

ARTICLE

CONVENTIONS OF AGENCY INDEPENDENCE

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It is often said that the legal touchstone of agency independence is whether agency heads are removable at will or only for cause. Yet this condition is neither necessary nor sufficient for operational independence. Many important agencies whose heads lack for-cause tenure protection are conventionally treated as independent, while other agencies whose heads enjoy for-cause tenure protection are by all accounts thoroughly dependent upon organized interest groups, the White House, or legislators and legislative committees.

This Article argues that the crucial role is played by what Commonwealth lawyers call “conventions.” Agencies that lack for-cause tenure yet enjoy operative independence are protected by unwritten conventions that constrain political actors from attempting to remove their members or to direct their exercise of discretion. Such conventions reflect norms within relevant legal and political communities that impose sanctions for violations of agency independence or create beliefs or internalized moral strictures protecting independence. Conversely, where agencies enjoy statutory independence yet lack operative independence, the interaction among relevant political actors has failed to generate protective conventions.

*The lens of convention helps resolve several puzzles about the behavior of Presidents, legislators, judges, and others with respect to agency independence—including the Supreme Court’s puzzling treatment of SEC independence in *Free Enterprise Fund v. PCAOB*. By acknowledging the conventional character of agency independence, U.S. courts can incorporate ideas from the courts of Commonwealth legal systems that harmonize conventions with written rules of law. This Article’s principal suggestion is that U.S. courts should adopt the leading Commonwealth approach, according to which judges may indirectly*

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“recognize” conventions and incorporate them into their interpretation of written law, but not directly enforce conventions as freestanding obligations.

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INTRODUCTION

Among the usual sources of administrative law, unwritten political norms—what Commonwealth lawyers call “conventions”—are nowhere to be found. Textbooks typically list the sources of administrative law as including (1) constitutional provisions, (2) statutory provisions, (3) agency regulations, and (4) judicial precedents, but do not refer to unwritten norms, conventions, customs, or usage. American courts say, in various contexts, that “custom” or “usage” is subordinate to the written law.¹

Despite this, I will suggest in what follows that conventions in the Commonwealth sense are central to the operation of the administrative state. Constitutional theorists periodically (re)discover that U.S. constitutional law is heavily based on conventions or unwritten political norms.² So too, I believe that a surprising amount of our administrative law is conventional and that we have a large body of unwritten administrative law. That is a broad claim that I cannot fully substantiate here, but I will illustrate it by addressing an important subset of the topic: conventions of agency independence in administrative law.

It is often said that the legal touchstone of agency independence is whether the agency head or heads are dischargeable at will, or only for cause.³ Yet this test does not adequately describe the landscape of agency independence. There are many important agencies that are conventionally treated as independent, yet whose heads lack for-cause tenure protection. Conversely, there are agencies whose heads enjoy for-cause tenure protection, yet are by all accounts thoroughly dependent upon orga-

1. See David J. Bederman, *Custom as a Source of Law* 105 (2010) (citing cases from U.S. jurisdictions).

2. For the latest phase of the cycle, see, e.g., Akhil Reed Amar, *America’s Unwritten Constitution: The Precedents and Principles We Live By* 335 (2012) (“In general, the underspecified [constitutional] text and the more specific institutional practices cohere to form a single system of daily governance in which the practices gloss and clarify the text, inducing interpreters to read the otherwise indeterminate text in a highly determinate way.”); Laurence H. Tribe, *The Invisible Constitution* 34 (2008) (“[C]ertain principles are so foundational to our legal and political order . . . that their binding status . . . is unimpaired by the fact that they are not stated in, or even plausibly inferable from, any part of the Constitution’s text.”); Ernest A. Young, *The Constitution Outside the Constitution*, 117 *Yale L.J.* 408, 473 (2007) (“[I]f we seek to identify the set of legal norms that actually *constitute* our public legal order[,] then the ‘Constitution’ will include not only the canonical document but a host of statutes, regulatory materials, federal common law rules, and established practices.”).

3. See, e.g., Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 *Admin. L. Rev.* 1111, 1138 (2000); Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 *Vand. L. Rev.* 599, 610 (2010); Jacob E. Gersen, *Designing Agencies*, in *Research Handbook on Public Choice and Public Law* 333, 347 (Daniel A. Farber & Anne Joseph O’Connell eds., 2010).

nized interest groups, the White House, legislators and legislative committees, or all of these. Legally enforceable for-cause tenure protection is neither necessary nor sufficient for operational independence.

The crucial consideration, largely neglected in the literature, is the role of conventions in creating and protecting agency independence. (As we will see, commentators refer vaguely to the “politics” surrounding agency independence, yet conventions are distinct from ordinary politics,⁴ and the theory of conventions has more structure and substance than a generic reference to “politics” can provide.) Agencies that lack for-cause tenure yet enjoy operative independence are protected by unwritten conventions that constrain political actors from attempting to bully or influence them. Those conventions may be generated by a variety of mechanisms, yet they have in common that unwritten political norms within relevant legal and political communities impose sanctions for perceived violations of agency independence or create internalized values or beliefs protecting that independence. Conversely, where agencies enjoy for-cause protection yet lack operative independence, the reason is that the interaction among relevant political actors has failed to generate any such set of protective unwritten norms.

The lens of convention helps resolve a range of puzzles about the behavior of agencies, Presidents, legislators, courts, and other actors with respect to agency independence. Some examples:

- Contrary to a widespread belief, no rule of written law prevents Presidents from firing the Chair of the Federal Reserve (“Fed Chair”), the nation’s independent central bank. It is often suggested that Presidents would benefit politically from central banking policies that create short-run employment and economic growth, at the cost of long-run inflation. Why then do Presidents, in the modern era anyway, never fire the Fed Chair?⁵
- The Securities and Exchange Commission (SEC) is widely said to be an “independent” agency. The relevant statutes, however, do not give its Commissioners for-cause tenure protection. Nonetheless, lower courts have simply assumed that the Commissioners can only be discharged for cause,⁶ and in a recent decision the Supreme Court accepted a joint stipulation of the parties to that effect,⁷ despite the rule that parties may not stipulate to the law. In what sense

4. See *infra* text accompanying notes 126–127.

5. See *infra* Part III.A.2 (discussing Federal Reserve).

6. E.g., *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 681–82 (10th Cir. 1988).

7. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3148–49 (2010) (“The parties agree that the Commissioners cannot themselves be removed by the President except under the *Humphrey’s Executor* standard of ‘inefficiency, neglect of duty, or malfeasance in office,’ and we decide the case with that understanding.” (citations omitted) (quoting *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 620 (1935))).

does “the law” give for-cause protection to the SEC Commissioners? In what sense is the SEC an “independent” agency?⁸

- President George W. Bush discharged several United States Attorneys. The Supreme Court had held squarely that U.S. Attorneys have no tenure protection,⁹ and indeed there was a tradition that U.S. Attorneys should resign when a new President came into office, clearing the way for a new wave of political appointments.¹⁰ Nonetheless, President Bush was widely seen to have compromised the “independence” of these officers, and was subject to a firestorm of criticism from political actors and the public. Why?¹¹

As we will see, the legal doctrine and received understanding of agency independence prove unable to account for these episodes. The lens of convention, by contrast, explains the disparity between the written law of independence and the operating rules of independence in the administrative state.

That lens also yields prescriptive implications for judges. By bringing the conventional character of independence to the surface, U.S. courts may begin to incorporate ideas from the courts of Commonwealth legal systems—such as the United Kingdom and Canada—that are familiar with the promise and problems of conventions and with the methods courts may use to harmonize or reconcile them with the written law. My principal suggestion is that U.S. courts interpreting statutes and constitutional rules that bear on agency independence should adopt the leading Commonwealth approach, according to which judges may “recognize” conventions and incorporate them into their interpretation of written law, although they may not directly enforce conventions as freestanding obligations.

Part I lays out the received wisdom about agency independence, focusing on for-cause tenure protection as a purportedly critical feature, and then explains how the for-cause approach does not adequately describe the actual operation of norms of agency independence in the administrative state. Part II explains the Commonwealth idea of unwritten conventions, identifies the mechanisms underpinning conventions, and argues that it is simplistic to sort all forces bearing on agency independence into the two boxes of “law” and “politics.” Conventions, which differ from both written law and ordinary politics, constitute a third mode of regulation that may either support or undermine agency

8. See *infra* Parts III.A.1, IV.A (discussing SEC). For an argument against the *legal* independence of the SEC, one that is consistent with the argument here, see Note, The SEC Is Not an Independent Agency, 126 Harv. L. Rev. 781 (2013).

9. *Parsons v. United States*, 167 U.S. 324, 343 (1897).

10. See *infra* note 156 and accompanying text.

11. See *infra* Part III.A.4 (discussing U.S. Attorneys).

independence. Part III suggests that agency independence is usefully understood through the lens of convention, as is the related set of issues about presidential power to direct agencies in their exercise of statutory discretion. The conventionalist perspective resolves critical puzzles that are otherwise inexplicable, and yields implications, discussed in Part IV, for subjects such as the relationship between conventions and judicially enforceable legal rules, the relationship between conventions and statutes, and the role of quasi-constitutional clear statement rules and “background principles” in statutory interpretation and administrative law. A brief conclusion follows.

I. THE LANDSCAPE OF AGENCY INDEPENDENCE

By the landscape of agency independence, I refer to both the doctrinal law as embodied in judicial decisions and the revealed behavior of political actors. There is an important mismatch between the two: The legal test that courts deem central to agency independence is neither necessary nor sufficient for operative independence in the world outside the courtroom. The legal test, which focuses on for-cause tenure protection, does not capture the observable facts of agency independence in the administrative state.

A. *The Legal Doctrine*

Commentators broadly agree that for-cause tenure protection is the sine qua non of agency independence. A leading overview states that “[i]ndependence is a legal term of art in public law, referring to agencies headed by officials that the President may not remove without cause. Such agencies are, by definition, independent agencies; all other agencies are not.”¹² While some commentators also point to structural features that characterize many—although by no means all—independent agencies, such as staggered terms, multimember boards at the top level, bipartisan composition, and independent budgetary or litigating authority,¹³ for-cause tenure protection is typically seen as necessary for independence, whether or not it is sufficient. On this view, “independent

12. Gersen, *supra* note 3, at 347.

13. See, e.g., Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 *Tex. L. Rev.* 15, 26–41 (2010) (examining how well “design features traditionally associated with independent agencies” address “problem of capture and one-sided political pressure”); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 *Cornell L. Rev.* (forthcoming May 2013) (manuscript at 17–42), available at <http://ssrn.com/abstract=2125194> (on file with the *Columbia Law Review*) (considering “seven indicia of independence: removal protection, multi-member structure, partisan balance requirements, budget and congressional communication authority, litigation authority, and adjudication authority”).

agencies are different in structure because the President lacks authority to remove their heads from office except for cause.”¹⁴

The commentators are quite right to emphasize for-cause tenure protection, insofar—but only insofar—as they focus on judicial decisions, especially at the level of the Supreme Court and the Court of Appeals for the D.C. Circuit. To explain this, a brief overview of the constitutional law and principles of statutory interpretation that bear on agency independence is necessary. Although the Court has decided only a few cases on agency independence, the doctrine clearly makes for-cause tenure protection critical. As we will see, the same is true of executive branch precedents—including a long and consistent line of opinions from the Office of Legal Counsel.¹⁵

1. *Statutory Holdings.* — As a matter of statutory interpretation, the Supreme Court said early and very clearly that the interpretive default rule is set in favor of at-will tenure: Where statutes do not contain any express for-cause removal protection for officers of the United States, courts should read the statute to permit discharge at will. In *Parsons v. United States*, the issue was whether President Cleveland could remove a U.S. Attorney, who had been appointed under a statute providing that “[d]istrict attorneys shall be appointed for a term of four years.”¹⁶ The Attorney argued that the statute meant that he held a fixed term of four years and could not be discharged within that period.¹⁷ The Court suggested that such a construction would raise constitutional questions because it might amount to a legislative encroachment on executive power, and thus chose a narrower “construction by which no more than a period of four years is permissible, subject in the meantime to the power of the President to remove.”¹⁸ In the absence of any explicit tenure protection in the statute, in other words, the Court opted for an interpretive default rule in favor of presidential power to remove at will. As we will see, the logic of *Parsons* and successor cases¹⁹ implies that as a strictly

14. Bressman & Thompson, *supra* note 3, at 610.

15. See, e.g., Removability of the Federal Coordinator for Alaska Natural Gas Transportation Projects, 33 Op. O.L.C. (Oct. 23, 2009), 2009 WL 4325376, at *2 (finding Coordinator removable at will “[b]ecause Congress did not explicitly provide tenure protection”); The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 152 (1996) (characterizing “so-called independent agencies” as “those agencies whose heads are not subject to removal at will by the President and that conventionally are understood to be substantially free of policy direction by the President”).

16. 167 U.S. 324, 327–28 (1897) (quoting Rev. Stat. § 769 (1878)).

17. *Id.* at 328.

18. *Id.* at 342.

19. See, e.g., *Keim v. United States*, 177 U.S. 290, 293–94 (1900) (“In the absence of a specific provision to the contrary, the power of removal is incident to the power of appointment.”); see also Peter L. Strauss, *Overseer, or “The Decider”?* The President in Administrative Law, 75 *Geo. Wash. L. Rev.* 696, 716 (2007) (“[I]n the absence of a

legal matter the commissioners of a number of “independent” agencies, and the Chair of the Federal Reserve, can also be removed at will, contrary to widespread intuition.

Six years later, the Court went even further in *Shurtleff v. United States*, in which an officer who had been removed by President McKinley argued that the removal violated statutory tenure protection.²⁰ A federal statute created a set of nine “general appraisers of merchandise”²¹—customs officials—who enjoyed indefinite terms and who were appointed by the President with the Senate’s advice and consent. No more than five of the appraisers could be from the same political party, and the statute also provided that the officials could be “removed from office at any time by the President for inefficiency, neglect of duty, or malfeasance in office.”²² Here we have many of the main structural features that modern commentators associate with agency independence: multiple officials, partisan balance requirements, and for-cause tenure. Moreover, the discharged officer argued that the for-cause removal provision should be read, by virtue of the interpretive canon *expressio unius est exclusio alterius*, to make cause the *only* permissible ground for removal.²³

The Court, however, invoked a strong version of the *Parsons* default rule, holding that only “very clear and explicit language” would suffice to restrict the President’s background power to remove officers at will; no “mere inference or implication” would do.²⁴ The *expressio unius* inference, in particular, was insufficiently “plain” to overcome the default rule.²⁵ Accordingly, the Court read the statute’s tenure provisions narrowly, to mean merely that the President was empowered to remove for cause, after notice and a hearing,²⁶ but could also discharge the officers absent cause. In a remarkable passage, the Court endorsed the full consequences of its ruling:

It is true that, under this construction, it is possible that officers may be removed for causes unconnected with the proper administration of the office. That is the case with most of the other officers in the government. The only restraint in cases

statutory provision limiting removals, such as the civil service laws, officers of the executive branch serve at will, and may be removed from office by their superiors, including the President, for any reason.”).

20. 189 U.S. 311, 311–12 (1903).

21. *Id.* at 313 (quoting Act of June 10, 1890, ch. 407, § 12, 26 Stat. 131, 136).

22. *Id.* (quoting § 12, 26 Stat. at 136).

23. *Id.* at 315–16.

24. *Id.* at 315.

25. *Id.* at 316.

26. Separately, the Court held that where removal is for cause, the President would have to provide notice and a hearing on the grounds for dismissal, but that this procedural obligation would not attach to removal at will. *Id.* at 317.

such as this must consist in the responsibility of the President under his oath of office, to so act as shall be for the general benefit and welfare.²⁷

Read for all it is worth, *Shurtleff* implies that the “independence”—in the sense of for-cause tenure protection—of a number of modern administrative agencies is legally infirm. Their independence is protected, if at all, by convention rather than judicially enforceable legal rules.

Two later decisions qualify *Parsons* and *Shurtleff*, but not in ways that undermine the main conclusions I will draw from them. In *Humphrey's Executor v. United States*, the Federal Trade Commission statute gave the Commissioners fixed terms, unlike the statute in *Shurtleff*, and also limited removal to stated causes.²⁸ The Court distinguished *Shurtleff* on the ground that the customs officers there had indefinite terms, so that limiting removal to the specified for-cause grounds would in effect have given the officers a form of life tenure, contrary to settled practice for non-judicial officials.²⁹ The Court thus accepted the *expressio unius* argument that had been rejected in *Shurtleff*, holding that the causes for removal stated in the statute were the exclusive grounds for permissible removal.³⁰ Nothing in *Humphrey's Executor*, however, suggests that the Court meant to abandon the basic default rule of *Parsons* and *Shurtleff* that Congress must speak in clear terms to create for-cause tenure; on the contrary, the Court's point was merely that the express statutory enumeration of for-cause grounds and of a limited term were sufficient to overcome that default rule. “The words of the act,” the Court held, “are definite and unambiguous,”³¹ and Congress had made plain its intent to grant for-cause tenure “upon the face of the statute.”³²

Subsequently, in *Wiener v. United States*, the question was whether a member of the War Claims Commission could be discharged at will or only for cause.³³ The relevant statute was silent on tenure, but the Court held that the Commission's members enjoyed implied for-cause protection.³⁴ Crucial to the decision was the nature of the Commission's functions. Set up to decide adjudicative claims brought on specific facts by private parties, the Commission had an “intrinsic[ally] judicial char-

27. *Id.* at 318.

28. 295 U.S. 602, 604–05 (1935).

29. *Id.* at 622.

30. *Id.* at 623; see also *Kalaris v. Donovan*, 697 F.2d 376, 395 n.76 (D.C. Cir. 1983) (“[*Shurtleff*] rejected the claim of a general appraiser, whose term was not fixed by statute, that he could not be removed at the pleasure of the appointing authority.”).

31. *Humphrey's Ex'r*, 295 U.S. at 623.

32. *Id.* at 624; see also *Kalaris*, 697 F.2d at 395 n.77 (“*Humphrey's Executor* placed equal weight on both the statutorily provided fixed terms and the stated grounds for removal.”).

33. 357 U.S. 349 (1958).

34. *Id.* at 356.

acter.”³⁵ The Court saw this as creating a necessary implication that the Commissioners must enjoy for-cause tenure protection, by analogy to Article III judges.³⁶ As we will see, the emphasis in *Wiener* on the strictly adjudicative functions of the War Claims Commission makes the holding inapposite to most of the important independent regulatory agencies in the administrative state, which typically wield rulemaking as well as adjudicatory powers.³⁷

2. *Constitutional Holdings.* — *Parsons, Shurtleff, and Wiener*, despite their constitutional undertones, were decided as cases of statutory interpretation. But constitutional decisions also center on the permissibility of for-cause tenure protection. Starting in the 1920s, the Court has periodically visited and revisited the constitutional issues and produced a famous quintet of constitutional cases on the removal power and Congress’s power to give executive officials for-cause tenure protection: *Myers v. United States*,³⁸ *Humphrey’s Executor v. United States*,³⁹ *Bowsher v. Synar*,⁴⁰ *Morrison v. Olson*,⁴¹ and *Free Enterprise Fund v. Public Co. Accounting Oversight Board (PCAOB)*.⁴² Because these cases are canonical in constitutional and administrative law, there is no need to recount their holdings in detail, but I will offer a brief outline of the constitutional doctrine as it currently stands.

The current constitutional rules bearing on the permissibility of for-cause removal protection take the following form, in broad outline: First, by virtue of *Bowsher*, Congress may not itself participate in the removal of federal officials, except by impeachment.⁴³ Even a congressional determination that an officer may be removed for cause constitutes impermissible involvement with the execution of federal law. By contrast, *Morrison* gives Congress broad, albeit ill-defined, authority to make agencies independent of the President in the legal sense.⁴⁴ Although *Humphrey’s Executor* had drawn a mysterious distinction between “purely executive” officers on the one hand and “quasi-legislative” or “quasi-judicial” officers on the other, and implied that independence could only be granted to

35. *Id.* at 355.

36. *Id.* at 355–56.

37. For the more radical view that *Wiener* erred by implying for-cause protection based on strictly adjudicative functions, see Datla & Revesz, *supra* note 13 (manuscript at 58–60).

38. 272 U.S. 52 (1926).

39. 295 U.S. 602 (1935).

40. 478 U.S. 714 (1986).

41. 487 U.S. 654 (1988).

42. 130 S. Ct. 3138 (2010).

43. *Bowsher*, 478 U.S. at 726.

44. See *Morrison*, 487 U.S. at 685–96 (holding independent counsel statute does not violate constitutional separation of powers principle).

the quasi-officers,⁴⁵ *Morrison* held that the distinction is no longer legally relevant.⁴⁶ Congress may grant even purely executive officials for-cause tenure protection unless the “removal restrictions are of such a nature that they impede the President’s ability to perform his constitutional duty.”⁴⁷ Although the latter proviso is vague in the extreme, it suggests that where the President has independent and specific constitutional authority over the subject matter, for-cause protection for the relevant subordinate officials would be constitutionally suspect.⁴⁸ For example, because the President is the Commander in Chief, it is unlikely that *Morrison* would permit Congress to make the Secretary of Defense an independent officer with for-cause tenure.

A further wrinkle, however, is the Court’s recent ruling in the *PCAOB* case that Congress may not create *two* levels of independence by setting up a structure in which an agency whose heads enjoy for-cause tenure itself contains an agency whose heads enjoy for-cause tenure.⁴⁹ To be sure, dictum in *PCAOB*, to the effect that for-cause tenure is inconsistent with deep constitutional commitments to presidential accountability for executive policymaking,⁵⁰ might be pushed further in future cases to threaten Congress’s power to create even one level of independence. We might even see the *PCAOB* majority as laying down a cache of ammunition for future battles, in the form of dictum that may be quoted to support more aggressive future rulings against the constitutionality of independent agencies. For now, however, the constitutional doctrine remains broadly favorable to congressional power to grant for-cause tenure.

Importantly, the *PCAOB* opinion underscores that, legally speaking, for-cause tenure protection is the sine qua non of independence—regardless of the other factors commentators sometimes point to, such as multimember boards, staggered terms, bipartisan composition, and independent budgetary or litigating authority.⁵¹ The Public Company

45. *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 624, 628 (1935).

46. *Morrison*, 487 U.S. at 688–89.

47. *Id.* at 691.

48. See A. Michael Froomkin, Note, In Defense of Administrative Agency Autonomy, 96 *Yale L.J.* 787, 809 (1987) (arguing Congress’s power to insulate agencies is “weakest when facing the President’s enumerated powers,” such as Commander in Chief power); cf. *Loving v. United States*, 517 U.S. 748, 767–69, 773–74 (1996) (recognizing greater scope for delegation where President has specific constitutional authority over subject matter).

49. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151 (2010).

50. *Id.* at 3164 (“The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so. That power includes, as a general matter, the authority to remove those who assist him Without such power, the President could not be held fully accountable . . .”).

51. See *supra* note 13 and accompanying text (citing literature on structural features of agency independence).

Accounting Oversight Board (PCAOB), an independent agency nestled within the SEC, did not possess most of those collateral indicia of independence; as the Court noted, the SEC held the power to “approve the Board’s budget, issue binding regulations, relieve the Board of authority, amend Board sanctions, or enforce Board rules on its own.”⁵² For these reasons, the Court considered the argument that “[t]he Commission’s general ‘oversight and enforcement authority over the Board’ . . . ‘blun[ts] the constitutional impact of for-cause removal.’”⁵³ The Court, however, would have none of it, holding instead that “[b]road power over Board functions is not equivalent to the power to remove Board members” because “altering the budget or powers of an agency as a whole is a problematic way to control an inferior officer.”⁵⁴ For-cause tenure, in other words, is legally sufficient to create (what the Court saw as) constitutionally problematic independence, even if other indicia of independence are lacking. *PCAOB* reinforces the traditional learning that the legal touchstone of independence is tenure protection.

Thus stands the judicial doctrine. For present purposes, it is important to separate the statutory holdings from the constitutional ones and to understand the interaction between them. For now, Congress has broad power to make agency officials independent, in the for-cause sense. However, the Court has never repudiated its holdings that, as a statutory matter, create a clear default rule against independence: Absent either express for-cause tenure protection in the relevant statute (*Humphrey’s Executor*) or an agency modeled on the Article III judiciary with an “intrinsic[ally] judicial character”⁵⁵ (*Wiener*), agency officials are dischargeable at will by the President (*Parsons* and *Shurtleff*). Given the background views about removal held by a majority of the Roberts Court, on display in *PCAOB*, it seems very likely that, in an appropriate case, the Court would apply an interpretive default rule against legal independence and in favor of presidential removal authority.

Yet I have said nothing so far about the actual operation of agency independence in the administrative state. The judicial doctrine, as it turns out, does not offer a reliable guide to the body of observed practices and norms that constitute the landscape of agency independence. I now turn to documenting these claims.

B. Agency Independence in Practice

The legal test of independence fails adequately to describe or make sense of agency independence in practice. The communities that operate

52. *PCAOB*, 130 S. Ct. at 3158 (citations omitted).

53. *Id.* (quoting 15 U.S.C. § 7217(a) (2006); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 683 (D.C. Cir. 2008)).

54. *Id.* at 3158–59.

55. *Wiener v. United States*, 357 U.S. 349, 355 (1958).

the administrative state—executive and legislative officials, agency personnel, the administrative law bar, commentators on administrative law, and regulated parties—create and follow observable norms of agency independence that are not derived from the judicial doctrine and in some cases cannot be squared with it. In particular, for-cause tenure protection turns out to be neither necessary nor sufficient for the operational independence of administrative agencies. I will take up the two claims about necessity and sufficiency in turn.

1. *Formal Independence as Unnecessary.* — Consider these examples: the Commissioners of the Securities and Exchange Commission (SEC); the Commissioners of the Federal Communications Commission (FCC); the Commissioners of the Federal Election Commission (FEC); and the Chair and two Vice Chairs of the Federal Reserve. All of these appear on conventional lists of “independent” agencies and officials; indeed, one would be hard pressed to find agencies or officers whose independence is more firmly entrenched in the operating consciousness of administrative lawyers, governmental officials, and informed citizens. Congress itself, in a list of independent agencies embodied in the definitional sections of the Paperwork Reduction Act, includes the SEC and FCC.⁵⁶

Surprisingly, however, *none* of these officials have for-cause tenure protections written into their statutes. As to the SEC, the relevant statute provides a certain term for the Commissioners but does not expressly provide for-cause tenure or limit the grounds of removal to stated causes.⁵⁷ The same is true for the FCC,⁵⁸ the FEC,⁵⁹ the Equal Employment Opportunity Commission,⁶⁰ and a range of other agencies typically understood to be “independent.” Testimony by the Congressional Research Service identifies no fewer than thirteen agencies that are conventionally—in many senses—viewed as independent, yet whose heads lack for-cause tenure.⁶¹

56. 44 U.S.C. § 3502(5) (2006) (“Each commissioner shall hold office for a term of five years . . .”).

57. Securities Exchange Act of 1934 § 4(a), 15 U.S.C § 78d(a).

58. 47 U.S.C. § 154(c) (2006) (“[C]ommissioners shall be appointed for terms of five years . . .”).

59. 2 U.S.C. § 437c(a)(2)(A) (2006) (“Members of the Commission shall serve for a single term of 6 years . . .”).

60. 42 U.S.C. § 2000e-4(a) (2006) (“Members of the Commission shall be appointed by the President by and with the advice and consent of the Senate for a term of five years.”).

61. Reviewing the Performance of the Social Security Administration as an Independent Agency: Hearing Before Subcomm. on Soc. Sec. of H. Comm. on Ways & Means, 104th Cong. 12 & n.19 (1996) (statement of Rogelio Garcia, Specialist, Government Division, Congressional Research Service), cited in Breger & Edles, *supra* note 3, at 1143 n.161.

In the case of the Federal Reserve, matters are more complicated, but the main point still holds. In the United States, unlike some other constitutional democracies,⁶² the independence of the central bank is entirely conventional, in the sense that there is no constitutional provision protecting that independence. The central bank is a creature of statute and could be undone by statute as a legal matter, but its independence is protected by a network of statutory provisions and hoary conventions.

The Federal Reserve System, created by the Federal Reserve Act of 1913 and its amendments, has a complex semi-public, quasi-federalist structure. Twelve regional banks make up the system, whose apex is a Board of Governors composed of seven members. The members are appointed for fourteen-year terms and enjoy express for-cause tenure.⁶³ From among the members, the President selects a Chair and two Vice Chairs. The Act prescribes that “[t]he Chairman of the Board, subject to its supervision, shall be its active executive officer,”⁶⁴ and by law and custom the Chair enjoys broad agenda-setting authority and powerful influence over final decisions.

The Chair and Vice Chairs, as such, have defined terms but no explicit for-cause tenure protection. In other words, although the Chair and Vice Chairs may not be removed from their lesser posts *as members* without cause, on the face of the statutes there is no obstacle to the President removing them from their leadership posts.⁶⁵ In a structurally

62. See, e.g., Ústavní zákon č. 1/1993 Sb., Ústava České Republiky [Constitution of the Czech Republic] art. 98, cl. 1 (prohibiting extralegal interference with National Bank); cf. Konstytucja Rzeczypospolitej Polskiej [Constitution of the Republic of Poland] art. 227 (“The President of the National Bank of Poland shall not belong to a political party, a trade union or perform public activities incompatible with the dignity of his office.”).

63. 12 U.S.C. §§ 241–242 (2006).

64. *Id.* § 242.

65. See Robert E. Cushman, *The Independent Regulatory Commissions* 174 (1941) (arguing 1935 amendments to Federal Reserve Act gave President “the authority to designate the governor of the board”—as its Chair was then known—“and to remove him from the governorship at pleasure”); David C. Stockdale, *The Federal Reserve System and the Formation of Monetary Policy*, 45 U. Cin. L. Rev. 70, 75 (1976) (“Since there is no language in the Act limiting the grounds for removal of the chairman to removal for ‘cause,’ it has been argued that the President remains free to select his own man. This strategy, however, has never been used.” (footnote omitted)).

The legislative history of the relevant provisions is somewhat ambiguous on the issue. In 1935, during consideration of amendments to the Federal Reserve Act, a report of the House Banking and Currency Committee observed that the Act “ha[d] been consistently interpreted to mean that the Governor serves as Governor at the pleasure of the President,” and stated that “[t]he bill [i.e., the 1935 amendments] follows this interpretation without changing it, by including the additional words ‘to serve as such until the further order of the President.’” H.R. Rep. No. 74-742, at 8 (1935). The House Committee, in other words, expressed a view that the then meaning of the law and its longstanding interpretation made the Governor’s tenure at-will, but also proposed further

similar case, the Office of Legal Counsel (OLC) had to decide whether the President could remove, at will, the Chair of the Consumer Product Safety Commission (CPSC).⁶⁶ The CPSC is a five-member agency whose Commissioners enjoy seven-year terms and for-cause protection and who are appointed by the President with Senate advice and consent; the Chair is appointed the same way, from among the members of the Commission, but has no express for-cause tenure qua Chair.⁶⁷ OLC's opinion held that the President could discharge the Chair at will, although the officeholder would continue to serve as a Commissioner.⁶⁸ OLC reasoned that the alternative interpretation would raise serious constitutional questions, and that the CPSC does not perform solely adjudicative functions and thus does not fall within the *Wiener* exception to the general default rule against implicit grants of for-cause tenure.⁶⁹

By parallel, as far as the default rules for interpreting written law are concerned, President Obama could fire Ben Bernanke at will—not as a Board member, but as Chair. Under *Parsons*⁷⁰ and *Shurtleff*,⁷¹ the absence of any express for-cause tenure protection for the Chair qua Chair is enough to entail presidential power to remove the Chair from that capacity at will, rather than for cause.⁷² Moreover, by providing express for-cause tenure protection for members of the Board, but not for the post of Chair qua Chair, Congress created grounds for an inference by

language to make the assurance doubly sure. This clarifying language was, however, rejected by the Senate and eliminated from the final bill. On the other hand, the Senate also failed to incorporate a proposal by the American Bankers Association that would have given express for-cause tenure to the Governor. See Banking Act of 1935: Hearings on S. 1715 Before a Subcomm. of S. Comm. on Banking & Currency, 74th Cong. 627 (1935) (describing proposal that “members of the Federal Reserve Board, *including the Governor*, should be removable during their terms of office only for cause” (emphasis added)). The final enacted language merely provided a term of four years for the Chair, while providing a fixed term of fourteen years and express for-cause tenure protection to the Board members.

Overall, this history does not clearly show whether the Congress as a whole intended to reinforce or eliminate the at-will character of the Governor's tenure; the legislators seem to have differed on the issue, and no majority could be obtained in both Houses to speak clearly in either direction. Given this ambiguity, the legislative history is insufficient to overcome the default rule in favor of at-will tenure, which—according to the prevailing precedents—a fixed term of years does not by itself suffice to overcome. This view is fortified by the *expressio unius* inference from the explicit provision of for-cause tenure for Board members as such.

66. President's Authority to Remove the Chairman of the Consumer Product Safety Commission (*CPSC*), 2001 WL 34089651 (O.L.C. July 31, 2001).

67. 15 U.S.C. § 2053(a)–(b) (2006).

68. *CPSC*, 2001 WL 34089651, at *5.

69. *Id.* at *2.

70. *Parsons v. United States*, 167 U.S. 324, 343 (1897).

71. *Shurtleff v. United States*, 189 U.S. 311, 318 (1903).

72. See *supra* notes 16–27 and accompanying text (discussing *Parsons* and *Shurtleff*).

negative implication that the Chair as such enjoys no special tenure protection.⁷³ Nor does the *Wiener* exception to the background default rule create the need for a different result. The Federal Reserve Board is hardly an adjudicatory body modeled on an Article III court; although it has minor adjudicatory functions, its major functions involve market operations, policymaking, and rulemaking. The upshot is that under the default rule of *Parsons* and *Shurtleff*—even as qualified by *Wiener*—Ben Bernanke can be fired at will from his post as Chair, although not from his lesser position on the Board. Given the dominating role of the Chair, to which many observers of the Federal Reserve testify, that power is highly consequential—or would be were it not tightly constrained by conventions, a point I will amplify later.⁷⁴

Suppose, however, that this account of the legal situation is wrong. Suppose, in other words, that the best reading of the relevant statutes and their history and context, as a strictly legal matter, is that the SEC, FCC, the Fed Chair, and other agencies or top-level agency officials enjoy some sort of implied for-cause tenure protection.⁷⁵ My main conclusion would be unaffected, for the reason that lawyers' expectations and understandings about which agencies are "independent" are not typically derived from a technical reading of the statutes and their context, even if such a reading would happen to support that understanding. Almost all lawyers firmly believe that the Fed Chair, the FCC, and similarly situated agencies enjoy "independence," even though few generalist administrative lawyers have ever investigated the relevant statutes and the historical materials behind them, or even consulted an expert on the relevant questions. I suggest, rather, that lawyers, even well-informed administrative lawyers, typically operate with a set of beliefs about which agencies are "independent" that are derived from normatively freighted equilibria—conventions—within the relevant legal subcommunities. These conventions, rather than the recondite legal technicalities, are what shape beliefs about the independence of agencies.

To summarize, as far as formal written law goes, when read in light of the interpretive default rules for removal provisions developed by the courts and the Office of Legal Counsel, the best account of the legal position is that the Commissioners of the SEC, FCC, and FEC, and the Chair

73. See *CPSC*, 2001 WL 34089651, at *3 (offering structurally parallel *expressio unius* argument for presidential power to discharge CPSC Chair at will).

74. See *infra* Part III.A.2.

75. Compare *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3183–84 (2010) (Breyer, J., dissenting) (arguing SEC Commissioners lack for-cause protection), and *Removability of the Federal Coordinator for Alaska Natural Gas Transportation Projects*, 33 Op. O.L.C. (Oct. 23, 2009), 2009 WL 4325376, at *1 (“[A]n officer serves at the pleasure of the President where Congress has not plainly provided [otherwise].”), with *id.* at *3 (suggesting multimember boards with staggered terms and partisan balance requirements might nonetheless enjoy implied for-cause tenure).

and Vice Chairs of the Federal Reserve all lack tenure protection, as do the heads of a range of other agencies usually understood to be independent. The puzzle, then, is that many of the core “independent agencies” are not legally independent at all, so far as written law and the Court’s interpretive principles go.

As Part III.A will discuss, however, it is unimaginable that the President would fire Ben Bernanke without serious cause, and the same is true for the heads of the other independent agencies. The disconnect between the received wisdom about which agencies are properly viewed as independent, on the one hand, and the formal legal position, on the other, arises because the received wisdom does not seem to be derived from, or responsive to, the language and context of the relevant statutes and the legal default rules. Rather, the widespread consensus on the identity of the independent agencies is a function of other factors, and the next two Parts will suggest that the lens of convention supplies the best account of those other factors.

2. *Formal Independence as Insufficient.* — I now turn to the converse case, in which the agency members enjoy express for-cause tenure protection, and may also enjoy other legal protections, yet the agency as a whole and over time displays thoroughgoing dependence. Here the question “dependence on whom?” becomes important; nominally independent agencies may become operationally subordinate to congressional committees, to the White House, or to private parties, and nominally nonpartisan or bipartisan agencies may become thoroughly partisan. Indeed, there exist nominally independent agencies that manage to combine all of these types of subordination or dependence simultaneously.

The most glaring example is the National Labor Relations Board. The statute expressly provides that the Board’s members “may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.”⁷⁶ The members also serve for fixed terms, and the legislative history is overwhelmingly clear that the Board’s members were originally expected to be “impartial” and “strictly nonpartisan.”⁷⁷ Thus the Board was engineered to be independent of executive influence as well as independent of partisan politics.

The operating reality, however, is exactly the reverse. It is widely understood in the relevant regulatory community and among academic commentators that the Board is one of the most politicized agencies

76. National Labor Relations Act § 3(a), 29 U.S.C. § 153(a) (2006).

77. See Staff of S. Comm. on Educ. & Labor, 74th Cong., Memorandum Comparing S. 1958 (74th Cong., 1st Sess.), with S. 2926 (73d Cong., 2d Sess.), as Reported with Amendments, at 1 (Comm. Print 1935), reprinted in 1 NLRB, Legislative History of the National Labor Relations Act, 1935, at 1319, 1320 (1949).

among the nominally independent regulatory commissions.⁷⁸ Board members are routinely described as “union-side” or “management-side,” and the Board’s adjudications predictably shift their emphasis from a pro-employee bias to a pro-management bias as Democratic and Republican administrations come and go. Board members have been found to vote rather reliably in accordance with the party of the appointing President and the member’s own partisan affiliation;⁷⁹ by and large, Democratic members vote with a pro-union bias, and Republican members vote with a pro-management bias.

What produces this pattern? The main mechanism of White House influence seems to be presidential appointment. To the extent that Democratic and Republican Presidents systematically tend to have different preferences on labor-management issues, and to the extent that partisan affiliation or other indicators are reliable proxies for future voting, the White House is able to appoint members who will reliably pursue the President’s agenda. In recent years, as the parties have become increasingly polarized, partisan affiliation has become an increasingly accurate proxy and White House influence, through appointments, increasingly dominant.⁸⁰

Another factor appears to be the structure of the economic interests and regulated actors within the Board’s jurisdiction.⁸¹ Agencies like the SEC and FCC regulate a diverse collection of problems and interests, so

78. See, e.g., James J. Brudney, *Isolated and Politicized: The NLRB’s Uncertain Future*, 26 *Comp. Lab. L. & Pol’y J.* 221, 243–52 (2005) (describing transformation of “increasingly polarized Board, which . . . has eroded the agency’s role as a neutral and principled adjudicator”); Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935–2000*, 61 *Ohio St. L.J.* 1361, 1453 (2000) (“[T]he practice of appointing management and union-side representatives to the Board has become so well-entrenched as to make any reversion to [impartiality] all but inconceivable.”). Thanks to Ben Sachs for providing these references.

79. See Brudney, *supra* note 78, at 248–50; Flynn, *supra* note 78, at 1404–15. A small body of literature in empirical political science tends to confirm this impression: Board members systematically vote in accordance with the partisan affiliation of the appointing administration and with their own partisan affiliation, at least in important or complex cases. Compare Charles D. Delorme, Jr., R. Carter Hill & Norman J. Wood, *The Determinants of Voting by the National Labor Relations Board on Unfair Labor Practice Cases: 1955–1975*, 37 *Pub. Choice* 207, 216 (1981) (finding partisan affiliation positively predicts votes), with William N. Cooke et al., *The Determinants of NLRB Decision-Making Revisited*, 48 *Indus. & Lab. Rel. Rev.* 237, 254–55 (1995) (finding partisanship effect holds for important and complex cases but not routine cases).

80. See Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 *B.U. L. Rev.* 459, 477–91 (2008) (arguing “political polarization has figured prominently . . . in presidential efforts to gain control of independent agencies”).

81. This is how I read Brudney, *supra* note 78, at 257–59 (comparing NLRB’s role of “monitoring interactions between two identified constituencies” with other agencies’ more heterogeneous portfolios).

regulated actors will not always or necessarily be able to reliably predict where their interests lie in any given agency decision; this uncertainty can produce a kind of impartiality in the agency's decisionmaking. In the NLRB case, by contrast, labor and management are locked in a zero-sum game with respect to many of the issues the Board decides, so that their incentives to bring political influence to bear, through presidential appointments and other means, are overwhelming.

Whatever the mechanisms, the pattern is clear: Commentators describe the Board as "openly partisan,"⁸² and, among relevant regulated parties and commentators, any suggestion that the Board functions as a genuinely independent and nonpartisan expert body would be met with howls of derision. Nominally independent of the White House and theoretically nonpartisan, Board members function as reliable arms of the White House, relevant private groups, or both, and the Board's course of action changes tack as administrations come and go. Just as a lack of statutory for-cause tenure need not imply a lack of operational independence, so conversely the presence of statutory for-cause tenure is no guarantee of operational independence.

II. CONVENTIONS: BETWEEN "POLITICS" AND "LAW"

If the formal legal rules do not provide an adequate account of operative agency independence,⁸³ the theory of conventions may supply a more useful lens. This Part introduces the Commonwealth theory of conventions and identifies mechanisms that underpin the generation and maintenance of conventions. The following Part will turn from theory to applications, employing the mechanisms identified here to explain the conventions of agency independence in the American administrative state.

American legal theory often draws a loose contrast between "politics" and "law." However, the Commonwealth family of legal systems recognizes a third category of unwritten public norms, which go under the label of "conventions." There is a semantic morass here; sometimes, conventions are discussed as a special type of political norm, in which case "politics" would include both politics in the sense used by American legal theory, on the one hand, and conventions, on the other. That alternative taxonomy makes no difference, however, so long as the substantive dif-

82. E.g., *id.* at 223.

83. Datla and Revesz offer a useful overview of agencies and their statutory attributes, demonstrating that there are no such attributes that are common and exclusive to all "independent" agencies and no others. See Datla & Revesz, *supra* note 13 (manuscript at 17-42). The natural conclusion is that independence is unstable as a legal category. This does not rule out the possibility, however, that independence is best understood as a conventional rather than legal attribute.

ferences between the different modes of behavior are made clear. I will use the threefold terminology of “politics,” “law,” and “convention.”

A. *Conventions vs. “Law”*

I will begin with the distinction between convention and law, and then turn to the distinction between convention and (ordinary) politics. In the classical British account, stemming from Albert Venn Dicey, conventions are by definition not part of “the law.”⁸⁴ Legal norms are enforceable by courts; conventions are extrajudicial unwritten norms that are enforced by the threat of political sanctions, such as defeat in re-election, retaliation by other political institutions and actors, or the internalized sanctions of conscience. Conventions, in contrast to law, are generated, identified, and enforced through decentralized processes. In principle, there is an identifiable institution to which one may go in order to press for a change in statutory or common law rules, but there is no such institution to which one may go to change conventions as such.

Despite the great influence of Dicey’s account, Commonwealth theorists broadly agree that it must be qualified in several important respects. First, although conventions are traditionally defined as “unwritten” norms, they may be memorialized and codified in written form, as has been increasingly the practice in the United Kingdom with respect to conventions governing the political acts of cabinet ministers.⁸⁵ Even where this occurs, however, the conventions remain unwritten in a deeper sense, because the convention does not draw its force from the document that memorializes it.⁸⁶ “[W]hen conventions are written down ‘the formula *records*, rather than *creates*, the convention’. Unlike enacted laws, the conventions would be conventions even if they were not written down.”⁸⁷

Second, Dicey attempted to reconcile conventions with an overriding commitment to the rule of law—which he understood as the rule of judicially enforceable law—by arguing that a breach of convention would inevitably, sooner or later, require the offending party to also breach a strictly legal rule. In Dicey’s example, a government that refused to convene Parliament for more than a year would not be able to

84. A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 23 (8th ed. 1915).

85. See, e.g., Cabinet Office, *The Cabinet Manual* (2011) (U.K.), available at <http://www.cabinetoffice.gov.uk/sites/default/files/resources/cabinet-manual.pdf> (on file with the *Columbia Law Review*) (recording “laws, conventions and rules that affect the operation and procedures of the Government”).

86. See *id.* at iv (“The Cabinet Manual records rules and practices, but is not intended to be the source of any rule.”).

87. Colin Turpin & Adam Tomkins, *British Government and the Constitution: Text and Materials* 185 (7th ed. 2012) (quoting Joseph Jaconelli, *Do Constitutional Conventions Bind?* 64 *Cambridge L.J.* 149, 169 (2005)).

enact the annual appropriations statutes, and would thus inevitably end up causing its agents to act without legal authority.⁸⁸ Yet the example and the argument are both problematic. As Jon Elster has noted, “[a]part from the fact . . . that the need for *annual* [appropriations] acts is itself a [convention], the argument clearly fails to account for the vast majority of [conventions].”⁸⁹ The convention that a Minister who misleads Parliament must resign, for example, need not produce any conflict with law in Dicey’s sense. “Dicey himself recognized this obvious fact, when he wrote that ‘[some conventions] . . . might be violated without any other consequence than that of exposing the Minister or other person by whom they were broken to blame or unpopularity.’”⁹⁰

A third qualification of Dicey’s account—a crucial qualification for my purposes—is that Commonwealth legal theory and practice now widely endorse a limited role for reliance on conventions in adjudication; conventions are not strictly extrajudicial norms. To be sure, the leading precedents are reasonably clear that courts may not directly *enforce* conventions against other political actors, in the sense that courts may not invoke freestanding conventions to override written legal rules. However, courts may indirectly *recognize* and *incorporate* conventions in the course of performing their usual duty of interpreting written laws or rules of common law.⁹¹ In some cases, for example,

[j]udges can use conventions as an interpretative aid to clarify the meaning of statutes. Sometimes statutes make reference to conventions, and interpretation of the statute requires an interpretation of the convention. Sometimes statutes are passed in the context of conventions; the structure of the statute presupposes the parallel operation of these rules. A court which ignored conventions in this context would risk producing an impractical interpretation of the statute.⁹²

88. Dicey, *supra* note 84, at 446.

89. Jon Elster, *Unwritten Constitutional Norms* 44 (Feb. 24, 2010) [hereinafter Elster, *Constitutional Norms*] (unpublished manuscript) (cited with author’s permission), available at <http://www.ucl.ac.uk/laws/jurisprudence/docs/2010/Elster24Feb2010.pdf> (on file with the *Columbia Law Review*).

90. *Id.* at 44–45 (quoting Dicey, *supra* note 84, at 26 n.1).

91. See Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* 15 (rev. paperback ed. 1986) (distinguishing taking notice of conventions, for purposes of clarifying law, from directly applying or enforcing conventions). The canonical citations are *Attorney-General v. Jonathan Cape Ltd.*, [1976] 1 Q.B. 752 at 771 (Eng.) (recognizing convention of collective ministerial responsibility); *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 807, 909 (Can.) (recognizing but refusing to enforce convention that Parliament will not propose any measure to amend Constitution of Canada that affects federal-provincial relations without agreement of provinces).

92. N.W. Barber, *The Constitutional State* 90 (2011) (footnote omitted).

Judicial recognition of conventions as context for statutory interpretation implies that “the law will treat the existence of a convention as simply a question of fact—though not a simple question of fact—since the conclusion may need to be established by a complex process involving both argument and historical exegesis.”⁹³

The idea that conventions may supply crucial context for the interpretation of written laws, and should thus be incorporated into that interpretation, makes sense of several of the puzzles already mentioned.⁹⁴ Overall, Dicey’s rigid distinction between extrajudicial conventions and judicially enforceable law cannot be maintained, but there is a tolerably clear conceptual line between what courts may and may not do with conventions. Indirect recognition and incorporation through interpretation are permissible, even if direct judicial enforcement of freestanding conventions is not.

A final complication is that conventions have dimensions of both scope and weight, which may be unclear or contestable at the margins. In actual cases, even genuine conventions may be qualified, overridden, or breached if there is a consensus that political circumstances are sufficiently unusual as to call for an exception. In the constitutional setting, the unwritten convention that Presidents should step down after two terms was discarded when Franklin Roosevelt successfully stood for a third consecutive term in 1940; part of the impetus may have been a belief that the convention was “inapplicable in times of economic stress and with rumours of war abroad.”⁹⁵ This susceptibility to exceptions is a standard feature of conventions, but it is also a standard feature of written legal rules, which often and perhaps inevitably have a residuum of open texture,⁹⁶ and are subject to being qualified, overridden, or violated when unanticipated cases or circumstances arise. More generally, written rules of law also have dimensions of scope and weight, and those dimensions may also be unclear or contestable at the margins.

B. *Conventions vs. “Politics”*

I turn now to the thornier distinction between conventions and ordinary politics. This is one of the central issues of Commonwealth legal

93. Marshall, *supra* note 91, at 17.

94. For more on this point, see *infra* Part IV.

95. Joseph Jaconelli, *The Nature of Constitutional Convention*, 19 *Legal Stud.* 24, 33 (1999).

96. Compare H.L.A. Hart, *The Concept of Law* 124–36 (3d ed. 2012) (arguing legal rules are necessarily open-textured and thus defeasible), with Frederick Schauer, *On the Open Texture of Law* 21–23 (Sept. 13, 2011) (unpublished manuscript), available at <http://ssrn.com/abstract=1926855> (on file with the *Columbia Law Review*) (arguing defeasibility is only contingent feature of particular legal systems). Whoever has the better of this debate, it is orthogonal to the distinction between unwritten conventions and written legal rules.

theory and of the theory of international law; there is also a growing literature in philosophy and political science on the mechanisms that underpin conventions. I will not attempt to make any original contribution, but merely try to sketch a view that helps us make progress on the role of conventions in administrative law and theory.

Although definitions of convention differ slightly from commentator to commentator, there is an overlapping consensus that conventions are (1) regular patterns of political behavior (2) followed from a sense of obligation.⁹⁷ Each of the two conditions is necessary but insufficient, taken by itself. The first is necessary because there is no convention if the relevant patterns of political behavior are ill-defined or fluctuating. In some domains, the behavior of political institutions and actors in the public sphere amounts to a random walk, in which circumstantial contingencies drive behavior and no well-settled norm of any kind can be observed, even in the purely descriptive sense of “norm” as standardized behavior. Where this is so, the lens of convention has no purchase.

Even if there is a regular pattern of political behavior, however, there need not be a convention; the first condition, even if necessary, is insufficient. The annual practice by which the President pardons a turkey on Thanksgiving Day is an observed regularity in political behavior. Yet no one believes that it is followed from a sense of political obligation, or believes that others believe so, and a breach of the practice would not produce any sanctions, such as retaliation by other political actors. Conventions cannot be classed as “political” practices in any simple way because regularity of political practice is insufficient, taken on its own, to produce or constitute a convention.

A major issue in the theory of conventions, then, is to identify some further condition, over and above regularity of political behavior, that constitutes a convention. The consensus view is that the behavioral pattern must be followed from a sense of obligation, or *opinio juris*.⁹⁸ It is not just that the pattern is followed, but that in some sense it should be followed; conventions are norms of political behavior whose existence is common knowledge among all political actors, such that the relevant

97. See, e.g., Turpin & Tomkins, *supra* note 87, at 182 (defining conventions as usages “generally acknowledged . . . as having an obligatory character”). Sir Ivor Jennings argued for a third condition: There must be “a reason for the rule.” W. Ivor Jennings, *The Law and the Constitution* 136 (5th ed. 1959). However, this further condition has not commanded widespread agreement among Commonwealth theorists; “while in many respects commendable, [it] is not authoritative.” Turpin & Tomkins, *supra* note 87, at 190.

98. The conditions for convention thus parallel, in the domestic sphere, the conditions for obligatory custom in the international sphere, where the sense of obligation is called *opinio juris*. For an overview of customary international law and a game-theoretic account of its nature and origins—an account that has sparked an enormous follow-on literature—see Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law* 23–43 (2006).

behavior “must be *expected* to continue to recur,”⁹⁹ using expectation in both its positive and normative senses.

However, this crucial second condition can in turn be cashed out in various ways. The main distinction is that “[t]hose who obey moral or other non-legal rules they believe to be obligatory, characteristically do it because of their belief that they are obligatory, or else from some motive of prudence or expected advantage.”¹⁰⁰ Following this distinction, I will focus on two broad categories of mechanisms, which I will call the “thin” sense of obligation and the “thick” sense.

In the thin sense, conventions are followed because rational and self-interested actors believe it is in their interest to do so, conditional on the behavior of other actors; the sense of obligation is that the actor believes that, given others’ behavior, breaching the convention would harm the actor to a degree that makes following the convention the sensible course of action. Here, the most prominent sanctions for breach of the convention are the threat of political retaliation by other actors and the threat of political backlash from the public, possibly resulting in an electoral defeat. In the thicker sense of obligation, the convention becomes genuinely internalized by the actor as a rule of political morality. I will detail these two types of obligation and the mechanisms on which they rest, comment on the relationships between the two types, and then explain how these mechanisms underpin the distinction between judicial enforcement and recognition of conventions.

1. *Thin Obligations.* — In the thin sense of obligation, economists, political scientists, and philosophers have offered several mechanisms to explain the genesis of conventions and their persistence over time. Some conventions are probably pure coordination norms,¹⁰¹ such as driving on one side of the road or the other (or so a stock example runs).¹⁰² In such cases no one should have any wish to deviate, because by hypothesis no one’s interests are affected by which convention, left-side driving or right-side driving, is in force in a given community. A standard political example of a pure coordination norm is the annual date for convening a legislature or parliament; conditional on all actors desiring that such a convocation should occur at all, what matters is that all agree on a date certain on which to meet, and the particular date is largely a matter of indifference. In cases of this sort, the sense of obligation is at its most attenuated. Any given actor would individually do worse by unilaterally deviating from the convention—given that others are driving on the right, the consequences of driving on the left may be severe—but together the

99. Turpin & Tomkins, *supra* note 87, at 190.

100. Marshall, *supra* note 91, at 6.

101. See generally David K. Lewis, *Convention: A Philosophical Study* 36–82 (1969) (analyzing conventions as solutions to coordination problems).

102. E.g., *id.* at 44–45.

actors are indifferent to whether they coordinate on one convention or on a different one.

Other conventions are best viewed as equilibria in games that have an element of distributive conflict over payoffs as well as a coordination component. One possibility involves mixed games of coordination and distribution, such as the Battle of the Sexes.¹⁰³ In that sort of game, each player benefits from coordinating on the same institutional practice or rule as the other player, yet each player would prefer to coordinate on a *different* rule; thus the two players have both a joint interest in coordination and a conflict over which rule to coordinate on. An example at the intersection of constitutional law and political theory involves the large-scale choice between “[r]ecognizing as law what has been enacted by a popular assembly, as opposed to what has been enacted by a Hobbesian strong-man.”¹⁰⁴ Hobbes emphasized that this choice has a coordination component, insofar as all are better off coordinating on one choice or the other rather than descending into a civil war to determine which regime will prevail.¹⁰⁵ That said, different actors will have strong preferences for coordinating on either the democratic regime or the authoritarian one, so there is an element of conflict as well—as England’s Glorious Revolution illustrated.

A third type of case involves tit-for-tat equilibria in a repeated Prisoners’ Dilemma.¹⁰⁶ In a single-shot Prisoners’ Dilemma each actor’s dominant strategy is to defect, so there is no coordination component at all. In an indefinitely repeated Prisoners’ Dilemma, however, the parties may be able to do better by cooperating rather than defecting, depending upon their payoffs, the rate at which they discount the future, and whether cooperation or defection is clearly discernible and thus common knowledge.¹⁰⁷ Cooperation in a repeated Prisoners’ Dilemma is enforced by the threat of defection in retaliation for the defection of the other party; thus indefinite cooperation is possible, and it has been

103. See Richard H. McAdams, *Beyond the Prisoners’ Dilemma: Coordination, Game Theory, and Law*, 82 S. Cal. L. Rev. 209, 222–23 (2009) (describing Battle of the Sexes game in which “the worst outcome for each player is the failure to match strategies, and where one player prefers matching at Strategy A and the other prefers matching at Strategy B”).

104. Jeremy Waldron, *Are Constitutional Norms Legal Norms?*, 75 Fordham L. Rev. 1697, 1706 (2006).

105. See Russell Hardin, *Indeterminacy and Society* 42–44 (2003) (describing Hobbes’s position).

106. Cf. Elster, *Constitutional Norms*, supra note 89, at 39–41 (explaining “intra-legislature” and “inter-legislature” conventions as repeat games).

107. See generally Robert Axelrod, *The Evolution of Cooperation* 174–75 (rev. ed. 2006) (identifying “conditions for the evolution of cooperation”); Paul G. Mahoney & Chris William Sanchirico, *Norms, Repeated Games, and the Role of Law*, 91 Calif. L. Rev. 1281, 1295–308 (2003) (describing relation of cooperative strategies to third-party enforcement).

shown that such cooperation may be forthcoming if both parties play a tit-for-tat strategy in which each cooperates if and only if the other does as well.¹⁰⁸ To be sure, tit-for-tat cooperation is only one possible equilibrium¹⁰⁹—the parties may also end up in a cycle of mutual defection and retaliation—but at least cooperation can occur, whereas in the single-shot version of the game rational parties will always defect no matter what the other party does.

A number of public institutional conventions can plausibly be understood to have this sort of tit-for-tat structure, especially where two different political parties expect to alternate in power more or less regularly for the indefinite future. In the U.S. Senate, conventions of cooperation such as senatorial courtesy over appointments (in which senators from a given state have a decisive say on appointments to federal offices in that state),¹¹⁰ the filibuster rule,¹¹¹ and pairing of absent senators¹¹² are all plausibly sustained by the fear of retaliation. In the United Kingdom, there is a convention that incoming governments of a given party do not disclose to the public the confidential internal documents and memoranda of the other party, plausibly because they fear that disclosure would cause the other party to retaliate in kind when it comes to power.¹¹³ Similarly, tit-for-tat models have been used to show that regular elections and judicial independence can arise as endogenous equilibria where parties expect to alternate in power, are risk-averse, and have sufficiently long time horizons.¹¹⁴

108. Other strategies may induce cooperation as well, but there is no need to delve into the complexities here.

109. More broadly, indefinite repetition gives rise to multiple equilibria in many games, not just the Prisoners' Dilemma. See Drew Fudenberg & Eric Maskin, *The Folk Theorem in Repeated Games with Discounting or with Incomplete Information*, 54 *Econometrica* 533 (1986) (demonstrating Nash equilibria in reputation games is characterized by incomplete information).

110. See Betsy Palmer, Cong. Research Serv., RL31948, *Evolution of the Senate's Role in the Nomination and Confirmation Process: A Brief History 5–7* (2009) (on file with the *Columbia Law Review*) (describing evolution of senatorial courtesy custom); Tonja Jacobi, *The Senatorial Courtesy Game: Explaining the Norm of Informal Vetoes in Advice and Consent Nominations*, 30 *Legis. Stud. Q.* 193, 194–203 (2005) (characterizing outcome of "Senatorial Courtesy Game" as reflecting "expectation[s] of future reciprocity").

111. *Standing Rules of the Senate* r. XXII, cl. 2, *in* Comm. on Rules & Admin., Senate Manual, S. Doc. No. 112-1, at 1, 20–22 (2011).

112. See Floyd M. Riddick & Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices*, S. Doc. No. 101-28, at 968–69 (1992) (describing custom of pairing as "voluntary arrangement among Senators").

113. Marshall, *supra* note 91, at 74–75; Elster, *Constitutional Norms*, *supra* note 89, at 42.

114. For invocations of this sort of mechanism to explain judicial independence, see J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 *J. Legal Stud.* 721, 747 (1994) ("[I]ndependent courts may represent a cooperative

In these game forms of mixed cooperation and conflict, as in pure coordination games, the “sense of obligation” is present only in the thin and conditional sense that the convention or norm is a game-theoretic equilibrium: Given the behavior of others, no actor can improve her position by departing *unilaterally* from the pattern of behavior embodied in the convention. A unilateral departure will incur a lower payoff, because of retaliation by the other party or a failure of coordination. These sanctions support the obligation to follow the convention. It would be a mistake to think that this thin sense of obligation is not a real one; the conditional fear of material sanctions can create or even constitute a genuine sense of obligation. Many people obey many laws out of exactly the same fear, yet it would be implausible to say that they do not feel an obligation to obey the law. The fear of sanctions for breaching a rule, whether the rule is conventional or strictly legal, is just one way of feeling obliged to follow the rule.

2. *Thick Obligations.* — That said, some conventions do seem to be followed from a thicker sense of obligation. In these cases, it is not (or not only) that the actor rationally calculates that her individual payoff will be lower if she breaches the convention. Although the convention may have initially arisen as an equilibrium sustained by rational calculation on the part of all relevant actors, over time it assumes a stronger form.

Here two important subcases may be distinguished. The first subcase involves *internalized moral constraints*: Political actors are aware of the possibility of breaching the convention, yet they think it would be morally wrong to do so. In other words, actors genuinely internalize the convention as a precept of political morality, not merely as a counsel of prudence.

The psychological processes and mechanisms that bring about this sort of internalization are still poorly understood. Internalization may of course arise through rational argumentation about political morality.¹¹⁵

equilibrium to a game that closely resembles an infinitely repeated Prisoner’s Dilemma.”); Matthew C. Stephenson, “When the Devil Turns . . .”: The Political Foundations of Independent Judicial Review, 32 J. Legal Stud. 59, 61 (2003) (arguing “independent judiciary can facilitate tacit bargains between political competitors to exercise mutual moderation”). A technical complication here is that these models are not repeat Prisoners’ Dilemmas in the strict sense, but sequential games in which the parties make alternating choices (whereas in a repeat Prisoners’ Dilemma the parties make a series of simultaneous choices). Some of the examples I discuss here might best be understood in the same way. However, (1) the tit-for-tat logic of cooperation is essentially the same in both types of games, and (2) some of the examples here, such as pairing in the Senate, do conform to the strict sequence of the repeat Prisoners’ Dilemma. In any event, nothing of substance here turns on this technical distinction.

115. See Charles Fried, *Moral Causation*, 77 Harv. L. Rev. 1258, 1261 (1964) (“In moral causation . . . we procure a desired performance by making that performance the

But it may also arise as a byproduct of habit and routine, which give rise to “the normative power of the factual.”¹¹⁶ Behavioral regularities are insufficient to create a convention as a jurisprudential matter, but in political life such regularities often tend to become encrusted with a normative aura, although this does not invariably occur.¹¹⁷ Another cluster of mechanisms involves the psychological demands of consistency: “If one withholds esteem from others for dishonesty or littering, then it will be difficult to avoid disapproving of oneself for the same behaviours. One might like to grant oneself an exception, but the esteem-judgment is not an intentional act.”¹¹⁸ Relatedly, it is difficult to sustain a pretense of adherence to normative standards, especially if one applies those standards to others; rather, the face molds itself to the mask.¹¹⁹ In any of these cases, the relevant psychological processes are not invariable laws, but genuine mechanisms that operate with some robust probability.¹²⁰

Whatever the mechanisms, and however difficult it is to show in individual cases that a norm has been genuinely internalized, there is no doubt that normative internalization does sometimes occur. The reason that the President does not order the Special Forces to stage a midnight raid to kill his political enemies is not just, and not principally, that he fears disobedience by his agents, criminal sanctions, or popular odium. Rather, if such a course of action ever occurred to him, he would doubtless think it morally abominable.

The second subcase involves the *cognitive hegemony of conventions*. Here actors have so deeply internalized a convention or norm that it never occurs to them to breach it. Most plausibly of all, the President never even contemplates having his political enemies assassinated. After

right thing for the actor to do, and we rely for our success in moving the actor on the recognition of that rightness by him.”).

116. Georg Jellinek, *Allgemeine Staatslehre* [General Theory of the State] 338 (3d ed. 1914). Consider this example:

As an instance of the emergence of a norm by precedent, consider seating arrangements at a scientific conference. On the first day, the participants seat themselves more or less at random. On the second day, the arrangements of the first day emerge as a convention . . . that facilitates the allocation of seats. On the third day, the convention has hardened into a feeling of entitlement on my part and a sense of obligation to respect it on the part of others.

Elster, *Constitutional Norms*, *supra* note 89, at 31.

117. For some constitutional examples, see Adrian Vermeule, *The Atrophy of Constitutional Powers*, 32 *Oxford J. Legal Stud.* 421, 423–25 (2012) [hereinafter Vermeule, *Atrophy of Constitutional Powers*].

118. Richard H. McAdams, *Resentment, Excuse, and Norms*, *in* *The Hart-Fuller Debate in the Twenty-First Century* 249, 253 (Peter Cane ed., 2010).

119. See Jon Elster, *Alchemies of the Mind: Rationality and the Emotions* 347–48 (1999) (discussing “constraints that prevent us from picking and choosing conceptions of fairness à la carte according to what best serves our interest” (emphasis omitted)).

120. For the distinction between laws and mechanisms, see Jon Elster, *Explaining Social Behavior: More Nuts and Bolts for the Social Sciences* 32–51 (2007).

Thomas Jefferson set a precedent that the President should address Congress solely in writing, rather than through an oral speech, the convention persisted unchanged for over a century.¹²¹ This was no mere practice or behavioral regularity, but a genuine convention that was initially justified on the high-minded ground that the President's quasi-monarchical presence might overawe the legislators, to the detriment of the republican spirit of constitutionalism.¹²² What sustained the convention during its long life, however, was that after a certain amount of time had passed, no one even thought about the possibility of breaching it, until Woodrow Wilson did so. H.W. Horwill, an English commentator on American constitutional conventions, observed that "although the [Jeffersonian] tradition had come to be generally recognized as an unfortunate one, it did not occur to any President, until Mr. Wilson took office, that he had the power to break away from it."¹²³

In practice, these examples of a thick sense of obligation are very difficult to distinguish from the thin sense of obligation, in which actors would be perfectly willing to breach the convention if it paid for them to do so, given the behavior of others. It is hard to know when actors genuinely respect conventions or instead pay lip service to them for strategic reasons. In many cases, the phenomena are observationally equivalent. If a given political party respects an adverse constitutional decision by the courts, professing its commitment to the rule of law, is this because party leaders genuinely respect the rule of law, or is it because they fear future retaliation in kind from the other party or public condemnation? In rare cases, there is evidence that cleanly cuts between the two possibilities, as when a politician records her motives in a confidential personal diary that is exploited by historians of a later era. In many cases, however, the causal mechanisms underpinning compliance with conventions remain ambiguous. Happily, the precise nature of the mechanism, although analytically important, makes little pragmatic difference in many cases. If the convention is a socially desirable one, any mechanism that induces robust compliance over time is socially desirable as well.

3. *The Development of Obligations.* — So far I have distinguished thin and thick senses of obligation, but the two senses have important and complex relationships, and need not be mutually exclusive. In static terms, thin and thick obligation may occur simultaneously: A given actor may obey a convention both because its breach would give rise to retaliation or other political costs, and also because the actor has genuinely

121. Herbert W. Horwill, *The Usages of the American Constitution 198–99* (1925).

122. See Jeffrey K. Tulis, *The Rhetorical Presidency* 56 (1987) ("Since 'the custom was regarded as an English habit, tending to familiarize the public with monarchical ideas,' President Jefferson abandoned the practice." (quoting 1 Henry Adams, *History of the United States During the Administration of Thomas Jefferson* 247 (New York, Charles Scribner's Sons 1889))).

123. Horwill, *supra* note 121, at 199.

internalized the convention as a norm of political morality. This should not seem mysterious; in the parallel case of obedience to written laws, such as criminal statutes, casual observation suggests that it is commonplace that people simultaneously obey laws both because they fear the sanctions that violation of the law might trigger, and also because they believe that the law is morally important.

In dynamic terms, moreover, one sense of obligation might give rise to the other. Most commonly, perhaps, the thin sense of obligation may give rise to the thicker sense. Patterns of behavior initially followed out of fear of political retaliation, backlash, or other sanction may gradually become internalized and come to be seen as morally binding. More speculatively, the causal sequence might sometimes also run in reverse: A norm internalized in the conscience of political actors might affect the actor's beliefs about whether a breach of the norm will give rise to political sanctions. Whichever way the causal arrow points, the sanctions of conscience and the anticipation of sanctions by other political actors will sometimes pull in tandem, jointly helping to produce compliance with the convention.

These mechanisms help to make sense of the relationship between conventions and adjudication, and of the Commonwealth distinction between indirect judicial recognition of conventions through interpretation, which is permissible, and direct judicial enforcement of free-standing conventions, which is not. In this theoretical framework, the sanctions for a breach of convention are extrajudicial, and take the form of retaliation by other political actors, condemnation by public opinion, or the pangs of conscience; judges will not award damages or injunctive relief for violation of a convention *per se*. However, judicial recognition of conventions may itself have the indirect effect of *triggering* extrajudicial sanctions, by clarifying whether a convention has been breached. On this view,

a court decision may decisively change the situation since politicians' doubts about what ought to be done may stem not from uncertainty about whether duty-imposing conventions are morally binding but from disagreement as to whether a particular convention does or does not exist. . . . The decision of a court may be accepted as decisively settling a political argument about the existence of a conventional rule.¹²⁴

In game-theoretic terms, judicial recognition of a convention may provide a focal point on which politicians may converge in an ongoing game with a coordination component, including sequential or iterated Prisoners' Dilemma games. In the latter class of situations, a prerequisite for tit-for-tat cooperation is that what counts as a cooperative move must be common knowledge among the players; judicial recognition of a con-

124. Marshall, *supra* note 91, at 17.

vention may thus clarify whether parties are cooperating or defecting, and may signal to potential sanctioners that a breach of convention has occurred.¹²⁵

Stepping back from the details, the largest point is that conventions are a special type of political norm, not to be equated with “politics” in the loose and colloquial sense. The latter category is rough and encompasses many disparate phenomena. It includes, for example, (1) debates over what the top marginal tax rate should be, (2) the President’s annual pardoning of turkeys on Thanksgiving, and (3) the norm that political actors will obey adverse judicial judgments. The first is a random political walk that is constantly in flux, depending on the contingencies of economic and fiscal circumstances; the second is a regular political behavior not accompanied by any sense of obligation; and the third is a genuine convention that can have important effects in the real world, as when Al Gore acquiesced in the Supreme Court decision that handed the presidency to George W. Bush.¹²⁶ The theory of conventions allows us to draw useful distinctions between examples in all three categories, whereas a crude contrast between “law” and “politics” does not.

In particular, although conventions of agency independence are political in the sense that they arise extrajudicially, it is simplistic to say merely that independence has a “political” as well as a “legal” sense.¹²⁷ Conventions are not like ordinary politics; when they exist and are breached, people feel that the very rules of the game have been violated,

125. For an account of the role of constitutional rights and liberties as focal points that trigger political sanctions for unconstitutional behavior, see Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 *Am. Pol. Sci. Rev.* 245, 258, 261 (1997) (“In a society that has resolved its coordination problems, citizens hold the power to threaten political elites with loss of power if they violate agreed limits on government.”). For an argument that contract law should limit the extent to which judges consider informal norms surrounding formal agreements, see Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Contract and Innovation: The Limited Role of Generalist Courts in the Evolution of Novel Contractual Forms*, 88 *N.Y.U. L. Rev.* 170 (2013).

126. *Bush v. Gore*, 531 U.S. 98 (2000).

127. Cf. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3183 (2010) (Breyer, J., dissenting) (referring to “a political environment, reflecting tradition and function, that would impose a heavy political cost upon any President who tried to remove a commissioner of the agency without cause”); Cary Coglianese, *Presidential Control of Administrative Agencies: A Debate over Law or Politics?*, 12 *U. Pa. J. Const. L.* 637, 649 (2010) (arguing “no meaningful or practical *legal* constraint exists on presidential directive power” yet “political constraints are not trivial”); Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 *Cardozo L. Rev.* 273, 275–84 (1993) (contrasting “structural and political limitations to Department of Justice control of government litigation”). However, Breyer comes close to recognizing the conventional character of agency independence when he refers to “tradition,” and Devins does the same when he refers to “expectations” along with “interbranch power” as determinants of independence, *id.* at 274. Conventions are, at bottom, equilibria of mutual expectations among political actors and institutions.

whereas ordinary politics just amounts to moves within the game. Ordinary politics are shifting and highly contingent, whereas conventions are relatively enduring equilibria that may—although they need not—have an internalized moral dimension, such that their violation causes a sense of normative outrage. Needless to say, the lines between ordinary politics and conventions are imprecise, but there is no trouble identifying clear cases at the extremes, and it is not useful to collapse the distinction altogether.

I have argued for a threefold taxonomy—law, politics, and conventions—and canvassed some mechanisms that generate conventions and sustain compliance with them. Having laid the groundwork, we can now turn to an analysis of the role of conventions in the administrative state, with particular reference to one of the central questions in administrative law and theory: the independence of agencies. In the course of the discussion, however, I will also touch on related categories of conventions, such as conventions that make agencies dependent, rather than independent, and conventions that regulate presidential attempts to direct agencies in the exercise of their delegated discretion.

III. CONVENTIONS AND AGENCY INDEPENDENCE

Part I suggested that the legal test of agency independence—which focuses principally on statutory for-cause tenure protection—does not adequately map the landscape of independence in the operational sense. Part II introduced the theory of conventions and explained the differences among law, politics, and convention. This Part attempts to draw together the two halves of the argument by suggesting that, in operation, agency independence in the American administrative state is best viewed through the lens of convention.

This Part applies the conventionalist perspective to three particular problems of the administrative state. Part III.A focuses on removal. Part III.B focuses on presidential administration, both through the Office of Information and Regulatory Affairs and by means of presidential directions to line agencies exercising discretion under statutory delegations. Part III.C turns to conventions of agency dependence—cases in which unwritten norms of agency behavior render agencies less independent, usually from the White House, than formal written law and judicial doctrine would otherwise suggest.

A. *Removal*

As discussed in Part I, the legal test of independence, keyed to the presence or absence of statutory for-cause tenure, is neither necessary nor sufficient to explain operative independence. I will offer a conventionalist account of removal, based on the mechanisms discussed in Part II.

1. *The SEC and Its Chair*. — When John McCain suggested during the 2008 presidential campaign that, if elected, he would fire the Chair of the SEC, the suggestion was widely lambasted—both as ignorant, because the commentators believed that the SEC Chair could not be fired absent cause, and as disreputably political, because of the tradition of SEC independence.¹²⁸ On both counts, the critics' sneers were misguided. As a strictly legal matter, as we have seen, the relevant statutes do not give even the Commissioners, let alone the Chair qua Chair, for-cause tenure protection.¹²⁹ Moreover, at the time McCain spoke, the Supreme Court had not yet decided the *PCAOB* case, and the reigning precedent was a mere lower court decision that had assumed SEC for-cause tenure only as to the Commissioners, not the Chair.¹³⁰ Even on the level of unwritten rules, McCain's spokesman asserted that the conventions were actually to the contrary. Citing the political pressure that led to the resignation of SEC Chair Harvey Pitt in 2002 in the wake of the Enron scandal, the spokesman argued that “[n]ot only is there historical precedent for SEC chairs to be removed, the President of the United States always reserves the right to request the resignation of an appointee and maintain *the customary expectation* that it will be delivered.”¹³¹

Yet even if the critics were misguided, their charges themselves helped to solidify the convention of SEC independence, and were thus partly self-confirming; the very fact that McCain was widely mocked for ignorance and for willingness to “politicize” the SEC is telling. Broad publics, and even elites with relevant specialized knowledge, have only a dim understanding of legal niceties and use relatively crude heuristics to assess the competing claims of political actors.¹³² In the case of McCain and the SEC, the public and elite commentators reflexively took the view that firing the chair of an agency widely assumed to be in some sense independent represented an illegitimate form of interference with the

128. See, e.g., George F. Will, Op-Ed., McCain Loses His Head, Wash. Post, Sept. 23, 2008, at A21 (assailing “depths of McCain’s shallowness on the subject of Cox’s chairmanship”); Jennifer Parker, McCain Flub? Republican Says He’d Fire SEC Chair as President, ABC News: Political Radar (Sept. 18, 2008, 1:47 PM), <http://abcnews.go.com/blogs/politics/2008/09/mccain-blasts-o-2/> (on file with the *Columbia Law Review*) (characterizing McCain’s view of presidential power to fire SEC Chair as “flub”).

129. See *supra* note 57 and accompanying text.

130. *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 681–82 (10th Cir. 1988).

131. Natalie Gewargis, From the Fact Check Desk: Could McCain ‘Fire’ the SEC Chairman?, ABC News: Political Punch (Sept. 18, 2008, 3:24 PM) (emphasis added) <http://abcnews.go.com/blogs/politics/2008/09/from-the-fact-2-2/> (on file with the *Columbia Law Review*) (quoting Tucker Bounds, McCain campaign spokesperson).

132. See Vermeule, Atrophy of Constitutional Powers, *supra* note 117, at 433–34 (describing “political precedent heuristic” as “tool[] of ‘low-information rationality’” (quoting Samuel L. Popkin, *The Reasoning Voter* 7 (1991))). Whether such heuristics are a rational decisionmaking strategy in the face of high information costs is a difficult and context-sensitive question, not relevant for these purposes.

operation of the administrative state. The episode thus illustrates the central distinction between conventions and “ordinary” politics: McCain was derided because public opinion and a decisive fraction of elites felt that the boundaries of ordinary politics had been transgressed. I will return to the SEC and the conventions that protect its independence in Part IV.A.

2. *The Federal Reserve Chair*. — We have seen that while the members of the Federal Reserve Board enjoy statutory for-cause protection, the Chair and Vice Chairs do not, qua Chairs. Yet there are no cases of Presidents formally removing the Fed Chair. Why not? I suggest that there is a strong unwritten norm protecting the Fed Chair from removal. Whatever the relevant statutes say, it is currently unimaginable that a President would fire the Fed Chair because of disagreements over macroeconomic policy.

Some or all of the mechanisms canvassed in Part II support the unwritten norm of independence that protects the Fed Chair. In some cases, of course, the President will agree with the Chair on matters of macroeconomic policy and the other matters within the Fed’s jurisdiction. Furthermore, Presidents may in some cases benefit politically from blame avoidance, and will thereby want to let a different official make controversial decisions about monetary policy.¹³³ Even where these conditions fail to hold, however, both anticipated sanctions and perhaps even genuine internalization of the relevant conventions rule out the option of removal.

I will begin with the anticipated reaction of other political actors and institutions, including general public opinion among the electorate. One principal sanction for violating the norm of an independent Fed Chair is presidential anticipation of retaliation by Congress. To some degree, Congress has institutional interests in maintaining the Fed’s independence from the White House, because allowing the President to control monetary policy would enhance the power of the executive.¹³⁴ Congress does not always act as a cohesive institutional entity, of course; sometimes, party politics and the career interests of individual legislators prevent Congress from acting on its institutional interests.¹³⁵ Yet even in partisan terms, if divided government is in place, legislators of one party

133. See Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 *Wm. & Mary L. Rev.* 503, 546 (2000) (“Politicians, no doubt, also have appreciated the political cover that comes with having the Fed as a scapegoat for economic disruptions.”).

134. For documentation of this theme in the legislative history and surrounding politics of the Federal Reserve Act and its 1935 amendments, see Cushman, *supra* note 65, at 146–77.

135. Cf. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 *Harv. L. Rev.* 2311, 2324 (2006) (questioning whether “anyone has any stake in the power of the branches qua branches” but acknowledging that “on some issues, branch affiliation will correlate with policy preferences”).

will have an incentive to prevent a sitting President of the other party from controlling monetary policy. Such control might be leveraged to the President's partisan and personal advantage by causing the Fed to allow higher employment in the run-up to the President's reelection bid; anticipating this, opposition party legislators will want the Fed to remain independent of presidential control.¹³⁶

The form that congressional retaliation would take is important. In many domains, Congress suffers from problems of collective action that result in inadequate sanctions on executive encroachment or even executive law violation—inadequate from the standpoint of Congress's institutional interests, although not necessarily from the standpoint of individual legislators. For those reasons, framework statutes such as the War Powers Resolution¹³⁷ and the National Emergencies Act¹³⁸ are often poorly enforced, oversight hearings make life difficult for executive underlings but do not substantially alter policy, and new laws that overturn executive decisions are extremely difficult to enact.¹³⁹ In all of these cases, the basic problem is inertia: Where the default rule is that Congress can only retaliate through positive action, the costs of collective action make the default of institutional inertia difficult to overcome.¹⁴⁰

In the case at hand, however, the default rule switches. The Federal Reserve Act requires the President to appoint a new Chair with senatorial advice and consent, which entails that the President needs the agreement of at least a (super)majority of the Senate to install a successor to the discharged Chair.¹⁴¹ A principal locus of retaliation for presidential encroachment on the independence of the Fed, then, would be the appointments process. Given the need to secure senatorial consent to the appointment of a successor, the President must anticipate that key legislators, especially those of the opposition party, would make the process as painful as possible, and would exploit the confirmation hearing to exacerbate public unease over the “politicization” of macroeconomic policy. In some cases, then, the President may calculate that it is better to bear with macroeconomic policies he finds objectionable and simply wait for a chance to appoint a new Chair, rather than face senatorial retaliation and the adverse publicity that a politically charged appointment process would inevitably create.

136. See Ramirez, *supra* note 133, at 546–50 (discussing political pressures on Fed during Nixon, Carter, and Reagan Administrations).

137. 50 U.S.C. §§ 1541–1548 (2006).

138. *Id.* §§ 1601–1651.

139. See Eric A. Posner & Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* 85–88 (2011) (discussing ineffectiveness of framework statutes intended to constrain executive power).

140. *Id.*

141. 12 U.S.C. § 242 (2006).

Beyond Congress, an attempt to fire the Fed Chair would risk creating an overwhelming backlash from public opinion, not to mention other political and financial actors. That claim must inevitably be somewhat speculative, given that no President has ever formally discharged the Fed Chair. Yet it seems highly plausible to think that the political opposition could inflict serious damage on the President by charging that Fed independence had been compromised on disreputable political grounds. Likewise, a decisive segment of elites and the general public would feel that firing the Fed Chair because of disagreements over monetary policy would violate the unwritten rules of the game and would in that conventionalist sense be illegitimate, not merely politically objectionable or bad policy.¹⁴²

Even apart from threats of legislative retaliation or political backlash, genuine internalization of norms of Fed independence may also play a role, although this is inevitably speculative. Perhaps Presidents either believe that the independence of the Fed Chair is good for all and thus have no desire to compromise it, or do not even consider attempting to compromise it (the cognitive hegemony of conventions).¹⁴³ If these mechanisms operate, then rather than calculating that removal will produce intolerable retaliation from Congress or backlash from financial actors or the general public, the President will not engage in such calculations in the first place, either because he will think removal a breach of political morality in any event, or because the possibility will not even come to mind. As always, however, it is difficult to know which if any of these mechanisms operates at any given time.

It is consistent with this account—indeed, it is evidence for this account—that in one or two cases Beltway insiders and journalists have suggested that Presidents or their aides have attempted to use informal pressure to nudge Fed Chairs from office. In the most famous such episode, a persistent Beltway account has it that Reagan Administration aides pressured Paul Volcker into disavowing any interest in reappointment in 1987.¹⁴⁴ The facts are unclear; Volcker denied that his decision

142. During the 2012 election campaign, the head of a financial firm was quoted as saying that Mitt Romney “can’t fire the Fed chairman.” Bernice Napach, *Romney Wants Bernanke to Go but One of His Top Advisers Doesn’t Seem to Agree*, Yahoo! Finance: The Daily Ticker (Aug. 24, 2012, 9:31 AM), <http://finance.yahoo.com/blogs/daily-ticker/Romney-wants-Bernanke-one-top-advisers-doesn-t-133109315.html> (on file with the *Columbia Law Review*). One doubts that the speaker was subtly referring to the Chair’s lesser role as a member of the Board of Governors, the only role in which he enjoys statutory for-cause tenure.

143. See *supra* text accompanying notes 121–123 (discussing effect of convention on capacity to recognize possible unconventional alternatives).

144. See Nathan Gardels, *Stiglitz: The Fall of Wall Street Is to Market Fundamentalism What the Fall of the Berlin Wall Was to Communism*, Huffington Post (Sept. 16, 2008, 4:52 PM), http://www.huffingtonpost.com/nathan-gardels/stiglitz-the-fall-of-wall_b_126911.html (on file with the *Columbia Law Review*) (quoting economist Joseph

to retire resulted from political pressure,¹⁴⁵ although almost all officials say the same, even when they have been forced from office. In any event, the crucial point for present purposes is that even if Volcker was pressured into retiring, the Reagan aides felt it necessary to proceed through informal sanctions and back channels—even though the President would have merely had to refuse to reappoint Volcker rather than fire him, and even in an administration that was conspicuously hostile to independent agencies and that pushed outwards the boundaries of formal presidential power in many domains. Conventions often exert their power by creating the administrative equivalent of the “Victorian compromise”—in effect forcing those who would test their limits, or even violate them, to proceed on the quiet, so as not to trigger blaming, shaming, retaliation, electoral backlash, or other norm-enforcing sanctions. Conventions can be causally efficacious even if they do not ultimately block *de facto* removal; they may make removal more difficult than it would otherwise be, and drive violators or would-be violators into the shadows.

Here and throughout, I neither claim nor need to claim that the relevant conventions are ironclad. Were political and economic circumstances to become sufficiently extreme—were a severe depression or other national economic emergency to arise—one could imagine political contingencies in which a President might want to discharge the Fed Chair and might succeed in doing so. Yet such possibilities also hover over facially clear rules of written law, which are subject to being ignored, overridden, or qualified on dubious grounds in emergency circumstances. Politics in the contingent sense ultimately constrains all binding rules, written or unwritten, yet this point does not cut between conventions and other types of binding rules, nor does it imply that such rules are somehow illusory in ordinary circumstances.

3. *United States Commission on Civil Rights*. — The Fed is a highly consequential institution with some legal guarantees of independence (just not for its powerful Chair). Yet in other cases, conventions of independence have grown up around, and in fact protected, less powerful agencies squarely located in the executive branch and lacking any colorable legal claim to independence. A famous example involves the

Stiglitz’s statement that “Paul Volcker, the previous Fed Chairman known for keeping inflation under control, was fired because the Reagan administration didn’t believe he was an adequate de-regulator”). Compare Bob Woodward, *Maestro: Greenspan’s Fed and the American Boom* 15–24 (2000) (portraying Volcker’s departure as orchestrated by Treasury Secretary James Baker and Chief of Staff Howard Baker), with William L. Silber, *Volcker: The Triumph of Persistence* 260–61 & n.44 (2012) (disputing Woodward’s account and claiming “Reagan could not have risked rejecting Volcker if the chairman still wanted the job”).

145. Robert D. Hershey, Jr., *Volcker Out After 8 Years as Federal Reserve Chief; Reagan Chooses Greenspan*, *N.Y. Times*, June 3, 1987, at A1 (reporting Volcker’s statement, “I had no feeling I was being pushed”).

United States Commission on Civil Rights.¹⁴⁶ When Ronald Reagan fired several members of the Civil Rights Commission, he ended up blunting his lance, despite the complete absence of any for-cause tenure protection in the relevant statute.

In its original incarnation in 1957, the Commission had multiple members, appointed by the President with advice and consent, and there was a statutory requirement of partisan balance, but there were no other indicia of independence; the statute said expressly that the Commission was created “in the executive branch” and not only failed to afford the Commissioners for-cause protection, but even failed to prescribe a fixed term,¹⁴⁷ implying plenary presidential power of removal at any time.¹⁴⁸ By practice, Commissioners would submit their resignations when a new administration took office.

However, “[b]ecause the Commission was established to apprise the federal government when denials of constitutional rights occurred, it traditionally was believed that the Commission should be independent of the President and that its members should be protected from removal for political reasons.”¹⁴⁹ The expectation of Commission independence was inchoate but real, and was backed up by latent threats of congressional retaliation—if only during the appointment of new members—and by diffuse public support for the Commission’s “nonpolitical” work. The overall situation, then, involved an agency with no formal guarantees of independence whatsoever, but protected by a proto-convention of independence that had never been put to the test and hence had never congealed.

The crucial test of the Commission’s independence came in 1983. After simmering disputes with some members and several appointment skirmishes, President Reagan formally discharged three members of the Commission and submitted new appointments.¹⁵⁰ Legally speaking, the Administration maintained, there was no obstacle to that course of action. Yet the convention that the Commission was in some sense independent thwarted Reagan’s efforts:

The hold-over members refused to resign and the President was unable to get his new appointees confirmed. Much was made in the press, and on the Hill, about the need for policy-making

146. This example is drawn from Richard J. Pierce, Jr., Sidney A. Shapiro & Paul R. Verkuil, *Administrative Law and Process* 110–11 (5th ed. 2009).

147. Civil Rights Act of 1957, Pub. L. No. 85-315, § 101(a), 71 Stat. 634, 634.

148. See *Kalaris v. Donovan*, 697 F.2d 376, 397 (D.C. Cir. 1983) (holding Benefits Review Board members appointed pursuant to statute silent on tenure or renewal terms “serve indefinite terms at the discretion of their appointing officers”).

149. Garrine P. Laney, Cong. Research Serv., RL34699, *The U.S. Commission on Civil Rights: History, Funding, and Current Issues* 5 (2010) (on file with the *Columbia Law Review*).

150. Pierce et al., *supra* note 146, at 110–11.

“independence” in civil rights policy, even though the legal case for such a proposition was weak, at best.¹⁵¹

A large segment of public opinion felt that somehow Reagan was acting “politically,” and thereby interfering with the “independence” of the Commission.

Reagan was eventually forced to compromise the dispute on unfavorable terms, resulting in the United States Commission on Civil Rights Act of 1983.¹⁵² In the short run, Reagan got a few appointments to the Commission—four out of eight—but the remainder were appointed by the Senate and House,¹⁵³ and the Commissioners were given formal for-cause tenure protection.¹⁵⁴ The long-run effect of the episode was to cause Congress to transform the convention of Commission independence into a formal legal rule.

4. *United States Attorneys*. — A final example of unwritten constraints on presidential removal involves U.S. Attorneys, as illustrated by a vivid episode during the George W. Bush Administration. The background involved a set of conventions that struck a rough balance among presidential control, partisan control, and independence. When President Bush and his Attorney General, Alberto Gonzales, breached these conventions by firing seven U.S. Attorneys, the backlash was vigorous; there was a widespread sense that unwritten norms of independence had been compromised, and Gonzales was eventually forced to resign under pressure.

U.S. Attorneys are appointed for four-year terms, and it is clear that as a strictly legal matter they serve at the pleasure of the President; *Parsons* itself involved a federal district attorney, and the Court held that a statutory term of years does not, as a matter of statutory interpretation, immunize the office-holder from at-will discharge by the President.¹⁵⁵ Yet over the course of the succeeding century a set of normatively freighted practices—conventions—had developed that shaped and constrained presidential removal. If appointed by a President of one party, all U.S. Attorneys would submit their resignations when a President of a different party came into office; by virtue of this convention, in the early days of his Administration, President Clinton replaced ninety-three U.S.

151. *Id.* at 111.

152. Pub. L. No. 98-183, 97 Stat. 1301 (codified as amended at 42 U.S.C. §§ 1975–1975d (2006)).

153. 42 U.S.C. § 1975(b). This despite *Buckley v. Valeo*, which held that Congress may have no direct role in appointing “officers of the United States.” 424 U.S. 1, 135 (1976) (*per curiam*).

154. 42 U.S.C. § 1975(e).

155. *Parsons v. United States*, 167 U.S. 324, 343 (1897); see also *supra* notes 16–19 and accompanying text (discussing *Parsons* and successor cases).

Attorneys more or less simultaneously.¹⁵⁶ However, if a given President was reelected, U.S. Attorneys whose terms had expired would serve as holdovers until the end of the President's second term. Most importantly, it was "unprecedented"¹⁵⁷ for a President to discharge particular U.S. Attorneys *during* the President's term. As the convention had developed, in other words, it allowed en masse replacement of U.S. Attorneys at the time of a partisan change of administration, but barred targeted removal midstream.

President Bush directly violated this convention by discharging some seven U.S. Attorneys in 2006. A scandal ensued that for a time enveloped the whole Department of Justice. Legislators—initially Democratic legislators, but later Republican ones as well¹⁵⁸—charged that the Attorneys had been discharged on "political" grounds, and that the Department of Justice's hiring practices and other operations were being "politicized" in a broader and more systematic way.¹⁵⁹ Congressional hearings followed, as did an investigation by the Department of Justice's quasi-independent Inspector General. Gonzales's performance at the hearings was weak and evasive, and by 2007 he was forced to resign.¹⁶⁰ The episode seems to have solidified the relevant conventions: Although President Obama accepted a large number of U.S. Attorney resignations at the beginning of his term, he was careful to leave in place Republican prosecutors in the middle of politically sensitive investigations or prosecutions, and there have been no claims that he has discharged any individual prosecutors on political grounds.

Overall, the U.S. Attorneys scandal underscores the limits of formal legalism as a lens through which to understand independence. *Parsons* notwithstanding, a President can now be said to act illegitimately, in the

156. David G. Savage, *Replacing U.S. Attorneys Stretches Back to Reagan*, L.A. Times, Mar. 23, 2007, at A22.

157. Julie Scelfo, "Quite Unprecedented," Newsweek (Mar. 14, 2007), <http://www.thedailybeast.com/newsweek/2007/03/14/quite-unprecedented.html> (on file with the *Columbia Law Review*) (quoting Mary Jo White, former U.S. Attorney for Southern District of New York).

158. See, e.g., Dan Eggen, *Prosecutor Firings Not Political, Gonzales Says*, Wash. Post, Jan. 19, 2007, at A2 (discussing Democratic charges of politically motivated forced resignations); TPM Canned US Attorney Scandal Timeline, Talking Points Memo (May 14, 2007) (former webpage) (on file with the *Columbia Law Review*) (listing lawmakers of both parties who called on Gonzales to resign).

159. See, e.g., David Johnston & Neil A. Lewis, "Nothing to Hide," Gonzales Insists Before Hearing, N.Y. Times, Apr. 16, 2007, at A1 (discussing Gonzales's response to accusations that U.S. Attorneys were politically discharged); Eric Lipton, *Some Ask If U.S. Attorney Dismissals Point to Pattern of Investigating Democrats*, N.Y. Times, May 1, 2007, at A20 ("Some critics . . . are suggesting that the department dismissed some prosecutors to squelch corruption investigations of Republicans, while encouraging other prosecutors to go after Democrats.").

160. E.g., Philip Shenon & David Johnston, *A Defender of Bush's Power, Gonzales Resigns*, N.Y. Times, Aug. 28, 2007, at A1.

conventional sense, if he replaces individual U.S. Attorneys midstream, with no partisan change of administration. The key distinction is between wholesale partisan replacement and retail replacement, a distinction that supporters of the convention justify as preventing Presidents or their underlings from pressuring prosecutors to bring particular, politically charged cases. Partisan en masse replacements will often, to a large extent, occur behind a kind of veil of uncertainty, before it is clear what particular prosecutions will be politically consequential during a given President's term, and this will minimize the ability of the White House to interfere in particular cases. Although this relatively nuanced convention has plausible arguments in its favor, it is an open question whether it strikes an optimal balance between independence and presidential accountability, or whether it is otherwise desirable from a social point of view. But it does underscore that the formal interpretive rules governing for-cause tenure and independence do not at all capture the dynamics of the operational rules of independence for U.S. Attorneys.

B. Presidential Direction: Statutory Interpretation and the Role of Convention

Conventions also play a crucial role where the issue is not removal power, but “directive” power—the power of the President, or of cabinet officials subordinate to the President, to overrule or direct the exercise of delegated statutory power by agency officials. The legal debates over presidential administration and direction are interminable and inconclusive; the written constitutional materials are fragmentary and ambiguous, and the possible interpretive default rules—either a default rule that Presidents can direct the exercise of delegated statutory discretion unless Congress clearly says otherwise, at least as to executive agencies, or the opposite rule—each have plausible considerations in their favor. However, the lens of convention suggests that the stakes of these debates are low, because in operation conventions will at least sometimes, and perhaps often, structure the relationship between the White House and agencies. Even as to agencies nominally within the executive branch, longstanding restraint by the White House or cabinet officials, in a given domain, can harden into a norm that constrains the directive power.

By way of background, I will begin with the strictly legal issues. The *Myers* decision, although focused on removal, also offered suggestive but ultimately ambiguous dicta on the issue of presidential administration and directive authority. On the one hand, *Myers* said that “[t]he ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their con-

struction of the statutes under which they act.”¹⁶¹ On the other hand, *Myers* offered two important, albeit carefully hedged, qualifications of this baseline rule. First, “there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer’s interpretation of his statutory duty in a particular instance.”¹⁶² Second, “there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge [i.e., execution] of which the President cannot in a particular case properly influence and control.”¹⁶³

Both the baseline approach of *Myers*, suggesting presumptive presidential power to direct subordinate officers’ execution of statutory delegations of discretion, and the qualifications of *Myers* have been cited in support of competing views of presidential directive power. Putting aside the question of whether the Constitution of its own force grants Presidents directive authority, the main issue in the legal literature has involved interpretive default rules for statutes that—as many do—delegate discretion not directly to “the President” by name, but instead to cabinet officers, freestanding executive agencies, or other bodies in the executive branch. A special complication involves statutory delegations to the independent agencies; even if the President has directive power over executive agencies, does that power extend to the independent ones?

As to these questions of statutory interpretation, there are two main positions. One view holds that grants of statutory discretion to a subordinate officer should be read, at least presumptively, as grants to that officer, rather than the President. Although Congress may of course delegate discretion directly to the President if it chooses to do so, it may also have reasons to direct its grant to subordinate officers, and where it does so, the President may not exert a formal legal power to exercise the granted discretion himself or to command the subordinate to exercise it according to the President’s wishes. The President’s role, on this view, is confined to a power of “oversight,” understood to mean persuasion, coordination, and other nonbinding modes of influence over officials exercising delegated discretion.¹⁶⁴

161. *Myers v. United States*, 272 U.S. 52, 135 (1926).

162. *Id.*

163. *Id.*

164. See Strauss, *supra* note 19, at 704 (distinguishing presidential “oversight” from “decision”). For arguments that the interpretive default rules should be set against presidential direction, see Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 *Duke L.J.* 963, 1003–10 (2001) (offering policy considerations for limiting presidential direction); Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 *Colum. L. Rev.* 263, 276–99 (2006) (arguing as matter of statutory construction “delegations to executive officials alone . . . should not be read to grant directive authority to the President”).

In a major article, Elena Kagan offered an alternative view that entails a different set of default rules, in the interest of promoting a regime of “presidential administration.”¹⁶⁵ On this view, grants of discretion to the heads of executive agencies are presumptively to be read as authorizing presidential direction as a formal legal matter.¹⁶⁶ The President would then step directly into the shoes of the relevant official. Thus Kagan suggested that where the action of the subordinate official would be judicially reviewable under the Administrative Procedure Act (APA), the directive commands of the President would be as well,¹⁶⁷ even though (the Court has held) the President is not an “agency” for purposes of the Act.¹⁶⁸ As to independent agencies—defined in the formal legal sense as agencies whose heads have for-cause tenure—the opposite default rule would prevail: Congress would be taken to have impliedly precluded presidential direction unless it clearly said otherwise.¹⁶⁹

Whatever the merits of the debate, conventions are at least as important as formal law and interpretive default rules in determining the scope and limits of presidential directive power. Kagan’s “presidential administration” is shaped and cabined, not only or even primarily by the precise language of delegating statutes, but by unwritten rules that emerge from long-run interactions among the White House, the agencies, Congress, voters, bureaucratic elites, interest groups, and other political actors. I will offer four examples: three involving important executive branch agencies or offices that, by convention, have some independence from the White House, and one involving the special network of conventions surrounding formal on-the-record adjudication by agencies.

1. *OIRA*. — The Office of Information and Regulatory Affairs (OIRA), within the Office of Management and Budget, is charged by executive orders with a range of functions whose centerpiece is “regulatory review”—a process by which OIRA examines proposed agency regulations (as well as, in theory, inaction by agencies where there is a plausible case for regulation) and determines whether those regulations comport with criteria set out in the executive orders.¹⁷⁰ Among the criteria, as currently defined, are cost-benefit analysis, equity, human dignity, and distributive impact.¹⁷¹ For present purposes, the important

165. Elena Kagan, *Presidential Administration*, 114 *Harv. L. Rev.* 2245 (2001).

166. *Id.* at 2251.

167. *Id.* at 2351.

168. *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992).

169. Kagan, *supra* note 165, at 2327.

170. Exec. Order No. 12,866, 3 C.F.R. 638 (1994), reprinted as amended in 5 U.S.C. app. § 601 (2006 & Supp. V 2011).

171. Exec. Order No. 13,563, § 1(c), 3 C.F.R. 215, 216 (2012), reprinted in 5 U.S.C. app. § 601 (Supp. V 2011); see also Memorandum from Cass R. Sunstein, Adm’r, Office of Mgmt. & Budget, to Heads of Exec. Dep’ts & Agencies, & of Indep. Regulatory Agencies 1 (Feb. 2, 2011), available at <http://www.whitehouse.gov/sites/>

feature of OIRA is its relative independence from the political goals of interest groups and, to some degree, even from the White House.

Although OIRA is, nominally speaking, an office within an office within the Executive Office of the President, and thus firmly under presidential control, commentators discern a “tradition,” or convention, by now firmly established, that the OIRA Administrator must be a highly credentialed and largely nonpartisan technocrat, who enjoys a substantial measure of de facto autonomy:

Since Congress created the position of OIRA Administrator in 1980, Presidents have tended to nominate to this position relatively independent figures, rather than individuals with close ties to interest groups. This tradition would presumably be costly to depart from, especially since the Administrator position is subject to Senate confirmation. If a new President appointed, for example, the head of a trade association representing polluters or the head of an ideological group, there might well be serious political fallout. This appointment practice, which developed over three decades, helps—at least to some degree—insulate OIRA from interest group influence.

. . . .
 . . . [Overall], a tradition of appointing relatively independent voices to the position of OIRA administration has developed that would likely be difficult to break.¹⁷²

In this account, the tradition of relatively independent appointments to head OIRA is clearly no mere behavioral regularity, but a norm or convention backed by an implied threat of legislative retaliation, and in that sense accompanied by a sense of obligation.

The quoted account emphasizes the conventions that secure the OIRA Administrator’s de facto independence from interest groups. There is no such clear convention implying OIRA independence from the White House; indeed, on one view, a major function of OIRA is to enforce presidential preferences on the line agencies.¹⁷³ That said, the same appointment-related mechanisms that insulate OIRA from interest groups may have a spillover effect that creates some measure of inde-

default/files/omb/memoranda/2011/m11-10.pdf (on file with the *Columbia Law Review*) (noting section 1 of Executive Order No. 13,563 permits agencies to consider such unquantifiable values).

172. Michael A. Livermore & Richard L. Revesz, Can Executive Review Help Prevent Capture?, in *Preventing Regulatory Capture: Special Interest Influence and How to Limit It* (Daniel Carpenter & David Moss eds.) (forthcoming 2013) (manuscript at 32, 35) (footnote omitted), available at <http://www.tobinproject.org/books-papers/preventing-capture> (on file with the *Columbia Law Review*).

173. See Eric A. Posner, Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective, 68 U. Chi. L. Rev. 1137, 1141 (2001) (arguing cost-benefit analysis is useful tool for “disciplining agencies and enhancing the control of elected officials”).

pendence from the White House. The expertise, nonpartisan credentials, and relative lack of political ties that characterize the Administrators will also tend to dilute their affiliation with career politicians and their vulnerability to pressure from any quarter. An Administrator, for example, who came from and expects to return to an academic post has relatively little to fear or to hope from White House underlings or even the President. The claim must not be overstated, however, because the appointment process will tend to select Administrators who share the President's basic preferences and beliefs.

2. *FDA*. — Another, more complex example involves the relationships among the Food and Drug Administration (FDA), the Secretary of Health and Human Services (HHS), and the White House. Late in 2011, a political controversy erupted after the HHS Secretary, Kathleen Sebelius, overturned the FDA's determination that the "morning-after pill" should be available over the counter as a nonprescription drug, and hence freely available to minors sixteen and under, who under current law need a prescription.¹⁷⁴ Although in one sense the controversy is an example of the violation of a convention of agency independence, in another sense the episode actually underscored the strength of the convention and suggested that a new convention was in the process of being born.

The relevant statutes clearly give the Secretary the legal power to direct the FDA exercise of delegated statutory discretion and to overturn the FDA action. The Secretary's official memorandum overturning the FDA's determination cited a provision that states "[t]he Secretary [of Health and Human Services], through the Commissioner, shall be responsible for executing" the statutory scheme¹⁷⁵ and for "providing overall direction to the Food and Drug Administration."¹⁷⁶ Furthermore, the statute pointedly states that "[t]he authority to promulgate regulations for the efficient enforcement of this chapter, except as otherwise provided . . . is vested in the Secretary";¹⁷⁷ locates the FDA "in" HHS;¹⁷⁸ and provides no for-cause tenure protection or other standard statutory indicia of independence for the FDA Commissioner. Indeed, in 1982, the Secretary withdrew a preexisting subdelegation of power to the FDA to

174. Gardiner Harris, *F.D.A. Overruled on Availability of After-Sex Pill*, *N.Y. Times*, Dec. 8, 2011, at A1.

175. Memorandum from Kathleen Sebelius, Sec'y of Health & Human Servs., to Margaret A. Hamburg, Comm'r of Food & Drugs 2 (Dec. 7, 2011) (alterations in original) (quoting 21 U.S.C. § 393(d)(2) (2006)), available at <http://www.hhs.gov/news/press/2011pres/12/20111207a.pdf> (on file with the *Columbia Law Review*).

176. 21 U.S.C. § 393(d)(2)(A).

177. *Id.* § 371(a).

178. *Id.* § 393(a).

issue regulations, and required instead that FDA regulations be reviewed and approved by the Secretary.¹⁷⁹

As far as written law is concerned, it is hard to imagine a clearer case of directive power that is lodged squarely in the relevant cabinet official, and—on the Kagan view at least—derivatively in the President. As it happens, however, conventions of agency independence complicate the picture at two levels: the relationship between the Secretary and the FDA, on the one hand, and the relationship between the President and the Secretary, on the other.

At the first level, despite the clear statutory allocation of directive authority over the FDA to the Secretary, HHS had never previously exercised the authority to overturn an FDA determination; thus the Secretary's action in the morning-after pill controversy was unprecedented.¹⁸⁰ An unbroken practice of deference to the FDA seemed to have developed at the HHS level, and there were some grounds for thinking that the practice had hardened into a convention.¹⁸¹ The FDA had developed an outstanding reputation for impartial expertise, supported in part by its extensive network of expert advisory committees and the carefully designed protocols for deliberation and voting within those committees.¹⁸² This reputation raised the specter that a decision by the Secretary to overturn an FDA determination would be condemned as the "politicization of science," and indeed Sebelius's decision was immediately and vehemently condemned on just that ground in certain sectors of the regulatory community.¹⁸³

In this example of an apparent convention and its breach, it is too soon to tell whether the backlash against the Secretary's action will peter

179. Reservation of Rulemaking Authority of the FDA in Matters Involving Significant Public Policy, 47 Fed. Reg. 16,318 (Apr. 16, 1982) (codified at 2 Food & Drug Admin., Staff Manual Guides 1410.10.2.A (2012)), available at <http://www.fda.gov/downloads/AboutFDA/ReportsManualsForms/StaffManualGuides/UCM273771.pdf> (on file with the *Columbia Law Review*).

180. Harris, *supra* note 174.

181. See generally Daniel Carpenter, Reputation and Power: Organizational Image and Pharmaceutical Regulation at the FDA (2010) (discussing pattern of strong deference to FDA by other agencies and judiciary).

182. See Food & Drug Admin., Guidance for FDA Advisory Committee Members and FDA Staff: Voting Procedures for Advisory Committee Meetings (2008), available at <http://www.fda.gov/downloads/RegulatoryInformation/Guidances/UCM125641.pdf> (on file with the *Columbia Law Review*) (describing FDA procedure for utilizing advisory committees).

183. See Alastair J.J. Wood, Jeffrey M. Drazen & Michael F. Greene, The Politics of Emergency Conception, 366 *New Eng. J. Med.* 101, 102 (2012) ("Any objective review makes it clear that Plan B is more dangerous to politicians than to adolescent girls."). For a more recent reaction from the bench, see *Tummino v. Hamburg*, No. 12-CV-763 (ERK) (VVP), 2013 WL 1348656, at *6–*7 (E.D.N.Y. Apr. 5, 2013) (criticizing Sebelius's intervention as "obviously political").

out or instead produce a denouement analogous to the case of the Civil Rights Commission,¹⁸⁴ in which the FDA would be given some form of statutory independence from cabinet or presidential direction. Tellingly, however, the White House took great pains to demonstrate that President Obama had not influenced the Secretary's decision in any way,¹⁸⁵ suggesting that the convention of independence may have merely shifted from the FDA level to the HHS level. Referring to agency regulation of toxic substances, Kagan suggests that there is "less space for presidential involvement" with respect to subjects that "involve[] significant levels of scientific expertise."¹⁸⁶ That suggestion is difficult to link up to any well-defined legal restriction on presidential directive power, but it captures a tacit amorphous convention that operates to constrain the exercise of such power.

3. *OLC.* — The Office of Legal Counsel (OLC) is an office within the Department of Justice whose most prominent function, by delegation from the Attorney General, is to issue formal written opinions on issues of statutory and constitutional law, especially issues of presidential and executive power and the jurisdiction of the myriad executive branch agencies. OLC has developed a set of "cultural norms" that emphasize "the importance of providing the President with detached, apolitical legal advice."¹⁸⁷ On the other hand, the office also legitimately serves the institutional interests of the executive branch, of the presidency, and of particular sitting Presidents,¹⁸⁸ and its staff is selected not only for professional competence but for "[p]hilosophical attunement"¹⁸⁹ with the incumbent administration. The consequence is that "OLCs of both parties have always held robust conceptions of presidential power."¹⁹⁰

For present purposes, then, the crucial question is whether OLC independence amounts to a regular pattern of behavior supported by a sense of obligation, in either the thin or thick sense, and thus whether it amounts to a genuine convention that might even constrain the President or his aides. Put negatively, there are two distinct threats to OLC's independence: either that the White House will apply pressure to constrain OLC to issue opinions that the White House desires, or that the White House will circumvent the OLC process altogether, by declining to seek an OLC opinion where the expected consequences of

184. See *supra* Part III.A.3.

185. Jackie Calmes & Gardiner Harris, *Obama Backs Aide's Stance on Morning-After Pill*, *N.Y. Times*, Dec. 9, 2011, at A20.

186. Kagan, *supra* note 165, at 2308.

187. Jack Goldsmith, *The Terror Presidency* 33 (2007).

188. Walter E. Dellinger et al., *Principles to Guide the Office of Legal Counsel* (Dec. 21, 2004), reprinted in Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 *UCLA L. Rev.* 1559 app. 2 at 1606 (2007).

189. Goldsmith, *supra* note 187, at 34.

190. *Id.* at 36.

doing so appear politically damaging on net. Any theory about these issues must embed OLC's independence in a larger account of the institutional equilibrium, one that explains why the President—acting through the Attorney General—delegates advisory power to OLC in the first place, or leaves in place the extant delegation, which as a legal matter could be undone with the stroke of a pen.

On one account, the White House itself benefits politically, over an array of cases, by respecting OLC's independence at least to some degree. Approval from a (partially) independent gatekeeper of executive legality gives the White House political credibility and legitimacy when OLC approves, and the price of such credibility and legitimacy is that OLC must also have the power to disapprove.¹⁹¹ Relatedly, conditional on OLC already being in place, a public disclosure that the White House had pressured or bypassed OLC might supply a focal point that would trigger investigations by legislators or by Inspectors General, or even condemnation by broad public opinion, at least in a highly salient case.

Under these scenarios, the convention of OLC independence is enforced by anticipation of political consequences for breaching the convention—obligation in the thin sense. In the thicker sense of obligation, internalization of professional norms of objectivity and detachment by the lawyers in OLC and elsewhere in the executive branch might support the relevant convention, either by making such lawyers relatively resistant to pressure from the White House, or in the extreme case causing them to resign (or credibly threaten to resign) in a visible and politically damaging fashion. In the latter scenario, the thick internalized sense of obligation on the part of OLC lawyers would itself create a credible threat of anticipated political sanctions that would enforce the thin sense of obligation on the part of the White House.

Reasonable observers may differ about whether these mechanisms in fact provide robust protection for the putative conventions of independence that surround OLC opinion-giving. When President Obama more or less bypassed OLC in order to obtain legal approval from other executive branch agencies for military intervention in Libya, the political sanctions that some observers predicted failed to materialize.¹⁹² More-

191. See Trevor W. Morrison, *Constitutional Alarmism*, 124 *Harv. L. Rev.* 1688, 1722–23 (2011) (book review) (describing OLC's "incentives cutting in favor of independence, credibility, and principle"). See generally Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 *U. Chi. L. Rev.* 865 (2007) (describing mechanisms by which President can signal credibility through self-binding).

192. See, e.g., Bruce Ackerman, *Op-Ed.*, *Legal Acrobatics, Illegal War*, *N.Y. Times*, June 21, 2011, at A27 (calling for congressional action to curb future "trivialization of the War Powers Act"); Ruth Marcus, *Op-Ed.*, *Obama's Legal Hopscotch*, *Wash. Post*, June 22, 2011, at A17 (arguing contravening OLC opinion "is a terrible approach and a dangerous precedent"); Charlie Savage, *2 Top Lawyers Lose Argument on War Power*, *N.Y. Times*,

over, when background political circumstances become unusually pressing or extreme, the relevant conventions will give way; the episode of the “torture memos” is a possible example.¹⁹³ Yet there have also been conspicuous cases in which OLC did decline to approve presidential action¹⁹⁴ in ways that are hard to explain without reference to unwritten conventions of OLC independence. The best description is probably that the relevant conventions, although real, are fragile, intermittently effective, and susceptible to bending or breaking when political pressures become unusually powerful.

4. *Executive Branch Adjudication.* — A final example involves presidential direction of adjudication by executive agencies, as opposed to rulemaking by the same agencies. Commentators widely agree that presidential direction is highly constrained in this domain. I will argue that the strictly legal grounds for limiting presidential direction of the adjudicative activities of executive agencies are at best dubious. The real source of the limitation is a network of tacit unwritten conventions that protect the independence of even executive agencies when engaged in adjudication.

The legal background includes both the cryptic *Myers* dictum,¹⁹⁵ to the effect that adjudicative decisions affecting individuals “may” be beyond the scope of presidential directive power,¹⁹⁶ and also the later decision in *Wiener*, which baldly stated that the strictly adjudicative functions of the War Claims Commission “precluded the President from influencing the Commission in passing on a particular claim.”¹⁹⁷ Courts have also restricted ex parte contacts between the White House and agencies with respect to matters subject to formal adjudication, although the judicial decisions to that effect rest on legally dubious grounds.¹⁹⁸ Proponents of expansive presidential power to direct subordinates’ exercise of delegated discretion stop short of arguing for presidential directive power over adjudication, even where strictly executive agencies lacking for-cause tenure protection are concerned. Kagan, for example, acknowledges that “presidential participation in [adjudication], of what-

June 18, 2011, at A1 (noting “disclosure that key figures on the administration’s legal team disagreed with Mr. Obama’s legal view could fuel restiveness in Congress”).

193. See generally Goldsmith, *supra* note 187, at 141–76 (criticizing OLC opinions on interrogation issued in 2002 and 2003); John Yoo, *War by Other Means: An Insider’s Account of the War on Terror* 168–87 (2006) (defending memos as legal analysis).

194. For examples, including impoundment and the line item veto, see Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 *Colum. L. Rev.* 1448, 1457 n.36 (2010).

195. See *supra* notes 161–163 and accompanying text.

196. *Myers v. United States*, 272 U.S. 52, 135 (1926).

197. *Wiener v. United States*, 357 U.S. 348, 356 (1958).

198. See *infra* Part IV.B.

ever form, would contravene procedural norms and inject an inappropriate influence into the resolution of controversies.”¹⁹⁹

Yet it is hardly clear, as a strictly legal matter, that the logic of presidential administration should not apply here as well. If one believes that Presidents hold directive power over the delegated discretion of executive agencies, it is unclear why that power would not extend straightforwardly to adjudicative functions of agencies as well as rulemaking functions. The major rationales for presidential directive power—the unitary executive rationale rooted in Article II’s vesting of “the executive power” in the President and the Kagan argument that grounds presidential directive power in a default rule stipulating the existence of such a power for executive but not independent agencies—are both intrinsically insensitive to the distinction between rulemaking and adjudication. Agency adjudication, just as much as agency rulemaking, is an exercise of the “executive power” under Article II. Adjudication, in the administrative law sense of the term—the process of formulating an agency order, typically involving the application of law to particular facts—is a routine activity of almost all agencies, and excepting it from the directive power is a major restriction on the scope of that power. Even if the exception is itself restricted to *formal* adjudication on the record, the justification for the exception is still unclear.

There are two serious arguments to the contrary. The first is that presidential direction of administrative adjudication would threaten to make agency action unreviewable, to the extent that presidential action is itself unreviewable.²⁰⁰ Yet as Kagan suggests in the rulemaking setting, even though the President as such is not an “agency” for purposes of the APA, when the President steps into an agency’s shoes to exercise its delegated discretion, courts might review the resulting action as ordinary agency action.²⁰¹ By way of analogy, the Court suggested in *Shurtleff* that judges might even review presidential dismissals premised on for-cause grounds, and issued after notice and hearing;²⁰² such dismissals are predicated on an application of defined statutory conditions and thus amount to an exercise of adjudicatory authority.

The second argument is that “background norms of due process” should constrain presidential direction of adjudication, even by purely executive agencies. This argument is usually accompanied by a citation to a famous pair of cases, *Londoner*²⁰³ and *Bi-Metallic*,²⁰⁴ and by the observa-

199. Kagan, *supra* note 165, at 2363.

200. Cf. Strauss, *supra* note 19, at 757 (suggesting “stronger case for the President as ‘the decider’ . . . in contexts where we do not expect judicial review”).

201. Kagan, *supra* note 165, at 2351.

202. *Shurtleff v. United States*, 189 U.S. 311, 314 (1903).

203. *Londoner v. City & Cnty. of Denver*, 210 U.S. 373 (1908).

204. *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915).

tion that due process imposes greater obligations in adjudication than in rulemaking. The observation is undoubtedly correct, yet it does not hook up to the question of presidential directive power. When applied to adjudication, any exercise of directive power would have to comply with due process rules where applicable, but that does not amount to or justify a blanket prohibition on presidential direction of adjudication, even formal adjudication. In other words, to the extent that the law of due process is implicated, presidentially directed agency action is subject to it no less than any other agency action. If, for example, due process requires an oral hearing where particularized deprivations affecting a small number of people based on adjudicative facts are concerned—the holding of *Londoner* and *Bi-Metallic*—then presidentially directed agency action will have to do the same. But that is as far as the due process point will take us. The appeal to background norms of due process fails because it generalizes “due process” far beyond anything with support in actual due process law.

The stock reference to “background norms” is on the right track, however, if norms are understood as referring not to ordinary legal norms, but instead to conventions. A better explanation for the restriction of presidential direction to rulemaking is entirely conventional; it is rooted in the practice of Presidents accompanied by a sense of obligatory constraint. As Kagan put it: “The only mode of administrative action from which [President] Clinton shrank was adjudication. At no time in his tenure did he attempt publicly to exercise the powers that a department head possesses over an agency’s on-the-record determinations.”²⁰⁵

Kagan does not offer any conjectures about mechanisms that might cause even an innovative and powerful President to shrink away from directing adjudication by executive agencies, but the mechanisms discussed earlier seem straightforwardly relevant. Among the communities that shape administrative law—including civil servants, the organized bar, legislative committees, and regulated parties—presidential direction of administrative adjudication would be seen as an unprecedented exertion of power, violating longstanding unwritten traditions, and would for that reason provoke a storm of protest. In virtue of its particularized character, agency adjudication is a salient mode of agency action—a focal point—such that presidential interference might well trigger a coalition among political critics of the relevant administration, legalist defenders of the autonomy of the civil service bureaucracy, and academic critics of the unitary executive. Anticipating the risk of this sort of reaction, Presidents will shy away from testing the outer limits of directive authority. And whether or not it is plausible that Presidents themselves generally internalize the relevant conventions, the lawyer-advisers on whom

205. Kagan, *supra* note 165, at 2306.

Presidents rely in such matters have been socialized in a legal culture that valorizes judicial independence and is prone to casually transpose the thick conventions surrounding judicial independence into the setting of administrative adjudication.

C. *Conventions of Agency Dependence*

So far I have given examples of conventions that protect agency independence where written law, read in conjunction with judicially declared default rules, does not formally protect it. The converse phenomenon is that conventions might, in effect, reduce an agency to dependent status in whole or in part—even where written law, read in conjunction with the judicial default rules, attempts to protect its independence. At a minimum, the *absence* of a protective convention of independence might expose an agency to outside pressure, rendering its formal legal independence fragile. Some possible examples follow, with the caution that the available evidence is sketchy in the extreme, so that these examples must be understood as mere hypotheses requiring further research and confirmation or disconfirmation.

1. *Independent Agency Chairs*. — Martin Shapiro discerns a “custom” requiring that “at the beginning of each presidential term, [independent regulatory] commission chairs resign not only their chairmanships but also their seats on the commission and that the incoming President appoints a new chair.”²⁰⁶ If this is so, then the custom constrains the independence of such commissions in an important way, for chairs typically wield important agenda-setting powers. In many cases, furthermore, the chair of an independent regulatory commission, such as the SEC or FCC, is generally the only member who commands public visibility and may thus employ the power of the bully pulpit to push her agenda forward.

There are two problems, however. First, Shapiro does not cite any evidence, and it is unlikely that such a custom currently exists, even if it did at one time. A recent systematic study of membership on independent agencies finds an “increasing propensity of opposition-party commissioners to serve out all or nearly all of their terms” when a President of a new party comes into power.²⁰⁷ Although the putative custom Shapiro suggests is described in terms of all independent commission chairs regardless of party, the finding is, so far as it goes, inconsistent with the existence of such a custom.

The second problem is that it is also unclear whether Shapiro means a custom in the mere sense of a behavioral regularity, or is instead sug-

206. Martin Shapiro, A Comparison of US and European Independent Agencies, *in* Comparative Administrative Law 293, 298 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010).

207. Devins & Lewis, *supra* note 80, at 470–72, 477.

gesting the existence of a pattern of behavior backed by a sense of obligation (*opinio juris*).²⁰⁸ There are many good personal reasons for chairs of independent commissions to resign when the President of a new party comes into power; presidential elections are convenient focal points for transition to a new post, and the prospect of a change in regime with concomitant change in policies may make it less appealing for holdovers to hang around. Nothing in Shapiro's argument suggests that a normatively freighted convention is in play, as opposed to a simple behavioral regularity that for any number of reasons happens to coincide with presidential transitions.

2. *Requirements of Clearance and Regulatory Coordination.* — Shapiro further suggests that “the independent agencies customarily . . . submit their proposed legislation for clearance [by the Office of Management and Budget],” although it is unclear whether they are legally obliged to do so.²⁰⁹ This actually represents just one part of a network of conventions that encompasses not only the independent agencies' proposals for substantive legislation, but also their budget requests and regulatory agendas.

As we have seen, a consistent line of executive orders, issued by Presidents of both parties, provides for regulatory review by the Office of Information and Regulatory Affairs, within the Office of Management and Budget.²¹⁰ Under this scheme, executive agencies must both submit their regulatory plans and agendas for *ex ante* coordination and submit their “significant” proposed rules for review. Independent agencies, by contrast, are subject only to the former obligation.²¹¹

This pattern of regulatory review for independent agencies—*ex ante* coordination and regulatory planning, but no mandatory review of major rules—is not yet fully congealed as an administrative convention. On the one hand, a 1981 OLC opinion argued that the President's directive power was sufficient to subject independent agencies to review of particular rules,²¹² but President Reagan shied away from that confrontation, and all subsequent Presidents have done so as well. More recently, President Obama solicited comments on a new executive order governing regulatory review, and many of the commentators urged him to

208. See *supra* notes 97–98 and accompanying text.

209. Shapiro, *supra* note 206, at 296.

210. See *supra* notes 170–171 and accompanying text.

211. Exec. Order No. 12,866, §§ 3(b), 4, 6, 3 C.F.R. 638, 641–648 (1994), reprinted as amended in 5 U.S.C. app. § 601 (2006 & Supp. V 2011); Exec. Order No. 13,563, § 7(a), 3 C.F.R. 215, 217 (2012), reprinted in 5 U.S.C. app. § 601 (Supp. V 2011).

212. Memorandum from Larry L. Simms, Acting Assistant Att'y Gen., Office of Legal Counsel, to David Stockman, Dir., Office of Mgmt. & Budget 7–13 (Feb. 12, 1981), reprinted in *Role of OMB in Regulation: Hearing Before Subcomm. on Oversight & Investigations of H. Comm. on Energy & Commerce, 97th Cong.* 152, 158–64 (1981).

extend regulatory review to all agencies, including the independents.²¹³ The new Obama order, however, retained the scope of the previous orders.²¹⁴ As far as these episodes go, bipartisan practice suggests a convention that independent agencies are free from the requirement of regulatory review that applies to executive agencies.

There is a bit more to the story, however. President Obama's framework order for regulatory review, applicable by its terms only to executive agencies, laid out a number of general guiding principles and also instituted a more specific obligation of retrospective review, under which agencies must examine past rules to see whether predictions of costs and benefits were borne out in practice.²¹⁵ In July 2011, a follow-on executive order from President Obama stated that "[t]o the extent permitted by law, independent regulatory agencies should comply with these provisions [i.e., the general principles] as well," and further stated that independent agencies "should" develop plans for retrospective review.²¹⁶

The order is puzzling on its face, in strictly legal terms anyway. For one thing, presumably, it is true of all executive orders that they apply "only to the extent permitted by law." What exactly is the point of saying so? And what of the crucial directions that the independent agencies "should comply" with the general principles of the prior framework order and "should" engage in retrospective review? It is not clear that "should" is even a legally operative term. "May" grants permission, while "must" creates an obligation; what does "should" do?

I suggest that the July 2011 order may best be understood as an attempt to generate a new convention, under which independent agencies would be obliged to comply with general principles of regulation and with the process of retrospective review, despite the uncertainty about whether the President may subject them to a strictly legal obligation to do so. The order, in other words, seeks to encourage independent agencies to comply with those general principles and with the process of retrospective review as a matter of informal obligation and comity—with the tacit expectation that comity, prolonged over a sufficient period, will harden into a conventional obligation. On this account, the inclusion of "to the extent permitted by law" serves to emphasize that the obligation is indeed conventional, rather than an obligation traceable to some formal source of written law, while the term "should" is best

213. See Public Comments on OMB Regulations for a New Executive Order on Regulatory Review, Reginfo.gov, <http://www.reginfo.gov/public/jsp/EO/fedRegReview/publicComments.jsp> (on file with the *Columbia Law Review*) (last updated Apr. 20, 2009) (collecting comments).

214. Exec. Order No. 13,563, § 7(a), 3 C.F.R. at 217.

215. *Id.* § 6.

216. Exec. Order No. 13,579, § 1(c), 3 C.F.R. 256, 257, reprinted in 5 U.S.C. app. § 601 (Supp. V 2011).

viewed as an attempt to infuse the new behavioral regularity with an element of *opinio juris*.

In fact, the independent agencies all complied with the July 2011 order by undertaking plans for retrospective review, although some made a point of asserting that they were doing so out of comity rather than obligation.²¹⁷ That behavior, if prolonged over several administrations, may well harden into a convention that allows the President to subject independent agencies to retrospective review. Such a pattern may even lay the groundwork for more extensive obligations of regulatory review in the future, as initially thin conventions harden into thicker obligations. Despite the uncertainty over whether the President might subject the independent agencies to regulatory review through the formal authority of an executive order, a functionally equivalent outcome may occur through the growth of administrative conventions.

Overall, the network of conventions surrounding clearance and regulatory review by independent agencies is partly settled, partly in flux. It is settled that independent agencies have to submit proposed legislation and budgets to the OMB in advance. It is also settled that the independent agencies have to comply with the process of regulatory planning and *ex ante* coordination of regulatory agendas. Still uncertain, however, is the question of whether independent agencies are subject to regulatory review of major rules. The Obama Administration's orders and memoranda nudging independent agencies to respect general principles of regulation and to engage in retrospective review may best be understood as a first step toward creating such an obligation as a matter of convention, rather than formal legal direction.

217. See, e.g., Reducing Regulatory Burden; Retrospective Review Under E.O. 13565, 76 Fed. Reg. 38,328, 38,328 (Commodity Futures Trading Comm'n June 30, 2011) ("While Executive Order 13563 does not apply to independent agencies, such as the Commission, the OIRA Memorandum encourages independent agencies to give consideration to its provisions, consistent with their legal authority, and to consider undertaking voluntarily retrospective analysis of existing rules."); Press Release, Fed. Mar. Comm'n, Updated: Economic and Regulatory Relief Approved for More than 3,300 Businesses (Apr. 7, 2011), http://www.fmc.gov/updated_economic_and_regulatory_relief_approved_for_more_than_3300_businesses/ (on file with the *Columbia Law Review*) (explaining compliance by stating "[a]lthough Executive Order 13563 does not apply to independent agencies such as the FMC, the White House has encouraged independent agencies to voluntarily follow its guidance"); Press Release, Fed. Trade Comm'n, FTC Enhances Longstanding Regulatory Review Program to Increase Public Participation and Reduce Burden on Business (July 7, 2011), <http://ftc.gov/opa/2011/07/regreview.shtm> (on file with the *Columbia Law Review*) ("The testimony notes that because the FTC is an independent agency, it is not bound by the President's January 2011 Executive Order directing all executive agencies to institute regulatory reviews. However, the agency fully supports the goals of that Order.").

IV. IMPLICATIONS FOR LEGAL DOCTRINE

This Part elicits some implications of the conventionalist lens for an array of puzzles and questions in administrative law. The theory of conventions helps put in the best possible light important judicial rulings that otherwise seem difficult to justify on strictly legal grounds. In such cases, the legal tests of independence, and the standing legal default rules for interpreting statutes, suggest one outcome or mode of analysis, yet the courts reach entirely contrary results or approach the problem in an entirely different way. Unwritten conventions of independence in the background, however, supply missing premises that make the judicial approach appear sensible, whether or not ultimately persuasive. Likewise, the distinction between judicial enforcement of conventions and judicial recognition of conventions helps to make sense of decided cases and of theoretical debates in statutory and constitutional interpretation over the role of background constitutional principles, constitutional norms, and clear statement rules.

A. *For-Cause Tenure*

Let us return to the Court's puzzling treatment of the independence of the SEC in the recent *PCAOB* case.²¹⁸ As Justice Breyer pointed out in dissent, the majority managed to issue a decision whose rationale was necessarily premised on the for-cause tenure protection of the SEC Commissioners, even though the statute says no such thing.²¹⁹ As discussed above, the interpretive default rules bearing on agency independence entail that in the face of statutory silence for-cause tenure should not be implied into statutes, unless the relevant body has intrinsically judicial tasks.²²⁰ The SEC, of course, is predominantly a regulatory and policymaking body rather than a strictly adjudicative tribunal.

Even more oddly, the majority blandly observed that the parties had stipulated to the premise that the SEC Commissioners enjoy for-cause tenure, and then announced that the case should be decided on that assumption.²²¹ As commentators have noted, however, the prevailing rule is that parties cannot stipulate the law, or at least that courts need not allow them to do so.²²² Indeed, this was an unusually inappropriate case

218. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010); see also *supra* notes 49–54 and accompanying text (discussing *PCAOB* case).

219. *PCAOB*, 130 S. Ct. at 3182–84 (Breyer, J., dissenting).

220. See *supra* Part I.A.

221. *PCAOB*, 130 S. Ct. at 3148–49 (majority opinion).

222. See *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993) (holding lower court “acted without any impropriety in refusing to accept what in effect was a stipulation on a question of law”). But cf. Gary Lawson, *Stipulating the Law*, 109 Mich. L. Rev. 1191, 1195–96 (2011) (acknowledging current rule but arguing legal stipulations should be allowed).

in which to allow the parties to agree upon a crucial legal premise, because the stipulation created a constitutional problem that would not otherwise exist, in violation of the Court's putative practice of avoiding unnecessary constitutional rulings. Absent the stipulation, there would have been only one layer of for-cause independence between the President and the PCAOB. The stipulation, then, was crucial to the Court's constitutional holding, which would have been unnecessary had the ordinary rules been followed.

All this is defensible, if at all, only on the ground that the Court was implicitly recognizing and incorporating by reference an extrajudicial convention about the independence of the SEC. In Commonwealth terms, conventions arise extrajudicially, but courts may recognize them in the course of interpreting written laws.²²³ Thus in the leading lower court case on the independence of the SEC, a Tenth Circuit decision called *SEC v. Blinder, Robinson & Co.*, the appellate panel noted that the SEC Commissioners are "commonly understood" to enjoy for-cause tenure protection.²²⁴ "Common understandings" are best understood as extrajudicial conventions that the courts fold into their interpretive calculus.²²⁵

223. See Barber, *supra* note 92, at 90 (noting "[j]udges can use conventions as an interpretative aid to clarify the meaning of statutes").

224. 855 F.2d 677, 681 (10th Cir. 1988). In full, the panel stated that "for the purposes of this case, we accept appellants' assertions in their brief, that it is commonly understood that the President may remove a commissioner [of the SEC] only for 'inefficiency, neglect of duty or malfeasance in office.'" *Id.* Revealingly, the quoted language is not found in the statutes organizing the SEC; rather, the panel seems to refer to a sort of standardized notional for-cause provision, offered in a party's brief, to make concrete the "commonly understood" unwritten norm against at-will discharge of the SEC Commissioners. The only legally respectable understanding of such a decision is that the court was reading into the relevant statutes a convention of agency independence widely shared in the relevant legal communities.

225. A separate question is whether this move is justifiable in originalist terms. In 1934, when the Securities Exchange Act established the SEC, the prevailing constitutional rule of *Myers* held that no officers exercising executive power could constitutionally be given for-cause tenure. *Myers v. United States*, 272 U.S. 52, 134–35 (1926); see also *supra* notes 161–163 and accompanying text (discussing *Myers*). On one view, this implies that Congress could not have intended to make the SEC independent. The opposite possibility, however, is that Congress wanted to make the SEC independent but was constitutionally constrained from doing so, and thus would not have objected to the growth and eventual recognition by judges of a convention accomplishing the same end.

Whatever the best understanding of the (original or counterfactual) legislative understandings and intentions, I believe the *PCAOB* Court's recognition of a background convention of SEC independence was not premised on such grounds. Rather, it is best understood as premised on a "dynamic" view of statutory interpretation that affords the judiciary scope to read statutes in light of subsequent developments among actors in the relevant domain—including agency officials, legislators, judges, and regulated parties. See William N. Eskridge, Jr., *Dynamic Statutory Interpretation* 9 (1994) (arguing "meaning of a statute is not fixed until it is applied to concrete circumstances, and it is neither

The *PCAOB* decision makes more sense in this light. We have seen the force of the convention of SEC independence in the political episode described in Part III, in which John McCain suffered political damage in the 2008 presidential election for speaking cavalierly about firing the SEC Chair,²²⁶ and it seems unlikely that the *PCAOB* Justices were oblivious to the convention. By implicitly recognizing it, they merely acknowledged a special sort of fact: the existence of a normatively freighted practice of SEC independence, amounting to a convention on which all relevant actors, including citizens, legislators, parties, and lower court judges, had premised their behavior.

Because the relevant conventions were a special sort of fact, it made sense to allow the parties to stipulate to them, even if parties may not stipulate to the law. In other cases, of course, parties may dispute the existence and nature of conventions, and a controverted evidentiary question will arise. But this sort of evidentiary question is one with which courts are entirely familiar, and it poses no special problems. In a number of settings, ranging from commercial law to international law to constitutional law, both federal and state courts attempt to discern the existence and nature of normatively freighted practices—variously called conventions or customs.²²⁷ The relevant questions in administrative law are no different.

A conventionalist lens also makes most sense of two well-known cases from the D.C. Circuit that assumed or recognized, in dictum, that the heads of the Federal Election Commission (FEC) and of the National Credit Union Administration (NCUA) have for-cause tenure, even though the relevant statutes do not expressly grant for-cause tenure and

uncommon nor illegitimate for the meaning of a provision to change over time”). In that sense, the crucial premise of the *PCAOB* decision is reminiscent of the interpretive views of Justice Stevens, who argued that securities statutes and regulatory statutes should generally be read in light of postenactment developments in the legal system. See, e.g., *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 192–201 (1994) (Stevens, J., dissenting) (concluding “[o]ne need not agree as an original matter with the many decisions recognizing the private right against aiders and abettors [for Rule 10b-5 violations] to concede that the right fits comfortably within the statutory scheme, and that it has become a part of the established system of private enforcement”).

I am here attempting to put *PCAOB* in its best possible light, without necessarily endorsing its approach. Compare Eskridge, *supra*, with Adrian Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* 5 (2006) (advocating formalist interpretive approach on consequentialist grounds).

226. See *supra* Part III.A.1.

227. For an overview, see generally Bederman, *supra* note 1. The general rule in Commonwealth legal systems—modified by statute in some jurisdictions—is that the existence of custom is a matter of fact, which may become the subject of judicial notice if it is sufficiently “notorious.” See *id.* at 60–61; cf. U.C.C. § 1-303(c) (2011) (providing “existence and scope of [trade] usage must be proved as facts”).

the agencies have nonadjudicatory functions.²²⁸ Despite being widely cited, these decisions are legally dubious if cited as direct authority for implied for-cause tenure in nonadjudicatory contexts. Neither case offers a sustained analysis of the Supreme Court precedents, discussed earlier, that require a clear legislative statement in order to create for-cause tenure;²²⁹ rather the decisions offer all-things-considered interpretive analysis, without a real presumption in favor of at-will tenure. In the NCUA case, for example, the court merely concluded that “the evidence is sufficiently ambiguous as not to permit us to discount the possibility that Congress did intend at least term protection”²³⁰—a facially inadequate showing even under *Humphrey’s Executor*, let alone *Parsons* and *Shurtleff*. To be clear, the court had no direct need to decide whether the members of the NCUA board did ultimately enjoy for-cause tenure—the issue in the case involved the tenure of holdover members with expired terms, a distinct problem—but this merely underscores that the decision was purely dictum. Given that the interpretive approach of these decisions stands in patent tension with the default rules established in earlier Supreme Court precedents, one suspects that the current Roberts Court might well simply reject the decisions out of hand; this Court holds a markedly more expansive view of presidential removal power, as the *PCAOB* decision indicates.²³¹

A better justification for reading tenure protection into the relevant statutes would sound in conventionalist terms; it would recognize such protection on the ground that as to both agencies there is a widespread expectation of independence, backed by a sense of obligation, that forms the background for the operation of the statutory regimes. It is significant in this regard that the first decision in this line relied upon the Tenth Circuit decision in *Blinder* to justify its dictum on the FEC Commissioners’ for-cause protection.²³² This suggests that the *Blinder* decision—now implicitly endorsed by the *PCAOB* decision—pioneered a mode of conventionalist analysis that has become widespread and that influences outcomes beyond the particular setting of the SEC. The circuit courts that have issued these decisions in essence recognize, and incorporate into their decisions, unwritten norms of independence that have arisen outside the courtroom.

228. *Swan v. Clinton*, 100 F.3d 973, 981–83 (D.C. Cir. 1996) (dictum) (assuming “arguendo that [NCUA] Board members have removal protection during their appointed terms”); *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 826 (D.C. Cir. 1993) (dictum) (suggesting FEC “is likely correct” that “the President can remove the commissioners only for good cause”).

229. See *supra* Part I.A.

230. *Swan*, 100 F.3d at 983.

231. See *supra* notes 49–50 and accompanying text (discussing dictum in *PCAOB*).

232. See *NRA Political Victory Fund*, 6 F.3d at 826 (citing *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir. 1988)).

It is an open question, of course, whether any or all of these decisions are correct on the merits. The relevant courts may have mistakenly discerned a convention that does not exist. Moreover, the “commonly understood” test is strictly speaking too permissive as an analytic matter, because it does not—at least on its face—include the crucial *opinio juris* component. A convention should rest not merely on a common understanding, but on a common understanding backed by a sense of obligation.²³³ In operation, however, the relevant courts seemingly mean to incorporate such an element; they appear to suggest that a decision to fire the SEC Commissioners, or the FEC Commissioners, and perhaps even the NCUA board members, would be widely thought to violate the unwritten rules of the political game.

This analysis helps to clarify the distinction between permissible judicial recognition of conventions, as context for the interpretation of legal rules, and impermissible direct enforcement of conventions by the judiciary. Suppose that (1) some relevant statute, rightly interpreted, gives the President the power to discharge an agency official at will; (2) an extrajudicial convention of independence and tenure protection has grown up around the agency; (3) the President violates the convention by removing the agency official; and (4) the agency official sues to prevent or remedy the discharge. In this posture, courts will not directly enforce the convention, and will instead respect the legal power of the President to remove the official. The convention must be enforced, if at all, by extrajudicial mechanisms, such as retaliation by Congress or other actors, or blaming, shaming, and electoral sanctions by the political public.²³⁴ However, as in the *PCOAB* case, the court may recognize the convention indirectly, in a different procedural posture or in the course of interpreting relevant statutes, and such recognition may have a focal-point effect that clarifies the existence of the convention and thus makes political sanctions for a breach more likely.²³⁵

B. *Ex Parte* Contacts and the White House

The conventionalist approach also makes sense of another lower court decision that is legally puzzling, perhaps even indefensible, but that has become widely recognized as part of the basic fabric of administrative law. Here the question at issue is the scope of White House authority,

233. See *supra* notes 97–98 and accompanying text.

234. The suggestion, then, is definitely *not* that “courts must also enforce a convention that is enforced through political mechanisms.” Datla & Revesz, *supra* note 13 (manuscript at 60 n.314). The Commonwealth distinction between recognition and enforcement is designed to obviate exactly that problem, while allowing courts to construe statutes sensibly in light of the broader landscape of conventions.

235. See *supra* note 125 and accompanying text (arguing judicial recognition of conventions may serve as focal point for sanction of their breach).

under the APA, to initiate informal ex parte contacts with agencies engaged in formal proceedings. The leading decision—the 1993 Ninth Circuit opinion in *Portland Audubon Society v. Endangered Species Committee*—holds that the President and White House staff are subject to the APA’s prohibition on ex parte contacts in formal adjudication.²³⁶ Although standard interpretive default rules make the decision highly questionable, a conventionalist lens puts it in the best possible light.

The Endangered Species Committee, known as the “God Squad,” granted an exemption from the requirements of the Endangered Species Act to the Bureau of Land Management, which wanted to conduct timber sales in Oregon.²³⁷ Environmental groups complained that the Committee’s decision—which counted as adjudication within the terms of the APA—had been improperly influenced by ex parte contacts between the Committee and White House officials in the George H.W. Bush Administration.²³⁸ The relevant provision of the APA says that “no interested person outside the agency shall make” any ex parte communication to the agency that bears on a pending formal adjudication (or rulemaking).²³⁹ The panel decided that the Endangered Species Act required formal, on-the-record adjudication after a public hearing and thus triggered the applicability of the ex parte contact prohibition.²⁴⁰

The crucial legal issue, then, was whether the President and White House staff should count as “interested persons” for purposes of that prohibition. In similar contexts, where general nonspecific statutory language is claimed to cover the President and his immediate agents, the Supreme Court has been extremely reluctant to find such coverage, in view of the resulting constitutional questions about executive power. Indeed, the year before *Portland Audubon* was decided, the Court had held in *Franklin v. Massachusetts* that the APA’s definition of an “agency” does not include the President.²⁴¹ That definition sweeps in “each authority of the Government of the United States,” and carefully excludes Congress, the courts, and other actors in express terms,²⁴² but pointedly fails to exclude the President; in other words, the language and structure of the definition suggest, both directly and by negative implication, that the President counts as an “agency.” The Court would have none of it, however, stating that “[o]ut of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the

236. 984 F.2d 1534, 1539–48 (9th Cir. 1993).

237. *Id.* at 1536.

238. *Id.* at 1538.

239. 5 U.S.C. § 557(d)(1)(A) (2006).

240. *Portland Audubon*, 984 F.2d at 1541.

241. 505 U.S. 788, 800–01 (1992).

242. 5 U.S.C. §§ 551(1), 701(b)(1).

APA.”²⁴³ That was somewhat tendentious, given that the APA’s definition was arguably not “silent” at all, but this merely underscores the strength of the clear statement rule the Court created: Absent very specific language, APA provisions do not encompass the President.²⁴⁴

So the Ninth Circuit panel might have written a straightforward opinion, following *Franklin* and holding that the President and White House are not subject to the APA’s ex parte contact prohibition, whose general application to “all interested persons” seems no more specific than the language at issue in *Franklin*.²⁴⁵ Instead the panel held the opposite. It first observed that “the [Endangered Species] Committee is, in effect, an administrative court,” and invoked a principle—whose source was left mysterious—that “[e]x parte contacts are antithetical to the very concept of an administrative court reaching impartial decisions through formal adjudication.”²⁴⁶ Turning to the separation of powers problems, the panel insisted that “[i]t is a fundamental precept of administrative law that an [sic] when an agency performs a quasi-judicial (or a quasi-legislative) function its independence must be protected. There is no presidential prerogative to influence quasi-judicial administrative agency proceedings through behind-the-scenes lobbying.”²⁴⁷ Finally, in response to *Franklin*, the panel claimed that its holding “works no innovation comparable to” holding the President covered by the APA’s definition of an “agency,” because “the general principle that the President may not interfere with quasi-adjudicatory agency actions is well settled.”²⁴⁸

It should be apparent that *Portland Audubon* is dubious in the extreme, at least so far as written law and judicially established interpretive default rules go. The Court had established, in *Franklin*, a strong

243. *Franklin*, 505 U.S. at 800–01. The Court confirmed this default rule in another opinion decided the year after *Portland Audubon*. *Dalton v. Specter*, 511 U.S. 462, 476 (1994).

244. Cf. *Sierra Club v. Costle*, 657 F.2d 298, 407 (D.C. Cir. 1981) (“Where the President himself is directly involved in oral communications with Executive Branch officials, Article II considerations—combined with the strictures of *Vermont Yankee*—require that courts tread with extraordinary caution in mandating disclosure beyond that already required by statute.”).

245. The *Portland Audubon* court offered an unconvincing distinction of *Franklin*, pointing out that *Franklin* addressed the question whether the President is an “agency” for purposes of the APA’s judicial review provisions, rather than the question whether the President is an “interested person” for purposes of the APA’s ban on ex parte communications in formal proceedings. *Portland Audubon*, 984 F.2d at 1547. The Court’s strong default rule, however, applies equally to both situations. See Michael A. Bosh, Note, The “God Squad” Proves Mortal: Ex Parte Contacts and the White House After *Portland Audubon Society*, 51 Wash. & Lee L. Rev. 1029, 1067–68 (1994) (criticizing *Portland Audubon*’s treatment of *Franklin*).

246. *Portland Audubon*, 984 F.2d. at 1543.

247. *Id.* at 1546.

248. *Id.* at 1547.

clear statement rule to define the relationship between the President and general provisions of the APA; the Ninth Circuit panel overrode or perhaps set aside that clear statement rule on the basis of “fundamental precept[s]” whose source and pedigree were unclear, to say the least.²⁴⁹ Where do such precepts come from, and why might they control the interpretation of the APA? On this point, the panel offered little but conclusory assertions.

The panel did point to the dictum from *Myers*, discussed previously, which suggests that “there may be duties of a quasi-judicial character imposed on executive officers . . . the discharge of which the President can not in a particular case properly influence or control.”²⁵⁰ Yet that dictum is deeply ambiguous; it is subject to at least two other readings, under which it would provide no support for the panel’s opinion. First, the *Myers* dictum might be read to imply only that Congress has the *constitutional* power to legislate so as to immunize quasi-judicial executive tribunals from presidential influence or control. If so, then the statutory question would be *whether* Congress had done so through the general *ex parte* prohibitions of the APA. And the answer—given *Franklin*’s clear statement rule for interpreting general APA provisions claimed to cover the President—would be no.

Second, even if the *Myers* dictum is taken to establish an interpretive default rule for statutes, it might be argued—by analogy to Justice Kagan’s views—that the scope of such a rule would be confined to adjudicating agencies whose heads enjoy for-cause tenure protection and are in that sense independent. The *Myers* dictum as to presidential influence over administrative adjudication, on that view, would simply not apply to strictly executive branch entities like the Endangered Species Committee.

Finally, *Franklin*’s clear statement rule was necessary to the decision, in contrast to *Myers*’s dictum. Indeed, the *Franklin* rule is not only a holding, but a later holding; under ordinary principles for interpreting precedents *Franklin* would supersede *Myers* on this point, even if there is a clear conflict between them. Overall, the *Myers* dictum is, by itself, too weak a reed on which to lean in the face of recent, pointed, and clear Supreme Court precedent squarely inconsistent with the panel’s opinion.

Portland Audubon thus seems legally dubious, perhaps even indefensible. It appears in a better light, however, when unwritten conventions of independence are brought into the picture. The panel’s mysterious appeals to “fundamental precept[s]” and “well settled” principles²⁵¹ are best understood to point, implicitly, to a set of conventions that had

249. *Id.* at 1546.

250. *Id.* at 1547 (quoting *Myers v. United States*, 272 U.S. 52, 135 (1926)); see also *supra* notes 161–163 and accompanying text (discussing *Myers*).

251. *Portland Audubon*, 984 F.2d at 1546, 1547.

grown up within the administrative state across many administrations of both parties and in a diverse range of settings. These conventions do not originate in particular instruments of written law, which is why the panel could not cite, at least in a persuasive way, any particular statutory texts or judicial decisions that unambiguously supported its holding. Yet these conventions are part of the normative landscape for any well-socialized administrative lawyer.

It is simply not done for the President to tell the Federal Aviation Administration (FAA) whether to revoke a particular pilot's license after a hearing on the record, even though the FAA is an executive branch agency within the Department of Transportation; it is simply not done for the White House to direct the EPA to apply or not to apply sanctions to a particular firm alleged to have polluted, after a hearing on the record. And if the President or the White House did do those things, they would be widely thought, in the community of regulators and regulated, and among relevant political actors in Congress and elsewhere, to have violated the unwritten rules of the game, despite the absence of any clear legal text forbidding the practice. The panel's otherwise mysterious references to "fundamental precepts" that could not be pinned down to any particular legal texts plausibly point to general understandings, in the relevant political, legal, and regulatory communities, about the limits of presidential direction. Such understandings are backed by a thick sense of normative obligation as well as the anticipated outrage of other actors, and the concomitant threat of political retaliation by such actors.

Portland Audubon, then, is best understood as "recognizing"—in the Commonwealth theorists' sense—extant conventions that constrain presidential intervention in formal administrative adjudication, and as incorporating those conventions into the interpretation of the APA. On this view, it is easier to reconcile *Portland Audubon* with *Franklin*. The latter case involved the decennial census, requiring a presidential determination of the number of federal representatives each state would receive, in turn based on particular methods of enumerating or counting the relevant populations;²⁵² no relevant conventions, involving administrative quasi-judicial decisionmaking or otherwise, entered the picture to compete with the separation of powers considerations that militated against reading the APA to make the President's actions reviewable. In *Portland Audubon*, by contrast, the presence of a strong convention had to be reconciled with the interpretive default rule set in *Franklin*; the panel can be understood as holding, implicitly, that the best way to reconcile the competing norms was the hoary maxim that the more specific norm controls the more general one. In other words, although the *Franklin* default rule would generally govern the relationship between the APA

252. *Franklin v. Massachusetts*, 505 U.S. 788, 790–91 (1992).

and the President, the more specific convention would govern as to formal adjudication.

Sometimes, background principles of “due process” are invoked to ground the sort of argument made in *Portland Audubon*.²⁵³ Such vague background principles are themselves best understood as conventions that judges recognize and incorporate into the interpretation of written laws, such as the APA, so to that extent the argument is consistent with the account offered here. Absent such an account, however, it seems implausible that due process strictly understood, as a judicially enforceable constitutional obligation, has anything to say about the issues in *Portland Audubon*. Due process requires a neutral adjudicator, but the whole issue in such cases is *who* the adjudicator should be taken to be—the agency alone, or instead the agency acting under the direction of the President. After all, the agency is exercising executive power in the Article II sense even when it adjudicates. It begs the question to assume that the President’s attempt to direct the adjudication compromises the adjudicative decision at the behest of an “interested person” external to the proceeding; the competing view is that the President is just the paramount decisionmaker *within* the proceeding. Moreover, Congress did not add the relevant prohibition on ex parte communications in formal proceedings to the APA until 1976;²⁵⁴ the odd implication of the due process argument would be that the APA was unconstitutional for the first thirty years of its existence insofar as it allowed such contacts where due process would forbid them. Finally, the Ninth Circuit panel never suggested that absent the APA, constitutional due process would of its own force require a prohibition on presidential communications with formal agency adjudicators. The due process argument, in other words, is implausible if read as an appeal to the judicially enforceable law of due process in the strict sense; whatever power it enjoys stems from its implicit appeal to conventions that have grown up in the interstices of the administrative state.

A doctrinal implication of this account is that it is a separate question whether the APA’s ex parte contact prohibition for formal rule-making should also be held to apply to the White House. The question would be whether there is, within the relevant regulatory communities,

253. In an analogous context, the D.C. Circuit has observed that there may be instances where the docketing [placing on the record] of conversations between the President or his staff and other Executive Branch officers or rulemakers may be necessary to ensure due process. This may be true, for example, where such conversations directly concern the outcome of adjudications or quasi-adjudicatory proceedings; there is no inherent executive power to control the rights of individuals in such settings.

Sierra Club v. Costle, 657 F.2d 298, 406–07 (D.C. Cir. 1981).

254. Government in the Sunshine Act, Pub. L. No. 94-409, § 4, 90 Stat. 1241, 1246 (1976) (codified at 5 U.S.C. § 557(d) (2006)).

an extant, robust convention barring such contacts in formal rule-making. Whatever the answer to that question, the issue cannot be resolved strictly by reference to the text of the APA, which treats all formal proceedings—adjudications and rulemakings—identically so far as the prohibition on ex parte contacts is concerned.²⁵⁵ Rather, the issue is more localized, turning on whether there are specific conventions about formal rulemaking that parallel the conventions about formal adjudication.

C. “*Background Principles*” as Conventions

Finally, the conventionalist approach supplies a way to make sense of the many cases that employ clear statement rules of statutory interpretation based on quasi-constitutional “background principles” or “background norms.”²⁵⁶ The central puzzle of clear statement rules premised on background principles and norms is that such rules can be triggered even when courts refuse to enforce the background principles as a matter of substantive constitutional law. Courts, that is, sometimes invoke such principles when reading statutes, but will not directly enforce them as constitutional law if statutes are otherwise clear. Read through the lens of convention, such decisions are less arbitrary and more plausible than they otherwise appear. The Commonwealth distinction between recognition and enforcement of conventions supplies a natural justification for this pattern.

Judges and commentators appeal to “background principles” (or “norms” or “values”) to support quasi-constitutional clear statement rules, under which courts will interpret statutes not to raise serious constitutional questions unless Congress has spoken clearly. Yet in a range of critical cases, these principles will not be directly enforced as a constitutional matter if Congress has indeed spoken clearly. Examples include principles of constitutional federalism,²⁵⁷ the nondelegation doctrine,²⁵⁸

255. 5 U.S.C. § 557(d).

256. See William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 *Vand. L. Rev.* 593, 597 (1992) (describing clear statement rules as “quasi-constitutional law”); John F. Manning, *Clear Statement Rules and the Constitution*, 110 *Colum. L. Rev.* 399, 404 (2010) [hereinafter Manning, *Clear Statement Rules*] (arguing “constitutionally inspired clear statement rules . . . seek to enforce constitutional values in the abstract, standing apart from the constitutional provisions from which they are derived”); John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 *Harv. L. Rev.* 2003, 2037 (2009) [hereinafter Manning, *Federalism and Generality*] (observing recent federalism cases “abstract from . . . structural clauses in the Constitution to a more general background purpose to adopt a judicially enforceable system of federalism”).

257. Compare *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985) (refusing to enforce constitutional restrictions on federal regulation of traditional state functions), with *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991) (invoking clear statement rules based on federalism to narrow scope of federal statute).

and principles of free exercise of religion.²⁵⁹ Thus one commentator describes such principles as “resistance norms,”²⁶⁰ and this captures a widespread view: Courts may properly use background constitutional principles to construe ambiguities or to narrow the scope of legislation, even where those principles do not directly support constitutional invalidation of statutes.

But this approach raises serious puzzles.²⁶¹ If the background principle or norm does not support direct constitutional review, by what warrant does the court invoke the principle to “resist” the interpretation of the statute that would otherwise be appropriate? Clear statement rules or resistance norms make a difference only when they cause the court to choose an interpretation that differs from the otherwise preferred interpretation—from the interpretation that the relevant legal materials, all things considered, would otherwise suggest.²⁶² Where that is so, background principles or norms are being used to shape statutes even though the same principles or norms have no direct constitutional force.

I suggest that in at least some such cases, “background principles” or “resistance norms” are being used to incorporate by reference unwritten conventions. Such conventions may be recognized by courts in the course of interpretation, but may not be directly enforced as free-

258. Compare *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (invoking nondelegation principles to construe delegation of authority to federal agencies narrowly), and *Indus. Union Dep’t, AFL-CIO v. Am. Petrol. Inst.*, 448 U.S. 607, 646 (1980) (same), with *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (rejecting constitutional nondelegation challenge to regulatory authority).

259. Compare *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 507 (1979) (applying clear statement principle based on free exercise to bar government regulation of lay employees at religious schools), with *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 303–05 (1985) (dismissing free exercise challenge to government regulation of lay employees at religious foundation).

260. Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 *Tex. L. Rev.* 1549, 1552 (2000) (defining resistance norms as constitutional principles “that may be more or less yielding . . . depending on the strength of the government’s interest, the degree of institutional support for the challenged action, or the clarity of purpose that the legislature has expressed”).

261. For criticism of interpretations that draw upon background quasi-constitutional principles, see, e.g., Eskridge & Frickey, *supra* note 256, at 632–45 (criticizing Supreme Court’s application of these principles as theoretically incoherent, countermajoritarian, and normatively indefensible); Manning, *Clear Statement Rules*, *supra* note 256, at 404–05 (arguing enforcing background constitutional values tends to upset compromises embodied in constitutional text or, alternatively, contradict premises of constitutional doctrine); Manning, *Federalism and Generality*, *supra* note 256, at 2008 (“When judges enforce freestanding ‘federalism,’ they ignore the . . . bargains and tradeoffs that made their way into the [Constitution].”).

262. See Frederick Schauer, *Ashwander Revisited*, 1995 *Sup. Ct. Rev.* 71, 89 (“*Ashwander* avoidance is only important in those cases in which the result is different from what the result would have been by application of a judge’s or court’s preconstitutional views about how a statute should be interpreted.”).

standing rules that would trump clear statutes or executive action clearly authorized by statute.²⁶³ Conventions of “due process” in its extended sense, for example, may be invoked as aids when interpreting statutes enacted against the backdrop of such conventions; I have suggested that *Portland Audubon* is best understood as a case of this sort, in which the court interpreted the APA in light of a convention that has, over time, come to regulate the relationship between the White House and the agencies where formal adjudication is concerned.²⁶⁴

Yet such conventions of due process could not be directly enforced in a freestanding way. If, for example, Congress were to amend the APA to expressly exempt the President and his aides from the ex parte contact prohibition, judges would surely refuse to enforce the relevant extrajudicial convention on constitutional grounds. Likewise, although the convention of SEC independence may be recognized as a premise for statutory interpretation in cases like *PCAOB*, were Congress to amend the Securities Exchange Act of 1934 to clearly provide that the Commissioners serve at the President’s pleasure, courts would not directly enforce the convention to override the legal enactment. So background principles and resistance norms are best understood as resting on conventions that courts may recognize when interpreting duly enacted statutes, but may not directly enforce as a legal matter in order to invalidate statutes that are clearly contrary.²⁶⁵

This account, linking clear statement rules and resistance norms to the theory of conventions, helps to clarify the constraints on judicial identification of such norms. One of the critics’ major concerns about such an approach is that it licenses judicial subjectivity in the identification of clear statement principles. After all, the argument runs, if judges can (by hypothesis) invoke such norms when constitutional rules do not directly apply of their own force, there are no constraints on judges’ ability to enforce whatever “principles” or “values” they think

263. For a different (not necessarily incompatible) response, see Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 *Yale L.J.* 2, 5–6 (2008) (arguing for judicial doctrine raising “enactment costs” of policies that trench on constitutional values in order to test “strength of the government’s interest in the challenged policy more effectively than under a direct judicial balancing test”).

264. See *supra* Part IV.B.

265. In any given setting, there might, of course, be a separate convention forbidding Congress from exercising its legal powers in this way, or requiring Congress to create an independent agency. As discussed earlier, there is such a constitutional convention requiring Congress to create and maintain an independent central bank. See *supra* text accompanying note 62. Yet the existence or nonexistence of a convention at the constitutional level is immaterial to the point about the use of conventions as interpretive aids at the statutory level.

best.²⁶⁶ The theory of convention, however, offers such constraints. In order to invoke “background principles,” the judge would have to show as a matter of fact that a convention actually exists,²⁶⁷ which in turn requires the usual twofold showing: There must be, in the relevant domain, (1) a regular pattern of behavior (2) followed from a sense of obligation.²⁶⁸ Absent such a showing, there is no convention and no basis for recognizing any background principles in the course of interpreting statutes.

In many cases, of course, there will be controversies over the existence, scope, and weight of conventions, and evidence will be ambiguous or costly to acquire. But Commonwealth nations have predicated well-functioning political and legal systems on the premise that conventions are sufficiently determinate to provide adequate guidance for political and legal actors, so the difficulties need not be insuperable. And at least the lens of convention gives the inquiry an intelligible structure, something the vague appeal to background principles and resistance norms has so far failed to supply.

CONCLUSION

Between “politics” on the one hand and formal written law on the other lies a third category of unwritten rules of the game, or conventions. Constitutional lawyers have recently rediscovered the role of conventions in the U.S. constitutional order (a rediscovery that seems to happen every other generation or so), but administrative lawyers have lagged behind. I believe that the lens of convention is useful for understanding agency independence in the American administrative state, allowing us to make sense of phenomena that from a formal legal point of view must remain mysterious.

Among those phenomena are the independence of administrative agencies, in which the official legal test of for-cause tenure does not map at all well onto the operating rules of independence in the administrative state; presidential directive power, which is shaped and constrained by conventions governing formal agency adjudication; the selection of OIRA Administrators, the relationship between OIRA and the independent agencies, and the partial independence of executive branch lawyers; and the puzzling invocation of quasi-constitutional background principles and resistance norms as principles of statutory interpretation,

266. See Manning, *Clear Statement Rules*, *supra* note 256, at 432–39 (“Those who framed the Constitution implemented values in concrete ways and applied them in particular contexts. Separating those values from their implemental means disregards the terms and conditions upon which their adopters embraced them.”).

267. See Marshall, *supra* note 91, at 17 (noting “the law will treat the existence of a convention as simply a question of fact”).

268. See *supra* notes 97–98 and accompanying text.

even where courts decline to directly enforce constitutional restrictions. In all these cases, the theory of conventions, and the distinction between enforcement and recognition of conventions, helps both to explain the behavior of political and legal actors and to present the resulting legal doctrine and administrative rules in their best light.

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