consider legislation on everything from artificial intelligence to privacy, it will be tempting to punt difficult decisions to federal agencies along the way. But in the absence of statutory hammers, this may be closer to no regulation at all on these crucially important issues.

Additionally, the presence of statutory hammers in existing law should affect the calculus of regulators and other stakeholders, such as public interest groups. For example, regulators should consider removing rules that deviate from statutory hammers to "reset the baseline" before rulemaking in a particular area.

This essay illustrates these claims through a comparative analysis of two provisions of the Dodd-Frank Act: rules on mortgages and debit card interchange fees. More than a decade after Congress enacted Dodd-Frank, some of its most consequential financial regulations are firmly entrenched, widely accepted by industry, and rarely litigated. Others addressing conduct no less central to the operation of our financial markets remain precarious. The difference between these two fates lies in legislative design.

II. CASE STUDY 1: MORTGAGE RULES UNDER DODD-FRANK

The Dodd-Frank Act's regulation of the mortgage market, Title XIV, provides a clear example of Congress using strong default rules to ensure a meaningful rulemaking process and democratically legitimate outcome. In the wake of the 2008 financial crisis, Dodd-Frank imposed a range of rigorous new standards for mortgage lending. The significance of mortgage loans at that time can hardly be overstated, as predatory mortgage lending had just caused the Great Financial Crisis. Notably, on this extraordinarily important issue, Dodd-Frank built strict standards directly into the statute as a default rule, effective on a tight timetable.[4] The law gave the new consumer protection agency that it created, the Consumer Financial Protection Bureau ("CFPB"), authority to deviate from these standards.[5] The result was a robust rulemaking process and ultimately durable regulatory regime.

Dodd-Frank provided an eighteen-month deadline from the opening of the CFPB's doors, after which many of the Act's strict mortgage provisions would

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[3] *See* KEVIN J. HICKEY, CONG. RSCH. SERV., R45336, AGENCY DELAY: CONGRESSIONAL AND JUDICIAL MEANS TO EXPEDITE AGENCY RULEMAKING 14 (2018) (noting "infrequent use of hammer provisions" in existing law).

[4] *See* Jonathan Gould & Rory Van Loo, *Legislating for the Future*, 92 U. CHI. L. REV. 375, 401–02 (2025) (describing Dodd-Frank mortgage rules specifically and some of the benefits of "strong statutory default rules" in general).

[5] *See, e.g.*, 15 U.S.C. § 1639c(a)(1) ("In accordance with regulations prescribed by the Bureau . . . ."); *id.* § 1639c(b)(3)(A) ("The Bureau shall prescribe regulations to carry out the purposes of this subsection.").

automatically take effect if the agency failed to issue implementing rules.[6] Specifically, Dodd-Frank included, for example, stringent requirements for mortgage lenders to assess borrowers' ability to repay that would take effect automatically.[7] Additionally, the law specified that the effective dates of any rules deviating from these statutory defaults could be no later than one year from issuance.[8] This ensured that industry could not lobby for endless extensions.

These default rules created a powerful incentive for the agency to act promptly and, crucially, for industry to engage meaningfully in the rulemaking process. The mortgage industry provided voluminous data and arguments, which significantly shaped the rules' final form. For example, industry commenters raised concerns about the proposal's treatment of points and fees for smaller loans under the ability-to-repay mandate.[9] They warned that the proposed approach would reduce access to credit or raise costs for borrowers of small loans and advocated that points and fees not be considered at all for such loans. In response, the CFPB did not fully exempt points and fees for small loans but did implement revised points and fees limits for them.[10] These adjustments helped preserve credit availability for smaller loans while still honoring Congress's intent to curb excessive fees.

No lawsuits followed. Unlike many regulations resulting from Dodd-Frank, the mortgage regulations actually took effect. And more than a decade later, those rules have become an accepted baseline in the industry. In fact, the mortgage industry now defends these regulations—which, again, they actually engaged substantively on creating—as essential to market functioning. For instance, when the CFPB's existence was threatened in a recent constitutional challenge, a coalition of mortgage industry groups filed an amicus brief urging the Supreme Court to preserve the CFPB's mortgage rules, warning of "catastrophic consequences" if those rules were undone.[11]

Dodd-Frank's mortgage rules show that when Congress clearly articulates strict default standards, the regulatory system can achieve both flexibility and durability. The stringent default encourages engagement in the rulemaking process. And once the regulatory scheme is in place, it faces less likelihood of legal challenge.

III. CASE STUDY 2: DEBIT CARD INTERCHANGE FEES

Dodd-Frank's regulation of debit card interchange fees took a very different approach that, in hindsight, reveals the pitfalls of not having a clear statutory

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[6] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 § 1400(c)(3), Pub. L. No. 111–203, tit. XIV, 124 Stat. 1376, 2136 (codified at 15 U.S.C. § 1601 note).
[7] *See, e.g.*, 15 U.S.C. § 1639c.
[8] 15 U.S.C. § 1601 note.
[9] Ability-to-Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 6,408, 6,530–31 (Jan. 30, 2013) (final rule).
[10] *See id.* at 6,531.
[11] Brief for the Mortgage Bankers Ass'n et al. as Amici Curiae Supporting Petitioners at 3, Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., Ltd., 601 U.S. 416 (2024) (No. 22-448).

default. In the United States, merchants are charged a fee whenever a consumer pays with a debit or credit card. The explosion of debit card fees before Dodd-Frank led Congress to pass the so-called Durbin Amendment, which directed the Federal Reserve to limit debit card interchange fees to an amount "reasonable and proportional to the cost incurred."[12] However, the statute itself did not specify a numeric cap or formula to use when regulating these fees. The law left the details to the Fed's rulemaking, specifying certain things that the Fed should consider.[13] Because Congress did not set a "default" interchange fee cap amount in the statute, the stakes of litigation were asymmetric. Banks knew from the outset of the rulemaking process that challenging the Fed's rule could only help them, as overturning it would cause the market to revert to effectively unregulated (and much higher) fees.

In 2011, the Fed issued a regulation governing debit card interchange fees, setting a cap of 21 cents per transaction plus 0.05% of the transaction's value.[14] This final threshold was substantially higher than the Fed's original proposal of 12 cents,[15] which the Fed may have raised in the final rule in fear of a legal challenge from banks. The result was that the supposed "cap" on interchange fees ended up being far higher than any fees actually present in the market, making the cap essentially meaningless.[16] Several merchant trade associations promptly sued to challenge the rule, seeking a lower limit. Relying on the provision's open-ended "reasonable and proportional" standard, the DC Circuit eventually upheld the Fed's rule as a permissible interpretation of the statute.[17]

Nearly a decade later, industry plaintiffs tried again by launching a new lawsuit—the ongoing *Corner Post, Inc. v. Board of Governors of the Federal Reserve System* litigation—to attack the same Federal Reserve rule. The case was essentially a repeat of the DC litigation, except that the litigants filed in North Dakota. The Supreme Court ruled in 2024 that the trade associations in question could proceed with their suit under the Administrative Procedure Act ("APA"), notwithstanding the extended passage of time since the rule's issuance, because their co-plaintiffs in the case included Corner Post, a company that allegedly had been recently injured by the rule.[18] (This holding was contrary to the view of every Circuit to have considered the APA's statute of limitations and means that "there is effectively no longer any limitations period for lawsuits that challenge agency regulations."[19]) On remand, the district court vacated the

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[12] 15 U.S.C. § 1693o-2(a)(2).
[13] *See* 15 U.S.C. §§ 1693o–2(a)(3)(A); 1693o–2(a)(4).
[14] Debit Card Interchange Fees and Routing (Regulation II), 12 C.F.R. § 235.3 (2026).
[15] Debit Card Interchange Fees and Routing, 75 Fed. Reg. 81,722, 81,726 (proposed Dec. 28, 2010).
[16] *See* Brief of Consumer Groups as Amici Curiae in Support of Respondents at 9–11, Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., No. 25-3000 (8th Cir. Feb. 20, 2026), *available at* https://smallbusinessmajority.org/sites/default/files/policy-docs/2026.2.20-Corner-Post-Consumer-Groups-Amicus-final.pdf [https://perma.cc/J7VM-L5JE].
[17] NACS v. Bd. of Governors of the Fed. Reserve Sys., 746 F.3d 474, 477 (D.C. Cir. 2014).
[18] Corner Post, Inc. v. Bd. of Governors of the Fed. Reserve Sys., 603 U.S. 799, 825 (2024).
[19] *Corner Post*, 603 U.S. at 835, 843 (Jackson, J., dissenting).

Fed's interchange rule on a nationwide basis.[20] The case is now on appeal.[21] In short, over a decade after Dodd-Frank and despite clear congressional intent therein to limit debit interchange fees, it remains in doubt whether there will be any meaningful regulation of those fees.

How might this rulemaking and the industry's response have played out differently if Congress had structured the Durbin Amendment with a hammer, i.e., a strong statutory default? Imagine if the statute had capped debit interchange fees at 10 percent per transaction, unless and until the Federal Reserve deviated from that number by rule. Such a provision—even if harsh from the banks' perspective—would have fundamentally flipped the incentives for the rulemaking process, as well as litigation. The Fed would not have felt pressure to select a higher limit to insulate itself from legal challenges from banks. And any legal challenge from either merchants or banks would have at least left a 10-cent cap in place.

The debit card interchange fee rule is just one of several relevant examples in the field of financial services. Many of the hundreds of rulemakings required or authorized by Dodd-Frank have been unsuccessful or languished in the absence of statutory hammers.[22] And that barely scratches the surface of the relevance of hammers across policy areas.[23]

IV. EXISTING STATUTORY HAMMERS: REGULATORS AND OTHER STAKEHOLDERS

In addition to the relevance of statutory hammers for future legislation, hammers that are already present in at least some areas of existing law offer a range of opportunities for regulators and other stakeholders, such as public interest groups, to revisit deviations from statutory defaults. Regulators should think carefully about whether a productive rulemaking process should include "resetting the baseline" by revoking agency rules that deviate from statutory hammers. And stakeholders should consider challenging rules that deviate from statutory defaults.

Consider credit card late fees, another example in financial services. Congress in 2009 required those fees to be "reasonable and proportional" to credit card companies' costs and, importantly, provided specific criteria actually

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[20] Corner Post, Inc. v. Bd. of Governors of the Fed. Reserve Sys., 794 F.Supp.3d 610, 640 (D.N.D. 2025).

[21] Amended Notice of Appeal, Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., No. 1:21-cv-00095-DMT-CRH, (D.N.D. Oct. 28, 2025).

[22] *See, e.g.*, 12 U.S.C. § 5641 (requiring rulemaking on executive compensation within "9 months after July 21, 2010"). No such rules have ever been finalized. *See* Incentive-Based Compensation Arrangements, Notice of Proposed Rulemaking, Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, Federal Housing Finance Agency & National Credit Union Administration (May 6, 2024), *available at* https://www.fdic.gov/sites/default/files/2024-05/2024-05-03-fed-reg-incentive-based-compensation-agreements_0.pdf [https://perma.cc/6V9V-Y23J].

[23] *See* Gould & Van Loo, *supra* note 4, at 402 (describing examples from environmental law). *But see* HICKEY, *supra* note 3, at 14 (noting "infrequent use of hammer provisions" in existing law).

governing that standard—not just considerations for a rulemaking.[24] The law allowed but did not require the Federal Reserve Board (and now the CFPB) to create a "safe harbor" late fee level that is "presumed to be reasonable and proportional."[25] This provision was a statutory hammer, at least as the regulatory history has played out. The Federal Reserve acted swiftly in 2010 to create a safe harbor (up to a $25 fee for the first late payment, and $35 for subsequent late payments, with regular adjustments for inflation).[26] Today, it seems that literally all credit card companies set their late fees based on this safe harbor.[27] This strongly suggests that the regulation deviates downward from a more stringent statutory standard.

When the CFPB issued new regulations about credit card late fees in 2024, it simultaneously revoked the existing safe harbor and created a new safe harbor that was significantly lower (typically $8, without inflation adjustment).[28] A Texas court eventually enjoined the CFPB rule, finding that the new safe harbor was inconsistent with the statute.[29]

In retrospect, instead of revoking and revising the safe harbor all in one go, it may have been wiser for the CFPB to first have revoked the safe harbor and reverted to the more stringent statutory default. A targeted rulemaking to remove a discretionary safe harbor should be more straightforward for an agency than coming up with a new regulatory scheme. (Indeed, the Trump Administration is pushing the frontier on the process for removing regulations.[30]) And while industry would presumably have challenged the revocation, at least in theory a challenge to the removal of a discretionary safe harbor should be relatively difficult.[31] Removing the safe harbor would have reset the baseline to the statutory standard. The CFPB could then have launched a rulemaking, perhaps before the revocation even went into effect, to come up with a new safe harbor. This second rulemaking would have proceeded with the benefits of the statutory hammer.

Likewise, where there is an existing regulatory regime that deviates from a

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[24] Credit Card Accountability Responsibility and Disclosure Act of 2009, 15 U.S.C. § 1665d(a), (c).
[25] *Id.* § 1665d(b), (e).
[26] Truth in Lending, 75 Fed. Reg. 37,526, 37,527 (June 29, 2010) (final rule). As of 2024, due to inflation adjustments, these amounts were ($30 for the first late payment, and $41 for subsequent late payments. Credit Card Penalty Fees (Regulation Z), 89 Fed. Reg. 19,128, 19,128 (Mar. 15, 2024) (final rule).
[27] *See* Credit Card Penalty Fees, 89 Fed. Reg. at 19,129–30.
[28] *See id.* at 19,128.
[29] *See* Chamber of Commerce of U.S. v. Consumer Fin. Prot. Bureau, 767 F. Supp. 3d 357, 365–67 (N.D. Tex. 2024).
[30] *See* Sam Callahan, Andrew Tutt, John P. Elwood, Elisabeth S. Theodore, Sam Ferenc, Travis Annatoyn & Sonia Tabriz, *Deregulatory Executive Orders: Issues Under the Administrative Procedure Act*, ARNOLD & PORTER (Apr. 9, 2025), https://www.arnoldporter.com/en/perspectives/advisories/2025/04/deregulatory-eos-issues-under-the-apa [https://perma.cc/HS8Z-CNWC].
[31] *See* Seven Cnty. Infrastructure Coal. v. Eagle Cnty., 605 U.S. 168, 181 (2025) (indicating that courts "should afford substantial deference" to agency decisions within the agency's discretionary authority).

statutory hammer, public interest groups or other stakeholders should consider challenging that regime. *Corner Post* enables challenges to those rules regardless of when they were issued. The agency can then reconsider a new deviation from the statutory regime if appropriate, with all the benefits of the statutory default.

V. CONCLUSION: WHY HAMMERS, WHY NOW

Professor Elizabeth Magill's seminal 1995 article on statutory hammers in food nutrition labeling rules stresses a variety of benefits and drawbacks to such provisions.[32] As others have also emphasized, statutory hammers push agencies to meet statutory deadlines.[33] Magill also notes, somewhat briefly, that "the hammer strengthened the agency at each stage of the rulemaking process."[34] But on the other hand, statutory hammers can pull agency resources from other activities and provide an inflexible timeline for rulemaking.[35]

Fast forward three decades, and what was once something of an afterthought in the analysis now looms decidedly large. While hammers were once thought of primarily as a tool of accountability for federal agencies, now they also operate significantly as a shield against cynical litigation and activist courts. Doctrinally, the Supreme Court has done a complete 180 on agency deference.[36] Even more striking is the degree of forum-shopping and strategic gamesmanship in litigation. Whereas it was previously uncommon for companies to "sue their regulator," industry trade associations now shamelessly bring cynical lawsuits against agency rules. [37] They routinely cherry-pick favorable courts, even creating new entities solely to manufacture standing.[38] And rather than engage productively in the rulemaking process, industry has learned to "seed" rulemaking records with vague objections that can later be used to invalidate rules.[39] In an especially egregious example, the Supreme Court recently seized on a single, ambiguous sentence buried in the EPA's voluminous public comment record to justify blocking a major air-quality regulation.[40]

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[32] *See* Magill, *supra* note 2, at 178–89.
[33] *See, e.g.*, Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 955–56 (2008); Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 IOWA L. REV. 1, 8 n.40 (1994).
[34] Magill, *supra* note 2, at 184.
[35] *See* Magill, *supra* note 2, at 180–82, 187–89.
[36] *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024) (overturning the *Chevron* doctrine).
[37] *See* Seth Frotman & Brad Lipton, *The Greatest Trick John Roberts Ever Pulled: Convincing the World that Rigged Courts Are Neutral*, CALIF. L. REV. ONLINE BLOG (Aug. 2025), https://www.californialawreview.org/online/rigged-courts [https://perma.cc/YCA9-JHF6].
[38] *See id.*
[39] *See* Seth Frotman & Brad Lipton, *The 100 Days That Put the Nail in the Coffin of Administrative Law*, YALE J. ON REG.: NOTICE & COMMENT (May 21, 2025), https://www.yalejreg.com/nc/the-100-days-that-put-the-nail-in-the-coffin-of-administrative-law-by-seth-frotman-brad-lipton/ [https://perma.cc/V685-864C].
[40] *See* Ohio v. Env't Prot. Agency, 603 U.S. 279, 288 (2024); *see also id.* at 308 (Barrett, J., dissenting) ("The closest comment that the Court can find—which it quotes repeatedly—is one sentence.").

It is fair to say that, when Congress directs an agency to regulate industry without a default provision, the result is often no regulation. Congressional intent—the will of the people—is foiled.

At the same time, agency rulemaking documents have grown remarkably in length as agency lawyers steel themselves for judicial review.[41] The need to incentivize faster rulemaking has only grown.

Court reform or revisions to the Administrative Procedure Act may well be warranted to remedy some of the significant problems with judicial review across the board. But hammers offer a complementary path, which may be a lighter lift politically. Hammers allow Congress to roughly articulate a baseline, without the expectation that it will necessarily go into effect or the politically challenging task of reaching agreement on all the details.

Congress has employed statutory hammers here or there over the years, but it is fair to say that it has not consistently incorporated them into the law.[42] This failure may have caused avoidable negative consequences. To take just one example, the No Surprises Act of 2020 was intended to protect people from unexpected medical billing. That law establishes a preliminary amount that health care providers will be paid, but it also authorizes the creation of a dispute resolution process to allow further refinement of that amount.[43] The executive branch wrote rules to govern the dispute resolution process, and industry sued, demanding rules that would favor larger payments. Over several years, a court in Texas ruled in favor of the industry multiple times,[44] and the agency is again engaged in rulemaking. If Congress had taken the relatively minimal step of creating the hammer that the preliminary payment amount would be binding *unless* agency rules regarding the dispute resolution process were in place, a regulatory standard for this important provision would likely have been established by now. Indeed, it may be appropriate for Congress to now add hammers to existing statutory provisions such as this one where rulemaking has stalled.

Scholars have also advocated for other statutory structures that are broadly similar to hammers that may have value in certain contexts. For instance, scholars have pointed to "big waiver" regimes in which Congress delineates detailed statutory schemes that federal agencies can waive,[45] as well as statutory floors or "regulatory minimums" from which agencies can deviate with more stringent rules.[46] Yet the relative benefits of hammer provisions should not be

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[41] Mark Febrizio, *Federal Agencies Are Publishing Fewer but Larger Regulations*, GEO. WASH. UNIV.: REGULATORY STUD. CTR. (Dec. 20, 2021), https://regulatorystudies.columbian.gwu.edu/federal-agencies-are-publishing-fewer-larger-regulations [https://perma.cc/5DE5-ZANM]

[42] *See* Hickey, *supra* note 3.

[43] *See* 42 U.S.C. §§ 300gg-111(a)(3)(E) (preliminary payment amount) and 300gg-111(c) (dispute resolution process).

[44] *See* Tex. Med. Ass'n v. U.S. Dep't of Health & Hum. Servs., No. 6:22-cv-372-JDK, slip op. at 2–3 (E.D. Tex. Feb. 6, 2023) (mem. op. & order) (describing litigation history).

[45] *See generally* David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265 (2013).

[46] *See* Gould & Van Loo, *supra* note 4, at 400.

overlooked.

A detailed statutory scheme that an agency can waive will be useful when Congress actually has the ability to generate such a regime. But devising the details of a regulatory scheme often requires technical expertise and policy compromise—the exact reasons why Congress often delegates to agencies. Indeed, the difficulty of actually settling on a rule is also probably one of the biggest obstacles to the passage of hammer provisions. But a benefit of hammers is that Congress can do "rough justice," settling on a single number or simplified regime with a delegation to the agency to modify it as necessary. Congress does have to make a decision about what the default will be, but it is just a default. As noted, in the current litigation environment, the choice for Congress is often not really between a hammer provision and rules designed fully by an agency, but between a hammer provision and no rule at all.

Floors from which agencies can deviate only upward with more stringent rules also certainly have their place. Where Congress can agree on a floor, it should do so. The *Federal Register* is littered with instances of agencies creating exceptions and carve-outs from statutory requirements that undermine congressional intent.[47] Congress should avoid handing that authority over to the Executive Branch where possible. But, depending on the context, agreeing on a statutory floor may be more challenging for Congress than creating a hammer. Hammers allow legislators to answer objections to the law with the truthful assertion that modifications can be made in the rulemaking process.

Finally, while this essay focuses on Congress, the imperative to ensure that the law is effective will also inevitably fall to presidential administrations as well. As major legislation is shepherded by the White House, the idea of punting to the regulatory process will almost certainly arise, especially because that administration will get the first bite at the apple for such regulation. But it is crucial for those whose role it is to help the President accomplish his or her goals—such as the Department of Justice—to ensure that the law's drafting actually lives up to the administration's ambitions. That means having a plan for effective legislation.

Statutory hammers can be a blunt instrument. They must be crafted thoughtfully, with due regard to potential unintended consequences. And it will undoubtedly be harder for Congress to reach agreement on strong default rules than to delegate the details of legislation to administrative agencies. But the alternative leaves vital policy subject to a stunted rulemaking process, cynical litigation, and activist judging that undermine the public interest and the democratic process itself.

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[47] *See, e.g.*, Overdraft Lending: Very Large Financial Institutions, 89 Fed. Reg. 106,768, 106,768 (Dec. 30, 2024) (final rule) (describing "non-statutory exceptions in Regulations Z and E that have allowed very large financial institutions to avoid statutory consumer credit protection requirements when extending certain overdraft credit").

NOTE

THE MAJOR QUESTIONS DOCTRINE AND POST-ENACTMENT LEGISLATIVE HISTORY

AARON L. BAUM*

ABSTRACT

The major questions doctrine ("MQD") has quietly resurrected an interpretive tool that the Court foreswore during the textualist revolution: post-enactment legislative history. Starting with one of the earliest (proto) major questions cases, FDA v. Brown & Williamson*, and continuing through modern MQD cases like* Biden v. Nebraska*, the Court has relied on rejected bills, post-enactment statements by individual legislators, and congressional inaction to deny the executive branch claimed statutory authority. Justice Gorsuch defends the practice by claiming such evidence is relevant only to the antecedent inquiry of whether a question is "major." Justice Barrett, meanwhile, defends it on textualist grounds as ordinary statutory "context." But both defenses fail. Justice Gorsuch's is belied by the "antecedent" inquiry's dominant role in deciding the merits of major questions cases, and Justice Barrett's is vulnerable to the same critiques that textualists levied against earlier uses of post-enactment legislative history.*

This Note then asks whether the practice might at least serve the goal that some Justices have for the MQD—reinvigorating Congress as a lawmaking institution—by giving Congress a more flexible lawmaking tool. Post-enactment legislative history does not live up to that hope, at least as deployed in the MQD. First, where pre-textualist uses of post-enactment legislative history reflected judicial modesty in affirming the status quo (whether the existing judicial or executive construction of a statute), the MQD deploys the same evidence to displace it, reflecting judicial hubris rather than congressional empowerment. Second, the MQD's embrace of sub-bicameral signaling functions as a one-way ratchet, available only to strip the executive of authority, but never to make new law. Third, by treating rejected bills and offhand legislator remarks as evidence against executive power, the doctrine chills legislative activity. It discourages Presidents from first seeking congressional ratification before acting unilaterally, and it raises the cost of messaging legislation that serves useful informational and bargaining functions. The Court, this Note concludes, must decide whether it believes in bicameralism or not.

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I. INTRODUCTION

In the midst of an intra-party fight about how to accomplish student debt relief, then-Speaker of the House Nancy Pelosi claimed that President Biden would need to work with Congress—he could not go it alone.[1] But Speaker Pelosi eventually supported the President after Congress failed to act and President Biden turned to his independent statutory authority, supported by a new opinion from the Office of Legal Counsel. The Speaker must have been surprised, then, when the Supreme Court cited her earlier remark in striking down President Biden's action under the major questions doctrine ("MQD") in *Biden v. Nebraska*. Legislators who witnessed the saga play out might now think twice before questioning the authority of a President of their own party.

Legislative history usually ends when the President signs a bill into law. For purposivists, anything said up until that point should help a judge understand what Congress was thinking in enacting the law. Any legislative history past that point is, particularly in the wake of the textualist revolution at the Supreme Court, considered worthless or nearly worthless for understanding the earlier statute. But in some cases—both historically and today in MQD cases—courts have extended the timeline past the President's signature, reading congressional action short of formally amending prior legislation back onto the earlier legislation to help inform its meaning.

[1] *See infra* Parts III.C.4, IV.B.1 for a full description of this case.

The Court's embrace of such sub-bicameralism-and-presentment congressional signals—including hearings, committee reports, statements by legislators, or legislation that dies in committee or in one of the houses[2]—might at first blush empower Congress, fulfilling some jurists' goal for the MQD. By crediting low-cost signals, the MQD might help gridlocked Congress get back in the game of controlling delegations of legislative power to the executive and judiciary—particularly in construing so-called "common law statutes," where post-enactment evidence often appeared in 20th century cases. But such evidence comes with three limits that make it ill-suited to achieve the Court's goal of energizing congressional action. First, the MQD uses of post-enactment legislative history speak in the language of legislative supremacy while operating as judicial supremacy, in comparison to the judicial modesty of the 20th century cases: The former use post-enactment legislative history to enact a change in the status quo, while the latter rely on it only to affirm the status quo. Second, the "tool" is a one-way ratchet—the modern Court has only endorsed its use in MQD cases, so post-enactment legislative history can only *dis*empower the executive, in contrast to its historical role in "congressional acquiescence" cases where it could empower the executive. Third, resorting to *failed* legislative enactments to prove what the President *may not* do could end up counterproductively chilling worthwhile congressional dialogue, as legislators learn that their good ideas may be used against them in a future case to prove why the executive *cannot* exercise the power that legislators proposed. This could also, contra the hopes of the Justices, encourage Presidents to take more unilateral action rather than first go to Congress for authorization (fearing that congressional rejection will bar later unilateral action).

This Note proceeds in three parts. Part 0 defines "post-enactment legislative history" (also sometimes called "subsequent legislative history"[3]) and differentiates it from other similar evidence of legislative intent. Part III traces the history of post-enactment legislative history, from the height of purposivism in the second half of the 20th century, to the death of post-enactment legislative history during the textualist revolution, and finally to its surprising revival by textualist judges in the MQD. A close read of those modern cases belies Justice Gorsuch's argument that post-enactment evidence goes only to the preliminary determination of whether an action is "major," rather than the merits of what a statute authorizes. Nor, this Note concludes, does Justice Barrett's defense—that the executive's post-enactment failure to exercise a power is probative evidence that it does not exist—hold water. And Part IV explains why the Court's narrow endorsement of post-enactment legislative history will disappoint jurists hoping that the Court's MQD jurisprudence will reinvigorate congressional action.

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[2] *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 635 (1990).
[3] Sullivan v. Finkelstein, 496 U.S. 617, 632 (1990) (Scalia, J., concurring).

II. DEFINING POST-ENACTMENT LEGISLATIVE HISTORY

A brief aside before defining this Note's terms: carefully parsing the legal meaning of facially similar yet ontologically distinct pieces of evidence is crucial for sound statutory interpretation, where legal reasoning often bucks a straightforward "necessary or sufficient" logic. Instead, judges compare conflicting sources of legislative history, ascertaining the "weigh[t]" of each source and "balanc[ing]" the evidence on one side against the other.[4] As a result, good jurisprudence demands careful reasoning about which types of legislative history arguments are appropriate depending on how one thinks Congress may constitutionally change the law.

Post-enactment legislative history for this Note's purposes means (1) congressional actions or statements (including silence or acquiescence) (2) short of bicameralism and presentment (3) made after the President has signed a bill into law (4) that a court uses to inform its understanding of that law. Relevant congressional actions include actions and statements by individual members of Congress, congressional committees, or even acts by an entire chamber or by both chambers short of bicameralism and presentment. This definition of post-enactment legislative history also includes congressional silence or acquiescence, which commentators often consider separate from other congressional acts subsequent to enactment.[5] But congressional acquiescence is useful to consider as a form of post-enactment legislative history for this Note's purposes, given that neither post-enactment silence nor post-enactment speech can speak to the enacting Congress's intent.

Congressional acquiescence overlaps with another source of post-enactment evidence that is somewhat beyond this Note's scope: post-enactment executive practice. For instance, *Skidmore* (as recently reaffirmed in *Loper Bright*) provides that agency "interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning."[6] Professor Daniel Deacon has explored (and rejected) various theoretical justifications for crediting such evidence,[7] including, as relevant here, that such evidence might be probative of the enacting Congress's intent (a traditional bicameralist view) or a later Congress's acquiescence.[8] This Note overlaps with Deacon's account in identifying the MQD's reliance on post-enactment practice as difficult to square

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[4] *See, e.g.*, Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 559 U.S. 573, 595–96, 596 n.14 (2010).

[5] *Compare, e.g.*, 2A SHAMBIE SINGER & NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 48:20 (7th ed. 2024) (including "Post-enactment history" in the chapter on "Extrinsic Aids—Legislative History"), *with* 2B *id.* § 49:9 (including "Legislative inaction following contemporaneous and practical interpretation" in the chapter on "Contemporaneous Construction").

[6] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2262 (2024) (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[7] Daniel T. Deacon, *Statutory Liquidation*, 77 ADMIN. L. REV. 503, 551–72 (2025).

[8] *See id.* at 540–41.

with modern textualism.[9] But while Deacon focuses on the power of the executive to liquidate statutory meaning, this Note focuses on the power of the legislature to liquidate meaning.

Two other types of congressional material are similar to and often considered alongside[10] post-enactment legislative history given that all three lie outside of the typical sources of legislative meaning: (1) earlier but rejected drafts of the statute being considered by the court; and (2) post-enactment amendments to the statute at issue that made it through bicameralism and presentment. But this Note does not count those types of evidence as post-enactment legislative history. Both forms of evidence rely on ratification through bicameralism and presentment, and they thus do not operate through sub-bicameral signaling like post-enactment legislative history does. Professor Anita Krishnakumar terms these two categories "drafting history" and "amendment history," respectively, and describes both together as subsets of "statutory history."[11] Statutory history is "the historical evolution of a statute"[12]—as distinguished from typical "legislative history"—"the hearings, committee reports, and debate leading up to the enactment in question."[13]

Drafting history relies on traditional understandings of congressional intent: Earlier discarded versions of a statute speak to a given Congress's intent in enacting the final version.[14] Although drafting history is vulnerable to the criticism that it only went through consideration by a single committee or one, but not both, chambers,[15] traditional legislative history (floor statements, committee reports, etc.) is vulnerable to the same criticism.[16] As Krishnakumar argues, neither drafting nor amendment history is as different from legislative

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[9] *See id.* at 503.

[10] *See, e.g.*, William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 84–85 (1988) (considering together the impact of "the rejection of [a given] interpretation by *either the enacting Congress* [what this Note categorizes as drafting history] *or a subsequent one* [what this Note categorizes as post-enactment legislative history]").

[11] Anita S. Krishnakumar, *Statutory History*, 108 VA. L. REV. 263, 271 (2022).

[12] Hubbard v. United States, 514 U.S. 695, 702–03 (1995).

[13] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 256 (2012).

[14] *See, e.g.*, Arizona v. United States, 567 U.S. 387, 405 (2012) (arguing that proposals rejected while drafting the statute at issue "underscore[d] . . . Congress['s] . . . deliberate choice . . . [and] considered judgment" regarding the question presented); *see also* Krishnakumar, *supra* note 11, at 271.

[15] *See, e.g.*, United States v. United Mine Workers of Am., 330 U.S. 258, 282–83 (1947) (arguing that any intent reflected by an amendment considered only by the Senate, but not the House, cannot be imputed onto Congress as a whole); *see also* BNSF Ry. Co. v. Loos, 139 S. Ct. 893, 906 (2019) (Gorsuch, J., dissenting) ("[T]he statutory history I have in mind here isn't the sort of unenacted legislative history that often is *neither truly legislative (having failed to survive bicameralism and presentment)* nor truly historical (consisting of advocacy aimed at winning in future litigation what couldn't be won in past statutes)." (emphasis added)).

[16] *See, e.g.*, SCALIA & GARNER, *supra* note 13, at 376 ("Floor statements may well have been (and in modern times very probably were) delivered to an almost-empty chamber . . . . As for committee reports, they are drafted by committee staff and are not voted on (and rarely even read) by the committee members, much less by the full house.").

history as the textualists who employ them would hope.[17]

But amendment history's basis in bicameralism will take longer to explain. As the Supreme Court has recognized, subsequent successful amendments to earlier legislation, unlike other sources of post-enactment legislative history, are properly enacted law which at least modify the text of a statute passed previously.[18] Those amendments might also arguably speak to the meaning of parts of an earlier law they did *not* amend—getting closer to, but not quite, exceeding typical bicameralism. Consider, for instance, *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*,[19] which held that the Fair Housing Act[20] ("FHA") recognized disparate impact liability.[21] Justice Kennedy, writing for the majority, argued in part that when Congress amended the FHA in 1988 to create certain liability exemptions,[22] it was aware that all nine circuits to have considered the disparate impact question had held that the FHA did recognize disparate impact liability.[23] Congress expressly exempting certain liability while leaving unchanged the provisions directly at issue in the case[24] served as "convincing support for the conclusion that Congress accepted and ratified the unanimous holdings of the Courts of Appeals."[25] Moreover, the liability exemptions enacted by the amendment sounded to the Court like exemptions *from disparate impact liability*, and thus would have been "superfluous" if the FHA did not provide for disparate impact liability in the first place.[26]

Justice Alito's dissent disputed the majority's broad reading of the FHA's amendment history. He argued that "[t]o change the meaning of language in an already enacted law, Congress must pass a new law amending that language. Intent that finds no expression in a statute is irrelevant."[27] Addressing the majority's superfluity point, Justice Alito argued that "what matters is what Congress *did*, not what it might have 'assumed,'" pointing out that the liability exclusions "make no reference to" the FHA provisions directly relevant to the question of disparate impact.[28]

Yet one can still hold a bicameralist view of Congress and believe that a

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[17] *See* Krishnakumar, *supra* note 11, at 315–22.
[18] Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 n.13 (1980) ("With respect to subsequent *legislation* . . . Congress has proceeded formally through the legislative process. A mere statement in a conference report of such legislation as to what the Committee believes an earlier statute meant is obviously less weighty.").
[19] 576 U.S. 519 (2015).
[20] 42 U.S.C. §§ 3601–3619.
[21] *Inclusive Cmtys.*, 576 U.S. at 525.
[22] *See* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619.
[23] *Inclusive Cmtys.*, 576 U.S. at 535–36.
[24] The Court focused on 42 U.S.C. §§ 3604(a) and 3605(a), which provide that it is unlawful to "otherwise make unavailable" (which the Court read to refer to the impact, rather than intent, of an action) housing "because of" a person's protected characteristics. *Inclusive Cmtys.*, 576 U.S. at 533–35.
[25] *Inclusive Cmtys.*, 576 U.S. at 536.
[26] *Id.* at 537–38.
[27] *Id.* at 569–70 (Alito, J., dissenting).
[28] *Id.* at 571.

later amendment represented Congress's constitutionally recognized method for imbuing new statutory meaning into old law. The majority in *Inclusive Communities* envisioned a Congress surveying the statute as a whole and "ma[king] a considered judgment to retain the relevant statutory text."[29] On that view, when Congress amends a law, it updates the intent of the law with Congress's new intent by reenacting the parts of the law that live within the penumbras of the parts that Congress *does* amend (for instance, adding certain liability carveouts reenacts the FHA as to the scope of liability generally). Scholars have described this type of inference as the "reenactment rule,"[30] reflecting the view that Congress breathes new meaning into the statute by reenacting it.[31] This approach is a cousin of recent constitutional interpretation scholarship that argues the Bill of Rights should be read anew in light of the Reconstruction Amendments, the "Second Founding."[32]

The structure of Justice Kennedy's amendment history argument reveals his traditional, bicameral view. Justice Kennedy led his argument that the 1988 amendment had ratified disparate impact with the fact of the amendment itself and its legal backdrop (the unanimous courts of appeals).[33] After that lead-in, Justice Kennedy bolstered his argument with sources from the legislative history and drafting history[34] of the amendments. Without the successful amendment to cap off those sources of statutory meaning, Justice Kennedy may not have felt comfortable relying on the legislative and drafting history on its own. A House report, floor debate, hearing transcript, and rejected statutory language may have been useful to infer the purpose of the amendment that Congress ultimately adopted (and thus Congress's intent in "reenacting" the FHA), but it would require some additional justification to argue that those post-enactment sources could be useful in interpreting the FHA itself without any post-enactment amendment to ratify that history. That latter form of reasoning is the focus of this Note.

Two edge applications of the reenactment rule help define the boundary between amendment history, which can still rest on the traditional view of Congress, and post-enactment legislative history, which cannot. First, most formulations of the reenactment rule are limited to the inference that Congress

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[29] *Id.* at 536.

[30] *E.g.*, Eskridge, *Interpreting Legislative Inaction*, *supra* note 10, at 79; HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1365 (William N. Eskridge, Jr. & Philip Frickey eds., 1994); SCALIA & GARNER, *supra* note 13, at 256.

[31] *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 380–81 (1969) ("Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction.").

[32] *See, e.g.*, Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 460 (1989) ("[W]hich fragments of the Founding order were now[, post-Reconstruction,] inconsistent with the new Republican constitution? . . . [T]he Court has self-consciously struggled with the synthetic problems involved in integrating Founding (time one) and Reconstruction (time two) into a principled doctrinal whole."); William M. Carter Jr., *The Second Founding and the First Amendment*, 99 TEX. L. REV. 1065, 1065–82 (2021).

[33] *See Inclusive Cmtys.*, 576 U.S. at 535–36.

[34] *See id.* (citing H.R. REP. NO. 100-711, at 89–93 (describing a rejected amendment that would have eliminated certain disparate impact liability)).

"incorporates any settled interpretations of the statute" upon reenactment.[35] That formulation does not permit courts to infer later congressional *modification* of a statute *sub silentio*, instead only allowing the inference that Congress *ratified* the existing judicial interpretation of a statute, as recognized by its "settled" construction (which presumably reflects its original meaning). Thus, *Inclusive Communities* perhaps goes beyond the traditional "reenactment rule" if Justice Alito is correct that the original meaning of the relevant statute did not include disparate impact liability and that there was no settled interpretation for Congress to acquiesce to given that the Supreme Court had not yet weighed in.[36] Regardless, Justice Kennedy's opinion rested on the opposite view, that Congress was aware of and tacitly approved the prevailing circuit court approach by amending the statute. *Inclusive Communities* demonstrates, then, that even very aggressive uses of amendment history do not necessarily rely on a nontraditional view of Congress.

Second, some courts have used the reenactment logic when Congress has not amended the statute at issue, but rather legislated on the same general topic. The Court in *Zemel v. Rusk*[37] held that the Secretary of State could permissibly restrict where U.S. passport holders could travel under the Passport Act of 1926.[38] The Court argued that "[d]espite 26 years of executive interpretation of the 1926 Act as authorizing the imposition of area restrictions, Congress in 1952, though it once again enacted legislation relating to passports, left completely untouched the broad rule-making authority granted in the earlier Act."[39] The legislation in question was the Immigration and Nationality Act of 1952,[40] which made it unlawful to enter or leave the United States without a valid passport after the President declares war or a national emergency.[41] Assuming that that subsequent Act ratified executive practice still relies only on a bicameralist view of Congress, as it focuses on Congress positively enacting legislation and again pictures Congress looking over the existing legislation and deciding not to amend it.[42] Whether that inference is *valid* depends on how on-point the post-enactment legislation was. An amendment to the section at issue may strongly imply acquiescence, while a *Zemel*-type statute may do so weakly. But the core logic remains the same. Lower courts have reflected a similar type of logic in providing that later appropriations statutes can "change[] substantive law."[43] At

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[35] *See, e.g.*, Eskridge, *Interpreting Legislative Inaction*, *supra* note 10, at 69.
[36] *See* 576 U.S. at 566, 568 (Alito, J., dissenting).
[37] 381 U.S. 1 (1965).
[38] 22 U.S.C. § 211; *Zemel*, 381 U.S. at 7.
[39] *Id.* at 12.
[40] Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).
[41] *See* 8 U.S.C. § 1185.
[42] *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 601 (1983) ("The evidence of congressional approval of the policy embodied in [a decision by the Internal Revenue Service (IRS)] goes well beyond the failure of Congress to act on legislative proposals. Congress affirmatively manifested its acquiescence in the IRS policy when it enacted [a law subsequent to the statute at issue in the case].").
[43] Gillian E. Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075, 1127

other times, courts have declined to recognize subsequent appropriations as overriding earlier substantive law.[44] Again, whether a court will determine that the related statute modifies the earlier statute depends on the strength of the inference about whether an appropriations bill speaks to the appropriating Congress's intent to change the earlier law (e.g., requiring the language of "futurity," like the word "hereafter," in order to have effect beyond the appropriated fiscal year).[45]

Finally, where amendment history and post-enactment legislative history are used alongside each other, it is possible to tease apart their separate logics and assert that reliance on the latter still only makes sense if one also buys some theory of non-bicameralist congressional action. While many cases employ both simultaneously,[46] at least one statement of the doctrine of congressional acquiescence expressly conditions judicial recognition of acquiescence on Congress amending (not merely trying to amend) the statute at issue subsequent to the promulgation of the judicial or executive interpretation—demonstrating that some courts have recognized that these types of evidence rely on separate rationales.[47] As a result, separating out the two and independently critiquing their logic can help distinguish valid from invalid legal reasoning.

Take *United States v. Rutherford*.[48] The Court held that the Federal Food, Drug, and Cosmetic Act of 1938 ("FDCA")[49] did not impliedly exempt medication for terminally ill patients from the Act's requirements that "[a]ny drug . . . not generally recognized . . . as *safe and effective*" be first approved for sale by the Secretary of Health, Education, and Welfare before going on the market.[50] The Court thus rejected the appellate court's holding that "'safety' and 'effectiveness' . . . have no reasonable application to terminally ill cancer patients" given they would "die of cancer regardless of what may be done."[51] The Court leveraged both amendment history and post-enactment legislative history to reach its holding: In 1962, Congress amended the FDCA to add "effective" alongside the existing "safe" requirement.[52] The Court argued that

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(2021) (quoting Tin Cup, LLC v. U.S. Army Corps of Eng'rs, 904 F.3d 1068, 1073 (9th Cir. 2018)).

[44] *Id.* at 1127–28 (citing, *inter alia*, Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978)).

[45] *Id.* at 1127 (quoting *Tin Cup*, 904 F.3d at 1073).

[46] *See, e.g.*, *Bob Jones*, 461 U.S. at 600–01 (arguing that Congress demonstrated its acquiescence both by failing to pass several introduced bills that would have repudiated the administrative interpretation at issue, *and* by amending the relevant statute without disturbing the reigning interpretation); N. Haven Bd. of Ed. v. Bell, 456 U.S. 512, 534 (1982) (same).

[47] *See* United States v. Rutherford, 442 U.S. 544, 554 n.10 (1979) ("[When] an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation *although it has amended the statute in other respects*, then presumably the legislative intent has been correctly discerned." (emphasis added)), *quoted in, inter alia*, *N. Haven*, 456 U.S. at 535.

[48] 442 U.S. 544 (1979).

[49] 21 U.S.C. §§ 301–399.

[50] *Id.* §§ 321(p)(1), 355 (1979) (emphasis added); *Rutherford*, 442 U.S. at 551.

[51] *Rutherford*, 442 U.S. at 551 (quoting Rutherford v. United States, 582 F.2d 1234, 1236–37 (10th Cir. 1978)).

[52] *Id.* at 552 n.8 (citing Drug Amendments, Pub. L. No. 87-781, 76 Stat. 780 (1962)).

the Senate and House reports on the amendment "note[d] with approval the [Food and Drug Administration's ("FDA")] policy of considering effectiveness when passing on the safety of drugs prescribed for 'life-threatening disease.'"[53] The Court also highlighted that subsequent to the 1962 amendments, the particular drug at issue in the case, Laetrile, and the FDA's decision to require premarket approval for Laetrile had been "a frequent subject of political debate," including in front of Congress.[54]

Imagine that the FDA's policy was not settled enough for the amendment to have implicitly ratified it, or imagine that Laetrile was meaningfully different from the drugs Congress considered in 1962. If so, the Court could still argue that its conclusion holds on the basis of the post-1962 evidence. But if one holds only a traditional view of the enacting Congress, such reliance would make no sense, and the majority's reasoning would fall apart given that the post-1962 evidence could not have spoken to the intent of the last Congress to amend the statute.

III. THE EVOLUTION OF POST-ENACTMENT LEGISLATIVE HISTORY

The loose doctrine of post-enactment legislative history has evolved over time. As Professor Nicholas Parrillo outlines, courts began routinely turning to any kind of legislative history around 1940, once government lawyers representing the newly expansive administrative state had the manpower, institutional incentive, and inside knowledge of statutory regimes necessary to plumb the previously impenetrable depths of legislative history.[55] From then until the 1980s, the Court relied on post-enactment legislative history from time to time, in line with its expansive approach to using legislative history generally. As Professor William Eskridge described the approach in its latter days, "almost anything that casts light upon what Congress attempted to do when it enacted a statute is potentially relevant."[56] The modern textualist revolution led by Justice Scalia in the mid-1980s[57] sought to eradicate legislative history, particularly *post-enactment* legislative history, which Justice Scalia saw as nonsensical even for purposivists. Since then, the mainstream view has been that post-enactment legislative history is worthless or next-to-worthless in statutory interpretation.[58]

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[53] *Id.* at 553 & n.9 (citing S. REP. NO. 87-1744, at 15 (1962); H.R. REP. NO. 87-2464, at 3 (1962)).

[54] *Id.* at 554 n.10 (citing, inter alia, *Banning of the Drug Laetrile from Interstate Commerce by FDA: Hearing Before the Subcomm. on Health & Sci. Rsch. of the S. Comm. on Hum. Res.*, 95th Cong. (1977)).

[55] *See generally* Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950*, 123 YALE L.J. 266 (2013).

[56] Eskridge, *The New Textualism*, *supra* note 2, at 626.

[57] *See generally id.*; Stuart Minor Benjamin & Kristen M. Renberg, *The Paradoxical Impact of Scalia's Campaign against Legislative History*, 105 CORNELL L. REV. 1023 (2020) (detailing the history of the textualist revolution).

[58] *See generally* Brief of Members of Congress as *Amici Curiae* in Support of Plaintiffs at 15–20, Wilderness Soc'y v. Trump, No. 17-2587 (D.D.C. Nov. 19, 2018) (describing the modern state and evolution of the doctrine).

But post-enactment legislative history has reemerged in the MQD, with limited acknowledgment by its backers that such use is inconsistent with the rest of their textualist jurisprudence.[59] The First Circuit recognized this confusion in a recent case, responding to a litigant's reliance on post-enactment legislative history by recognizing both the Supreme Court's "eschewal of the importance of post-enactment legislative history outside the major questions context," and simultaneously "the absence of a clear statement by the Supreme Court that subsequent history has no bearing on the major questions determination."[60]

A. Post-Enactment Legislative History Before Scalia

The Court occasionally turned to post-enactment legislative history during its several decades of broader reliance on legislative history from 1940 through the mid-1980s. Many of these uses went uncriticized or unremarked, in line with the sometimes instinctual or inconsistent approaches to statutory interpretation that typified the era,[61] making it difficult to craft a coherent "doctrine" of post-enactment legislative history during this period.[62] In general, post-enactment legislative history was a weak but permissible source of congressional purpose. For instance, Professors Eskridge and Philip Frickey's hierarchy of sources of legislative history, built to reflect the pre-textualist Court's all-things-considered practice, included post-enactment legislative history but placed it at the bottom of the hierarchy—the least authoritative source.[63] This placement reflected the view that post-enactment legislative history "form[ed] a hazardous basis for inferring the intent of an earlier [Congress]."[64] Courts in this era would thus sometimes resort to such material only out of claimed necessity, where no other sources could speak to the enacting legislature's purpose.[65]

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[59] Two justices have defended the MQD's use of post-enactment legislative history. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2621 n.4 (2022) (Gorsuch, J., concurring); Biden v. Nebraska, 143 S. Ct. 2355, 2383 (2023) (Barrett, J., concurring). Both of these rationales are discussed in depth in Parts III.C.3–4.

[60] United States v. Freeman, 147 F.4th 1, 21 (1st Cir. 2025).

[61] *See* HART & SACKS, *supra* note 32, at 1169 ("The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.").

[62] *See* Eskridge, *Interpreting Legislative Inaction*, *supra* note 10, at 90 ("[O]ne might conclude that the Supreme Court's legislative inaction decisions are coherent . . . . These conclusions would be hasty. I have made the best effort I can to present the range of outcomes and the Court's reasoning as coherently as possible.").

[63] *See, e.g.*, Eskridge, *The New Textualism*, *supra* note 2, at 636 (citing William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 319, 353 (1990)).

[64] United States v. Price, 361 U.S. 304, 313 (1960), *quoted in, inter alia*, United States v. Phila. Nat'l Bank, 374 U.S. 321, 349 (1963); Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 117 (1980).

[65] *See* Andrus v. Shell Oil Co., 446 U.S. 657, 666 n.8 (1980) ("[W]e cannot fail to note Mr. Chief Justice Marshall's dictum that '[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived.' In consequence, while arguments predicated upon subsequent congressional actions must be weighed with extreme care, they should not be rejected out of hand . . . ." (citations omitted) (quoting United States v.

That suspicion was in line with the era's purposivism.[66] Purposivists generally care about the purpose of the *enacting* legislators, relying on the following logic: The Constitution's structure demands legislative supremacy, meaning judges must be faithful agents of the legislature.[67] But faithful to what, exactly? Because the legislative power is uniquely prone to abuse, the Framers required bicameralism and presentment to carefully circumscribe how the legislature could permissibly convey instructions to the judiciary.[68] Thus, judges should be faithful to the legislature's instructions as enacted in particular statutes.[69] As Professors Henry Hart and Albert Sacks put it: When determining statutory purpose, "a court should try to put itself in imagination in the position of the legislature which enacted the measure."[70] As a result, most of the cases from this period citing atypical sources of legislative purpose relied more heavily on amendment history, even if also citing unenacted post-enactment legislative history.[71]

Yet a few cases from this period, like the two outlined below, bucked the trend, relying on post-enactment legislative history even where it made little sense under a faithful agent model focused on the enacting Congress's purpose. The common logic visible in these cases is that the Court would recognize a congressional policy where it saw a long and consistent history of congressional activity,[72] or where Congress appeared aware of a divisive issue (through hearings and the like) even though never acting through bicameralism and

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Fisher, 6 U.S. (2 Cranch) 358, 386 (1805) (Marshall, C.J.)); *see also* Eskridge, *The New Textualism*, *supra* note 2, at 635 (When the Court considers post-enactment legislative history, its "stated reason is usually the dearth of other interpretive guides.").

[66] *See* Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1277 (2020) (describing the 1970s as "the heyday of purposive analysis").

[67] *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 58–105 (2001).

[68] *See* Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 951 (1983) ("It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7 [vesting clause and bicameralism & presentment], represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure."); *accord* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 539 (1983) ("A court could not treat these widely-supported but never-enacted proposals as law without dishonoring the procedural aspects of the legislative process . . . . Under article I of the Constitution, not to mention the rules of the chambers of Congress, support is not enough for legislation.").

[69] Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 288–89 (1989) ("Hence, to give legal effect to legislative intentions in the absence of any relevant statutory text would undermine the constitutional scheme. Disobedience, therefore, must relate to a text rather than merely to an unexpressed intention."). We will leave to the side the obvious next question, which has dominated most debates over statutory interpretation in the modern era: how best to adhere to the legislature's instructions—by focusing on the text, or on the purpose? *See* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 95–96 (2006).

[70] HART & SACKS, *supra* note 32, at 1378.

[71] *See, e.g.*, Red Lion Broad. Co. v. FCC, 395 U.S. 367, 380–81 ("Here, the Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation.").

[72] *See* Flood v. Kuhn, 407 U.S. 258, 281 (1972).

presentment.[73] Another common thread is that the Court was willing to read congressional signaling to affirm the status quo—whether the reigning judicial or executive construction of the statute—but rarely to change the status quo.[74] Finally, both cases construed "common law statutes," where it may be even more important for judges to heed congressional signaling for fear of their own development of the statutes straying too far from congressional intent.[75] Focusing on these outliers that leaned on post-enactment legislative history alone showcases early forms of the unstated logic that has now reemerged in the MQD.

1. Flood*: Failed Bills as Acquiescence*

In *Flood v. Kuhn*,[76] the Court declined to overturn a prior decision, although acknowledging it was wrongly decided, on the basis that Congress had only ever attempted to expand, not overturn, that earlier decision. Fifty years before *Flood*, the Court in *Federal Baseball Club v. National League*[77] had exempted professional baseball from the Sherman Antitrust Act's[78] prohibition on contracts "in restraint of trade or commerce among the several States"[79] on the logic that baseball did not involve commerce between the states.[80] By the time of *Flood*, the Court recognized that reasoning was wrong: "Professional baseball is a business and it is engaged in interstate commerce."[81] And, due to *Federal Baseball*'s poor reasoning, baseball had become an "aberration" by the time of *Flood* as courts had denied litigants' requests to extend the *Federal Baseball* exemption to several other sports (football, basketball, etc.).[82]

However, the Court highlighted that since 1953 (when the Court decided another case reaffirming *Federal Baseball*), "more than 50 bills ha[d] been introduced in Congress relative to the applicability or nonapplicability of the antitrust laws to baseball."[83] Of the bills that "passed one house or the other," all "would have expanded, not restricted, the . . . exemption to other . . . sports."[84] The Court concluded that failing to overturn the exception "with full and continuing congressional awareness" demonstrated Congress's preference

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[73] *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 732–33 (1975).
[74] *See* Eskridge, *Interpreting Legislative Inaction*, *supra* note 10, at 71, 84; *but see, e.g.*, Bradley v. Sch. Bd., 416 U.S. 696, 716 n.23 (1974).
[75] *See* William N. Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1052 (1989) (describing Section 10(b) of the Securities Exchange Act (the statute at issue in *Blue Chip Stamps*), as a "common law statute" given it was drafted with broad wording that demands gap-filling, like the Sherman Antitrust Act (the statute at issue in *Flood v. Kuhn*), Section 1983, various civil rights laws, and others).
[76] 407 U.S. 258 (1972).
[77] 259 U.S. 200 (1922).
[78] 15 U.S.C. §§ 1–7.
[79] *Id.* § 1.
[80] *Fed. Baseball*, 259 U.S. at 209.
[81] *Flood*, 407 U.S. at 282.
[82] *Id.* at 282–83.
[83] *Id.* at 281.
[84] *Id.*

against overturning it:[85]

> [The introduced legislation], obviously, has been deemed to be *something other than mere congressional silence and passivity*. . . . Congress, by its *positive inaction*, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively.[86]

Justice Douglas, in dissent, advanced the opposite reading of the post-enactment legislative history. He argued that the 50 bills' failure to survive bicameralism demonstrated Congress's *disapproval* of antitrust exemptions for sports leagues, not its approval of the status quo.[87] And Justice Douglas reminded the majority that, regardless, any reliance on congressional acquiescence is suspect.[88] Justice Marshall's dissent added an argument sounding in political economy: by exempting baseball alone from antitrust law (and the player protections that would have come with that law), the Court isolated baseball players, making them incapable of mustering the political capital needed to get Congress to care enough about the issue to overturn *Federal Baseball*.[89]

2. Blue Chip Stamps*: Failed Bills and Common Law Statutes*

Like in *Flood*, the Court in *Blue Chip Stamps v. Manor Drug Stores*[90] relied on failed legislative proposals to justify its holding that only plaintiffs who have actually purchased or sold shares that they allege were fraudulently marketed may maintain a private action under Section 10(b) of the Securities Exchange Act of 1934.[91] That is, putative plaintiffs like those in *Blue Chip*, who had some noncontractual opportunity to buy or sell shares that they rejected in reliance on allegedly misleading representations, cannot maintain an action.[92]

Just over twenty years prior, in 1952, the Second Circuit in *Birnbaum v. Newport Steel Corp.*[93] announced the initial version of that rule based on Section 10(b)'s proscription of fraudulent conduct "in connection with the purchase or sale of any security."[94] Five years later, and again two years after that, the Securities and Exchange Commission requested Congress amend Section 10(b) to overturn *Birnbaum* by extending Section 10(b)'s coverage to

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[85] *Id.* at 283.
[86] *Id.* at 283–84 (emphasis added).
[87] *Flood*, 407 U.S. at 287 (Douglas, J., dissenting).
[88] *Id.* at 287 n.3.
[89] *Id.* at 292 (Marshall, J., dissenting).
[90] 421 U.S. 723 (1975).
[91] 15 U.S.C. § 78j; *Blue Chip*, 421 U.S. at 723.
[92] *Blue Chip*, 421 U.S. at 734.
[93] 193 F.2d 461 (2d Cir. 1952).
[94] *Blue Chip*, 421 U.S. at 730; 15 U.S.C. § 78j(b).

include "any attempt to purchase or sell."[95] Congress rejected both proposals.[96] Moreover, the Court pointed out, "virtually all lower federal courts facing the issue in the hundreds of reported cases presenting this question over the past quarter century" followed *Birnbaum*'s rule.[97] "The longstanding acceptance by the courts, coupled with Congress' failure to reject *Birnbaum*[] . . . argue[d] significantly in favor of acceptance of the *Birnbaum* rule by [the] Court."[98]

Notably, the Court disclaimed its role as a faithful agent of Congress, seemingly because it felt empowered by Section 10(b)'s broad language to exercise common law-esque powers. The present state of Section 10(b) law, the Court recognized, was "a judicial oak which ha[d] grown from little more than a legislative acorn."[99] As to the question presented, the Court could not "divine from the language of § 10(b) the express 'intent of Congress,'" and Section 10(b)'s contemporaneous legislative history was only moderately useful as the Court found no "indication that Congress considered the problem of private suits . . . at the time of its passage."[100] Thus, the Court considered it "proper" to weigh "policy considerations" in "flesh[ing] out the portions of the law with respect to which neither the congressional enactment nor the administrative regulations offer[ed] conclusive guidance."[101]

B. Post-Enactment Legislative History After Scalia

Although the Warren and Burger Courts already reflected skepticism of post-enactment legislative history, Justice Scalia's elevation to the Court in 1986 shifted it decisively away from such evidence. During his first term on the Court, Justice Scalia penned a scathing dissent in *Johnson v. Transportation Agency*[102] in response to a congressional acquiescence argument by the majority. Justice Brennan, writing for the Court, advanced the then-typical cautious post-enactment legislative history argument: the Court had earlier held that Title VII, which prohibits racial (and other) discrimination in employment, permits voluntary affirmative action programs.[103] In the eight years following that decision, Congress had neither amended nor even attempted to amend Title VII despite the case being "widely publicized" and "address[ing] a prominent issue of public debate," and Congress had separately amended Title VII in response to a different Court opinion.[104] As a result, the Court now "assume[d] that [its] interpretation was correct."[105] Justice Brennan acknowledged that although such evidence "may not always provide crystalline revelation, . . . it may be probative

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[95] *Id.* at 732 (quoting S. 2545, 85th Cong. (1957); S. 1179, 86th Cong. (1959)).
[96] *Id.*
[97] *Id.* at 731.
[98] *Id.* at 733.
[99] *Id.* at 737.
[100] *Blue Chip*, 421 U.S. at 729, 737.
[101] *Id.* at 737.
[102] 480 U.S. 616 (1987).
[103] United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979).
[104] *Johnson*, 480 U.S. at 629 n.7.
[105] *Id.*

to varying degrees."[106]

Justice Scalia argued that such acquiescence logic, "which frequently haunts our opinions, should be put to rest. It is based . . . on the patently false premise that the correctness of statutory construction is to be measured by what the current Congress desires, rather than by what the law as enacted meant."[107] He added that reliance on Congress's failure to legislate "ignore[s] rudimentary principles of political science" by ignoring the multiple permissible inferences that the Court could have drawn from bare congressional silence: "(1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice."[108]

Federal courts have, at least facially, come around to Justice Scalia's view. Most modern treatises agree that post-enactment legislative history is not a fruitful source of statutory meaning.[109] Modern courts will often quote[110] Justice Scalia's statement of the "law" of post-enactment legislative history, which abandoned the little weight it was afforded by purposivists in favor of no weight:

> Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation. Real (pre-enactment) legislative history is persuasive to some because it is thought to shed light on what legislators understood an ambiguous statutory text to mean when they voted to enact it into law. But post-enactment legislative history by definition "could have had no effect on the congressional vote."[111]

When federal courts do rely on post-enactment legislative history, as in the litigation over whether Title VII bars discrimination based on sexual orientation, they are often reversed.[112] Any modern federal courts that occasionally rely on

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[106] *Id.*

[107] *Id.* at 671 (Scalia, J., dissenting).

[108] *Id.* at 672.

[109] *See, e.g.*, 2B SINGER & SINGER, *supra* note 5, § 48:20 ("A legislator's post enactment statements about legislative intent have limited value to clarify a statute's meaning . . . .").

[110] *See, e.g.*, United States v. Woods, 571 U.S. 31, 48 (2013); Kisor v. Wilkie, 139 S. Ct. 2400, 2446 (2019) (Gorsuch, J., concurring in the judgment).

[111] Bruesewitz v. Wyeth LLC, 562 U.S. 223, 242 (2011) (quoting District of Columbia v. Heller, 554 U.S. 570, 605 (2008) (Scalia, J.)).

[112] *Hively v. Ivy Tech Community College*, 830 F.3d 698 (7th Cir. 2016), *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), and other circuit panels relied on Congress "time and time again" rejecting "every attempt to add sexual orientation to the list of categories protected from discrimination by Title VII" to conclude that Title VII does not protect sexual orientation. *Hively*, 830 F.3d at 717; *see also Simonton*, 232 F.3d at 35 (similar). Both were overturned by subsequent en banc decisions of their respective circuits. *See* Zarda v. Altitude Express, Inc., 883 F.3d 100, 108 (2d Cir. 2018) (en banc); Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 341 (7th Cir. 2017) (en banc). And the other circuit opinions left standing were overturned by the Supreme Court in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), which rejected the post-enactment legislative history argument made by Justice Kavanaugh in dissent.

post-enactment legislative history should, under this logic, limit their reliance to post-enactment legislative history produced by "those who drafted or voted for the law."[113] In that context, at least, a purposivist could argue the legislative history reflected the views of legislators in the enacting Congress.[114]

The modern rejection of post-enactment history and congressional acquiescence may even undermine the landmark precedent governing the exercise of executive power, *Youngstown Sheet & Tube Co. v. Sawyer*.[115] In particular, the modern doctrine calls into question whether it is possible for "congressional inertia, indifference or quiescence"[116] to be read as enabling independent presidential action.[117] The impact on *Youngstown*, however, may still be up for grabs: the Court has been less hostile to recognizing historical gloss on the *Constitution*,[118] the focus of *Youngstown*, than it has been to recognizing historical gloss on *statutes*, the focus of this Note.

C. MQD Complicating the Modern Doctrine

Despite that near abandonment, post-enactment legislative history has made a comeback in the Court's new MQD jurisprudence. *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*,[119] what some consider the very first MQD case,[120] repudiated the use of amendment history in a majority

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Id. at 1747 (citing *id.* at 1823–24, 1830–31 (Kavanaugh, J., dissenting)). *But see* Gov't Emps. Ret. Sys. of Virgin Islands v. Gov't of Virgin Islands, 995 F.3d 66, 115 (3d Cir. 2021) (Matey, J., concurring in part and dissenting in part) (pointing out that the majority impermissibly relied on post-enactment legislative history).

[113] *Heller*, 554 U.S. at 605.

[114] Sullivan v. Finkelstein, 496 U.S. 617, 631 (1990) (Scalia, J., concurring in part) ("It seems to be a rule for the use of subsequent legislative history that the legislators or committees of legislators whose post-enactment views are consulted must belong to the institution that passed the statute.").

[115] 343 U.S. 579 (1952).

[116] *Id.* at 637 (Jackson, J., concurring in the judgment and opinion of the Court).

[117] *See* Kristin E. Eichensehr, *Courts, Congress, and the Conduct of Foreign Relations*, 85 U. CHI. L. REV. 609, 655 (2018) ("[T]raditional *Youngstown* Category 2 cases involve congressional silence, and "assigning interpretive consequences to congressional silence or inaction is perilous at best" because congressional silence may indicate agreement or simply reflect inertia . . . ." (quoting Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 451 (2012)); David B. Froomkin, *The Nondelegation Doctrine and the Structure of the Executive*, 41 YALE J. ON REGUL. 60, 94 (2024) ("Cases following *Youngstown*, in confronting situations with a less clear congressional statement, have encountered more difficulty. The Court has often presumed broad presidential authority from vague statutory language and has even sometimes taken post-enactment congressional silence to indicate congressional approval of adventurous presidential conduct. In a post-*Chadha* world, . . . relying on congressional silence to legitimate presidential action is particularly perverse . . . ." (footnotes omitted)).

[118] *See* Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477, 1477 (2023) ("Today's Supreme Court is committed to originalism—the idea that the Constitution's meaning is fixed at ratification. But it often rests decisions on the post-ratification practices of other actors . . . . Call this method 'living traditionalism' . . . .").

[119] 512 U.S. 218 (1994).

[120] *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 236 (2006) (describing *MCI*

opinion authored by Justice Scalia.[121] But several of the MQD cases since have looked to the views of subsequent Congresses at least to determine whether an issue is major, and thus whether it is subject to the MQD's requirement that Congress provide clear authorization for the agency's claimed authority.[122] And the close reading of the cases below[123] shows that the MQD cases may use post-enactment legislative history beyond the "majorness" question, instead using it to understand the meaning of an earlier statute—the same purpose as the pre-textualist revolution cases. Post-enactment evidence relied on by MQD cases has included later quasi-on-point legislation (*à la Zemel*),[124] Congress rejecting bills that would have delegated the claimed authority,[125] statements and practice by executive agencies (especially the historical failure to assert the now-claimed authority),[126] and statements by individual lawmakers.[127]

Such reliance is striking given the authors of modern MQD opinions are avowed textualists.[128] As explored below, this dissonance could be explained by the reliance on post-enactment legislative history in a foundational MQD case, *FDA v. Brown & Williamson Tobacco Corp.*,[129] written by a non-textualist. Despite the shift in methodology toward textualism, that case's initial approach persisted. Reliance on post-enactment history is especially problematic for the textualists who believe (like Justice Gorsuch) that the text is defined not by the meaning we would give to it today, but instead by its "original meaning"—the

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Telecomms. as such). *But see* Cass R. Sunstein, *Two Justifications for the Major Questions Doctrine*, 76 FLA. L. REV. 251, 262 (2024) (arguing that *MCI Telecomms.* "could have rested only on the ordinary meaning" of the relevant term, and that its "main thrust . . . was textualist, and did not involve the major questions doctrine at all"). Justice Gorsuch traces "[s]ome version of" the MQD "to at least 1897." West Virginia v. EPA, 142 S. Ct. 2587, 2619 (2022) (Gorsuch, J., concurring) (citing ICC v. Cincinnati, N. O. & T. P. R. Co., 167 U.S. 479, 499 (1897)).

[121] *See MCI Telecomms.*, 512 U.S. at 232–33.

[122] *West Virginia*, 142 S. Ct. at 2610.

[123] *Gonzales v. Oregon*, 546 U.S. 243 (2006), one of the early few major questions cases, deployed post-enactment legislative history in a brief paragraph supporting its holding rejecting the Attorney General's claim of authority. *See id.* at 266. Because its use was sparse and not mentioned by either dissent, this Note will not closely analyze the case.

[124] *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143 (2000); *Gonzales*, 546 U.S. at 266; Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring).

[125] *See Brown & Williamson*, 529 U.S. at 144; *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 668 (Gorsuch, J., concurring); *West Virginia*, 142 S. Ct. at 2610; Biden v. Nebraska, 143 S. Ct. 2355, 2373 & n.8 (2023).

[126] *See Brown & Williamson*, 529 U.S. at 144; *West Virginia*, 142 S. Ct. at 2610.

[127] *See Nebraska*, 143 S. Ct. at 2374.

[128] *See* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 263–67 (critiquing *Brown & Williamson*'s use of post-enactment legislative history as inconsistent with textualism); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1062 (2023); Anita S. Krishnakumar, *What the New Major Questions Doctrine Is* Not, 92 GEO. WASH. L. REV. 1117, 1149 (2024); Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL'Y 463, 485–86 (2021).

[129] 529 U.S. 120 (2000).

meaning that the drafters or the public would have given it.[130] On that view, whatever "context" post-enactment history provides for a certain text is irrelevant to the *original* meaning of a statute. The original public meaning textualist justices have landed in the same place as the purposivists who struggled to justify post-enactment history given their focus on the purpose of the enacting Congress. Indeed, Justice Barrett's textualist defense of the MQD's use of post-enactment legislative history in *Biden v. Nebraska*[131] is liable to the same critiques to which Justice Scalia subjected the 20th century post-enactment history cases.[132]

1. Brown & Williamson*: Origins of Post-Enactment History in the MQD*

In *Brown & Williamson*, now cited by the Court as the second proto-MQD case (i.e., deploying MQD logic before the MQD label existed),[133] the Court held that the Food, Drug, and Cosmetic Act's grant of authority to the FDA to regulate "drugs" and "devices"[134] did not include the "drug" nicotine or the "device" of a cigarette, invalidating an FDA regulation of tobacco products for minors.[135] Justice O'Connor, writing for the majority, applied *Chevron*'s[136] two-step framework to determine whether the Court must defer to the FDA's interpretation of the FDCA.[137] She concluded at Step One that "Congress ha[d] directly spoken to the issue" and precluded the FDA's interpretation.[138]

Much of the Court's analysis hinged on six pieces of tobacco-related legislation that Congress enacted subsequent to the FDCA.[139] Justice O'Connor argued that such statutes were enacted against the "backdrop of the FDA's consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco," and Congress's consideration and rejection of legislation that would have granted that jurisdiction.[140] She concluded that those statutes "effectively ratified the FDA's long-held position."[141] As opposed to the more modern MQD cases that claim to use post-enactment legislative history only to determine whether an issue is major, thus mitigating some of the textualist critiques, *Brown & Williamson* explicitly used such evidence to determine the merits of whether Congress delegated the claimed power. That reliance on post-

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[130] *See* Victoria Nourse, *Textualism 3.0: Statutory Interpretation After Justice Scalia*, 70 ALA. L. REV. 667, 676 (2019) (explaining that originalism has seeped into textualism).
[131] 143 S. Ct. 2355 (2023).
[132] *See infra* notes 187–190 and accompanying text.
[133] *See West Virginia*, 142 S. Ct. at 2609 (citing as proto-MQD cases *MCI Telecomms.*, 512 U.S. 218 (1994), *Brown & Williamson*, 529 U.S. 120 (2000); Gonzales v. Oregon, 546 U.S. 243 (2006); Utility Air Regul. Grp. v. EPA, 573 U.S. 302 (2014); King v. Burwell, 576 U.S. 473 (2015)).
[134] 21 U.S.C. § 321(g)–(h).
[135] *Brown & Williamson*, 529 U.S. at 125–26.
[136] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984).
[137] *Brown & Williamson*, 529 U.S. at 133.
[138] *Id.*
[139] *Id.* at 143.
[140] *Id.* at 144.
[141] *Id.*

enactment history prompted Justice Breyer's dissent to quote from a Justice Scalia opinion: "Arguments based on subsequent legislative history . . . should not be taken seriously, not even in a footnote."[142]

Although the Court's reasoning based on subsequent positive law could conceivably have been supported by *Zemel*-like logic on the border between amendment history and post-enactment legislative history,[143] the Court seemed to instead reject a traditional bicameralist view of Congress: Justice O'Connor theorized that, upon enactment, a statute "may have a range of plausible meanings" that "[o]ver time" become "shape[d] or focus[ed]" by "subsequent acts."[144] The "classic judicial task" is to reconcile those laws, which may mean "that the implications of a statute may be altered by the implications of a later statute."[145] Justice O'Connor observed that there was no evidence that the FDCA-enacting Congress considered whether the Act would apply to tobacco products.[146] However, the tobacco statutes passed over the course of thirty-five years "consistently evidenced [Congress's] intent"—together, they reflected a "collective premise" and a coherent "congressional policy."[147] Unlike the amendment history cases that rely on reenactment rule logic—that a later Congress substantially reenacts a statute upon amending it, thus imbuing it with new meaning—the *Brown & Williamson* Court seemed to instead believe that Congress could send signals of its general intent over time.

That more flexible approach to statutory interpretation accorded with the non-textualist Justice O'Connor's "practical" approach to judging.[148] And *Brown & Williamson* came a decade before John Manning wrote that textualism was "uncontroversial" at the Supreme Court.[149] It was thus not inconsistent for Justice O'Connor to deploy an atextualist source of meaning at that time. But that original consistency has bred later inconsistency. The modern MQD cases relying on post-enactment legislative history routinely cite *Brown & Williamson* while considering post-enactment legislative history,[150] disregarding the fact that the methodological foundation of the earlier reasoning has fallen away. This precedent, perhaps, is the source of the Court's confusion in the MQD doctrine.

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[142] *Id.* at 181–82 (Breyer, J., dissenting) (quoting Sullivan v. Finkelstein, 496 U.S. 617, 632 (1990) (Scalia, J., concurring)).
[143] *See supra* notes 34–42 and accompanying text.
[144] *Brown & Williamson*, 529 U.S. at 143.
[145] *Id.* (quoting United States v. Fausto, 484 U.S. 439, 453 (1988)).
[146] *Id.* at 146–47.
[147] *Id.* at 139, 157.
[148] *See* Stewart J. Schwab, Tribute, *Justice O'Connor as the Good Judge*, 137 HARV. L. REV. 1809, 1811 (2024) ("She employed a variety of approaches in her judicial opinions and was not wedded to any label, be it textualism, originalism, purposivism, or doctrinalism.").
[149] John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 114 (2012).
[150] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022) (citing *Brown & Williamson*, 529 U.S. at 159–60); *id. at* 2623 (Gorsuch, J., concurring) (citing *Brown & Williamson*, 529 U.S. at 158–59); Biden v. Nebraska, 143 S. Ct. 2355, 2383 (2023) (Barrett, J., concurring) (citing *Brown & Williamson*, 529 U.S. at 159).

2. NFIB*: More Post-Enactment History in the Proto-MQD*

The Court in *National Federation of Independent Business v. Department of Labor*[151] stayed implementation of an Occupational Safety and Health Administration ("OSHA") rule that would have required employers with at least 100 employees to implement a COVID-19 vaccine mandate for their workers on the grounds that the rule exceeded OSHA's statutory power "to set *workplace* safety standards, not broad public health measures."[152]

Although the per curiam opinion did not engage much with post-enactment legislative history,[153] Justice Gorsuch's concurrence, joined by Justices Thomas and Alito, relied heavily on such evidence to determine—as in *Brown & Williamson*—the merits of whether Congress delegated to OSHA the power to issue a vaccine mandate. Although it would be another five months until a majority of the Court, in *West Virginia v. EPA*, recognized the MQD by name, Justice Gorsuch argued that the rule counted as a major question (citing his own dissent naming the MQD in an earlier case[154]) because it would "force 84 million Americans to receive a vaccine or undergo regular testing."[155] Next, Justice Gorsuch brought in post-enactment legislative history to support his assertion that "Congress has nowhere clearly assigned so much power to OSHA": "Congress has adopted several major pieces of legislation aimed at combating COVID-19. But Congress has chosen not to afford OSHA—or any federal agency—the authority to issue a vaccine mandate. Indeed, a majority of the Senate even voted to *disapprove* OSHA's regulation."[156] His concurrence went even further than *Brown & Williamson* in leaning on this evidence: *Brown & Williamson* led with an argument about the statute's text and structure,[157] introducing the post-enactment legislative history only after first addressing the statute itself.[158] But Justice Gorsuch's concurrence appeared comfortable relying on post-enactment legislative history *alone*, only analyzing the text of OSHA's claimed statutory authority in the context of rebutting "OSHA's reply" to the otherwise conclusive argument that "OSHA's mandate fails [the MQD's] test."[159]

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[151] 142 S. Ct. 661 (2022) (per curiam).
[152] *Id.* at 662–63, 665.
[153] *See id.* at 666 (mentioning post-enactment legislative history briefly to refute the dissent's use of it).
[154] *Id.* at 667 (Gorsuch, J., concurring) (citing Gundy v. United States, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting)).
[155] *Id.*
[156] *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 667–68 (citation omitted) (citing American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4; S.J. Res. 29, 117th Cong. (2021)).
[157] *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133–43 (2000).
[158] *See id.* at 143–59.
[159] *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 667–68. Perhaps Justice Gorsuch focused less on the text because he felt the majority had already sufficiently addressed it.

3. West Virginia v. EPA*: Separating "Majorness" and Merits*

The Court again relied on post-enactment legislative history in *West Virginia v. EPA*,[160] the first case to explicitly name the MQD[161] and (equivocally) explain its theoretical basis: "both separation of powers principles and a practical understanding of legislative intent."[162] The Court held that the Environmental Protection Agency ("EPA") during the first Trump Administration correctly concluded in rescinding an Obama-era EPA rule that the EPA could not seek to restructure the country's overall mix of electricity generation using its narrower Clean Air Act[163] authority to set topline limits on emissions by new sources of pollution.[164]

West Virginia was also the first case to frame its use of post-enactment legislative history as answering the preliminary question of whether the MQD applies to the claimed statutory authority, rather than whether the statute in fact authorized the regulation. The Court relied on two sources of post-enactment legislative history: the inconsistency between the EPA's traditional use of its Clean Air Act authority and the use now asserted, and Congress's consideration and rejection of various schemes similar to the one the EPA promulgated.[165] Chief Justice Roberts's majority opinion implied that such evidence only went to the majorness question by separating the majorness and merits inquiries into two different subsections and mentioning post-enactment legislative history only in the former. But Justice Gorsuch's concurrence made the argument explicit: to Justice Kagan's reminder in dissent that "normal principles of statutory construction" instruct the Court to "ignore" post-enactment legislative history,[166] Justice Gorsuch responded that "the Court has not pointed to failed legislation to resolve what a duly enacted statutory text means, only to help resolve the antecedent question whether the agency's challenged action implicates a major question."[167]

Despite Justice Gorsuch's protest, Chief Justice Roberts's framing of that "antecedent question" still seemed focused on the enacting Congress's intent, thus re-raising the question of how post-enactment legislative history can speak to original intent: when an agency's "discovery [of newfound power] allow[s] it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself, . . . there is every reason to 'hesitate before concluding that Congress' meant to confer on [the agency] the authority it claims under [the

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[160] 142 S. Ct. 2587 (2022).
[161] *See id.* at 2634 (Kagan, J., dissenting).
[162] *Id.* at 2609 (majority).
[163] 42 U.S.C. §§ 7401–7671q.
[164] *See West Virginia*, 142 S. Ct. at 2602, 2604–07 (citing 42 U.S.C. §7411(a)(1)).
[165] *See id.* at 2610, 2614.
[166] *See id.* at 2641 (Kagan, J., dissenting) (citing Bostock v. Clayton County, 140 S. Ct. 1731, 1747 (2020) (Gorsuch, J.); Sullivan v. Finkelstein, 496 U.S. 617, 632 (1990) (Scalia, J., concurring in part)).
[167] *Id.* at 2621 n.4 (Gorsuch, J., concurring).

relevant statute]."[168] Chief Justice Roberts's interest in the scope of power Congress *meant* to delegate indicates that whether an act is major or not turns, to some extent, on what Congress *considers* major.

4. Biden v. Nebraska*: Betraying the Majorness/Merits Divide.*

Regardless of the believability of Justice Gorsuch's cautionary note in *West Virginia*, the Court's very next MQD case failed to clearly distinguish between using post-enactment legislative history for majorness versus merits. In *Biden v. Nebraska*, the Court held that the Higher Education Relief Opportunities for Students Act of 2003[169] ("HEROES Act"), which authorizes the Secretary of Education to "waive or modify any statutory or regulatory provision applicable to . . . student financial assistance programs,"[170] did not permit the Secretary to completely cancel around $430 billion of student debt to provide relief during the COVID-19 pandemic.[171] Chief Justice Roberts's majority opinion rested on two arguments: first, that the plain text of the HEROES Act did not support the Secretary's claimed authority, and second, that the Secretary could not use the Act to answer the major question of student debt forgiveness.[172]

In its MQD analysis, the Court eschewed the clean separation between the antecedent and merits inquiries from *West Virginia*. Instead, the majority spent several pages purportedly just establishing the question's majorness,[173] followed by one paragraph on the merits:

> All this leads us to conclude [that this is a major question]. In such circumstances, we have required . . . "clear congressional authorization" . . . . And as we have already shown, the HEROES Act provides no authorization for the Secretary's plan even when examined using the ordinary tools of statutory interpretation.[174]

Nebraska thus seems to indicate that most of the MQD's work is being done by the question Justice Gorsuch described as merely "antecedent." And insofar as the Court incorporates by reference the evidence from the antecedent "majorness" question into the merits question ("as we have already shown"), post-enactment legislative history that the Court uses to determine majorness also goes to the merits, despite Justice Gorsuch's claim to the contrary.

Moreover, while notionally focused on majorness, the majority opinion's several pages of analysis still sounded in congressional intent. The Court argued that the debt cancellation program "assert[ed] . . . administrative authority . . .

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[168] *Id.* at 2610 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)).
[169] Pub. L. No. 108-76, 117 Stat. 904.
[170] 20 U.S.C. § 1098bb(a)(1).
[171] *Nebraska*, 143 S. Ct. at 2362.
[172] *Id.* at 2368, 2372.
[173] *See id.* at 2372–75.
[174] *Id.* at 2375 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)) (citations omitted).

that Congress has chosen not to enact itself," pointing to over eighty pieces of student loan-related legislation considered in the 116th Congress (which covered the first year of COVID-19), as well as two resolutions calling on the executive branch to cancel student debt that both "failed to reach a vote."[175] The Court argued that those modern-day "sharp debates" showed that the enacting Congress would not answer "yes" if asked whether the Secretary could cancel $430 billion in student loans using his HEROES Act authority—"Congress did not unanimously pass the HEROES Act with such power in mind."[176] The Court capped its argument by quoting then-Speaker of the House Nancy Pelosi's comment at a press conference that the President does not have authority to forgive student debt.[177] That the Court would rely on a statement made not on the floor of the House, nearly two decades after the bill's passage, by a Representative who did not sponsor the bill[178] is surprising given the Court's traditional aversion to post-enactment statements by individual legislators even when published in the Congressional Record, made shortly after enactment, by the bill's sponsor.[179] Quoting Speaker Pelosi's statement did not meaningfully advance the Court's argument that the question was a politically divisive one, nor even the Court's understanding of the enacting Congress's intent. And whether the 116th Congress succeeded or failed to pass resolutions asking the executive for debt relief could not have influenced the 108th Congress's ex ante answer to whether the HEROES Act granted such power.

Justice Barrett concurred, arguing that the MQD and its reliance on post-enactment legislative history are consistent with textualism.[180] By forthrightly defending post-enactment legislative history, Justice Barrett's approach seemed to clash with Justice Gorsuch's attempts to cabin that evidence to only the "majorness" question. Justice Barrett premised her opinion on faithful agent textualism (even citing the Third Restatement of the Law of Agency), arguing that truly faithful agents will consider the "*context* in which the principal and agent interact" alongside the plain text.[181] But rather than repudiate *Brown & Williamson*'s reliance on post-enactment legislative history, or narrow it as Justice Gorsuch did, Justice Barrett argued that such evidence went to "context": "the FDA's longstanding disavowal of authority to regulate [tobacco and] Congress's creation of 'a distinct regulatory scheme for tobacco products'" proved that "Congress could not have *intended* to delegate" authority over tobacco.[182] Justice Barrett acknowledged that "[o]f course, an agency's post-

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[175] *Id.* at 2373 & n.8.
[176] *Id.* at 2374.
[177] *Nebraska*, 143 S. Ct. at 2374 (quoting Press Conference, Office of the Speaker of the House (July 28, 2021)).
[178] *See Cosponsors: H.R.1412 — 108th Congress (2003-2004)*, CONGRESS.GOV, https://www.congress.gov/bill/108th-congress/house-bill/1412/cosponsors [https://perma.cc/8MFE-ZEV9].
[179] *See, e.g.*, Heintz v. Jenkins, 514 U.S. 291, 298 (1995).
[180] *See Nebraska*, 143 S. Ct. at 2376 (Barrett, J., concurring).
[181] *Id.* at 2378–79 (citing RESTATEMENT (THIRD) OF AGENCY § 2.02(1) (A.L.I. 2005)).
[182] *Id.* at 2382 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)) (emphasis added).

enactment conduct does not control the meaning of a statute," but reasoned that such evidence could be "probative" because "[a] longstanding 'want of assertion of power by those who presumably would be alert to exercise it' may provide some clue that the power was never conferred."[183] She also cited *Skidmore* for the proposition that the consistency of an interpretation bears on its persuasiveness.[184]

Recast in the terms of original meaning textualism, Justice Barrett's argument might go something like the following: *Skidmore* (as incorporated into *Loper Bright*) provides that an interpretation an agency issued "contemporaneously with enactment of the statute [that] remained consistent over time" could speak to a statute's original meaning given that those promulgating the interpretation often worked with Congress to draft the statute.[185] In this context, the agency's contemporaneous decision to *not* exercise a certain power could similarly speak to how those who framed a statute understood its meaning.

This Note leaves a full treatment of post-enactment *executive* (rather than legislative) liquidation of statutory meaning to Professor Daniel Deacon's recent work.[186] One additional response here, however: Justice Barrett's view relies on both a particular set of factual circumstances that is never discussed in the MQD cases (the agency's involvement in statutory drafting) and a view of legislative action that seems at odds with the otherwise formalist separation of powers view endorsed by the MQD (legislative action puppeteered by executive drafters). Justice Barrett's approach is also subject to the same critique that dogged post-enactment legislative history: just like congressional silence, executive silence is subject to multiple permissible inferences.[187] Although the executive branch declining to exercise a certain power in the early years of a statute could mean "that the power was never conferred," it could also mean that the executive saw no need to exercise power at that time. In *Nebraska*, for instance, the predicate for issuing nationwide debt relief was the nationwide COVID-19 emergency, under which the government "declared every State, the District of Columbia, and all five permanently populated United States territories to be disaster areas."[188] Never before (and relevantly, never since the enactment of the HEROES Act) had the federal government designated the entire country as a disaster area[189]—in such circumstances, the executive might understandably

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[183] *Id.* at 2383 (citing FTC v. Bunte Bros., Inc., 312 U.S. 349, 352 (1941)).
[184] *Id.* (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).
[185] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2258 (2024).
[186] *See supra* notes 6–9 and accompanying text.
[187] *See supra* note 108 and accompanying text.
[188] *See* Federal Student Aid Programs (Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program), 87 Fed. Reg. 61512, 61513 (Oct. 12, 2022).
[189] Justine Coleman, *All 50 States Under Disaster Declaration for First Time in US History*, THE HILL (Apr. 12, 2020, at 16:31 ET), https://thehill.com/policy/healthcare/public-global-health/492433-all-50-states-under-disaster-declaration-for-first/ [https://perma.cc/U6YR-G5LN].

assert "never previously claimed powers of this magnitude."[190]

IV. CONGRESSIONAL CONTROL OF LAWMAKING

The MQD's narrow acceptance of post-enactment legislative history does not, in fact, reinvigorate Congress. The doctrine's choice to credit subtle congressional signaling accords with the views of some political scientists, who theorize that doing so would help courts avoid embarrassment and better track democratic will. But the MQD's use of post-enactment legislative history operates less as a genuine empowerment of Congress than as a one-way anti-executive ratchet—one that may chill productive legislative action while encouraging unilateral presidential action.

A. Post-Enactment Legislative History's Potential to Reinvigorate Congress

Both the pre-Scalia post-enactment legislative history cases and the modern MQD cases at least implicitly endorse sub-bicameral congressional signaling. Even accepting *arguendo* Justice Gorsuch's footnote that such evidence is merely probative of majorness, that use still implicates Congress wielding legislative power via sub-bicameralism: why are a subsequent Congress's views especially relevant to what makes a certain exercise of authority major, as opposed to other social or economic indicators of majorness to which the Court also turns?[191] Under Justice Barrett's view of the MQD as a form of regular statutory interpretation, whether an issue is of "vast 'economic and political significance'" such that the Court should "expect Congress to speak clearly" before delegating such issues to the executive branch should be determined, it seems, by what the enacting Congress considered to be significant.[192] One would not "expect" a Congress to explicitly delegate a power that it does not consider significant enough to explicitly delegate. For instance, as Justice Kavanaugh argued in dissent in *Learning Resources*, it should be sufficient to defeat the MQD if the *enacting* Congress did not consider the use of delegated authority to make across-the-board tariffs to be significant enough to demand more precise language than already existed.[193] Turning to evidence other than the evidence of the enacting Congress would thus appear to provide that Congress and its members can take actions to change the law without going through bicameralism and presentment.

At first blush, that endorsement would appear to *empower* Congress in the separation of powers vis-à-vis the executive—particularly because it appears to grant Congress the authority to overturn the status quo. Pre-Scalia purposivists

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[190] *Nebraska*, 143 S. Ct. at 2372 (majority).
[191] *See* Ala. Ass'n. of Realtors v. HHS, 141 S. Ct. 2485, 2489 (2021) (pointing to numerical indicators of majorness—including number of people impacted and federal funds spent—as well as the regulation's "intru[sion] into an area that is the particular domain of state law").
[192] Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).
[193] *See* Learning Res., Inc. v. Trump, 146 S. Ct. 628, 690 (2026) (Kavanaugh, J., dissenting).

mainly employed post-enactment legislative history to affirm the status quo, whether the existing administrative[194] or judicial[195] interpretation. In contrast, MQD cases use post-enactment legislative history to negate the status quo executive interpretation.

More generally, permitting Congress to exercise legal power without going through bicameralism and presentment—whether in the MQD or outside the MQD—could have democratic benefits. Some public choice theorists argue that it could, among other benefits: improve judicial legitimacy by allowing courts to heed democratically legitimate signals and avoid embarrassing legislative overrulings; allow legislators to save political capital for big-ticket policy goals, using cheaper speech to signal when the courts should make minor fixes that would otherwise require formal adoption;[196] and lower the ex ante transaction costs of legislating by permitting the drafting legislators to trust that later legislators can use low-cost signaling to fix any unforeseen problems.[197]

Consider, for instance, *Tennessee Valley Authority v. Hill*, which demonstrated the peril of ignoring congressional signaling.[198] Despite Congress sending the message via the relatively inexpensive (but still democratically legitimate) means of appropriations legislation that it preferred a challenged dam project to move forward despite the risk to an endangered fish, the Supreme Court blocked the project after concluding that the appropriations bill did not supersede the Endangered Species Act (ESA).[199] Following the Court's ruling, Congress not only amended the ESA to provide additional flexibility in similar situations, but also pushed the dam project forward by explicitly exempting it from the ESA.[200] Forcing such overrides not only costs Congress (and here, the

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[194] *See, e.g.*, Zemel v. Rusk, 381 U.S. 1, 12 (1965) (acquiescence to the Secretary of State's interpretation of a statute).

[195] *See, e.g.*, Flood v. Kuhn, 407 U.S. 258, 283 (1972) (acquiescence to an earlier Supreme Court interpretation of a statute).

[196] *See, e.g.*, King v. Burwell, 576 U.S. 473 (2015); Abbe R. Gluck, Comment, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 62–64, 100 (2015) (suggesting that *King* may have been a pragmatic opinion focused on helping Congress function by fixing its errors).

[197] *See, e.g.*, Edward P. Schwartz, Pablo T. Spiller & Santiago Urbiztondo, *A Positive Theory of Legislative Intent*, 57 LAW & CONTEMP. PROBS. 51, 71–74 (1994). *But see* Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 254 (1992) (arguing that public choice theory demonstrates that legislative intent is "meaningless[]" because while "[i]ndividuals have intentions and purpose and motives; collections of individuals do not"). *See generally* William N. Eskridge, Jr., *Post-Enactment Legislative Signals*, 57 LAW & CONTEMP. PROBS. 75 (1994) (applying these arguments to the practice of the Burger and Rehnquist Courts, and finding that while the Burger Court acted like these political scientists would assume, the Rehnquist Court did not). *But see* James J. Brudney & Ethan J. Leib, *Statutory Interpretation as "Interbranch Dialogue"?*, 66 UCLA L. REV. 346, 379–80 (2019) (laying out a model of interbranch dialogue that is suspicious of sub-bicameral signaling).

[198] 437 U.S. 153 (1978).

[199] *See id.* at 189–90.

[200] *See Telling the Story of Tellico: It's Complicated*, TENN. VALLEY AUTH., https://www.tva.com/about-tva/our-history/built-for-the-people/telling-the-story-of-tellico-it-s-complicated [https://perma.cc/87VC-A29P].

Tennessee Valley Authority) time and resources, but also imposes institutional legitimacy costs on the Court. In line with the reigning rejection of the use of post-enactment statutory interpretation, however, a 2002 review of the empirical literature concluded that there is no support for the theory that the Supreme Court seeks to anticipate congressional preferences in order to avoid being overturned.[201]

Post-enactment legislative history could be especially useful for checking the judiciary's implementation of "common law" statutes, as in *Blue Chip*. Common law statutes—like those governing economic competition and securities trading—often regulate complex areas of the economy where sophisticated actors could find workarounds to detailed and rigid legislative schemes. So common law statutes instead employ "brief and imprecise" language to allow courts to police the boundaries of bad behavior case-by-case—such an approach is "suitable for a vast and ever-changing array of conduct and circumstances, the effects of which might be discernible only after extensive, detailed, and case-specific factual inquiry."[202] Congress cannot be expected to amend these common law statutes as frequently as it would others, for fear of replacing simple language barring "restraint of trade"[203] or "monopoliz[ation]"[204] with something more complex and thus easier to exploit. Considering post-enactment legislative history in this context instead enables Congress to exercise oversight of the judiciary's implementation of these statutes without over-specifying the black-letter law. Just as executive agencies that implement statutes care about what congressional committees or even individual members of Congress think about their implementation, so too could the judiciary when it is entrusted with carrying out a statute.

Some on the Court might celebrate the opportunity to reinvigorate congressional power by more closely aligning the Court's decisions with what the modern Congress wants. Though scholars disagree on *why* the modern Congress is ineffective, they largely agree on the modern fact of congressional impotence as a lawmaking institution.[205] Neomi Rao, then writing as a scholar and now serving as an influential conservative jurist, argued in 2015 that congressional gridlock has incentivized Congress to delegate authority to the executive given Congress's inability to wield its own authority, and that courts ought to respond by reinvigorating the doctrine barring such expansive delegations to force Congress back into action.[206] Some Justices, Justice Gorsuch in particular, have endorsed similar reasoning in recent nondelegation

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[201] JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 326–27, 349 (2002).
[202] Michael L. Katz & A. Douglas Melamed, *Competition Law as Common Law:* American Express *and the Evolution of Antitrust*, 168 U. PA. L. REV. 2061, 2062 & n.2 (2020).
[203] 15 U.S.C. § 1.
[204] *Id.* § 2.
[205] *See* Sarah Binder, *The Dysfunctional Congress*, 18 ANN. REV. POL. SCI. 85, 86 (2015).
[206] *See* Neomi Rao, *Administrative Collusion*, 90 N.Y.U. L. REV. 1463, 1488, 1509–11 (2015).

and MQD cases.[207] In *Learning Resources, Inc. v. Trump*, for instance,[208] Justice Gorsuch described the MQD as "pro-Congress"[209] and chided those trying "to impose more tariffs" for attempting to "bypass Congress,"[210] thus pushing Congress to do its job.[211] Justice Thomas embraced similar logic in *Loper Bright Enterprises v. Raimondo*,[212] hoping that the decision to overturn *Chevron*'s regime of judicial deference to executive interpretations would protect Congress's "legislative power" from seizure by the executive branch.[213]

B. The Reality of the MQD's Institutional Incentives

But the MQD's resort to post-enactment legislative history does not, in fact, empower Congress as against the executive. Instead, it is more a trap for unwary legislators than a tool to be wielded by Congress.

First, although MQD cases do change the status quo, they do so more at the Court's behest than at Congress's. The 20th century approach reflected judicial modesty both in deferring to the executive and in leaving judicial precedent in place.[214] By using similar (weak) sources of evidence to overturn the actions of a coordinate branch, rather than merely leave them in place, the MQD instead reflects judicial hubris.[215] That the MQD is based more on the modern Court's view of a challenged presidential action, rather than the modern Congress's view, is made clear in MQD cases relying on congressional action post-

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[207] *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2134–35 (2019) (Gorsuch, J., joined by Roberts, C.J., and Thomas, J., dissenting) (permitting "Congress [to] pass off its legislative power" would undermine "[a]ccountability" and "deliberation" by diverse interests); West Virginia v. EPA, 142 S. Ct. 2587, 2618 (2022) (Gorsuch, J., joined by Alito, J., concurring) (similar). *See also* Daniel Farber, *The Major Question Doctrine, Nondelegation, and Presidential Power*, YALE J. ON REGUL.: NOTICE & COMMENT (Nov. 2, 2022), https://www.yalejreg.com/nc/synposium-shane-democracy-chief-executive-07/ [https://perma.cc/5ZFK-X46A] (The MQD is "not so much . . . a way of preventing Congress from giving away too much power as a way to prevent Presidents from snatching powers they were not given.").

[208] 146 S. Ct. 628 (2026).

[209] *Id.* at 654 (Gorsuch, J., concurring).

[210] *Id.* at 671–72.

[211] Catie Edmondson, *In Gorsuch's Homage to Legislative Power, a Subtle Reproach of a Neutered Congress*, N.Y. TIMES (Feb. 21, 2026) https://www.nytimes.com/2026/02/21/us/politics/gorsuch-congress-trump-tariffs.html [https://perma.cc/MA3T-3JAH] (Justice "Gorsuch made a forceful case for the sanctity of the legislative process—and an implicit critique of its current dysfunction.").

[212] 144 S. Ct. 2244 (2024).

[213] *Id.* at 2275 (Thomas, J., concurring).

[214] *See* RICHARD A. POSNER, LAW AND LEGAL THEORY IN THE UK AND THE USA 90 (1996) (describing stare decisis as a doctrine of modesty).

[215] Daniel E. Walters, *The Major Questions Doctrine at the Boundaries of Interpretive Law*, 109 IOWA L. REV. 465, 492 ("[T]he major questions doctrine runs substantial risks of a systemic judicial takeover of the legislative power that goes well beyond the bounds of the judicial power."); Jody Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 SUP. CT. REV. 1, 21 (2023) ("[T]he MQD shifts substantial policy discretion to unelected federal judges.").

enactment but pre-presidential action[216]—i.e., evidence that could speak to neither what the statutory drafters thought nor what the Congress responding to this particular action thought.

Second, the use of post-enactment legislative history cabined largely to the MQD can restrict the executive but cannot make new law. That is precisely the MQD's goal for those like Justice Gorsuch, who want to recenter lawmaking in Congress not because they want more legislating, but instead because they want less.[217] As Justice Gorsuch has argued, the Constitution intentionally makes legislating slow and arduous in order to mitigate the "threat to individual liberty" posed by heavy-handed lawmaking; the MQD is meant to enforce that constitutional design.[218] But some scholars think that sub-bicameral congressional control of the executive is normatively desirable not because it means there will always be *less* law, but instead because it means that there will be more democratically responsive law[219] or that the judicial understanding of Congress will more closely match the reality of how Congress acts.[220] As in *Youngstown* cases where the Court saw in post-enactment history either implicit congressional approval of executive action or silence as acquiescence,[221] this could sometimes mean there is *more* law. Deeming post-enactment history legally effective only when it serves to reject executive power thus implicitly embraces a libertarian "minimal-state philosophy that appears nowhere in the Constitution."[222] Yes, the Constitution embraces bicameralism and presentment. But there is no principled reason to allow Congress to skip bicameralism when

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[216] *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143 (2000); West Virginia v. EPA, 142 S. Ct. 2587, 2614 (2022).

[217] Justice Gorsuch has separately laid out his view that there is simply "too much law." *See generally* NEIL GORSUCH & JANIE NITZE, OVER RULED: THE HUMAN TOLL OF TOO MUCH LAW (2024).

[218] *West Virginia*, 142 S. Ct. at 2618–19 (Gorsuch, J., concurring).

[219] Note, *Separating the Powers in the Administrative State: Article I*, 139 HARV. L. REV. 1139 (2026) (Proposing a novel model of "Article I agencies" that could "pass rules pursuant to statutory delegations without bicameralism and presentment," *id.* at 1147, in order to "reinvigorate[]" Congress. *Id.* at 1159. "Congressional elections might once again become independently important rather than mere referenda on the President. Thus, to the extent one's democratic sympathies lie with Congress, sending power back to Congress in this way would be a functional upgrade." *Id.* (footnote omitted)).

[220] *See* Bradley & Morrison, *supra* note 117, at 451 ("Expanding the [*Youngstown*] inquiry to include a wider array of congressional responses to executive action will substantially shrink the universe of cases where Congress can truly be said to have remained silent, which will in turn shrink the number of cases drawing inferences from such silence. That is all to the good . . . . [A]ssigning interpretive consequences to congressional silence or inaction is perilous at best. . . . [C]ourts and other interpreters should strongly prefer affirmative evidence of that understanding, [even if sub-bicameral evidence], not just silence.").

[221] *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654, 678 (1981).

[222] Andrew Koppelman, *The Mystery of Neil Gorsuch*, L.A. REV. BOOKS (Mar. 19, 2025) (reviewing GORSUCH & NITZE, *supra* note 217), https://lareviewofbooks.org/article/the-mystery-of-neil-gorsuch [https://perma.cc/NEQ8-NCPX]. *See also* David G. Savage, *On an Often Unpredictable Supreme Court, Justice Gorsuch Is the Latest Wild Card*, L.A. TIMES (July 12, 2019, at 04:00 PT), https://www.latimes.com/politics/la-na-pol-gorsuch-supreme-court-conservative-20190712-story.html [https://perma.cc/7AGS-GDQV] (describing Justice Gorsuch as a libertarian).

it wants the President to do less, but not when it wants the President to do more.

And third, the MQD's use of post-enactment legislative history may be counterproductive even for Justice Gorsuch, as it disincentivizes constructive legislative deliberation by raising the cost of political discourse. Consider *West Virginia*, which relied on rejected legislative proposals in determining that the executive did not have the authority that had been proposed and rejected. That judicial signal tells legislators to be wary of such proposals in the future unless they are certain they will be enacted, for fear that proposing that power will conversely mean stripping the President of it. This is primarily a problem for unified governments, where a congressional majority has a chance, but not a certain one, of passing legislation. In that setting, consideration of failed legislative efforts will in particular discourage two policy tools: first, as Professors Freeman and Stephenson have argued,[223] it will discourage the President from asking Congress for authority to act, in favor of acting unilaterally in the first instance. Second, it will raise the cost of so-called "messaging bills."

1. The President: Avoiding Congressional Ratification

Headline policies in the Obama, Trump I, and Biden Administrations went through similar policymaking cycles: the President first went to Congress to try to achieve his policy goal, and when Congress was too gridlocked (often stymied by the filibuster) to produce results, the President took unilateral action. That approach was typified by President Obama's statement during a speech in 2011: "Where they won't act, I will."[224] With a job bill aimed at staving off recession stuck in Congress, President Obama used the speech to kick off a series of executive actions that would provide economic relief.[225] President Obama took a similar approach to immigration reform—providing protection for "Dreamers" after Congress refused to pass the DREAM Act.[226] Same for both President Trump and President Biden: in his first term, President Trump took executive action to redirect funds to building a border wall after Congress refused to

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[223] *See* Freeman & Stephenson, *supra* note 215, at 43.

[224] President Barack Obama, Remarks in Las Vegas: We Can't Wait (Oct. 24, 2011), https://www.presidency.ucsb.edu/documents/remarks-las-vegas [https://perma.cc/47C7-DNNU].

[225] Jackie Calmes, *Jobs Plan Stalled, Obama to Try New Economic Drive*, N.Y. TIMES (Oct. 23, 2011), https://www.nytimes.com/2011/10/24/us/politics/jobs-plan-stalled-obama-to-try-new-economic-drive.html [https://perma.cc/F26N-QYXN].

[226] Barack Obama, President, United States of America, Remarks by the President on Immigration (June 15, 2012), https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration [https://perma.cc/D9PL-NUR3] ("This morning, Secretary Napolitano announced new actions my administration will take to mend our nation's immigration policy . . . . I have said time and time and time again to Congress that, send me the DREAM Act, put it on my desk, and I will sign it right away. . . . [A] year and a half ago, Democrats passed the DREAM Act in the House, but Republicans walked away from it. . . . It's still the right thing to do.").

provide the level of appropriations he requested.[227] And President Biden did the same for both the COVID-19 eviction moratorium[228] and his clean energy agenda[229] when they stalled in Congress.

But that strategy of starting with Congress, and working unilaterally only if the President cannot get congressional approval, is made riskier now that Congress's decision to turn down that power could be evidence that the President does not have it. *Nebraska*'s citation to Speaker Pelosi's press conference is a useful example: when Speaker Pelosi said she did not believe President Biden could unilaterally cancel student debt, Democrats controlled both the House and Senate. At that press conference, Speaker Pelosi raised the prospect of congressional action to cancel student debt, and discussed the policy considerations that would go into that decision.[230] And she praised President Biden's eventual unilateral action[231] (the legality of which was backed up by a new Office of Legal Counsel opinion[232] not available when Speaker Pelosi made her initial comments), and decried the Supreme Court blocking that action.[233] Her statement that President Biden did not have that power, then, was potentially part of an intra-party negotiation between executive and congressional authority, with Speaker Pelosi on board for the policy outcome but defending Congress's institutional role. Her former Chief of Staff once confirmed that Speaker Pelosi "views herself as a defender of the institution of the House of Representatives."[234] But by seizing on Speaker Pelosi's statement, the Court disincentivizes similar statements that would normally be part of the give-and-take of the separation of powers. That back-and-forth will be forced, then, out of the public eye, incentivizing parties to shore up the party line, avoid spats

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[227] Jeff Mason & Roberta Rampton, *Trump Vetoes Measure to End His Emergency Declaration on Border Wall*, REUTERS (Mar. 15, 2019, at 19:00 ET), https://www.reuters.com/article/world/trump-vetoes-measure-to-end-his-emergency-declaration-on-border-wall-idUSKCN1QW29O/ [https://perma.cc/9PM8-LKC6].

[228] David Shepardson, *CDC Rebuffs Biden Bid to Reinstate COVID-19 Eviction Moratorium*, REUTERS (Aug. 2, 2021, at 19:02 ET), https://www.reuters.com/world/us/pelosi-urges-white-house-reinstate-expired-covid-19-eviction-moratorium-2021-08-02/ [https://perma.cc/P5X7-A4XE].

[229] Kelsey Tamborrino, *Biden Unveils New Wind Power Push as Congress Stalls on His Clean Energy Agenda*, POLITICO PRO (Jan. 12, 2022, at 10:31 ET), https://subscriber.politicopro.com/article/2022/01/biden-unveils-new-wind-power-push-as-congress-stalls-on-his-clean-energy-agenda-2102227 [https://perma.cc/YGD8-6W26].

[230] Press Conference, Office of the Speaker of the House (July 28, 2021), https://pelosi.house.gov/news/press-releases/transcript-of-pelosi-weekly-press-conference-today-111 [https://perma.cc/7TJ8-RDYP].

[231] Press Release, Office of the Speaker of the House (Aug. 24, 2022), https://pelosi.house.gov/news/press-releases/pelosi-statement-on-president-biden-s-historic-student-debt-relief [https://perma.cc/DV2L-6Q2Z].

[232] Use of the HEROES Act of 2003 to Cancel the Principal Amounts of Student Loans, 2022 WL 3975075 (O.L.C. Aug. 23, 2022).

[233] Press Release, Office of Speaker Emerita Nancy Pelosi (June 30, 2023), https://pelosi.house.gov/news/press-releases/pelosi-statement-on-supreme-court-decision-on-president-biden-s-student-loan [https://perma.cc/32AC-5R3Y].

[234] *Interview with John Lawrence*, FRONTLINE: PELOSI'S POWER, https://www.pbs.org/wgbh/frontline/interview/john-lawrence/ [https://perma.cc/L3JF-L2AY].

with the executive, and leave action to the President alone.

That trend may already be emerging during President Trump's second term, during which the President has preferred to start with executive action, rather than first asking Congress for permission.[235] For instance, President Trump proposed a sweeping government restructuring agenda in his first term premised on congressional approval.[236] That plan proposed, among other changes, merging the Departments of Education and Labor in line with President Trump's stated interest in closing or substantially shrinking the Department of Education.[237] President Trump pursued the same goal unilaterally in his second term, purporting to "clos[e]" the agency via Executive Order and later transferring many of its responsibilities to other agencies like the Department of Labor via interagency agreements.[238] Similarly, while President Trump sought congressional authorization for across-the-board tariff power from Congress in his first term,[239] he relied on existing authority in the International Emergency Economic Powers Act to do much the same in his second. Even after the Supreme Court rejected that initial go-it-alone approach, President Trump responded to questions about whether he would seek congressional approval for his new round of tariffs by stating: "No, I don't need to, it's already been approved."[240] As Professors Freeman and Stephenson stipulated, "it would be better—both as a matter of democratic legitimacy and as a matter of public policy—if major public problems were addressed through legislation than through unilateral agency action."[241] Between a regime where the executive acts unilaterally only after trying to achieve policy results through Congress, and one where the executive acts unilaterally and ignores Congress altogether, the former at least has the benefit of potential congressional participation in policymaking.

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[235] INTERESTING TIMES WITH ROSS DOUTHAT: *Trump Is the End of a 100-Year Experiment*, at 24:24 (Spotify, Apr. 16, 2026) ("What makes Trump kind of unique is that Joe Biden actually *did* try to move legislation about student loan debt forgiveness. . . . It failed. Obama tried to move legislation on immigration. It failed. Trump hasn't even tried. And remember before the election, in fact, he told Republicans not to vote for immigration legislation changes, because one gets the sense he wanted to do government by executive order because this is more fun.").

[236] *See* Clare Lombardo & Alexis Arnold, *White House Proposes Merging Education and Labor Departments*, NPR (June 21, 2018, at 15:51 ET), https://www.npr.org/sections/ed/2018/06/21/622189097/white-house-proposes-merging-education-and-labor-departments [https://perma.cc/DHP7-EQG4].

[237] *Id.*

[238] *See* Katharine Meyer et al., *FAQs: Checking in on the Department of Education*, BROOKINGS INST. (Feb. 20, 2026), https://www.brookings.edu/articles/faqs-checking-in-on-the-department-of-education/ [https://perma.cc/YX4B-7YQQ].

[239] *See* Gary Clyde Hufbauer & Eujin Jung, *Navarro Asks Congress to Give Trump Absolute Authority over the US Tariff Schedule*, PETERSON INST. FOR INT'L ECON. (Jan. 18, 2019, at 09:15 ET), https://www.piie.com/blogs/trade-and-investment-policy-watch/2019/navarro-asks-congress-give-trump-absolute-authority [https://perma.cc/5SGB-4FLZ].

[240] Trevor Hunnicutt & Jarrett Renshaw, *Supreme Court Checks Trump's Expansive View of Executive Power*, REUTERS (Feb. 20, 2026, at 19:59 ET), https://www.reuters.com/legal/government/supreme-court-checks-trumps-expansive-view-executive-power-2026-02-21/ [https://perma.cc/3DAX-ZGH3].

[241] Freeman & Stephenson, *supra* note 215, at 43.

Some MQD supporters might reason that the consideration of this evidence is precisely aimed at preventing the President from doing unilaterally what could only be done through Congress. Stopping at Congress first is thus evidence that the President could not take this action on his own. But this counter considers the issue at too high a level of generality. The economic relief President Obama could achieve on his own was different from the jobs program he hoped to pass through Congress.[242] And President Trump worked through alternative, but existing, statutory mechanisms to reroute already-appropriated funds to the border wall when he failed to get new money.[243] Evidence that the President asked for one specific authority does not necessarily mean that a different authority (even if addressing the same problem) does not exist.

2. Congress: Avoiding Political Messaging

One (perhaps, but not certainly) salutary outcome of raising the cost of public statements by Members of Congress is decreasing the use of so-called "messaging bills." As Senator Olympia Snowe of Maine explained, much of the legislation introduced in Congress today "is not intended to ever actually pass," but is instead meant to either present a façade of productivity to voters, or simply embarrass or pressure the other party.[244] The *New York Times* editorial board has complained that such efforts are a "colossal waste of time."[245] In the face of a Court that will read failed legislation as meaningful, these messaging bills may no longer be cheap political signals—rather, members could become wary of introducing legislation that fails and then later is counted against them. If messaging bills send the false signal to voters that their representative is a productive member, thus perpetuating the tenure of unproductive members, tamping down on that tactic could encourage congressional productivity. One empirical study suggests that voters do reward legislators who advance messaging bills.[246]

On the other hand, messaging bills may be unfairly maligned. First, messaging bills may enable compromise. As Christian Fong and Nicolas Hernandez Florez argue, party leaders can propose a messaging bill that takes an extreme position, knowing that they will eventually land on a bipartisan compromise.[247] The messaging bill, however, provides the political "cover"

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[242] *See* Calmes, *supra* note 225.
[243] Mason & Rampton, *supra* note 227.
[244] Olympia J. Snowe, Essay, *The Effect of Modern Partisanship on Legislative Effectiveness in the 112th Congress*, 50 HARV. J. ON LEGIS. 21, 27 (2013).
[245] Editorial, *The Bills to Nowhere*, N.Y. TIMES (June 7, 2012), https://www.nytimes.com/2012/06/08/opinion/the-bills-to-nowhere.html [https://perma.cc/JW2Z-SAWV].
[246] Nicole Huffman, John Kane & David Stack, *Worth a Try? The Electoral Consequences of Symbolic Legislation* (Feb. 3, 2025) (unpublished working paper), https://preprints.apsanet.org/engage/apsa/article-details/679daa3ffa469535b9a16b76 [https://perma.cc/H5LQ-NPGM].
[247] Christian Fong & Nicolas Hernandez Florez, *Enabling Compromise* 3 (Ctr. for Effective Lawmaking, Working Paper No. 2024-06, 2024), https://thelawmakers.org/wp-content/uploads/2024/10/Enabling_compromise.pdf [https://perma.cc/343W-ZEDN].

necessary to agree on the ultimate compromise without alienating the party's base—in particular, the relatively more extreme voters who control primary elections.[248] Second, messaging bills can help voters understand who to blame, and thus who to punish electorally. Where a majority is blocked by the filibuster in the Senate, congressional leadership may regardless bring legislation to a vote, knowing it will fail, so that voters see that the minority party is blocking important legislation.[249] And finally, messaging bills can put legislators "on the record." Majority party members can propose legislation that they know will not pass, but will force minority members to cast potentially politically unpopular votes.[250] Empirical research shows that how members vote on messaging bills closely matches how they vote on "real" legislation—that is, messaging votes reflect members' "true" preferences.[251] As a result, such forced votes on uncomfortable issues may help reveal candidate stances, providing valuable information to voters.

V. CONCLUSION

In theory, judicial consideration of post-enactment legislative history holds promise for our constitutional system. But as incorporated into the MQD, post-enactment legislative history cannot realize this promise. Instead, it will more likely quiet Congress—discouraging already weakened legislators from carrying out their constitutional obligations. And regardless of whether considering post-enactment legislative history is a normative good, there is no principled reason to consider it *only* in MQD cases. The Court should make up its mind: does it believe in bicameralism, or not?

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[248] *Id.*

[249] *See* Jim Saksa, *Messaging Bills Are Loud, But Do Voters Hear Them?*, ROLL CALL (July 25, 2024, at 16:29 ET), https://rollcall.com/2024/07/25/messaging-bills-are-loud-but-do-voters-hear-them/ [https://perma.cc/UY3D-DZN5].

[250] *Id.*

[251] Thomas R. Gray & Jeffery A. Jenkins, *Messaging, Policy and "Credible" Votes: Do Members of Congress Vote Differently When Policy Is on the Line?*, 42 J. PUB. POL'Y 637 (2022).