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ON DOLLARS AND DEFERENCE: AGENCIES, SPENDING, AND ECONOMIC RIGHTS

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ABSTRACT

Agencies can change society not just by prescribing conduct, but also by spending money. The Obama administration gave us two powerful examples of this phenomenon. To secure widespread access to affordable health insurance and affordable higher education, the administration took actions that were not required *by statutory text. These entitlements are built upon a scaffolding of aggressive agency statutory interpretations, not upon clear legislative commands.*

This Article uses these two examples as case studies for evaluating the institutional competence of the executive branch to underwrite large-scale positive economic entitlements on the basis of ambiguous statutory authority. Such agency-initiated schemes may help improve the economic wellbeing and enhance the economic opportunity of

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millions of Americans. But, as these case studies reflect, the risks of such agency action are considerable. First, when the executive branch gives money away, Article III standing requirements will weaken the check of judicial review on administrative action. Second, agency creation of schemes for protecting economic entitlements may result in political and even legal entrenchment that could complicate or obstruct future lawmakers' ability to undo those agency decisions. Third, the initiation of broad-scale government spending programs entails society-wide redistributive trade-offs that neither individual agencies, nor the executive branch as a whole, can properly make. In sum, this form of executive-branch action may advance important interests—interests in health, education, and economic equality and opportunity. But it may also corrode values that are at least equally important—most notably, the power of Congress to control the current and future financial obligations of the United States.

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INTRODUCTION

A long line of constitutional law scholars has pressed the case that the Constitution protects judicially enforceable economic rights, such as the rights to education, health care, and welfare.[1] Other scholars

1. *See generally, e.g.*, CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER (2004) (arguing for reforms that would vindicate social and economic rights); Susan Bitensky, *Theoretical Foundations for a Right to Education under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550 (1992) (arguing for the recognition of education as an affirmative right); Erwin Chemerinsky, *Making the Case for a Constitutional Right to Minimum Entitlements*, 44 MERCER L. REV. 525 (1993) (advocating for a constitutional right to minimal entitlements); Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92 (2013) (arguing that there is a federal constitutional right to education); Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the*

have sharply criticized the idea that courts should treat the Constitution as conferring substantive guarantees to economic goods.[2] All participants in this debate generally agree, however, that "the political branches"—that is, Congress and the executive branch—can together create and protect entitlements to economic goods via statutory lawmaking without generating the separation-of-powers or institutional-choice worries of the kind that would be provoked if courts undertook this task. Professor Frank Cross, for example, while arguing that the judiciary should not create positive rights through constitutional law, called "[t]he notion of positive *statutory* rights . . . utterly unexceptionable."[3]

At the federal level, American law has largely heeded the concerns of the critics, and has left the creation of economic rights to the political branches.[4] Over the last century, Congress has created myriad "utterly unexceptionable" legislative schemes to shield economic rights, among them Social Security, Medicare, and Medicaid, and has enlisted myriad federal agencies to carry out these schemes.[5]

Poor Through the Fourteenth Amendment, 83 HARV. L. REV. 7 (1969) (arguing that economic inequality is not in itself unconstitutional, but that the courts should intervene to protect the poor from the hazards that accompany economic inequality); Edward Rubin, *The Affordable Care Act, the Constitutional Meaning of Statutes, and the Emerging Doctrine of Positive Constitutional Rights*, 53 WM. & MARY L. REV. 1639, 1688 & n.241 (2012) (collecting nearly a dozen examples of literature arguing in favor of recognition of positive constitutional rights). *Cf.* Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. Rev. 669, 695–96 (2014) ("Extreme concentrations of economic and political power undermine equal citizenship and equal opportunity."); Jon D. Michaels, Note, *To Promote the General Welfare: The Republican Imperative to Enhance Citizenship Welfare Rights*, 111 YALE L.J. 1457, 1459 (2002) (arguing that "welfare rights should be protected as citizenship rights").

2. *See, e.g.*, Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 900 (2001); *see also* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1133–35, 1155, 1175–83 (1999) (reviewing barriers to judicial enforcement of welfare rights).

3. Cross, *supra* note 2, at 861 (emphasis added). Cross notes that "[t]here is an indisputable statutory right to receive payments under the Earned Income Tax Credit, for example, assuming one meets the statutory conditions and at least until its statutory authority is revoked," and that "proponents of positive rights argue for something more[:] a right of constitutional magnitude that compels the legislature to create and implement programs such as the Earned Income Tax Credit." *Id.*

4. *See* Daryl Levinson, *The Supreme Court, 2015 Term—Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 133 (2016) (noting that courts have "shunn[ed] the possibility of casting rights as positive, redistributive claims to social and economic goods"); Michaels, *supra* note 1, at 1472–78 (tracing case law that dealt the "deathblow" to the "welfare-as-property movement"); *cf.* Hershkoff, *supra* note 2, *passim* (discussing counterexamples from state constitutional law concerning economic rights).

5. The Internal Revenue Service (IRS) today plays an increasingly important role. Kristin E. Hickman, *The (Perhaps) Unintended Consequences of* King v. Burwell, 2015 PEPP. L. REV. 56,

Meanwhile, although the federal courts have imposed *procedural* due process protections on such rights,[6] they have stayed away from articulating *substantive* protections for them[7]—to the deep dissatisfaction of some and the certain relief of others.

But the political branches do not always speak with one voice. In the arena of health insurance, agencies under the Obama administration took important steps—steps that arguably exceeded statutory authority—to spend money to keep premiums low and plans affordable in the years following the enactment of the Patient Protection and Affordable Care Act (ACA).[8] In the arena of higher education, agencies under the Obama administration took steps—again, steps arguably in excess of statutory authority—to ease the burden of debt borne by recipients of federal loans for higher education.[9] Through these efforts, the executive branch helped to secure rights[10] that are both *vertical*—in that they are funded by the government[11]—and *economic*—in that they deliver goods that are fungible with direct cash transfers.[12] In a nutshell, the executive branch

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68–69 ("[T]he IRS is now one of the government's principal welfare agencies, on par with the Department of Health and Human Services and the Social Security Administration.").

6. *See* Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973, 1973 (1996) (noting that between 1970 and 1972, "the Court expanded dramatically the scope of the interests that are protected by procedural due process and the procedural safeguards that apply to those interests"); Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1207 (1982) ("A statute creates a constitutionally protected 'property' entitlement if it limits the discretion of administrative officials so as to mandate the provision of a benefit to those meeting specified terms.").

7. Flemming v. Nestor, 363 U.S. 603, 611 (1960) ("We must conclude that a person covered by the Act has not such a right in benefit payments as would make every defeasance of 'accrued' interests violative of the Due Process Clause of the Fifth Amendment.").

8. *See infra* Part I.A.

9. *See infra* Part I.B.

10. I use the term "right" in a pragmatic and shallow sense, to mean "a legal entitlement," regardless of whether that entitlement is grounded in nonconstitutional positive law (statute or regulation) or in constitutional law. *See* SUNSTEIN, *supra* note 1, at 203 (treating, for definitional purposes, rights as "instruments for protecting important human interests" while bracketing foundational or theoretical questions about the origins of rights) (emphasis omitted)).

11. Borrowing from Professor Stephen Gardbaum, I use the term "vertical" to denote rights that are either provided in kind by the government or supported by subsidies from the government. Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387, 388 (2003) (distinguishing constitutional rights that "regulate only the conduct of governmental actors in their dealings with private individuals (vertical)" from those that regulate "relations between private individuals (horizontal)").

12. I use the term "economic" to refer to rights to things that are either actually cash or could be substituted with a direct cash transfer—such as health care, education, or a minimum income—as opposed to civil and political rights, such as the right to free speech or the right to cast a vote, which are neither cash nor fungible with cash. To have a "right" to an economic good does not

committed to spending billions of government dollars so that millions of Americans could access affordable health insurance and affordable higher education.

These executive-branch actions were neither narrow nor nugatory. Rather, they were "broad-gauged" and systematic efforts to reform entire "*patterns* of distribution—of access, opportunity, and so on—affecting society as a whole."[13] These measures have furthered important, arguably fundamental, human interests—in health, education, financial security,[14] and economic opportunity[15]—that a venerable tradition of reformers have sought to secure for all Americans.[16] Courts *could* have conceivably attempted to protect these interests through constitutional adjudication, but they have not. Instead, in both instances, these interests received protection from the executive branch, not the judiciary or the legislature, and from the use of executive-branch tools—statutory interpretation in the service of agency spending decisions—rather than from constitutional judgments or clear legislative commands.

Such executive-branch-driven spending schemes are an understudied aspect of administrative law. Recent scholarship on mechanisms of agency self-funding,[17] agency control over monetary

entail that the government provide that good in kind to beneficiaries; instead, like the "right to a minimum wage," an economic right might be supported by restrictions on private parties. Alternatively, or in addition, it might be supported by subsidies to suppliers, as is the case with the "right to affordable housing" that has been promoted by various federal housing laws dating back to the New Deal. Obviously, not everyone uses the term "economic" in the same way. *See, e.g.*, Robin West, *A Tale of Two Rights*, 94 B.U. L. REV. 893, 895 & n.6 (2014) (calling "[t]he right to purchase health insurance at affordable costs" a "civil right" and stating that the ACA "rests squarely, if implicitly, on a civil right to health care").

13. Frank I. Michelman, *The Unbearable Lightness of Tea Leaves: Constitutional Political Economy in Court*, 94 TEX. L. REV. 101, 103 (2016) (noting that Forbath and Fishkin's proposed constitutional norm is "ultimately concerned not with particularized claims from discrete individuals or groups to preferred or advantageous treatment, but rather with broad-gauged *patterns* of distribution—of access, opportunity, and so on—affecting society as a whole").

14. Allison K. Hoffman, *Three Models of Health Insurance: The Conceptual Pluralism of the Patient Protection and Affordable Care Act*, 159 U. PA. L. REV. 1873, 1908–12 (2011) (describing how various provisions of the ACA promote insureds' financial security).

15. John R. Brooks, *Income-Driven Repayment and the Public Financing of Higher Education*, 104 GEO. L.J. 229, 232 (2016) [hereinafter Brooks, *Income-Driven Repayment*] ("The costs of higher education and the associated student-loan-debt burdens carried by former students are large drags on economic growth, social mobility, skills generation, and simply the well-being of vast numbers of past, current, and future students.").

16. SUNSTEIN, *supra* note 1, at 67–95, 115–26.

17. *See* Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1477–84 (2015); Michael Greve & Christopher C. DeMuth, Sr., *Agency Finance in the Age of Executive Government* 30–32 (George Mason U. L. & Econ.

settlements,[18] and delegations of the power to tax[19] has begun to explore the issues posed by agency control over inflows of money to the government. This vein of scholarship does not address the flip side of the coin: agencies' exercise of control over the power to spend government money. Prominent scholars have recognized that agencies will sometimes perform "interpretive jujitsu" to reshape prescriptive regulatory regimes to new problems such as climate change.[20] But the parallel fact of latitudinarian readings of transfer regimes—that is, schemes that authorize distributing funds[21]—has largely escaped attention. An influential body of political science scholarship models agencies as budget maximizers.[22] But that work treats all bureaucracies alike; it does not attend to the particular budget dynamics of an agency focused on the mission of distributing money or goods. An agency avidly accruing resources to spend on its own personnel and programs for regulation and enforcement is, however, quite different from an agency that seeks those resources in order to confer them upon others.

Series, Paper No. 16-25, 2016), http://ssrn.com/abstract=2798289 [https://perma.cc/6CAR-X97G]. *See generally* Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 HARV. L. REV. 1822 (2012) (analyzing the effects of budgetary control and self-funding in executive agencies).

18. *See* Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 854–913 (2014); Todd David Peterson, *Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice*, 2009 B.Y.U. L. REV. 327, 327–79; Greve & DeMuth, *supra* note 17, at 17–24.

19. *See generally* Daniel Hemel, *The President's Power to Tax*, 102 CORNELL L. REV. 633 (2017) (offering an account for why the executive branch may resist using available statutory and regulatory tools to increase revenues).

20. Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 21 (2014); *see also* Adam Cox & Cristina Rodriguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 187–94 (2015) (discussing immigration enforcement during the Obama administration).

21. *Cf.* Eric A. Posner, *Transfer Regulations and Cost-Effectiveness Analysis*, 53 DUKE L.J. 1067, 1076–77 (2003) (distinguishing statutory distributional schemes that have the purpose of "benefit[ing] a politically influential group" from those that have the purpose of "benefit[ing] poor people, people who suffer from discrimination, and people who have suffered a misfortune").

22. WILLIAM A. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 9, 37–38 (1971) (enumerating the utility functions of bureaucrats, including salary, perks, public reputation, power, patronage, output of the bureau, ease of making changes, and ease of managing the bureau). *See generally* Matthew Stephenson, *Statutory Interpretation by Agencies*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW (Daniel A. Farber & Anne Joseph Connell eds., 2010) (noting the problems with extreme versions but probable accuracy of more modest versions of budget-maximizing assumptions).

In the latter situation, the executive branch seeks not to fatten its own pocketbook, but to improve the financial straits of the citizenry.[23]

This is an area that calls for careful thought. Proponents of economic rights had the federal courthouse door slammed in their faces; they instead queued up at the doors of agencies. In two major recent instances, federal agencies opened their doors to admit such claims.[24] Future agencies may wish to do the same. President Donald Trump campaigned on a platform infused with rhetoric about economic rights, including the right to "a great education" and the right to "a secure job."[25] Though there may be divergences in how they conceive of those rights, Republican Presidents, not just Democratic ones, are interested in delivering economic goods, and—if Congress stands in their way—they may pull the levers of the federal administrative state to accomplish that goal.

Drawing on two examples from the Obama administration, this Article assesses the institutional competence of agencies to secure economic rights—here, access to affordable health insurance and affordable higher education—by exploiting the leeway afforded by ambiguous or unclear statutory text to underwrite these rights.[26] A

23. I do not mean to suggest that the executive branch will necessarily be driven by "charitable" motives in some Dickensian sense. Transferring economic resources to the less well-off may be equally compatible with shoring up a low-wage labor market (think, for example, of providing food stamps to Wal-Mart employees), with insulating the wealthy from political disruption, or with other counterintuitive patterns of incentives. Thanks to Professor Karen Tani for pointing this out.

24. It unfortunately lies beyond the scope of this Article to attempt to supply a historical account of past efforts by executive-branch agencies to secure vertical economic rights. For accounts of executive-branch spending, see generally LOUIS FISHER, PRESIDENTIAL SPENDING POWER (1975); LUCIUS WILMERDING, JR., THE SPENDING POWER: A HISTORY OF THE EFFORTS OF CONGRESS TO CONTROL EXPENDITURES (1943). More recently, Professor Zachary Price has written a fascinating account of interbranch struggles over appropriations and of modern-day implications for separation-of-powers disputes between Congress and the executive. *See* Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 VAND. L. REV. (forthcoming 2018) (manuscript at 10–18) (on file with the *Duke Law Journal*) (describing several examples that "illustrate how potent Congress's control over appropriations may be as a means of controlling the executive branch").

25. *See* Press Release, Trump Outlines New Civil Rights Agenda: A Safe Community, A Great Education, and a Secure Job (Sept. 3, 2016), https://www.donaldjtrump.com/press-releases/trump-outlines-new-civil-rights-a-safe-community-a-great-education-and-a-se [https://perma.cc/ZPM6-KUPX].

26. This Article's area of inquiry is bounded in three important ways. First, this Article does not address agency statutory interpretations that trigger non-governmental spending (for example, by imposing costs on firms or individuals), whether that spending operates horizontally (by causing transfers from private parties to other private parties) or vertically (for example, by causing net transfers from private parties to the federal government); its focus is on vertical,

threshold point here deserves emphasis. As they are conventionally understood, *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*[27] and its progeny do not impose any special rules upon this type of agency statutory interpretation. *Chevron* instructed, and *City of Arlington v. Federal Communications Commission*[28] recently affirmed, that all delegations deserve equal deference, as long as the delegation does not threaten to cross into some constitutional danger zone.[29] Because a delegation to spend money is well clear of any recognized danger zone,[30] it should in principle be treated just like any other delegation. And, indeed, when the Obama administration encountered challenges to agency actions that interpreted ambiguous statutory language to authorize spending money—billions of federal dollars—on securing access to affordable health insurance, it cited *Chevron*,[31] just as it would have in a case challenging its authority to promulgate a prescriptive regulation.

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economic measures that cause net transfers from the government to private individuals or entities. Second, this Article does not address administrative decisions that indirectly affect the government's overall financial position (for example, regulatory action that reduces economic activity and thereby incidentally reduces tax receipts); again, its focus is on decisions that directly transfer funds or subsidies to private recipients. Third, this Article picks out and addresses only situations where the executive branch's spending decisions have pushed at or arguably exceeded the bounds of its statutory authority, not situations where the executive branch is implementing a clear legislative command to spend; its focus is on the executive branch's competence to make broad-scale spending choices, not on congressional competence to make such choices.

27. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

28. City of Arlington v. FCC, 133 S. Ct. 1863 (2013).

29. *Id.* at 1874; *see* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 601–02, 605 (1992); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316–18, 330–35 (2000).

30. In *Cincinnati Soap Co. v. United States*, the Court explained:

> Appropriation and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated government agencies. A striking and pertinent example is afforded by the Act of June 17, 1902, c. 1093, 32 Stat. 388, where all moneys received from the sale and disposal of public lands in a large number of states and territories are set aside as a special fund to be expended for the reclamation of arid and semi-arid lands within those states and territories. The expenditures are to be made under the direction of the Secretary of the Interior upon such projects as he may determine to be practicable and advisable. The constitutionality of this delegation of authority has never been seriously questioned.

Cincinnati Soap Co. v. United States, 301 U.S. 308, 322 (1937).

31. *See* Brief for the Respondents at 55, King v. Burwell, 135 S. Ct. 2480 (2015) (No. 14-114) ("[T]he traditional tools of statutory interpretation confirm that Treasury's reading [of Section 36B] is at least a reasonable one warranting deference under *Chevron*."); Defendants' Memorandum in Support of Their Motion for Summary Judgment at 25, U.S. House of Representatives v. Burwell, 185 F. Supp. 3d 165 (D.D.C. 2016) (No. 1:14-CV-01967-RMC) ("The deference accorded to federal agencies under background principles of administrative law provides an additional reason for concluding that funds are available for the advance payments of the cost-sharing reimbursements.").

The point is that current administrative law doctrine and practice treat these agency efforts as falling within, and as being regulated by, the normal rubric of administrative law. That normal rubric treats agencies as empowered to act pursuant to ambiguous statutory authority; our law assumes that agencies will make policy within their zones of expertise and that regulatory policymaking will be subject to judicial review and will be overseen and constrained by legislative checks, thus rendering it both accountable and legitimate. But, as this Article explains, when agencies leverage statutory ambiguity to underwrite broad-scale government spending, certain distinctive concerns arise that sharply undercut the vitality of each of these conventional assumptions.[32]

Begin with judicial review. Administrative law generally takes it as a given that judicial review will police and deter agencies from acting outside the bounds of entrusted domains. But when the executive branch is giving money away, the check of judicial review on agency action will be much weaker than normal; because of the rules of Article III standing, it will frequently be impossible to sue to enjoin agency spending.[33] This, in turn, will make it correspondingly easier for agencies to push at the limits of their statutory authority. Consider next the possibility of policy entrenchment. Regulatory measures that transfer benefits on a broad-scale basis tend to become politically entrenched—at least when their recipients are in the middle and upper classes. And while prescriptive regulatory measures cannot become legally entrenched against alteration, regulatory transfers of property sometimes can.[34] Agency policymaking in this area may thus be stickier and less subject to legislative checking than is often the case—particularly in light of the fact that this type of agency policymaking is

32. In a future piece, I intend to explore how the Court's rejection of the *Chevron* framework in *King v. Burwell* might be read as indicating its reluctance to extend the ordinary amount of deference to agency interpretations that generate large financial obligations against the federal government—or, to put it another way, as creating a clear-statement rule for certain "vertical" elephants in mouseholes. Unlike other "major questions" cases, which have involved claims of agency authority over regulatory obligations to the government and/or to private parties, *King* posed the question whether an agency could commit the federal government to spend billions of dollars on securing the right to affordable health insurance. In my view, the considerations set out in Part II of this Article offer a robust post hoc justification for *King*'s otherwise rather inexplicable decision to eschew reliance on *Chevron* when the Court was anyway persuaded that the statute authorized the result the agency preferred.

33. *See infra* Part II.A.

34. *See infra* Part II.B.

not always transparent.[35] Last, if not least, are the reasons to doubt the existence of agency expertise and democratic accountability in this domain. When the executive branch exploits statutory ambiguity to embark on broad-scale spending programs to secure economic rights, the executive branch is making society-wide and intertemporal trade-offs about the expenditure of government funds. These are trade-offs that neither individual agencies, nor the executive branch as a whole, are properly equipped to make; rather, these are trade-offs that, for reasons of both expertise and democratic accountability, should be made by Congress.[36]

In sum, agency efforts to spend resources on broad-scale economic rights can advance important interests—interests that the federal courts have shown no inclination to shield and that Congress may not be willing to defend either. But such action simultaneously threatens to corrode other deeply important values: the need for accountable agency action, the avoidance of unilateral policy entrenchment by the executive branch, and legislative supremacy in matters of spending.[37]

The Article proceeds as follows. Part I describes the measures taken by the Obama administration to underwrite widespread access to affordable health insurance and affordable higher education. Part II analyzes the executive branch's institutional competence in this zone. A brief conclusion follows.

I. AGENCIES AND SPENDING: TWO CASE STUDIES

This Part addresses a simple question that has probably already started to nag. Given that Congress controls appropriations and agency budgets, how can agencies ever act "on their own steam" to spend money on shielding vertical economic rights? Even assuming that agencies might attempt to exercise a truly *executive* "power of the

35. *See infra* Part II.C.

36. *See infra* Part II.D.

37. In future work, I hope to set out and assess potential responses and solutions to these problems. Possibilities might include revisions to rules of Article III standing, perhaps in the direction of expanded legislative standing; carving out an exception to the rule of *Chevron* deference when an agency decides a "major question" creating broad-scale spending; a limited reversal of *INS v. Chadha*, 426 U.S. 919 (1983), to permit one-house legislative checks on executive spending; or institutional reforms that promote congressional oversight of the most significant spending choices made by the executive. *See* FISHER, *supra* note 24, at 263–64 ("[T]he compilation, analysis, and dissemination of budget execution material must be done with a fine sense of selectivity. Distinctions need to be made between the routine and the significant. . . . Painstaking efforts are needed to select from the thousands of administrative actions the relative few that deserve congressional attention.").

purse," wouldn't their attempts be pointless unless Congress made good on them by appropriating money? Agencies, we assume, act with either permission or forgiveness, with either authorization or ratification—particularly, one would think, when it comes to spending money, an area in which Congress has traditionally been jealous of its prerogatives. By delving into two examples from the Obama administration, the discussion below illuminates how agencies have leveraged the tools of statutory interpretation to underwrite broad-scale access to economic goods without clear congressional authorization.[38]

A. Affordable Health Insurance

The chief goal of the ACA was to expand access to health insurance. To achieve that end, agencies needed to ensure that consumers and insurers received federal subsidies so that insurance plans would be affordably priced and consumers would have the funds to purchase the plans. The subsidies took various forms and flowed to different recipients. For insurers, there were cost-sharing reduction payments, risk-adjustment payments, reinsurance payments, and risk-corridor payments. For individuals, there were premium tax credits. The subsidies to insurers enabled insurers to offer plans at affordable prices, and the subsidies to consumers enabled consumers to purchase those affordably priced plans. These subsidies, along with the mandates on some employers to provide health insurance and on individuals to obtain health insurance or pay a penalty, were the price tag for the new rules imposed by the ACA on insurers—rules for minimum coverage, guaranteed issue, and community rating—that collectively extended access to affordable health insurance to millions of people.

To avoid getting lost in the weeds, it might be helpful here to imagine the new statutory right to affordable health insurance as a living thing or organism. For that organism to be robust and well-functioning, its "organs"—here, Medicaid, the federal and state

38. One might draw lines within this category of agency action. For example, one might distinguish spending choices that rest on interpretations of ambiguous organic statutes from those that rely on interpretations of ambiguous appropriations laws. One might distinguish interpretations of the tax code from interpretations of nontax statutes. One might distinguish agency interpretive decisions that result in "pure" spending (for example, handing out money directly to recipients) from regulatory commands that necessarily trigger increased federal outlays (for example, a rule requiring states to expand eligibility for Medicaid). Because the argument developed in Part II does not turn on these internal distinctions, this Article refrains from taxonomy.

exchanges, and the private insurance companies offering plans on the exchanges—had to be well-nourished and healthy, too. The array of federal subsidies just described—ranging from cost-sharing reduction payments to premium tax credits—formed the supply of blood and nutrients to these organs. The subsidies created by the ACA were interlocking and indirect, but they were collectively designed to safeguard a new, government-subsidized, economic right: a right to affordable health insurance.

The difficulty is that agencies have since carried the laboring oar in nourishing that right. The Democratic-controlled Congress that enacted the ACA did not clearly express some of the key federal subsidy provisions that undergirded the act, while the Republican-controlled Congress which succeeded it was intent on throttling the act, not salvaging it. The tax credits at issue in *King v. Burwell*[39] illustrate the point. *King* concerned a provision of the ACA that authorized federal tax credits for purchases of health insurance plans on "an Exchange established by [a] State."[40] The Internal Revenue Service (IRS) interpreted this ACA provision as authorizing it to provide tax credits to consumers purchasing plans on the federal exchange.[41] Without that interpretation, consumers would have not been able to purchase plans, and the insurance marketplace in the states served by the federal exchange would have collapsed. The IRS's interpretation may have been entirely consistent with enacting Congress's "legislative plan."[42] But it was still a hard fit with the statutory text, which did not clearly authorize those credits. Although a five-word fix ("or by the federal government") would have placed the IRS's payments on a secure footing, the Republican-controlled Congress would have rather seen the ACA's reforms collapse than make that fix.

The provision at issue in *King* was not, unfortunately, the only instance of ambiguity in the ACA. Other aspects of the ACA's implementation have implicated essentially the same fact pattern as *King*: the executive branch authorizing payments to secure the affordability of insurance plans and increase access to insurance coverage—but without an unambiguous statutory basis for those payments.

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39. King v. Burwell, 135 S. Ct. 2480 (2015).

40. *See* Patient Protection and Affordable Care Act § 1311, 42 U.S.C. § 18031 (2012).

41. *King*, 135 S. Ct. at 2482.

42. *Id.* at 2496 ("A fair reading of legislation demands a fair understanding of the legislative plan.").

Four examples are worth mentioning.[43] The first involves the payment of subsidies for cost-sharing reductions to insurers. To provide some background, the ACA requires insurers to reduce consumers' cost-sharing obligations for health insurance—the various deductibles, coinsurance, and copayments that insurance plans require customers to bear. The ACA states that the federal government must reimburse insurers for these cost-sharing reductions.[44] The agencies responsible for these payments, the U.S. Department of Health and Human Services (HHS) and the U.S. Department of the Treasury,[45] have made billions of dollars of cost-sharing payments under this provision. If these payments were not made, many customers would have faced higher priced plans[46]—thus undercutting the right to affordable health insurance that the ACA sought to shield.

The problem is that the ACA does not contain a permanent indefinite appropriation of funds from which the agency could make those payments. The Obama administration argued that a separate permanent appropriation—the one that funds the premium tax credits at issue in *King*—also appropriated money to pay the cost-sharing reductions.[47] But this argument is at least a stretch, and the conclusion that the tax-credit appropriation also supplies funds for cost-sharing

43. Professor Nicholas Bagley has written extensively and brilliantly about some of these topics, and I draw throughout on his various writings. *See generally* Nicholas Bagley, *A Legal Setback for the Affordable Care Act*, 374 NEW ENG. J. MED. 2307 (2016) (discussing a challenge to the ACA provision allowing for reimbursement of low-income citizens); Nicholas Bagley, *Legal Limits and the Implementation of the Affordable Care Act*, 164 U. PA. L. REV. 1715 (2016) [Bagley, *Legal Limits*] (offering an assessment of the Obama administration's efforts to implement the ACA); Nicholas Bagley, *The Legality of Delaying Key Elements of the ACA*, 370 NEW ENGL. J. MED. 1969 (2014) (discussing the ability of the executive to delay implementing the ACA); Mike Adelberg & Nicholas Bagley, *Struggling to Stabilize: 3Rs Litigation and the Future of the ACA Exchanges*, HEALTH AFF. BLOG (Aug. 1, 2016), http://healthaffairs.org/blog/2016/08/01/struggling-to-stabilize-3rs-litigation-and-the-future-of-the-aca-exchanges [https://perma.cc/E7YC-T9ZQ] (discussing legal issues facing ACA exchanges).

44. Patient Protection and Affordable Care Act § 1402, 42 U.S.C. § 18071(c)(3) ("An issuer of a qualified health plan making reductions under this subsection shall notify the Secretary of such reductions and the Secretary shall make periodic and timely payments to the issuer equal to the value of the reductions.").

45. Patient Protection and Affordable Care Act § 1412(a)(3), 42 U.S.C. § 18082(a).

46. *See* Nicholas Bagley, *What Happens if the House Wins Its ACA Lawsuit?*, YALE J. ON REG.: NOTICE & COMMENT (Aug. 21, 2015), http://yalejreg.com/nc/what-happens-if-the-house-wins-its-aca-lawsuit-by-nicholas-bagley [https://perma.cc/3H5M-C6Z2] ("[Cost-sharing reductions] cap the amount of out-of-pocket spending for those who make less than 250% of the poverty level. Given that exchange plans tend to have high deductibles and lots of cost-sharing, the reductions are a critical part of keeping health care affordable.").

47. Defendants' Memorandum in Support of Their Motion for Summary Judgment, *supra* note 31, at 25.

reduction payments was rejected initially by the IRS[48] and eventually by a district court judge.[49]

The second example—the risk-corridor payments—involves a similar fact pattern.[50] The goal of the risk-corridor program was to support participation by private insurers in the exchanges by limiting their risk of losses. Under the program, "[i]nsurers that sustain[ed] heavy losses [were] supposed to receive federal support; by the same token, highly profitable insurers [were] required to return some of their gains to the federal government."[51] Without this risk-limiting mechanism, insurers wary of the risk profile of the customers on the new exchanges would have been induced to raise premiums—thereby undercutting the right to affordable health insurance that the ACA seeks to shield.[52]

The problem, again, is that Congress did not appropriate funds to pay for the expenses of risk-corridor subsidies.[53] Instead, and in the face of mixed reviews,[54] the unit of HHS responsible for issuing these

48. The IRS initially concluded there was no appropriation for cost-sharing payments, explaining in a U.S. Department of Treasury memorandum that "there is currently no appropriation to Treasury or to anyone else, for purposes of the cost-sharing payments" and that the basis for making those payments "c[ould] be determined only in connection with whatever statute ultimately appropriate[d] funds for the cost-sharing program." Carl Hulse, *Report by House G.O.P. Returns Focus to Health Care Law's Spending Authority*, N.Y. TIMES, July 7, 2016, at A10. The Office of Management and Budget (OMB), U.S. Attorney General Eric Holder, and Secretary of the Treasury Jacob Lew took the opposite view. *See* Carl Hulse, *In a Secret Meeting, Revelations on the Battle over Health Care*, N.Y. TIMES (May 31, 2016), http://nyti.ms/1WVdCLO [https://perma.cc/S89G-VWAH] [hereinafter Hulse, *Secret Meeting*].

49. U.S. House of Representatives v. Burwell, 185 F. Supp. 3d 165, 168 (D.D.C. 2016).

50. *See* Standards Related to Reinsurance, Risk Corridors and Risk Adjustment, 77 Fed. Reg. 17,220, 17,220–21 (Mar. 23, 2012) (codified at 45 C.F.R. pt. 153 (2016)) (explaining rationale for program and how insurer uncertainty connects with higher rates for consumers).

51. Adelberg & Bagley, *supra* note 43 (emphasis omitted).

52. For some, but not all, of those purchasers, the higher costs would have been subsidized by higher tax credits.

53. *See* Memorandum from Edward C. Liu, Legislative Attorney, to House Energy and Commerce Committee, Funding of Risk Corridor Payments Under ACA § 1342, at 1–3 (Jan. 23, 2014), https://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/20140123CRSMemo.pdf [https://perma.cc/Z7YE-JAHJ] [hereinafter CRS Memorandum]; *see also* Nicholas Bagley, *Does the Risk Corridor Program Have a Fatal Technical Flaw?*, INCIDENTAL ECONOMIST (May 1, 2014, 6:22 AM), http://theincidentaleconomist.com/does-the-risk-corridor-program-have-a-fatal-technical-flaw [https://perma.cc/945T-AE4Q] ("The trouble is that the risk corridor program lacks any appropriations language.").

54. *See* Memorandum from the U.S. Gov't Accountability Office to Jeff Sessions, Ranking Member, U.S. Senate Comm. on the Budget, and Fred Upton, Chairman, House of Representatives Comm. on Energy and Commerce, Department of Health and Human Services—Risk Corridors Program, B-3256302, at 6 (Sept. 30, 2014), http://www.gao.gov/assets/670/666299.pdf [https://perma.cc/G93A-6Q7X]. The U.S. Government Accountability Office

particular payments, the U.S. Centers for Medicare and Medicaid Services (CMS), has used incoming payments from insurers to make outgoing payments to insurers.

The agency was forced into this position in December 2014, when Congress enacted the Consolidated and Further Continuing Appropriations Act of 2015,[55] popularly known as the "Cromnibus."[56] This act contained a rider that prohibited the CMS from using funds "transferred from other accounts funded by this Act to the [CMS program management account]" for making risk-corridor payments.[57] The agency apparently did not regard the risk-corridor payments that it draws *from* insurers and credits to the program-management account as funds whose use would be prohibited by the appropriations rider.[58]

(GAO) noted that the program management appropriation was designated "for carrying out . . . 'responsibilities of [CMS],'" and reasoned that one of those "responsibilities" was to make risk-corridor payments. *Id.* at 4 (second alteration in original) (quoting Pub. L. No. 113-76, div. H, tit. II, 128 Stat. 5, 374 (2014))). The GAO also agreed that under the 2014 appropriations act, sums collected from insurers could be treated as "authorized user fees" and credited to the "Program Management" account. *Id.* at 3, 4. In contrast to the GAO, the Congressional Research Service (CRS) had concluded that amounts coming in from insurers could not be used to fund amounts that needed to be paid out. That is, CRS rejected the idea that the ACA authorized the agency to create a "revolving fund" that would allow the agency to use inflows to the program to pay for outflows from it. *See* CRS Memorandum, *supra* note 53, at 2, 3.

55. Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, § 227, 128 Stat. 2130, 2491 (2014).

56. *See* Ashley Parker, *Fight Brews in Congress Over Spending Bill*, N.Y. TIMES (Nov. 25, 2014, 4:11 PM), http://www.nytimes.com/politics/first-draft/2014/11/25/fight-brews-in-congress-over-spending-bill [https://perma.cc/8VUC-VW3A].

57. The Cromnibus reads:

> None of the funds made available by this Act from the Federal Hospital Insurance Trust Fund or the Federal Supplemental Medical Insurance Trust Fund, or transferred from other accounts funded by this Act to the ''Centers for Medicare and Medicaid Services—Program Management'' account, may be used for payments under section 1342(b)(1) of Public Law 111–148 (relating to risk corridors).

§ 227, 128 Stat. at 2491.

58. One might construct a rationale for this determination as follows. The Cromnibus funds the program management account with, inter alia, "such sums as may be collected from authorized user fees." *Id.* at 2477. So, while the program management account is itself funded by the Act, the user fees *in* the program management account are not funds being "transferred *from* other accounts"—and thus blocked from use by the rider. *Id.* at 2477, 2491. Rather, the user fees are "credited" directly to the program management account. *Id.* at 2477. In the paragraph on program management, the Act says:

> For carrying out . . . other responsibilities of the Centers for Medicare and Medicaid Services, not to exceed $3,669,744,000, . . . together with all funds collected in accordance with section 353 of the PHS Act and section 1857(e)(2) of the Social Security Act, funds retained by the Secretary pursuant to section 302 of the Tax Relief and Health Care Act of 2006; *and such sums as may be collected from authorized user fees* and the sale of data, *which shall be credited to this account* and remain available until September 30, 2020 . . . .

And so the agency has proceeded to make payments from these collected inflows. But because inflows to the risk-corridor program are dramatically lower than claims upon it, the agency has been able to pay claims against the program only on a prorated basis.[59] In the meantime, Congress has not acceded to the need to appropriate more money to make good on the balance of the promised payments. Instead, subsequent appropriations laws have retained the language of the Cromnibus rider.[60]

The sums involved here are sizable—billions of dollars have flowed into and out of the CMS under the auspices of the risk-corridor program. The risk-corridor payments to insurers have probably helped to increase the affordability of insurance plans on the exchanges. But in making these payments, the agency has relied on aggressive readings of the ACA and subsequent appropriations laws.

A third example is the transitional reinsurance program created by section 1341 of the ACA.[61] The program "is financed by statutorily required contributions from participating health insurance issuers and

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Id. at 2477 (emphasis added). The reason that this rationale is a "stretch" is that it effectively creates a revolving fund—a form of permanent appropriation—and appropriations law requires that Congress specifically authorize the creation of revolving funds. *See* Bagley, *Legal Limits*, *supra* note 43, at 1733, 1735–38.

59. *See* Bagley, *Legal Limits*, *supra* note 43, at 1737 ("It's looking more and more likely that the risk corridor program will run out of money. . . . [F]or 2014, health plans were owed substantially more under the risk corridor program than they paid in. Unprofitable plans have therefore received just 12.6% of the amount due to them.") (citing Memorandum from the Ctr. for Consumer Info. & Ins. Oversight, Ctrs. for Medicare & Medicaid Servs. (Nov. 19, 2015), https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/RC_Obligation_Guidance_11-19-15.pdf [https://perma.cc/HV25-UGF8].

60. *Id.* at 1738 nn.149–150 (citing appropriations riders for 2015 and 2016). The proposed HHS appropriations bill also contains this language. *See* H.R. 5926, 114th Cong. § 225 (2016), https://www.congress.gov/114/bills/hr5926/BILLS-114hr5926rh.pdf [https://perma.cc/HY4Q-UM5W].

61. *See* Patient Protection and Affordable Care Act § 1341, 42 U.S.C. § 18061 (2012); Standards Related to Reinsurance, Risk Corridors and Risk Adjustment, 77 Fed. Reg. 17220, 17,221 (Mar. 23, 2012) (codified at 45 C.F.R. pt. 153 (2016)) ("The [transitional] reinsurance program . . . will reduce the uncertainty of insurance risk in the individual market by partially offsetting risk for high-cost enrollees. By limiting issuers' exposure to high-cost enrollees, this program will attenuate individual market rate increases that might otherwise occur . . . ."); *see also* Memorandum from Paulette C. Morgan and Edward C. Liu, Congressional Research Serv. to House Comm. on Ways and Means, Information on the ACA Transitional Reinsurance Program 3–5 (Feb. 23, 2016), https://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/documents/114/analysis/20160223CRS.pdf [https://perma.cc/7MHT-BHSH] (describing the Transitional Reinsurance Program).

group health plans."[62] The contributed funds are used to make payments to issuers "to stabilize health insurance premiums and encourage issuer participation in the health insurance markets."[63] The ACA requires that some of those incoming contributions—$5 billion of them, over a three-year period[64]—be allocated to the Treasury.[65] But because its estimates for developing contribution rates were uncertain, HHS announced that it would allocate all of the contributions it received from insurance companies for payments out to insurers, until its payments reached a stated target.[66] Basically, HHS decided to allocate all incoming reinsurance funds to pay insurers *before* giving the Treasury the portion allocated to the Treasury by the statute. Because the $9.7 billion it collected in 2014 fell short of the target figure, HHS remitted nothing to the Treasury. Likewise, the amounts collected in 2015 were also expected to be short of the target.[67]

The agency has taken the position that the ACA is sufficiently ambiguous to permit it to prioritize making these payments to insurers rather than depositing in the Treasury the sum specified by the ACA.[68] But the U.S. Government Accountability Office (GAO) has rejected this argument, concluding that when a shortfall materialized, the HHS should have proceeded to allocate funds on a pro rata basis between the Treasury and insurers, not redirected the Treasury's pro rata share to insurers.[69] Again, the agency's effort to shore up the affordability of

62. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO B-328016, DEPARTMENT OF HEALTH AND HUMAN SERVICES: TRANSITIONAL REINSURANCE PROGRAM 1 (2016), http://www.gao.gov/assets/690/680115.pdf [https://perma.cc/JP4W-RKUD].

63. *Id.*

64. *Id.* at 2.

65. Patient Protection and Affordable Care Act § 1341(b)(3)–(4), 42 U.S.C. § 18061(b)(3)–(4).

66. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 62, at 3 ("It announced that it would allocate all collections first for reinsurance payments until collections totaled the target amount set forth for reinsurance payments in [ACA section 1341] for each benefit year.").

67. *Id.*

68. *Id.*

69. *Id.* at 7 ("We do not see any flexibility under section 1341(b)(4) to allow HHS to expend the *pro rata* share of collections attributable to the Treasury under section 1341(b)(3)(B)(iv)—approximately $3 billion as of July 2016—to make reinsurance payments. Instead, these collections must be deposited in the Treasury.").

plans[70] certainly strained, and probably exceeded, the bounds of its statutory authority.[71]

A fourth and final example is the Basic Health Program.[72] The ACA authorizes states to establish a Basic Health Program for low-income individuals who are ineligible for Medicaid but have incomes close to the Medicaid cut-off line.[73] Two states—New York and Minnesota—have implemented Basic Health Programs.

The HHS appears to have supplied funds for these Basic Health Programs out of the permanent appropriation for premium tax credits.[74] Publicly available documents do not reveal why;[75] perhaps it is because the provision on how to calculate the Basic Health Program

70. Matthew Loughran, *GAO: Government Misuses Obamacare Reinsurance Funds*, BLOOMBERG BNA: HEALTH CARE POLICY REPORT (Sept. 29, 2016) ("In a statement provided to Bloomberg BNA, the HHS said its Centers for Medicare & Medicaid Services 'has implemented the Transitional Reinsurance Program lawfully and in a transparent manner, and strongly disagrees with today's GAO opinion. This critical program, which expires this year, helps to reduce premiums for consumers.'").

71. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 62, at 11.

72. *See* Patient Protection and Affordable Care Act § 1331, 42 U.S.C. § 18051 (2012) (explaining the Basic Health Program option); *see also* Final Rule, Basic Health Program: State Administration of Basic Health Programs, 79 Fed. Reg. 14,112 (Mar. 12, 2014) (codified at 42 C.F.R. pt. 600 (2016); 45 C.F.R. pt. 144 (2016)) (summarizing the Basic Health Program scheme).

73. *See* STAN DORN & JENNIFER TOLBERT, KAISER FAMILY FOUND., THE ACA'S BASIC HEALTH PROGRAM OPTION: FEDERAL REQUIREMENTS AND STATE TRADE-OFFS 1–2 (2014), http://files.kff.org/attachment/the-acas-basic-health-program-option-federal-requirements-and-state-trade-offs-report [https://perma.cc/QC33-5EM2] (explaining income and other eligibility requirements for enrollees in a Basic Health Program).

74. *See* HEALTH AND HUMAN SERVS. OFFICE OF INSPECTOR GEN. & TREASURY INSPECTOR GEN. FOR TAX ADMIN., REVIEW OF THE ACCOUNTING STRUCTURE USED FOR THE ADMINISTRATION OF PREMIUM TAX CREDITS 19, (Mar. 31, 2015), https://oig.hhs.gov/oei/reports/oei-06-14-00590.pdf [https://perma.cc/US5T-DTZS] (showing $60 million paid in December 2014 for the Basic Health Program outlay); Peter Sullivan, *GOP: Administration Ignoring ObamaCare Subpoenas*, HILL (May 31, 2016), http://thehill.com/policy/healthcare/281742-gop-administration-ignoring-obamacare-subpoenas [https://perma.cc/2FP6-2HDN] ("The administration argue[d] that that it already has a permanent appropriation under the [ACA] section covering the law's tax credits, but Republicans sa[id] that permanent appropriation was strictly only for the tax credits, not for the Basic Health Program.").

75. Few relevant documents are currently publicly available. As Lyle Adriano notes:

> The [House Committee] chairmen asked for the spending documents July last year after assistant HHS secretary Ellen Murray referenced them during a briefing. In November, HHS produced 24 pages of documents, with some parts redacted. In March, the department informed the committees that it would not provide any additional documents. The committees issued a subpoena later that month, but they only received one heavily redacted page since.

Lyle Adriano, *The Obama Administration Is Ignoring ACA Document Subpoenas, GOP Says*, INS. BUS. MAG. (June 2, 2016), http://www.ibamag.com/us/news/breaking-news/the-obama-administration-is-ignoring-aca-document-subpoenas-gop-says-32667.aspx [https://perma.cc/BN2M-ASF5].

payments *refers* to the amount of tax credits made available by the ACA as a benchmark for calculating these payments.[76] But the permanent appropriation for tax credits has never been used to fund a Medicare-like trust fund for states. If there is a colorable statutory argument for why the appropriation for tax credits should fund a Medicare-like trust fund, it has not yet been publicly made.

Let us pause to take stock. In all these instances, the executive branch has adopted aggressive interpretations of the ACA or of relevant appropriations laws in order to disburse money. But the outcome obtained by the executive branch was not the aggrandizement of the salaries of agency officials or the addition of employees to the agency's payroll. Rather, to help secure the public's right to affordable health insurance, these interpretations sought to pump any subsidies that the executive branch could plausibly claim into the intricate vascular system of money created by the ACA.

B. Affordable Higher Education

The executive branch has also dedicated billions of government dollars to underwrite students' right to an affordable higher education. The funding mechanism for securing this right differs from that used in the health insurance context. Here, the mechanism utilized is not generous outright spending, but rather generous debt forgiveness.

To enable student borrowers to repay federal student loans, the federal government offers several income-driven repayment plans.[77] For decades, Congress has required the U.S. Department of Education to offer the Income-Contingent Repayment Plan (ICR), which caps borrowers' payments at a set percentage of their incomes and forgives

76. The ACA sets forth a formula for calculating how much money HHS should transfer to states that create an acceptable Basic Health Program. Patient Protection and Affordable Care Act § 1331, 42 U.S.C. § 18051. The ACA directs HHS to calculate the amount that would have been provided, through tax credits and cost-sharing reductions, to individuals enrolled in the Basic Health Program if those individuals had instead enrolled in plans offered through exchanges. States are to receive 95% of that amount. *See* Basic Health Program, 79 Fed. Reg. 14,112, 14,139 (Mar. 12, 2014) (codified at 42 C.F.R. pt. 600 (2015); 45 C.F.R. pt. 144 (2016)) ("The provisions of this rule are designed to transfer funds that would be available to individuals for premium and cost-sharing reductions for coverage purchased on an Exchange to states to offer coverage through a Basic Health Program.").

77. *See* FED. STUDENT AID, INCOME-DRIVEN REPAYMENT PLANS FOR FEDERAL STUDENT LOANS 1 (2016), https://studentaid.ed.gov/sa/sites/default/files/income-driven-repayment.pdf [https://perma.cc/BN2H-WDSA].

the debt after a set period of years.[78] In 2007, Congress mandated the creation of an additional program that similarly capped borrowers' monthly loan payments at a percentage of the borrower's discretionary income and forgave remaining debt after a specified number of years. This new program was called the Income-Based Repayment Plan (IBR).[79] Three years later, when Congress enacted the Health Care and Education Reconciliation Act of 2010 alongside the ACA, it "amended IBR to shorten the repayment period to 20 years and reduce the repayment obligation to 10% of discretionary income *for those who borrowed in 2014* or later."[80]

The Department of Education thereafter undertook two regulatory actions that significantly expanded the scope and effect of these loan forgiveness schemes. In 2012, the Department of Education rolled out a new program called the Pay As You Earn Repayment Plan (PAYE), which "deployed funds to permit those who had borrowed in 2007 or later and entered repayment in 2012 or later to enroll in this more generous version of IBR."[81] As Professor John Brooks explains, the Department of Education accomplished this goal by "using its authority under the ICR, not IBR, provisions of the Higher Education Act."[82] It did so because the IBR provisions would not be effective until 2014,[83] whereas the ICR provisions already conferred "relatively expansive authority" upon the Secretary to specify when loans must be repaid.[84] By using the extant ICR provisions, the Department of

78. *See* Frank Pasquale, *Democratizing Higher Education: Defending and Extending Income-Based Repayment Programs*, 28 LOY. CONSUMER L. REV. 1, 5–7 (2015).

79. *Id.*

80. *Id.* at 7 (emphasis added); *see* 20 U.S.C. § 1098e(e) (2012) ("Special terms for new borrowers on and after July 1, 2014").

81. Pasquale, *supra* note 78, at 7.

82. Brooks, *Income-Driven Repayment*, *supra* note 15, at 252 n.131; *see also* Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 77 Fed. Reg. 42,086, 42,099 (proposed July 17, 2012) (codified at 34 C.F.R. pts. 674, 682, 685 (2016)) (describing the "ICR-A Plan").

83. 20 U.S.C. § 1087e(d)(1)(E) (2012) (granting the Secretary expansive authority to specify when IBR loans must be repaid, but specifying that this authority must be implemented according to 20 U.S.C. § 1098e); *Id.* § 1098e(e) (indicating that the special terms would not be effective for "any loan made to a new borrower on or after July 1, 2014").

84. Brooks, *Income-Driven Repayment*, *supra* note 15, at 252 n.131 ("This is because the IBR provisions of the HCERA had a 2014 effective date, whereas Section 455(d)(1)(D) of the HEA was already in effect and gave relatively expansive authority for setting loan repayment terms."); *see* 20 U.S.C. § 1087e(d)(1)(D). This provision states:

> (1) Design and selection. Consistent with criteria established by the Secretary, the Secretary shall offer a borrower of a loan made under this part a variety of plans for repayment of such loan, including principal and interest on the loan. The borrower shall

Education was able to "accelerate[] the implementation of the new 10% payment program" to those who borrowed as early as 2007.[85]

The second action occurred in 2014, when President Obama "called on the [Department of Education] to develop a program to assist *pre*-2007 borrowers," too.[86] In 2015, the Department of Education responded by issuing a proposal for a new program, called the Revised Pay As You Earn Repayment Plan (REPAYE). The REPAYE program, which went into effect in 2016, extended PAYE to all borrowers regardless of when they borrowed.[87] REPAYE was promulgated under the ICR provisions, just as PAYE had been.[88]

Commentators have noted the sea change wrought by these programs. As Brooks explains, the Department of Education's PAYE program made "a huge change in the way we publicly finance higher education" by "simply changing the repayment terms for a student loan and adding a forgiveness provision."[89] As he argues, "[t]hough described as a loan-forgiveness program, . . . income-driven repayment operates conceptually more like a progressive tax-and-transfer program," because the program's effect, "if it were widely adopted, would be as if the government paid tuition costs directly and raised the

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> be entitled to accelerate, without penalty, repayment on the borrower's loans under this part. The borrower may choose—
>
> . . .
>
> > (D) an income contingent repayment plan, with varying annual repayment amounts based on the income of the borrower, paid over an extended period of time prescribed by the Secretary, not to exceed 25 years, except that the plan described in this subparagraph shall not be available to the borrower of a Federal Direct PLUS loan made on behalf of a dependent student . . . .

Id. § 1087e(d)(1).

85. Brooks, *Income-Driven Repayment*, *supra* note 15, at 252.

86. Pasquale, *supra* note 78, at 7 (emphasis added); *see also* Memorandum from President Obama to the Sec'ys of Treasury and Education, Helping Struggling Federal Student Loan Borrowers Manage Their Debt 1–3 (June 9, 2014), https://www.gpo.gov/fdsys/pkg/CFR-2015-title3-vol1/pdf/CFR-2015-title3-vol1-other-id214.pdf [https://perma.cc/M7BG-AAKA] (ordering the Secretary of Education to take additional steps to expand and support the PAYE program).

87. Student Assistance General Provisions, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 80 Fed. Reg. 39,608, 39,627 (proposed July 9, 2015) (codified at 34 C.F.R pts. 668, 682, 685 (2016)). REPAYE "extend[ed] a plan with payments based on 10 percent of the borrower's discretionary income to borrowers with no restriction on when they borrowed." *Id.*

88. *See id*. at 39,616 ("To carry out the objective of the Presidential Memorandum, the Secretary initiated this rulemaking process to propose the creation of the new REPAYE plan as a type of Income-Contingent Repayment (ICR) plan in the Direct Loan Program under section 455(d)(1)(D) of the HEA."); *supra* note 84.

89. John R. Brooks, *Quasi-Public Spending*, 104 GEO. L.J. 1057, 1071 (2016) [hereinafter Brooks, *Quasi-Public Spending*].

money to do so in a somewhat progressive way and as a percentage of income."[90] In other words, these programs effectively replaced many student loans with a progressively financed income tax: "[F]or some borrowers, the government effectively pays their tuition, and the borrowers simply pay 10% of discretionary income—effectively a 10% income surtax. This is not so different—again, to a first approximation—from a world where tuition is free, financed by higher income tax rates."[91] Under the reformed regime, students incur debt that must be repaid, but it is debt with a sharply diminished prospect of default: "those who earn more pay more, returning the full amount of their loan, plus interest, before the 20-year forgiveness threshold is met. Those who earn less, for whatever reason, pay less. Nobody will ever default simply because they can't afford to pay."[92]

Where did this sea change come from? Not from a federal court suddenly ruling that student loan agreements with the federal government were unenforceable because an affordable higher education is a constitutional right. Nor did it come from Congress. It is true that Congress established an IBR program in 2010, but it did so only for those taking out loans *after* 2014.[93] It was executive action that "accelerated the implementation" of the scheme[94] by adjusting the program so it would not just extend prospectively from 2014, but also reach back to cover loans taken out as long ago as 2007.[95] And it was the executive branch that subsequently expanded the payment further backward in time, to all borrowers regardless of when they borrowed.[96]

The sums that will be forgiven are sizable. The Department of Education estimated a net budget impact of $15 billion traceable to REPAYE standing alone.[97] While there is substantial uncertainty

90. Brooks, *Income-Driven Repayment*, *supra* note 15, at 258.

91. Brooks, *Quasi-Public Spending*, *supra* note 89, at 1070.

92. Kevin Carey, *A Quiet Revolution in Helping Lift the Burden of Student Debt*, N.Y. TIMES: THE UPSHOT (Jan. 24, 2015), http://www.nytimes.com/2015/01/25/upshot/a-quiet-revolution-in-helping-lift-the-burden-of-student-debt.html [https://perma.cc/88E6-JBJ3]. *But see* Jonathan D. Glater, *Student Debt and the Siren Song of Systemic Risk*, 53 HARV. J. ON LEGIS. 99, 105 n.26 (2016) ("The benefit of these programs is economically the same as an up-front, ex ante subsidy, but they do not eliminate the need to borrow and do not eliminate debt's potentially discouraging and punishing effects.").

93. *See supra* notes 76–79 and accompanying text.

94. Brooks, *Income-Driven Repayment*, *supra* note 15, at 252.

95. *See supra* notes 80–82 and accompanying text.

96. *See supra* notes 84–86 and accompanying text.

97. In 2015, when promulgating the proposed rules for REPAYE, the Department of Education estimated that the new program would "have a net budget impact of $15.3 billion, of

around these estimates, it is clear that these programs are not going to be cheap.

How could an agency interpret a statute so as to incur expenses (or, if you prefer, forgo repayments) on this scale without first procuring Congress's sign-off? The answer has to do with how funds for the making and forgiveness of loans are appropriated and budgeted. Congress has permanently appropriated funds for *extending* student loans.[98] And the cost of *forgiving* student loans is not something that needs to be appropriated. Federal budget rules require that "the government record[] only the expected difference between outlays and receipts on the loan as a budgetary cost, which is only a small fraction

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which $8.3 billion is a modification for existing cohorts from 1994 to 2015 and $7 billion is related to future cohorts from 2016 to 2025." Student Assistance General Provisions, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 80 Fed. Reg. 39,608, 39,626 (proposed July 9, 2015); *id.* at 39,627 ("[T]he Department estimates that for cohorts from 1994 to 2025, approximately six million borrowers would be eligible for the REPAYE plan. We estimate that approximately 2 million borrowers would choose the REPAYE plan."). In 2015, a *Slate* journalist reported, "The White House Office of Management and Budget told me that it thinks Obama's executive action expanding eligibility for Pay as You Earn will cost the feds about $9 billion, while the administration's outreach efforts will cost another $15 billion as more people opt into the program. The grand total: $24 billion." Jordan Weissmann, *How Obama Sneakily Spent $24 Billion Helping Students Pay Back Their Loans*, SLATE (Feb. 5, 2015, 6:30 PM), http://www.slate.com/blogs/moneybox/2015/02/05/obama_pay_as_you_earn_how_the_president_spent_24_billion_helping_borrowers.html [https://perma.cc/H8RM-VHB9]. The GAO recently estimated that $108 billion in loans would eventually be forgiven across all income-driven repayment plans and the Public Service Loan Forgiveness Plan. U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-22, FEDERAL STUDENT LOANS: EDUCATION NEEDS TO IMPROVE ITS INCOME-DRIVEN REPAYMENT PLAN BUDGET ESTIMATES 51 & fig. 18 (2016), http://www.gao.gov/assets/690/681064.pdf [https://perma.cc/6ZKE-4GUT].

98. *See* Brooks, *Income-Driven Repayment*, *supra* note 15, at 252 n.132 (describing loan programs as "entitlement" programs because "funds are automatically available each year depending on qualifying formulas, as opposed to a discretionary program that requires Congress to appropriate funds annually") (citing 20 U.S.C. § 1087a(a) (2012))); *id*. at 259 n.182 ("The individual cash flows to and from the public associated with the loans or guarantees, such as the disbursement and repayment of loans, the default payments on loan guarantees, the collection of interest and fees, and so forth, are recorded in the credit program's *non-budgetary* financing account." (citing OFFICE OF MGMT. & BUDGET, FISCAL YEAR 2015: ANALYTICAL PERSPECTIVES: BUDGET OF THE UNITED STATES GOVERNMENT 37 (2014)) (emphasis added)). One CRS report states:

> Most mandatory credit programs receive automatic funding for the amount of credit needed to meet the estimated demand by beneficiaries, which depends on eligibility and benefits rules contained in substantive law. For mandatory credit programs, any additional cost from reestimates of subsidies for a credit program is covered by permanent indefinite budget authority.

JAMES M. BICKLEY, CONG. RESEARCH SERV., R42632, BUDGETARY TREATMENT OF FEDERAL CREDIT (DIRECT LOANS AND LOAN GUARANTEES): CONCEPTS, HISTORY, AND ISSUES FOR THE 112TH CONGRESS 6 (2012).

of the nominal amount of money actually loaned to pay tuitions."[99] When the actual loan is forgiven, the cost does not appear on the budget. "[B]ecause of a quirk in the budget process for credit programs," the Department of Education can simply add these loan costs to the deficit "automatically, without seeking appropriations or even approval from Congress."[100] In other words, debt forgiveness does not come out of the Department of Education's annual budget or out of the appropriations process; it is not money that the agency needs to obtain from Congress before it acts.[101]

It should be obvious that the Department of Education's actions were not required by statute, but instead leveraged statutory ambiguity to produce the desired policy outcome. It should be equally obvious that these actions will be consequential—both for students and for the public fisc. The agency has enabled millions of students to pay for higher education, with the price to be subsidized by the federal

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99. Brooks, *Quasi-Public Spending*, *supra* note 89, at 1070 (citing Federal Credit Reform Act § 502(5)(B), 2 U.S.C. § 661a(5)(B) (2012); then citing Brooks, *Income-Driven Repayment*, *supra* note 15, at 256). One CRS report provides an overview of the student loan programs and how they are funded:

> Federal credit consists of federal direct loans and federal loan guarantees. The William D. Ford Federal Direct Loan program is a direct loan program, and the Federal Family Education Loan (FFEL) program is a guaranteed loan program. Loan subsidy costs for these programs are funded through mandatory indefinite appropriations. According to requirements of the Federal Credit Reform Act of 1990 (FCRA), the budgetary costs of direct loans and loan guarantees are measured on the basis of their estimated long-term costs to the government on a net present value basis, and these costs are attributable to the fiscal year during which a direct loan obligation or guaranteed loan commitment is made (as opposed to the year during which the cash flows associated with these benefits occur).

ALEXANDRA HEGJI, DAVID P. SMOLE & ELAYNE J. HEISER, CONG. RESEARCH SERV., R43571, FEDERAL STUDENT LOAN FORGIVENESS AND LOAN REPAYMENT PROGRAMS 28 (2016).

100. Michael Grunwald, *The College Loan Bombshell Hidden in the Budget*, POLITICO MAGAZINE (Feb. 5, 2015), http://www.politico.com/magazine/story/2015/02/the-college-loan-bombshell-hidden-in-the-budget-114930 [https://perma.cc/6F68-ZJ9F]. Michael Grunwald discusses this "quirk":

> Student loan defaults increased somewhat last year, but the department says the primary drivers of the unprecedented "re-estimate"—budget-wonk jargon for the update of expected loan costs—were Obama's policy changes, the recent ones as well as the upcoming ones. And because of a quirk in the budget process for credit programs, the department can add the $21.8 billion to the deficit automatically, without seeking appropriations or even approval from Congress.

Id.

101. *See* Kevin Carey, *Flip Side of Reducing Student Debt Is Increasing the Federal Deficit*, N.Y. TIMES: THE UPSHOT (Feb. 10, 2015), https://www.nytimes.com/2015/02/11/upshot/calculating-the-price-to-taxpayers-of-easing-the-student-debt-burden.html [https://perma.cc/QNV6-2ND7] ("Unlike conventional student aid programs such as Pell Grants, loan forgiveness benefits are a matter of regulatory policy. They don't have to be fought for and approved every year as part of the annual budget process.").

taxpayer, but without going through the ordinary appropriations process.[102] This is a vertical economic right to affordable higher education, and it flows from actions taken by an agency, not by Congress.

II. INSTITUTIONAL COMPETENCE AND VERTICAL ECONOMIC RIGHTS

A common thread connects the examples reviewed above: a pattern of agencies aggressively pushing the bounds of statutory language to underwrite broad-scale government spending to secure access to economic goods. While some constitutional law scholars have been calling for courts to recognize economic rights in the Constitution, some agencies have been quietly acting to ensure widespread access to certain economic goods through existing statutory schemes and regulatory mechanisms—notwithstanding the absence of express ex ante congressional authorization for these efforts.

This pattern is broadly compatible with larger trends observable across the administrative state. Due to gridlock and partisanship, Congress is less able to act as an effective lawmaker and hence as an institution that actually authorizes and controls agency action.[103] With respect to some statutes, as Professors David Barron and Todd Rakoff have pointed out, Congress has conferred primary custodianship over the shape and structure of regulatory schemes on agencies by giving agencies the power to waive and alter key statutory requirements.[104] In other areas, as Professors Adam Cox and Cristina Rodriguez have argued in the context of immigration law, the accretion of complex statutory schemes and the opacity of legislative intent have together produced a system of "de facto delegation" that effectively transfers lawmaking power to the executive branch.[105]

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102. Or, as one journalist rather blithely put it, "[i]f you focus on the deficit and the deficit alone, then yeah, [the increased cost] looks kind of bad. But if you focus on the fact that the White House found a way to provide billions in student loan relief without asking permission from Congress then, well, it's kind of impressive." *See* Weissmann, *supra* note 97.

103. *See* William P. Marshall, *Actually We Should Wait: Evaluating the Obama Administration's Commitment to Unilateral Executive-Branch Action*, 2014 UTAH L. REV. 773, 776–77 (2014); David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 39–48 (2014).

104. David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 279–90 (2013) (discussing statutes related to education, health care, welfare, the budget, national security and foreign affairs, and immigration).

105. Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, *passim* (2015).

In tandem with and in response to congressional stasis, administrative lawmaking has also evolved. Consequential administrative lawmaking has increasingly occurred through formerly unusual or interstitial mechanisms subject to light procedural constraints and judicial review—for example, policies of programmatic waiver or delay, Office of Information and Regulatory Affairs review, settlements that approximate regulatory schemes, and informal tools of regulation such as "Dear Colleague" letters.[106] Even when agencies regulate through more quotidian methods, they often need to take more interpretive liberties than they formerly did. As Professors Jody Freeman and David Spence have noted, because Congress won't update old statutes,[107] agencies must engage "in 'interpretive jujitsu' to adapt the statute to contemporary imperatives."[108] Surveying this landscape, Professor Tom Merrill has observed that the emergent regime of administrative lawmaking "[c]umulatively . . . present[s] the prospect of a revision of the constitutional order in which the President exercises autonomous policymaking authority without the need for any delegation of power from Congress, at least for the duration of the presidential administration."[109]

Most scholars have studied the "prospect" of "autonomous policymaking" from the vantage point of *prescriptive* regulation—that is, executive action that sets rules for what private parties must or must not do. It should have been entirely predictable,[110] though, that the exercise of "autonomous policymaking authority" by the executive branch would eventually extend beyond the arena of prescriptive policymaking and into the arena of transfer policymaking—that is, executive action that transfers government resources to private

106. Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 536 (2009); Daniel Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1172–73 (2014); Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1800–03 tbl.1 (2015); Mila Sohoni, *The Administrative Constitution in Exile*, 57 WM. & MARY L. REV. 923, 946–50 (2016).

107. Freeman & Spence, *supra* note 20, at 21.

108. Michael E. Herz, *New Wine, Old Bottles, and a Do-Nothing Congress*, JOTWELL (Mar. 11, 2015), http://adlaw.jotwell.com/new-wine-old-bottles-and-a-do-nothing-congress [https://perma.cc/R597-SDSX] (reviewing Freeman & Spence, *supra* note 20).

109. Thomas Merrill, *Presidential Administration and the Traditions of Administrative Law*, 115 COLUM. L. REV. 1953, 1977 (2015).

110. *Cf. id.* at 1978–79 ("It is not difficult to imagine that future Presidents will continue to exploit the gaps where judicial review is not available and, building on these gaps, will seek to expand presidential administration in ways perhaps not presently imaginable.").

parties.[111] The examples described above illustrate that this possibility has materialized. The executive branch has demonstrated, at least in the realms of health insurance and higher education, that it is both willing and able to protect broad-scale vertical economic entitlements by aggressively construing its statutory authority.[112]

The elephant in this room (or mouse-hole) is the power of the purse. That power belongs to Congress, not the executive.[113] The Constitution says that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law,"[114] and the term "Law" in that clause refers to statute, not regulation or guidance document. The balance of power between the executive branch and Congress depends on Congress having control over the purse[115]—and on the executive branch *not* having it.[116]

Several sources of law shield congressional supremacy on questions of spending. The doctrine of sovereign immunity helps to protect Congress's prerogative to decide whether to expose the United States to financial liability.[117] Any waiver of sovereign immunity must

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111. These categories are not entirely watertight. For example, when agencies impose fines and agree to settlements in the course of enforcing prescriptive regulations, and transfer the funds they win to private parties as restitution, it becomes hard to discern where prescriptive policymaking ends and transfer policymaking begins. That type of agency action, as several scholars have recognized, raises interesting issues. *See* Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 492–511 (2012); Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 STAN. L. REV. 331, 359–86 (2015); Verity Winship, *Fair Funds and the SEC's Compensation of Injured Investors*, 60 FLA. L. REV. 1103, 1110–23 (2008); Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500, 533–39 (2011).

112. *See supra* Part I.

113. For a detailed analysis of the spending power, see Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1345 (1988) ("Agencies and officials of the federal government may not spend monies from any source, private or public, without legislative permission to do so. . . . All federal receipts must be 'deposited' . . . into the Treasury, and all spending in the name of the United States must be pursuant to legislative appropriation.").

114. U.S. CONST. art. I, § 9, cl. 7.

115. *In re* Aiken Cty., 725 F.3d 255, 259–60 (D.C. Cir. 2013); U.S. Dep't of Navy v. Fed. Labor Relations Auth., 665 F.3d 1339, 1346–47 (D.C. Cir. 2012); Bell Atl. Tel. Cos. v. FCC, 24 F.3d 1441, 1445–46 (D.C. Cir. 1994).

116. *See U.S. Dep't of Navy*, 665 F.3d at 1346–47 ("If not for the Appropriations Clause, 'the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure.'" (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1342, at 213–14 (1833))).

117. *See* Paul F. Figley & Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 MICH. L. REV. 1207 (2009) (arguing that "the constitutional preeminence of legislatures in determining governmental appropriations" establishes a basis for the doctrine of sovereign immunity).

be express; in cases seeking relief out of the federal purse, courts do not find implied remedies except in rare cases of constitutional violation.[118] Congress has waived the United States' sovereign immunity from suit in certain situations—for example, for contractual claims, for tort claims, and in scattered other contexts—but recovery in such suits is subject to a hard limit: Congress's power over appropriations of funds.[119] The Administrative Procedure Act contains a waiver of sovereign immunity, but only from suits "seeking relief other than money damages."[120] Congress has shielded its power of the purse through affirmative statutory prohibitions as well, by enacting the Anti-Deficiency Act, the Miscellaneous Receipts Act, and other provisions.[121] These statutes dictate limits on agencies' discretion to

118. *Compare* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971) (recognizing a cause of action for unlawful searches and seizures committed by officers acting under color of federal law but noting that implying a cause of action for damages for federal constitutional violations may be inappropriate where questions of "federal fiscal policy" are involved), *with* FDIC v. Meyer, 510 U.S. 471, 486 (1994) (finding no *Bivens* remedy against a federal agency because, inter alia, "[i]f we were to recognize a direct action for damages against federal agencies, we would be creating a potentially enormous financial burden for the Federal Government"), Schweiker v. Chilicky, 487 U.S. 412, 419–20 (1988) (finding no *Bivens* remedy for a Fifth Amendment due process violation), *and* Bush v. Lucas, 462 U.S. 367, 368 (1983) (finding no *Bivens* remedy for a federal employee's claiming of a violation of his First Amendment rights).

119. Professor Vicki Jackson explains that although a court may enter a judgment "satisfiable only from public funds," such a judgment "may prove inefficacious, in light of Congress' power over appropriations of public funds." Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 539 (2003) (footnote omitted).

120. 5 U.S.C. § 702 (2012).

121. 31 U.S.C. § 1341(a)(1) (2012); U.S. GOV'T ACCOUNTABILITY OFFICE, 2 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 6-34 (3d ed. 2006) [hereinafter GAO, PRINCIPLES] ("The Antideficiency Act is one of the major laws in the statutory scheme by which Congress exercises its constitutional control of the public purse. It has been termed 'the cornerstone of Congressional efforts to bind the Executive branch of government to the limits on expenditure of appropriated funds.'" (quoting Maj. Gary L. Hopkins & L. Col. Robert M. Nutt, *The Anti-Deficiency Act (Revised Statutes 3679): And Funding Federal Contracts: An Analysis*, 80 MIL. L. REV. 51, 56 (1978))). In addition, 31 U.S.C. § 1301(a) permits appropriated funds to be applied only "to the objects for which the appropriations were made." Also, "[t]he making of an appropriation must be expressly stated in law," 31 U.S.C. § 1301(d), and "[i]t is not enough for a statute to simply require an agency to make a payment," Memorandum from the U.S. Gov't Accountability Office to Jeff Sessions and Jeff Upton, *supra* note 54, at 3. *See also* GAO, PRINCIPLES, *supra*, at 6-37–6-39 (discussing limits on the ability of executive officers to incur obligations). Another relevant statute is the Miscellaneous Receipts Act, 31 U.S.C. § 3302, which "requires executive branch agencies to deposit any monies collected by the agency in the general Treasury account, which prevents the agencies from supplementing their appropriations budget." *See* Peterson, *supra* note 18, at 327 (citing 31 U.S.C. § 3302).

spend and attach criminal penalties to agency spending that crosses those limits.[122]

Viewed against this constitutional and statutory backdrop, the illegality of agencies spending money absent express congressional authority may seem obvious and irrefutable. To the extent that agency officials expend or commit public dollars outside of expressly specified statutory limits, they threaten the Constitution's scheme for separated powers—Q.E.D.—and possibly commit felonies punishable by jail time.

But it is not quite as simple as that. All agency activity requires spending government resources—formulating and enforcing regulations, issuing guidance, investigating and adjudicating regulatory violations, and so on. No Congress, no matter how far-seeing, could anticipate all of the spending and allocation decisions that agencies must make and address them in advance with perfect clarity. It cannot be the case that every time an agency performs activities without *clear* statutory authority, the agency has violated the Appropriations Clause of the Constitution or torn the Madisonian tapestry. *Chevron* itself seems to preclude such a limitation by treating agencies as authorized to act when they act based on *reasonable* readings of statutory authority;[123] express authority is not necessary.

The key question, then, is whether the scenario of agencies spending money on securing economic entitlements based on ambiguous statutory authority poses any special or distinctive concerns that justify departing from administrative law's ordinary assumption that agencies can legitimately act pursuant to ambiguous delegations. That assumption of administrative legitimacy in turn rests on several predicates: that agencies interpreting ambiguous statutes will be policed by courts; that agencies are ultimately accountable to congressional overseers who can perceive agency action and can check it when it runs afoul of legislative preferences; that agencies will act within the domains of their expertise; and that agency action, because it is subject to presidential control, will be democratically accountable. Each of these predicates, as explained below, is weakened in this zone.

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122. 31 U.S.C. § 1350. The criminal penalties, however, may be a "paper tiger." *See* Peterson, *supra* note 18, at 339 (noting that although the Anti-Deficiency Act has carried criminal penalties since 1905, there has never been a criminal prosecution brought under the Anti-Deficiency Act).

123. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

A. Judicial Review

The presence or absence of judicial review is an important variable when calculating the legitimacy of agency action.[124] Judicial review prevents agencies from crossing statutory lines and hence shields the structural value of legislative supremacy. The prospect of judicial review incentivizes agency reason-giving and public deliberation because the degree of judicial deference is often tethered to the quality of these factors.[125] And if an agency's reasons and rationales were not already transparent before a lawsuit, they will surely become so during the course of litigation.

Ordinary conceptions of administrative law assume that the check of judicial review will cabin and discipline agency statutory interpretation.[126] When it comes to the domain of agency spending, though, the rules of Article III standing make that possibility remote. When the executive branch gives away money in excess of statutory authority, what private party suffers a *distinctive* harm? Certainly, "every citizen" has "the right . . . to require that the government be administered according to law and that the public moneys be not wasted,"[127] but it is equally certain that this "general right" does not translate into Article III standing.[128] Only a highly odd set of circumstances arising from the cross-cutting subsidy and mandate provisions of the ACA made it possible for private plaintiffs to bring the challenge in *King*.[129] (Indeed, substantial doubts persisted, even until oral argument, about the Article III standing of those parties—doubts that the parties and the Court seemed willing to shelve in order

124. Merrill, *supra* note 109, at 1957–64 (tracing the melding of positivist and process traditions in administrative law and explaining the key role played by judicial review in anchoring administrative government's legitimacy).

125. Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1793 (2007) ("If an interpretation . . . emanates fully formed, from too many offices, with too little explanation, and too much possible variation, it does not receive *Chevron* deference. . . . Judicial review may also produce a longer-term gain to the extent that it encourages agencies to use oversight-worthy procedures in the future.").

126. *See* Sohoni, *supra* note 106, at 940–42.

127. Fairchild v. Hughes, 258 U.S. 126, 129 (1922).

128. *See* Allen v. Wright, 468 U.S. 737, 738 (1984) ("[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court."); *cf.* Merrill, *supra* note 109, at 1973 (noting that "executive waivers of statutory requirements will rarely be subject to judicial review" because "those most directly affected by a waiver will be relieved of a statutory burden and cannot claim to be adversely affected or aggrieved").

129. King v. Burwell, 135 S. Ct. 2480, 2487–88 (2015).

to reach a resolution of the critical question at issue in the case.[130]) But such odd circumstances will not always exist when an agency pays out money in arguable excess of statutory authority. In particular, given how these specific programs are set up, it seems probable that no private plaintiff would have standing to challenge agency payments of subsidies to health insurers, agency transfers of money to the states to set up Basic Health Programs, or agency forgiveness of student loans.

This point should not be overstated. Article III standing sometimes materializes in unexpected ways.[131] Litigants may be highly motivated to challenge agency decisions to spend in ways that are not clearly authorized by statute, and—given the structural constitutional concerns with leaving agencies unfettered leeway to spend—courts may be highly motivated to find ways to let those challenges proceed to the merits.[132] One cannot rule out the possibility that courts will, in fact, be enlisted as checks to such agency schemes.

But the point remains that this kind of agency action is less likely to be judicially checked than prescriptive agency policymaking. The attenuation of the judicial check does not logically entail that agencies will misinterpret their statutory authority or act ultra vires. Clearly, judicial review is neither necessary nor sufficient for agencies to act within the bounds of their statutory authority—myriad legitimate nonreviewable agency decisions and myriad court decisions reversing illegitimate agency action amply prove that point. The point is just that the lower likelihood of judicial review in this context opens up space for ultra vires agency action in the zone of transfer policymaking—space that may not be as available elsewhere.

130. *See* Transcript of Oral Argument at 3–7, 39–44, *King*, 135 S. Ct. 2480 (No. 14-114).

131. *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 520 (2007) (considering climate change's potential impact upon Massachusetts in its decision to grant the state "special solicitude" in the standing analysis, ultimately allowing Massachusetts to challenge the EPA's denial of a petition for rulemaking to regulate greenhouse gas emissions from mobile sources under the Clean Air Act). One can imagine a situation in which entities that compete with recipients of government funds would have standing to challenge the legality of those disbursements. *See* La. Energy & Power Auth. v. FERC, 141 F.3d 364, 367 (D.C. Cir. 1998) (articulating rules for establishing competitor standing). To my knowledge, no such challenges have been brought with respect to the particular agency programs discussed in this Article. I am grateful to Professor Scott Dodson and Professor Zach Price for helpful comments on this point.

132. *See, e.g.*, U.S. House of Representatives v. Burwell, 130 F. Supp. 3d 53, 76–77 (D.D.C. 2015) (granting the U.S. House of Representatives standing based on the injury to its institutional power under the Appropriations Clause). Thanks to Professor Richard Re for his helpful comments on these points.

B. Entrenchment

Where agencies strain at the boundaries of ambiguous statutory authority, the downside risk is generally limited by the fact that Congress retains ultimate control over agency action. Even when courts cannot review agency action, administrative law assumes that future lawmakers, at least, can override and discard agency policymaking. In this domain, however, this may not be so easy. When they engage in broad-scale spending or commitments of financial resources, agencies have a greater ability to entrench commitments in ways that may hamstring future lawmakers.

The explanation of how agencies are able to entrench commitments flows from the difference between legislative actions and certain kinds of executive-branch actions. Statutes that create economic entitlements do not become legally entrenched as a formal matter. The Supreme Court has held that even "accrued" rights, such as Social Security benefits, can be repealed by Congress.[133] To hold otherwise would permit an earlier Congress to bind a later one. Similarly, the Supreme Court has frequently rejected claims that agencies and agency officials have, by their actions, "estopped" the government from *denying* benefits where granting those benefits would be clearly ultra vires.[134]

The entrenchment picture becomes more complex, however, when executive-branch actors create vested rights by entering into contracts. Although the Contracts Clause does not apply to the federal government,[135] "it is clear that *the National Government* has some capacity to make agreements binding future Congresses by creating vested rights."[136] By entering into a contract (for example, a loan

133. Flemming v. Nestor, 363 U.S. 603, 611 (1960) ("We must conclude that a person covered by the Act has not such a right in benefit payments as would make every defeasance of 'accrued' interests violative of the Due Process Clause of the Fifth Amendment.").

134. Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 428 (1990).

135. Pension Benefit Guar. Corp. v. R. A. Gray & Co., 467 U.S. 717, 732, n. 9 (1984).

136. United States v. Winstar, 518 U.S. 839, 876 (1996) (Souter, J.) (plurality opinion) (emphasis added) (citing Perry v. United States, 294 U.S. 330 (1935); Lynch v. United States, 292 U.S. 571 (1934)); *see also* Cuyahoga Metro. Hous. Auth. v. United States, 57 Fed. Cl. 751, 779 (2003) (rejecting the claim that "the 1994 amendments come under the unmistakability doctrine because they saved money that, in turn, could be employed for the general welfare," because the unmistakability doctrine "does not apply where instead Congress uses the funds saved from reneging on the government's contractual obligations for other public purposes."); Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717, 773–74 (2010) (noting that courts "tend to resist efforts by successor governments to change or cancel existing government contracts that they have inherited").

forgiveness agreement), the executive branch can create such a vested right. Moreover, it can shield that vested right against future regulatory change by omitting provisions that protect the government against such change.[137] Legislative or administrative attempts to undo such vested rights down the road could subject the government to liability for a breach of contract or give rise to a takings claim.[138]

Consider, too, the situation faced by the companies that have received risk-corridor or risk-adjustment subsidies,[139] or the states that have received funds to operate Basic Health Programs.[140] It is surely illegal to fraudulently *apply* for such monies; but, in this case, whatever illegality attends to these payments flows from the executive branch's overgenerous statutory interpretation, not from the actions of the recipients.[141] If the current presidential administration or Congress

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137. *Winstar*, 518 U.S. 878–79 n.22 (noting that "sovereign power" does not include governmental actions that would "abrogate one of [the government's] contracts by a statute abrogating the legal enforceability of that contract, [g]overnment contracts of a class including that one, or simply all [g]overnment contracts"); *id*. at 880 ("So long as such a contract is reasonably construed to include a risk-shifting component that may be enforced without effectively barring the exercise of [sovereign] power, the enforcement of the risk allocation raises nothing for the unmistakability doctrine to guard against, and there is no reason to apply it."); GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT 329–30 (2000). As Michael Graf has argued:

> The elimination [by *Winstar*] of the unmistakability doctrine from interpretation of rights under quasi-regulatory agreements amounts to a significant power shift away from the government's sovereign authority and towards the property rights of private contractors. . . .
>
> . . . [I]n many cases, quasi-regulatory contractual rights will no longer be 'subject to' the exercise of the government's sovereign powers. Under *Winstar*, these contractual rights will thus rise to a level approaching that of the fee simple estate in [*Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992)], ultimately superior in constitutional status to the government's police power.

Michael W. Graf, *The Determination of Property Rights in Public Contracts After* Winstar v. United States*: Where Has the Supreme Court Left Us?*, 38 NAT. RESOURCES J. 197, 247–48 (1998).

138. *See* Cuyahoga Met. Housing Auth., 57 Fed. Cl. at 780; Centex Corp. v. United States, 49 Fed. Cl. 691, 712 (2001); Eric Posner, *Courts Should Not Enforce Government Contracts* 28 (U. Chi. Law & Econ., Olin Working Paper No. 132, 2001), http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1144&context=law_and_economics [https://perma.cc/54Q6-KRDZ] ("If Congress refused to appropriate funds to pay damages [for a breach of a contract with the government], or took the more radical step of repealing the Tucker Act with respect to the law in question, the Court might hold that Congress has expropriated a vested contract right in violation of the takings clause, or legislated retroactively in violation of the due process clause.").

139. *See supra* notes 43–71 and accompanying text.

140. *See supra* notes 72–75 and accompanying text.

141. *Cf.* Survivor Benefit Plan—Waiver of Erroneous Annuity Payments, B-133142, B-178696, 1978 WL 11284, at *1 (Comp. Gen. Sept. 6, 1978) (waiving annuity overpayments in excess of statutory authority where "the error was administrative and that there is no evidence of fraud, misrepresentation, fault or lack of good faith on the part of the annuitants" and "recovery

tried to claw back payments made by a past administration, the recipients could plausibly raise a variety of equitable defenses and arguments.[142] Moreover, a past administration that wanted to shield its spending choices from being unwound down the road might be able to enhance the plausibility of such arguments and defenses simply by continuing to pronounce publicly that, and distribute money as if, there was no legal dubiety in the recipients' right to receive payment. When CMS, for example, issues regulatory guidance stating to insurers that it is "recording" its unpaid risk-corridor payments as "binding obligations of the federal government,"[143] such guidance may actually make it harder for a future Congress to legislate those unpaid payments away.

Potentially more important than legal entrenchment is the more pragmatic obstacle of political entrenchment. Agencies can entrench rules as a practical matter, if not formally. This can happen even with prescriptive regulatory measures that only impose unpleasant new rules.[144] But it will happen much more readily with *transfer* measures, particularly those that create "universal" entitlements that benefit the politically powerful middle and upper classes.[145] Regardless of their

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would be contrary to the purpose of the [Survivor Benefit Plans], and it would be against equity and good conscience to require recovery from the affected annuitants").

142. *See* Heckler v. Cmty. Health Servs., 467 U.S. 51, 60 n.12 (1984) (refusing to disallow all claims of estoppel against the government and recognizing at least two cases that "rest on the premise that when the Government acts in misleading ways, it may not enforce the law if to do so would harm a private party as a result of governmental deception"); *see also* Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 421 (1990) (noting that despite its unbroken record of rejecting estoppel arguments, the Court has preserved the possibility that "some type of 'affirmative misconduct' might give rise to estoppel against the Government"); SISK, *supra* note 137, at 957–59 (describing the availability of claims for set-off against the United States).

143. CTR. FOR CONSUMER INFO. & INS. OVERSIGHT, CTRS. FOR MEDICARE & MEDICAID SERVS., RISK CORRIDORS PAYMENTS FOR THE 2014 BENEFIT YEAR (2015), https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/RC_Obligation_Guidance_11-19-15.pdf [https://perma.cc/KH7K-XM8X].

144. *See* Freeman & Spence, *supra* note 20, at 7 ("Once an agency charts a new policy course, and the regulated community begins to respond, it may be difficult to reverse the consequences. In this way, an agency's adaptive strategy is not merely a stopgap—it meaningfully changes the policy status quo, reconfiguring the options for Congress should it ultimately choose to act."); *see also* Mila Sohoni, *Notice and the New Deal*, 62 DUKE L.J. 1169, 1220 (2013) (describing recent Supreme Court cases that have reflected aversion to abrupt regulatory change); Zachary S. Price, *Reliance on Nonenforcement*, 58 WM. & MARY L. REV. 937, 987 (2017) (explaining that "due process principles" may, to a limited extent, "prevent enforcement following assurances that planned conduct will not incur sanctions").

145. Compare the political economy of welfare reform or food-stamps reform with the political economy of reforming Social Security:

formal status, benefits, once conferred, are often sticky things; witness Social Security's "third rail" status.[146]

In the coming months and years, it will become clear whether the executive-branch measures examined here have succeeded at entrenching the rights they were intended to secure. The ACA's fate remains uncertain.[147] To the extent its reforms survive, however, one signal fact deserves emphasis: the statute would owe that afterlife not to Congress, but instead to the executive-branch actions discussed above. Those actions kept federal dollars flowing and insurance plans being sold for three long and critical years, thereby creating political "facts on the ground" that the new Congress and the new President have had to negotiate around, rather than override. As for the student loan repayment plans, they seem to be on relatively safe terrain at this moment.[148] In this case, the Obama administration's loan repayment

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> [S]ocial policies do differ markedly in the extent to which they give rise to politically efficacious support coalitions. Social Security, for example, promotes widespread mobilization among the aged, who are well poised to fight cuts. Cash assistance for the poor, by contrast, gives rise to an extremely weak, fragmented, and politically demobilized constituency, which was unable to present an effective and united front against the 1996 welfare reform law. In general, policies are more durable if they create or encourage the creation of large-scale organizations with substantial setup costs, directly or indirectly benefit sizable organized groups or constituencies, and embody long-lived commitments upon which beneficiaries and those around them premise crucial life and organizational decisions.

Jacob S. Hacker, *Privatizing Risk Without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States*, 98 AM. POL. SCI. REV. 243, 247 (2004) (citations omitted).

146. *See* Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 451, 431 (2015); Frans Penning & Paul Secunda, *Towards the Development of Governance Principles for the Administration of Social Protection Benefits: Comparative Lessons from Dutch and American Experience*, 16 MARQ. BENEFITS & SOC. WELFARE L. REV. 313, 324–35 n.39 (2015) ("Because of its hallowed status after almost eighty years in existence, it is considered to be politically untouchable and the 'third rail' of politics in the United States."); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 426–27 (2007).

147. *See* Noam H. Levey, *Trump and the GOP Are Charging Forward with Obamacare Repeal, but Few Are Eager To Follow*, L.A. TIMES (Dec. 12, 2016), http://www.latimes.com/nation/la-na-trump-obamacare-repeal-20161212-story.html [https://perma.cc/6Q4Z-FBGD]; Robert Pear, Thomas Kaplan & Maggie Haberman, *In Major Defeat for Trump, Push to Repeal Health Law Fails*, N.Y. TIMES (Mar. 24, 2017), https://www.nytimes.com/2017/03/24/us/politics/health-care-affordable-care-act.html?_r=1 [https://perma.cc/YHT4-4FLP].

148. In contrast to President Trump's stance concerning health care, his stance concerning student-loan programs has been, at times anyway, far closer to the current status quo. *See* Josh Mitchell, *U.S. to Forgive at Least $108 Billion in Student Debt in Coming Years*, WALL STREET J. (Nov. 30, 2016), http://www.wsj.com/articles/u-s-to-forgive-at-least-108-billion-in-student-debt-in-coming-years-1480501802 [https://perma.cc/WA9B-FXWP] ("President-elect Donald Trump said during his campaign he supported the idea of helping student-loan borrowers. He has proposed setting payments at 12.5% of income and forgiving balances after 15 years."). On the

programs may have transformed the landscape of public expectations to such an extent that—even given the thunderous effects of the 2016 election—the legislative elimination of these programs is no longer worth the political capital.

There is no point in making predictions about what Washington will do in the years to come. What *can* be said, though, is that if the federal government continues to sustain broad-scale access to affordable health insurance and to subsidized higher education loans, it will prove that the executive branch, and not just Congress, can manufacture "third rails"[149] with the tools available to it.

This point gives a different overtone to this whole debate, and, in an important way, splits off into a special category agency efforts to expend resources on economic entitlements through aggressive statutory interpretation from other sorts of ambitious or "latitudinarian" agency actions. It means that certain types of spending decisions cannot be checked at leisure, in the long term, when and if Congress gets around to rolling back the agency's program or the courts get around to resolving attacks upon it. Rather, the other branches' powers to control agency action must be exerted expeditiously, before the right starts to vest or the money gets handed over. And the capacity of the other branches to exercise their power expeditiously will, in turn, depend on the degree to which agency action in this domain is transparent.

C. Transparency

At first blush, it might seem that agency action enabling and shielding broad-scale economic entitlements must surely be among the more transparent things an agency does. Indeed, one might think that agency decisions that involve lots of spending would be much easier to understand and to check—for both congressional overseers and for the public—than decisions involving esoteric matters of securities laws or environmental regulation. There is certainly no immediately apparent reason to expect that there would be *less* transparency on questions concerning large amounts of spending than on other regulatory matters.

Whatever one may think in theory, the case studies reviewed in this Article demonstrate that one cannot safely assume that agency

other hand, Trump "has also suggested winding down the federal student loan program and shifting lending to the private sector." *Id*.

149. *See supra* note 146.

spending choices of this ilk will occur in a completely transparent way. Consider the student loan forgiveness programs. The Department of Education has been able to effectively create billions in higher-education subsidies by extending loans and by expanding the conditions on which it will forgive past loans.[150] This spending on loan forgiveness has been "disguised," as Professor John Brooks notes, "because of how budget rules treat federal loans."[151] Matters have not been helped by the Department of Education's failure to supply separate cost estimates or estimated forgiveness amounts for PAYE and REPAYE.[152]

For a different reason, the sources of spending on risk corridors and on risk-adjustment subsidies have been obscured, too: the agency has used incoming funds to make payments to insurers by creating revolving funds, a solution that at least deferred—and, in the case of risk-corridor payments, it was hoped might obviate—the need to get money appropriated by Congress to make those payments.[153] The cost-sharing reduction payments, drawn from a permanent appropriation for tax credits, are perhaps the most transparent of the spending choices made in the health-insurance context. But even that spending choice was not particularly well publicized, given that "[t]he first hint of the administration's change of heart came when it quietly withdrew the cost-sharing payments from the list of funds subject to the budget sequester, which applies only to discretionary—not permanent—appropriations."[154] An unprecedented lawsuit between the U.S. House of Representatives and the executive branch has subsequently thrust this spending decision and its asserted legal rationale into the limelight.[155] But that kind of interbranch standoff will occur rarely

150. *See supra* notes 86–92 and accompanying text.

151. Brooks, *supra* note 89, at 1064.

152. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 97, at 38 ("Education does not produce separate cost estimates for each of the five IDR plans [including PAYE and REPAYE] currently available, even though these plans provide different benefits to borrowers and will likely have different costs to the government."); *id*. at 50 ("[S]haring the amount of principal Education expects to forgive on loans in IDR plans could help policymakers better understand a key plan feature that contributes to their expected costs.").

153. *See supra* notes 50–60 and accompanying text.

154. Bagley, *Legal Limits*, *supra* note 43, at 1730 n.102.

155. U.S. House of Representatives v. Burwell, 185 F. Supp. 3d 165 (D.D.C. 2016). Oversight by the (Republican-controlled) U.S. House Committee on Ways and Means also played an important role. The committee investigation revealed that when some IRS officials raised objections to the Treasury's determination that cost-sharing payments could come out of the permanent appropriation, the officials were briefly shown an OMB memorandum "laying out the administration's justification" and told that they "could not take notes or make copies." Hulse,

(especially when the same party controls both chambers of Congress and the presidency), meaning that spending choices of this nature could mostly remain in the shadows. The Basic Health Program illustrates this point. While the use of the tax-credit appropriation to fund cost-sharing reduction payments was the subject of litigation in *United States House of Representatives v. Burwell*,[156] the executive branch's rationale for using the same appropriation to fund payments for the Basic Health Program is still not publicly disclosed or defended, notwithstanding efforts to get at that information via congressional hearings and subpoenas.[157]

The point is that ordinary assumptions concerning agency transparency do not seem to translate intact into this context. At least a part of this faltering of transparency was surely an artifact of the deep political divide between the Obama administration and the Republican-controlled Congress. When faced with a hostile Congress, an executive branch seeking to deploy funds through aggressive statutory interpretation is not going to shout it from the rooftops.[158] In such a case, transparency might have the unwanted side effect of setting off the "fire alarm" oversight that the executive branch may prefer to avoid.[159] Even when the branches are politically united, however, the sparseness of judicial review will likely also contribute to a lack of transparency around these spending choices.[160] In the absence of litigation over nearly any of these agency statutory interpretations,[161] the executive branch has not been forced to defend its legal conclusions

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Secret Meeting, *supra* note 48. After "[t]he O.M.B. officials left the room to allow their [IRS] visitors a moment to absorb the document," the OMB officials "then returned to answer a few questions and note that Attorney General Eric H. Holder Jr. had been briefed and signed off on the legal rationale." *Id.* In addition, the IRS officials were informed that "Treasury Secretary Jacob J. Lew signed off on a separate memorandum approving the spending." *Id.*

156. U.S. House of Representatives v. Burwell, 185 F. Supp. 3d 165 (D.D.C. 2016).

157. Virgil Dickson, *House Republicans Subpoena HHS over Allegedly Illegal Insurance Payments*, MOD. HEALTHCARE (Mar. 29, 2016), http://www.modernhealthcare.com/article/20160329/NEWS/160329862 [https://perma.cc/LVE9-626H]; Peter Sullivan, *Showdown Over Obamacare Subpoenas Quickly Escalating*, HILL (June 2, 2016, 6:00 AM), http://thehill.com/policy/healthcare/281931-showdown-over-obamacare-subpoenas-quickly-escalating [https://perma.cc/7ZPS-4LDT].

158. *See, e.g.*, Hulse, *Secret Meeting*, *supra* note 48.

159. *See* Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 259–60 (1987) (discussing how public disclosure requirements decrease incentives for bureaucrats to deviate from policy).

160. *See supra* Part I.A.

161. *King v. Burwell*, 135 S. Ct. 2480 (2015) and *United States House of Representatives v. Burwell*, 185 F. Supp. 3d 165 (D.D.C. 2016) are, so far, the exceptions.

in depth and in a manner subject to adversarial testing. Nor have federal judges issued opinions or orders evaluating whether the executive branch's legal conclusions are correct—thus depriving Congress and the public of an expert and a (relatively) non-partisan source of opinion on the legal rationale and validity of these spending choices.[162]

The ACA, PAYE, and REPAYE have, of course, been highly visible programs, even though the precise details of their financial plumbing have remained relatively obscure. Healthcare reform and remedying the problem of rising college debt both formed important planks of President Obama's domestic policy agenda, and these programs were ineluctably associated with his political promises.[163] If viewed as examples of the model of "Presidential administration" in action,[164] these agency efforts to enable and shield access to affordable health insurance and affordable higher education likely satisfy some conceptions of transparency and of democratic accountability. But, as explained in the next section, they fall short when measured against a more robust vision of transparency and accountability that would tether those concepts to active congressional involvement in, and control over, large-scale spending choices.

D. Expertise and Accountability

The notion of agency expertise, a chief component of the standard case in favor of delegation, is the idea that agencies have access to specialized information about their allotted domains and that they are equipped with resources that enable them to legislate more

162. My thanks to Professor Zach Price for emphasizing these points.

163. *See, e.g.*, Memorandum from Obama, *supra* note 86; Barack Obama, President, Remarks by the President in State of the Union Address (Jan. 20, 2010), https://obamawhitehouse.archives.gov/the-press-office/2015/01/20/remarks-president-state-union-address-january-20-2015 [https://perma.cc/KUB3-EKHQ] (requesting that Congress act to make health care and college more affordable); *id*. ("And let's tell another one million students that when they graduate, they will be required to pay only 10 percent of their income on student loans, and all of their debt will be forgiven after 20 years—and forgiven after 10 years if they choose a career in public service, because in the United States of America, no one should go broke because they chose to go to college.").

164. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–46 (2001) (presenting a defense of presidential administration on the grounds that it is both effective and accountable); *see also* Merrill, *supra* note 109, *passim* (describing the evolution of administrative lawmaking from a long-standing "positivist" model of administrative legality—one derived the administrative state's claims to legality from notions of congressional authorization and control—toward a "proceduralist" model, under which claims of administrative legality derive not from delegation but from public input, transparency, and accountability through the President).

competently in those domains than Congress would if Congress retained power for itself.

Agency expertise is usually invoked to explain why we rely on agencies to perform prescriptive policymaking.[165] From the point of view of expertise, however, regulatory prescriptions and regulatory transfers may not in principle appear very different. If an agency has the requisite expertise to determine that a regulation mandating car seats for children will promote public safety, then (in principle) an agency ought to also have the expertise necessary to determine that funding the purchase and proper installation of car seats will promote public safety. If an agency has the requisite expertise to determine that a state's educational system fails to provide an adequate education to its students, then (in principle) it ought to also have the expertise necessary to determine the types and amounts of resources that are necessary to supply an adequate education to students in that state. These examples can be multiplied ad infinitum, but the gist should be clear. If an institution has expertise in a given arena, it will not extend solely to awareness of what new prescriptive rules are necessary to solve problems; that expertise will also extend to knowledge of how and where resources can be deployed to solve those problems.

Congress itself has long demonstrated confidence in agency expertise in the spending and allocation of resources. Congress has relied extensively on agencies to set up and run spending programs, and it often provides only the broadest and most generous of parameters to guide agency spending.[166] If we are confident that agencies will properly exercise delegated authority to spend when Congress imposes essentially no legislative checks on that spending, then we are confident that agencies have the capacity to sensibly steward vast sums of public money. If the National Institutes of Health (NIH) has the ability to pick and choose between funding research proposals concerning tetanus or diabetes, then one can presume it also

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165. *See, e.g.*, JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION & REGULATION 351–52 (2d ed. 2013) ("One obvious argument in favor of delegation is that administrative agencies may have specialized expertise that makes them more effective policymakers, especially in complex technical fields like environmental protection and securities regulation."); Posner, *supra* note 21, at 1070 ("Agencies have many advantages over their nominal overseers such as executive branch officials, members of Congress, and judges: agencies set the regulatory agenda within their domain and also have more information about the effects of different kinds of regulation.").

166. Cincinnati Soap Co. v. United States, 301 U.S. 308, 322 (1937) ("Appropriation and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated government agencies.").

has the expertise to determine that funding research on the Zika virus is a necessary and pressing public health imperative. Congress may not have appropriated funding for Zika research, but that is neither here nor there for the expertise question. The fact that Congress has not appropriated money to cure Zika does not somehow denude the NIH of the *expertise* to determine that a public health catastrophe will occur if Zika becomes epidemic.

The difficulty, though, is that while the NIH has expertise concerning Zika, it lacks expertise concerning appropriations. We must distinguish here between two different kinds of tasks: deploying resources that the legislature has allocated within a given regulatory domain, on the one hand, and deploying government resources that the legislature has *not* allocated, on the other. The expertise of agencies is the former kind of expertise. The latter kind involves far more difficult trade-offs—of priority-setting across the full plane of government action,[167] and indeed across successive planes of government action over time. CMS may know very well that committing billions to risk-adjustment payments rather than depositing that sum with the Treasury will help to lower the cost of health insurance premiums in the immediate term. But how can it judge whether those lowered premiums are worth more or less than spending those same billions on research into Zika, or on global warming research, or on the provision of housing vouchers? The Department of Education may know very well that expanding loan forgiveness will help many more students obtain college degrees. But how can it assess whether this benefit is worth the corresponding increase in the federal deficit—an increase that might require future cuts to Social Security, Medicare, or defense spending? No single agency has the expertise to determine how these kinds of allocation decisions should be made at a society-wide level.[168]

This lacuna of expertise extends even to the extraordinary and difficult case when Congress has previously made a firm promise to pay, but then—for whatever reason—subsequently refuses to fund that promise with an appropriation. Let us pause to consider this truly awful quandary, which agencies have encountered in their efforts to shield the right to affordable health insurance.

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167. *Cf.* Thomas W. Merrill, *The Disposing Power of the Legislature*, 110 COLUM. L. REV. 452, 473–74 (2010) (noting that Congress, and not the President, has the power to "make law, create institutions, set appropriation levels, [and] allocate enforcement authority among rival institutions").

168. *See infra* notes 175–88 for a discussion of the implications of presidential coordination of agency decisions to spend.

As described in Part I.A, the ACA promised various subsidies to insurers, including cost-sharing reduction payments and risk-corridor payments,[169] that Congress subsequently refused to fund fully. In response, the agency aggressively interpreted its statutory authority to pay out on those obligations, either in full or in part. If the agency had *not* made those payments, insurers would have likely been able to file suit under the Tucker Act in the U.S. Court of Federal Claims to recover money out of the Judgment Fund, a pot of money currently supported by a permanent indefinite appropriation.[170] With respect to the risk-corridor payments, exactly such litigation has materialized.[171]

On one level, the agency's action makes good sense: by making the payments, the agency fulfilled a clear statutory promise and furthered the goals of the ACA by keeping insurance plans more affordable, while at the same time avoiding costly and protracted litigation down the road. From the point of view of economic substance—from the perspective of the insurance companies' balance sheets—this argument has an undeniable logic. Even conceding the absence of an appropriation, all the agency has done is deliver to insurance companies the money (or a prorated share of the money) that insurers could likely have otherwise recovered out of the Judgment Fund.[172]

But is this the kind of call that a single agency—any agency—has the expertise to make? Say, for example, that the Consumer Finance Protection Bureau (CFPB) started making payments to veterans that the veterans were entitled to receive by statute, but which the CFPB lacked the formal statutory authority to make. It would be no

169. *See supra* notes 50–60 and accompanying text.

170. Bagley, *Legal Limits*, *supra* note 43, at 1731–32 & n.117, 1738 & n.152 (explaining why insurers could sue under the Tucker Act for money recoverable out of the Judgment Fund). The district court in *United States House of Representatives v. Burwell* noted this possibility but declined to rule on the viability of a Tucker Act suit. *See* U.S. House of Representatives v. Burwell, 185 F. Supp. 3d 165, 183 & n.20 (D.D.C. 2016) ("Unreimbursed insurers might sue the government under the Tucker Act, 28 U.S.C. § 1491(a)(1), to receive the money owed them under ACA Section 1402(c)(3)(A) . . . . The House disputes whether this language confers an actionable right upon the insurers. . . . Because the Tucker Act argument is not ultimately dispositive, the Court does not decide whether insurers could sue under the Tucker Act.").

171. *See* Adelberg & Bagley, *supra* note 43 ("Insurers have so far filed at least six lawsuits in the Court of Federal Claims to recover money due under the risk corridor program. Although Congress has not fully funded the program, the insurers argue that the federal government has promised to make those payments.").

172. *But see* Land of Lincoln Mut. Health Ins. Co. v. United States, 129 Fed. Cl. 81, 114 (2016) (dismissing as unripe an insurer's claim that it was entitled to risk-corridor payments before the end of the program).

justification for the CFPB's officials to say that Congress had promised those benefits to veterans in sufficiently clear terms and that the CFPB's officials had simply accomplished the right economic result.

It is no different when the reason that the CFPB lacks the formal statutory authority to make the payment is a subsequently enacted appropriations statute that undoes an earlier payment commitment. In guidance, the CMS has declared that "HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers, and HHS is recording those amounts that remain unpaid . . . as . . . obligation[s] of the United States Government for which full payment is required."[173] But *HHS* does not have the expertise to determine unilaterally what should or should not count as binding "obligation[s] of the United States Government," upon which "full payment" must be made. To put it another way, Congress may have indeed written a check, but if Congress then refuses to supply funds to an agency to cash that check, an agency cannot then simply draw funds from wherever it can in order to ensure that the check does not bounce, just because disbursing those funds would save the expense and inconvenience of future litigation in the Court of Federal Claims.[174] No single agency possesses the expertise to determine unilaterally which obligations a later Congress should continue to honor. To conclude otherwise would be to (incorrectly) credit the agency with the capacity to anticipate and assess the universe of trade-offs that the later Congress must make.

It is important to note that the equities decisively favor payment. Considerations of notice and fairness cut sharply in favor of people or companies receiving money that an earlier Congress has firmly promised to pay in a statute. That said, the situation boils down to this: the agency has been hell-bent on fulfilling earlier statutory promises to pay on which a later Congress has been equally hell-bent on reneging. But whether Congress is reneging on a past promise or is simply declining to appropriate funds for future executive-branch projects, the core point remains the same. When an agency expends large sums of federal money that are not clearly allocated to it by Congress, it is

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173. CTR. FOR CONSUMER INFORMATION & INS. OVERSIGHT, *supra* note 143.

174. At the very least, litigation through the Court of Federal Claims will have the beneficial effect of producing some independent review of, and confirmation that, the statute in fact mandates the payment of funds. For a description of the role of judicial review in checking agency action, see *supra* Part II.B.

effectively making trade-offs about other regulatory domains—trade-offs that no single agency is properly equipped to make.

The next question then naturally occurs: what about the executive branch as a whole? Thus far, the discussion of expertise has treated the executive branch in a disaggregated fashion, by assessing the expertise of individual agencies to make broad-scale spending choices based on ambiguous statutory authority. This treatment has bracketed an important reality of modern administrative government: that agencies do not make decisions autonomously, but instead operate in a coordinated fashion at the behest of a centralized and presidentially controlled executive branch. At least one of the agency spending choices discussed here was made in response to a presidential directive; another had its legal rationale signed off on by Cabinet-level officials. Perhaps institutional competence should be evaluated not at the level of individual agencies, but instead at the level of the executive branch as a whole. Even if no single agency is able to make the necessary society-wide trade-offs, maybe the executive branch, considered collectively, can do so. Perhaps the executive branch as a whole possesses an expertise on governmental spending that is greater than the sum of its parts.

At first blush, the idea seems a compelling one. The President, like Congress, has a comprehensive governance portfolio, with authority over "the full range of regulatory targets and tools."[175] Because the President is a single actor who is held democratically accountable to a national constituency every four years, the President, too, is apt to pay close heed to "the voice of the people."[176] Even more to the point, the President actually produces a national budget annually,[177] at Congress's command,[178] while the congressional budget process has for

175. *Cf.* Merrill, *supra* note 109, at 471 ("Only the legislature has the capacity to select among the full range of regulatory targets and tools. Likewise, only the legislature has the ability to implement the choices made in ways that are comprehensive and fair.").

176. *Cf. id.* at 470 ("The legislature is also the branch of government most closely associated with the voice of the people, and in a democracy it is fitting that basic questions about the allocation and enforcement of power should be determined by the most democratic body.").

177. Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182, 2209 (2016) (noting that the Congressional Budget Act of 1974 requires the President to submit a budget proposal to Congress each year).

178. 31 U.S.C. § 1105(a) (2012) (requiring the President to produce an annual budget for the next fiscal year "[o]n or after the first Monday in January but not later than the first Monday in February"); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 454–56 (1987) (describing the creation of a coordinated budget process within the executive branch).

years been "busted, beleaguered, and broken."[179] The President (or at least the Office of Management and Budget[180]) exercises significant control over the process of crafting that budget and then overseeing its deployment by myriad federal agencies.[181] If competence to spend consists in having a panoptic perspective on the federal government's spending, and if the executive branch, taken as a whole, possesses that trait, then it would seem to follow that the executive branch is the proper institution to determine how federal dollars should be spent.

The difficulty with this syllogism, however, is that it glosses over a critical fact: when the executive branch spends, the money must come from somewhere, and the institution responsible for generating that money will be Congress, not the President.[182] It is no coincidence that the Constitution allocates to a single branch not only the powers to appropriate[183] and to spend for the general welfare,[184] but also the powers to tax and to borrow against the credit of the United States.[185] The two sets of powers go—and must go—hand in hand,[186] because engaging in government spending necessarily entails making decisions about government revenues (that is, tax rates or federal debt).

Put differently, although the problem of expertise may dwindle to insignificance when one zooms out to the scale of the executive branch as a whole, a new problem then looms into view—one of democratic accountability. Because the powers to tax, borrow, appropriate, and spend are necessarily integrated, one institution should bear the

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179. Michelle Cottle, *The Busted, Beleaguered, Broken, Budget Process*, ATLANTIC (Apr. 15, 2016), https://www.theatlantic.com/politics/archive/2016/04/the-busted-beleagured-broken-budget/478416 [https://perma.cc/9Z68-WQG4].

180. Pasachoff, *supra* note 177, at 2209 ("OMB does the bulk of this work on behalf of the President.").

181. *See id*. at 2227–31 (describing OMB's role in apportioning funds to agencies).

182. *See* Stith, *supra* note 113, at 1349 ("If Congress could not prohibit the Executive from withdrawing funds from the Treasury, then the constitutional grants of power to the legislature to raise taxes and to borrow money would be for naught because the Executive could effectively compel such legislation by spending at will.").

183. U.S. CONST. art. I, § 9, cl. 7.

184. *Id.* art. I, § 8, cl. 1.

185. *Id.* art I, §. 8, cls. 1–2; *id.* amend. XVI.

186. *Cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 631–32 (1952) (Douglas, J., concurring) ("The President has no power to raise revenues. That power is in the Congress by Article I, Section 8 of the Constitution. The President might seize, and the Congress, by subsequent action, might ratify the seizure. But, until and unless Congress acted, no condemnation would be lawful. The branch of government that has the power to pay compensation for a seizure is the only one able to authorize a seizure or make lawful one that the President has effected." (footnote omitted)).

integrated responsibility for exercising those powers.[187] But if the executive branch can create financial obligations or generate spending that Congress has not expressly authorized, then the executive branch can take credit for those spending choices while externalizing onto Congress the bulk of the political costs associated with immediately or eventually funding those decisions.[188]

This transfer of political liability might have negligible effects where the dollar amounts involved are small. Voters might not be sensitive to the small fluctuations in the government's bank balance or to the infinitesimal changes in future tax liabilities that might result from agencies spending modest sums in excess of express statutory authority.[189] But when the sums involved are large—as will be the case when the executive branch is using billions of government dollars to underwrite broad-scale economic rights—it becomes correspondingly more difficult to countenance an arrangement in which one branch can reap the political dividends from spending while leaving the other branch with the political liabilities of taxing or borrowing to support that spending.[190]

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187. Stith, *supra* note 113, at 1350 ("Because of the appropriations requirement, it is not enough for Congress to direct federal agencies to produce a better world . . . . For the executive branch to act to achieve the ends of government identified by Congress, Congress must affirmatively authorize the funds to do the job.").

188. The notion that the executive branch will prefer to avoid being seen to make politically costly choices about funding draws some support from Professor Daniel Hemel's recent observation that Presidents are reluctant to act unilaterally to increase taxes via administrative action, even when they have adequate statutory authority to do so. *See* Hemel, *supra* note 19, at 3 (describing Presidents' reluctance to "publicly take[] ownership" of "tax-related" decisions by the Treasury, especially those that are "taxpayer-unfriendly"); *id.* at 18–30 (walking through several examples of the President choosing to "ask[] Congress for a legislative change rather than proceed[ing] through regulation").

189. One might reasonably ask whether the magnitude of the effect should matter. In the Tenth Amendment context, the Supreme Court has adopted what amounts to a per se rule against certain kinds of laws—commandeering of state officials—that would result in mangled lines of political accountability. *See* New York v. United States, 505 U.S. 144, 169 (1992) ("[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.").

190. If this argument has a somewhat familiar feel, it is because it is the mirror image of an argument often levied against the weakness of the nondelegation doctrine: the contention that delegations permit Congress to take credit for enacting aspirational and vague legislation, while leaving the executive branch to "pick up the tab" by actually executing those programs. *See, e.g.*, Indus. Union Dept., AFL–CIO v. Am. Petroleum Inst., 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring in judgment) ("If we are ever to reshoulder the burden of ensuring that Congress itself make the critical policy decisions, these are surely the cases in which to do it. . . . It is the hard

To some, this accountability concern may seem overblown. Voters are not stupid; they may well be capable of discerning when spending schemes, particularly large-dollar ones, emanate from executive-branch choices rather than congressional commands. The President himself might wish to take credit for making those choices. Either way, the executive branch—or perhaps the party of the President leading the executive branch—might be held to answer by voters for the costs of large-dollar, broad-scale spending choices.[191]

But even if one assumes that voters will correctly attribute such choices to the executive branch, it is still difficult to conclude that the executive branch possesses a democratic mandate that is comparable or equivalent to Congress's to articulate and advance broad-scale spending regimes. It is worth remembering here that economic rights mean very different things to different people, and that shielding some people's conceptions of those rights might require dedicating government resources in ways that many other people find objectionable. Today's "right to an income" or "right to private property" may become tomorrow's administrative suspension of collection of corporate taxes or of taxes on business income[192]—a decision that would effectively create a tax expenditure that Congress has not authorized and a hole in the budget that it may not wish to fill. Today's "right to a great job" might become tomorrow's executive order spending billions on a 2000-mile border wall—a wall that

choices, and not the filling in of the blanks, which must be made by the elected representatives of the people."); Morris Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33, 46–52 (1982). Here, the worm has turned; through interpreting ambiguous statutes to allow for broad-scale spending, the executive branch can reap the credit for a spending program, while offloading to Congress the task of paying for it. That symmetry, which is perhaps pleasing on an aesthetic level in a "tit for tat" sort of way, doesn't make this (doubled?) dilution of accountability a good idea.

191. "Were American parties well-disciplined and ideologically coherent—and of course, were Congress and the executive unified by party," voters could hold parties accountable when, for instance, the government incurred large budget deficits. *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2342–43 (2006). But because political parties are neither well-disciplined nor ideologically coherent—and nor are the branches often controlled by the same party (or by ideologically similar factions of the same party)—the possibility persists that voters may not reliably hold accountable either the President or his party for large-scale spending choices.

192. Jeanne Sahadi, *How Paul Ryan and Donald Trump Differ on Tax Reform*, CNN MONEY (JAN. 10, 2017, 12:03 AM), http://money.cnn.com/2017/01/09/pf/taxes/house-tax-reform [https://perma.cc/7G39-95P5] (explaining that then-President elect Trump wanted to lower the business tax rate much more than congressional Republicans).

Congress believes will be futile and in any event does not want to pay for.[193]

The (hypothetical) executive branch underwriting these (hypothetical) measures might have a good-faith belief that they will enhance citizens' wealth or increase their economic opportunities—a belief not different in kind, perhaps, from the belief that spending billions to subsidize health insurance purchases will enhance citizens' welfare or the belief that forgiving tens of billions in loans will increase students' economic opportunity and the nation's overall prosperity. But should the executive branch, even at the behest of the President, be able to make these kinds of choices without clear sign-off from Congress? Such spending decisions—both the hypothetical ones and the actual ones—involve difficult trade-offs about who should bear the costs of paying for government benefits, who should derive benefits from the government, and what kinds of benefits count as legitimate and worthy of public subsidization. Making such society-wide and intertemporal redistributive decisions is much less a matter of applying apolitical judgment or bureaucratic expertise than it is a matter of striking an inherently political bargain about what the government must fund and about how much government to fund. The whole point of such measures is to redistribute money or resources in a way that reshapes the American social contract. From the point of view of democratic values—and notwithstanding the existence of quadrennial nationwide presidential elections and a "national constituency"[194]—surely Congress, warts and all, is still the best forum in which to renegotiate that contract.

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193. Manu Raju Deirdre Walsh & David Wright, *Trump Asking Congress, Not Mexico, to Pay for Border Wall*, CNN (Jan. 6, 2017, 2:11 PM), http://www.cnn.com/2017/01/05/politics/border-wall-house-republicans-donald-trump-taxpayers [https://perma.cc/2PBC-4LTK] (describing Trump administration officials' arguments for why the authority to build such a wall exists and where the money might be obtained to pay for it).

194. *Cf.* Kagan, *supra* note 164, at 2337 n.347 (arguing that increasing presidential control should be welcomed because of the "President's national constituency, and his resulting comparative responsiveness to broad public interests"); *id.* at 2334 ("Bureaucratic action, in Mashaw's view, thus turns out to have a democratic pedigree purer even than Congress's in our system of government."). *But see* Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1217, 1232–1246 (2006) (arguing that the President actually "cater[s] to a narrower geographic and population constituency than . . . Congress"); Peter Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rule-Making*, 48 ARK. L. REV. 161, 200–01 (1995) (noting that "majority parties in Congress have effectively delegated power through the committee system in a way that" leads committees to "replicate the dominant policy views of Congress" and thus "dominant public opinion").

CONCLUSION

The project of recognizing and protecting vertical economic rights presents a simple and consequential issue of institutional choice. Should this task be done by the courts? By Congress alone? By agencies, too, but only when Congress is explicit in its delegations and appropriations? By agencies, even when Congress is merely ambiguous about its intentions in its delegations and appropriations, as long as the spending occurs at the direction of the President?

By pulling on the levers of ambiguous statutory text, the Obama administration committed billions of dollars so millions of people could access certain economic goods: affordable health insurance and affordable higher education. This will surely not be the last time the executive branch undertakes such a task. In the vast menagerie of federal spending programs, entitlements are like environmental law's "charismatic megafauna"[195]—big, visible, popular, and hard to leave to die—in contrast to the small-fry earmarks and pork-barrel schemes that, like the bedeviled snail darter, have had narrower and more easily quelled constituencies.[196] Because of their widespread appeal, entitlement programs are likely to be important to politicians; they may form a key plank of a presidential platform or indeed an entire social reform movement. As a result, agencies beholden to such politicians and sensitive to such political preferences may come to see it as their core mission to create and fund these rights—and that, in turn, may lead the executive branch to take interpretive liberties in order to secure them, if Congress stands in its way.

Drawing on two case studies, this Article has argued that there are serious reasons to doubt whether, in this domain, the executive branch should be afforded the leeway regularly accorded to it by administrative law. These agencies may have acted in a way that aligned with many voters' preferences and in a way that increased the economic security and opportunity of millions of Americans. But, as these examples also make apparent, this type of agency action can undercut Congress's control over matters of resource allocation and long-term spending. These agency spending decisions can also be

195. *See* Sharon Peterson, *Congress and Charismatic Megafauna: A Legislative History of the Endangered Species Act*, 29 ENVTL. L. 463, 479 & n.153 (1999).

196. In recent years, Congress has taken steps to ban earmarks. *See* Deirdre Walsh & Ted Barrett, *Ryan Slams Brakes Hard on Vote to Bring Back Earmarks*, CNN (Nov. 16, 2016), http://www.cnn.com/2016/11/16/politics/house-republicans-earmarks [https://perma.cc/7ADS-DBE9].

accomplished with little transparency and without the checks of judicial review, and can unilaterally cause policy entrenchment. It is not clear whether or how this needle can be threaded. More work will be necessary to conceptualize and create the requisite checks on this highly consequential form of executive-branch action.