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Federal Bureaucratic Studies

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Abstract

A vast literature has developed in legal scholarship on the topic of bureaucratic governance. To date, this literature has focused squarely on the executive branch. Yet a second bureaucracy also exists in the federal government: the congressional bureaucracy. Recent legislation scholarship has brought this bureaucracy into focus—documenting its traits, practices, and culture. In so doing, it has created a rich new opportunity for cross-disciplinary dialogue—one where executive-branch studies and legislative studies collaborate toward a larger understanding of how bureaucracy operates, and can operate, in a presidentialist system.

To begin that cross-disciplinary conversation, this Article turns to five themes in the executive-branch literature. These are: (i) the dual-allegiance problem, (ii) bureaucratic resistance, (iii) dual advising-adjudicating roles, (iv) agency capture, and (v) comparative understandings of the judiciary. In each case, theories developed in the executive branch context enrich our understanding of the congressional bureaucracy, while new knowledge about the congressional bureaucracy also forces revisions to those executive-branch theories. In many cases, the congressional bureaucracy also reveals new governance solutions in our tripartite system—solutions that are overlooked when bureaucracy scholarship is confined to studies of a single branch. Through an exploration of these and other lessons, the Article illustrates the many possibilities inherent in a new

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cross-disciplinary dialogue on the role of bureaucracy in our federal system.

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INTRODUCTION

In legal scholarship, a vast literature has developed on the topic of bureaucratic governance. Motivated by the rise of the administrative state, it has sought to understand the governmental structures that have predominated since the New Deal settlement.[1] Today, this literature spans a variety of fields,

1. On the idea of the "New Deal settlement," see, e.g., Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4, 122 (2001).

including administrative law,[2] separation-of-powers law,[3] and presidential scholarship.[4] Across these fields, it has taken on the important challenge of understanding the balance of democratic accountability and nonpartisan expertise in the bureaucracies that populate the modern administrative state.

To date, this literature has focused squarely on the executive branch.[5] This is not surprising: the rise of administrative agencies marked a momentous transformation in federal governance, expanding its ranks by millions and introducing new structures and actors.[6] In response, scholars have directed much attention toward the administrative agency—studying its different organizational arrangements, rules, and employees. Scholars also have devoted important attention to the attorneys and other professionals who populate specific executive branch offices, such as the Office of Legal Counsel ("OLC")[7] and the Office of Management and Budget

2. For discussions involving scholarship generally considered administrative law studies, see *infra* Parts IV, VI, & VII. Administrative law has often been understood centrally as the study of bureaucracy and its oversight by the judiciary. *See* DANIEL E. HALL, ADMINISTRATIVE LAW: BUREAUCRACY IN A DEMOCRACY 19 (7th ed. 2020); C. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 33 (1990).

3. For discussions involving scholarship generally considered separation-of-powers scholarship, see in particular *infra* Parts III, IV. *See also* Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 689 (2000) [hereinafter Ackerman, *New Separation of Powers*].

4. For discussions of scholarship generally considered separation-of-powers scholarship, see in particular Parts IV, V. This research has often focused on the tensions of a democratically accountable President reliant upon a careerist bureaucracy for policy goals. *See, e.g.*, JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 257 (1989); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2272 (2001) ("Since the dawn of the modern administrative state, Presidents have tried to control the bureaucracy only to discover the difficulty of the endeavor.").

5. *See generally* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006).

6. *See* Dennis Vilorio, *Working for the Federal Government: Part 1*, U.S. BUREAU OF LAB. STATS. (Sept. 14, 2014), https://perma.cc/W7X2-N975.

7. *See, e.g.*, BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 88 (2010); Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1209–11 (2013); Katyal, *supra* note 5, at 2327; Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104

("OMB").[8] Through a study of these and other executive branch institutions, this scholarship has made tremendous contributions to our understanding of the modern presidency, the administrative state, and modern bureaucratic power.

As Abbe Gluck and I have documented, however, a second bureaucracy also exists in the federal government: the congressional bureaucracy.[9] As the executive branch expanded over the twentieth century, Congress felt itself losing power to the president—and it responded by creating its own legislative bureaucracy.[10] Today, Congress has thousands of nonpartisan staffers spread across a dozen legislative offices.[11] Much like the civil servants studied in the executive branch context, this congressional bureaucracy contributes expertise to democratic governance, assisting partisans in their effort to govern in a world of large, complex financial and bureaucratic institutions.[12] Unlike executive branch agencies, however, the congressional bureaucracy has received virtually no attention in the literature on bureaucratic governance.[13] Instead, comparative studies are more likely to look to other nations—not realizing that a second bureaucracy exists in our own federal government.[14]

IOWA L. REV. 139, 150 (2018); Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805, 808 (2017); Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1448 (2010).

8. *See, e.g.*, John D. Graham, *Valuing the Future: OMB's Refined Position*, 74 U. CHI. L. REV. 51, 51 (2007); Donald R. Arbuckle, *Obscure but Powerful: Who Are Those Guys?*, 63 ADMIN. L. REV. 131, 133 (2011); Jim Tozzi, *OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding*, 63 ADMIN. L. REV. 37, 40 (2011); Eloise Pasachoff, *The President's Budget As A Source of Agency Policy Control*, 125 YALE L.J. 2182, 2182 (2016).

9. I take the term "congressional bureaucracy" from our article, Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541, 1543 (2020).

10. *See id.* at 1555–60.

11. *See id.* at 1599–1600.

12. *See id.* at 1543–45.

13. As Bruce Ackerman observes, "comparative public administration is not a well worked field." Ackerman, *New Separation of Powers*, *supra* note 3, at 710.

14. *See, e.g.*, *id.* at 700 (comparing American and European approaches to bureaucracy); Terry M. Moe & Michael Caldwell, *The Institutional Foundations of Democratic Government: A Comparison of Presidential and Parliamentary Systems*, 150 J. INSTITUTIONAL & THEORETICAL ECON. 171, 172 (1994).

It is not surprising that bureaucracy scholarship has neglected this congressional counterpart. Even among legislation scholars, the congressional bureaucracy has long been overlooked.[15] In recent years, however, a movement has arisen to construct a more detailed, accurate, and modern understanding of the institution of Congress.[16] Termed by Justice Amy Coney Barrett as the "process-based turn" in legislative studies,[17] this movement has brought the congressional bureaucracy into focus for the first time.[18]

This scholarship on the congressional bureaucracy has created a rich new opportunity for cross-disciplinary dialogue. Under this project, legislative and executive branch scholars can collaborate toward a larger understanding of how bureaucracy operates—and can operate—in a presidentialist system. It is the goal of this Article to begin that cross-disciplinary conversation, showing the ways in which each field's insights and discoveries can transform the other.

To begin that cross-disciplinary conversation, this Article turns to five persistent themes in the executive branch literature. In each instance, it shows how awareness of the congressional bureaucracy remakes conversations in both fields. Those five themes are as follows:

- *The dual-allegiance problem*: Bureaucrats can have allegiances to multiple principals, and scholars have theorized about the institutional pathologies this can create in a tripartite government (and about how to minimize those pathologies).
- *Bureaucratic resistance*: Bureaucrats sometimes gain autonomy from politically-accountable leaders, creating opportunities for strategic resistance. Scholars have examined the factors that foster this autonomy, as well as the opportunities and risks it creates.

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15. *See infra* Part I.

16. *See infra* Part I.

17. Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2193 (2017). For her part, Justice Barrett is skeptical of the interpretive utility of this process-based turn.

18. For the few studies before the Cross-Gluck study that looked together at multiple offices of this bureaucracy, see *infra* note 55.

- *Dual advising/adjudicating roles*: Some bureaucratic offices must simultaneously perform advisory and adjudicatory functions, and scholars have looked for ways to address the risks that attend this institutional structure.
- *Agency capture*: Private interest groups can gain undue influence over bureaucratic decision-making, and scholars have hypothesized about the origins of this risk—and about institutional designs to minimize it.
- *Comparative understandings of the judiciary*: Bureaucracies can provide illuminating comparisons to the judiciary, particularly on metrics of neutrality and expertise. Scholars have examined these two institutions together for lessons on comparative institutional competence and the proper relationship between the branches.

For each of these topics, adding the congressional bureaucracy to the discussion offers significant new lessons. For legislation scholars, it enriches the understanding of the congressional bureaucracy; here, executive-branch scholarship provides theories of bureaucratic governance that can help explain various dimensions of a previously under-theorized bureaucracy. For executive-branch scholars, it provides a testing ground for those same theories: the congressional bureaucracy sometimes confirms and expands those theories, other times revises or undermines them. At the same time, by introducing the possibility of relocating bureaucracy not only within but across branches, the congressional bureaucracy also reveals new governance solutions that exist within our tripartite system—solutions that are overlooked when bureaucracy scholarship is siloed by governmental branch. Together, these lessons illustrate the many possibilities inherent in a new cross-disciplinary dialogue on bureaucracy in federal government.

The Article proceeds in six Parts. Part I begins with a brief background on the congressional bureaucracy and a review of the relevant scholarship. Parts II through VI then introduce the congressional bureaucracy into discussions in executive branch theory, with each Part devoted to a different discussion. Part II looks at the dual-allegiance problem, Part III turns to the topic of bureaucratic resistance, Part IV examines the challenges faced by offices that must both advise and adjudicate, Part V

looks at the problem of agency capture, and Part VI examines comparative understandings of the judiciary. A brief conclusion follows.

I. BACKGROUND: A TALE OF TWO BUREAUCRACIES

Since the inception of the modern administrative state, scholarship on the federal bureaucracy has unfolded quite differently for the two political branches. On the one hand, the executive branch bureaucracy has received extensive study and discussion from legal scholars.[19] In the late nineteenth and early twentieth centuries, many leading legal academics devoted significant attention to understanding, debating, and legitimating the administrative agencies that were emerging as a pivotal tool of federal governance—figures including Woodrow Wilson,[20] Felix Frankfurter,[21] James Landis,[22] and others.[23] Frankfurter also helped cement administrative law in the academic curriculum of law schools, using his platform at Harvard Law School to entrench it as an important field of legal academic inquiry.[24] It has remained there ever since: today, the

19. While typically associated with the New Deal, administrative agencies date back to the Founding, and the rise of the modern administrative state does not have a clearly defined start date, with important antecedents in the late-1800s and before. *See generally* STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920 (1982); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987).

20. *See* Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 198 (1887) ("The science of administration is the latest fruit of that study of the science of politics which was begun some twenty-two hundred years ago.").

21. FELIX FRANKFURTER & J. FORRESTER DAVISON, CASES AND MATERIALS ON ADMINISTRATIVE LAW (2d ed. 1935).

22. JAMES LANDIS, THE ADMINISTRATIVE PROCESS (1938).

23. *See, e.g.*, WALTER GELLHORN, ADMINISTRATIVE LAW: CASES AND COMMENTS (1940); LLOYD MILTON SHORT, THE DEVELOPMENT OF NATIONAL ADMINISTRATIVE ORGANIZATION IN THE UNITED STATES 24 (1923); W.F. WILLOUGHBY, AN INTRODUCTION TO THE STUDY OF THE GOVERNMENT OF MODERN STATES 386 (1919); Robert L. Hale, *Coercion and Distribution in a Supposedly Noncoercive State*, 38 POL. SCI. Q. 470, 478–81 (1923); FRANK J. GOODNOW, COMPARATIVE ADMINISTRATIVE LAW: AN ANALYSIS OF THE ADMINISTRATIVE SYSTEMS NATIONAL AND LOCAL, OF THE UNITED STATES, ENGLAND, FRANCE AND GERMANY (1903).

24. *See* Mark Fenster, *The Birth of a "Logical System": Thurman Arnold and the Making of Modern Administrative Law*, 84 OR. L. REV. 69, 80 (2005).

executive branch bureaucracy regularly generates conferences,[25] symposia,[26] and journals.[27]

By contrast, the congressional bureaucracy has historically received little attention. The topic of legislation itself, after a brief promising period in the 1920s and 1930s, was not regarded as a distinct area of inquiry (or a separate class in most law schools) until the 1980s.[28] As the field emerged in that decade, it was shaped by formative figures such as Justice Antonin Scalia, whose approach to legislation and statutory interpretation displayed little interest in the realities of the modern legislative process.[29] Even among those with interest in legislative process, focus typically was upon the textbook "Schoolhouse Rock"[30] legislative process and the partisan staff that assisted it.[31] Generally overlooked were the nonpartisan

25. *See, e.g.*, *Bureaucracy and Presidential Administration: Expertise and Accountability in Constitutional Government*, CTR FOR THE STUDY OF THE ADMIN. STATE, ANTONIN SCALIA L. SCH. (Feb. 6, 2020), https://perma.cc/N3AY-4CXL; *The Administration of Immigration*, CTR. FOR THE STUDY OF THE ADMIN. STATE, ANTONIN SCALIA L. SCH. (Oct. 25, 2019), https://perma.cc/F38T-WRZJ; *Regulatory Change & the Trump Administrative State Conference*, YALE J. ON REG. (Mar. 22, 2019), https://perma.cc/ZXF3-8N7C; 2020 *Administrative Law Conference*, AM. BAR ASS'N (Nov. 19–20, 2020), https://perma.cc/44UT-Z2NW.

26. *See, e.g.*, Ctr. for the Study of the Admin. State, Symposium on Federal Agency Adjudication (Aug.-Sept. 2020), https://perma.cc/8S5L-DJEG; Ctr. for the Study of the Admin. State, The Administration of Democracy—The George Mason Law Review's Second Annual Symposium on Administrative Law (Oct. 4, 2019), https://perma.cc/YLX6-K3VX: Reg. Rev., Constitutional Questions and the Administrative State (Dec. 16, 2019), https://perma.cc/UC3C-6Q5T; Yale J. on Reg., Symposium on Racism in Administrative Law (2020), https://perma.cc/BS5T-TTK2.

27. ADMIN. L. REV., https://perma.cc/88VV-53NP.

28. *See* William N. Eskridge, Jr., *The Three Ages of Legislation Pedagogy*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 3, 4 (2004) (chronicling the early promise of the 1920s and 1930s, the period until the 1980s when "legislation was basically a dead area of legal academic inquiry," and the 1980s "resurgence"); *see also id.* at 6 (chronicling the assembly of Eskridge and Frickey's landmark 1988 legislation casebook and subsequent return of Legislation classes to most law schools).

29. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 624 (1990) (describing Scalia's role in ushering in the rise of "new textualism" and its lack of interest in legislative process).

30 *Schoolhouse Rock!: I'm Just a Bill* (ABC television broadcast Mar. 27, 1976), https://perma.cc/EN7K-Q27Q.

31. S*ee, e.g.*, WILLIAM N. ESKRIDGE JR ET AL., STATUTES, INTERPRETATION, AND REGULATION 33-80 (2014) (reviewing standard legislative process);

offices inside Congress, as well as the new legislative process that was evolving to incorporate them and their expertise.[32]

However, Congress did indeed create a significant nonpartisan legislative bureaucracy in the twentieth century. It was a project with roots in the Progressive Era,[33] when good governance projects at the state level exerted an influence on federal legislators[34]—and one that saw important expansions in the 1940s and 1970s,[35] when concerns about executive branch power led Congress to resist by building its own nonpartisan bureaucracy.[36] The result was the congressional bureaucracy

Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 845 (1992) (arguing for relevance of "congressional floor debates, committee reports, hearing testimony, and presidential messages"); *id.* at 858–59 (observing role of partisan "staff members for legislators"); Cross & Gluck, *supra* note 9, at 1636 ("Congress also has changed over time, and yet barely a dent has been made from those changes in even those interpretive theories and doctrine that are purportedly based on Congress's own operations.").

32. *See* Cross & Gluck, *supra* note 9, at 1554 (noting the "description deficit" for these offices in the literature).

33. *See Amendment to H.R. 15279, Legislative, Executive, and Judicial Fiscal Year 1915 Appropriations Act, June 13, 1914*, U.S. CAPITOL VISITOR CTR., https://perma.cc/KSR6-623D (providing funding and direction in 1914 to establish the service that would become the Congressional Research Service); Revenue Act of 1918, § 1303(a), Pub. L. No. 254, 40 Stat. 1057, 1141–42 (establishing Legislative Counsel in 1918).

34. *See* George K. Yin, *Legislative Gridlock and Nonpartisan Staff*, 88 NOTRE DAME L. REV. 2287, 2292–93 (2013) (discussing state antecedents to the Congressional Research Service); WIS. LEGIS. REFERENCE BUREAU, https://perma.cc/7RXS-PCZW; 56 CONG. REC. 10524 (1917) (statement of Rep. Greene).

35. *See* Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812; Legislative Reorganization Act of 1970, Pub. L. No. 91-510, 84 Stat. 1140 (codified at 2 U.S.C. § 166 (2012); Act of December 27, 1974, Pub. L. No. 93-552, 88 Stat. 1757 (establishing the Law Revision Counsel); Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified as amended at 2 U.S.C. §§ 601-688 (2012)) (establishing the Congressional Budget Office); Legislative Branch Appropriation Act of 1978, Pub. L. No. 95-94, 91 Stat. 653 (1977) (giving statutory foundation to the House Parliamentarian).

36. *See* Cross & Gluck, *supra* note 9, at 1555–60 (documenting offices' common origins in reclaiming power from executive).

that exists today: a bureaucracy with over 4,000 expert professional staff,[37] spread across eleven nonpartisan offices.[38]

To be sure, this congressional bureaucracy is not of comparable size to its executive branch counterpart. Its staff number in the thousands, not the millions.[39] Yet, thanks to its design as a nonpartisan center of expertise within a political branch, the congressional bureaucracy still shares important traits with its executive counterpart—traits that provide a valuable foundation for comparison.[40]

The eleven offices that now comprise the congressional bureaucracy and contribute directly to the legislative process are as follows:

- *Congressional Research Service (CRS)*: Congress's "think tank," a research service that provides legal and policy analysis of legislation and other issues.[41]
- *Offices of the House and Senate Legislative Counsel (Legislative Counsel)*: Legislative drafting offices in each chamber.[42]

37. *See id.* at 1599–1600.

38. This Article excludes nonpartisan congressional offices that do not regularly participate in the legislative process, such as the Government Printing Office, the Office of Senate Legal Counsel and the Office of the General Counsel of the House of Representatives, the Architect of the Capitol, the Capitol Police, each chamber's Sergeant at Arms, and each chamber's chaplain. On these offices, see IDA. A. BRUDNICK, CONG. RESEARCH SERV., RL33220, SUPPORT OFFICES IN THE HOUSE OF REPRESENTATIVES: ROLES AND AUTHORITIES 1 (2020); IDA A. BRUDNICK, CONG. RESEARCH SERV., R43532, OFFICES AND OFFICIALS IN THE SENATE: ROLES AND DUTIES 1 (2015).

39. *Compare* Cross & Gluck, *supra* note 9, at 1599–1600 (listing employee numbers in congressional bureaucracy offices), *with* Vilorio, *supra* note 6 (noting over two million federal civilian workers).

40. *See* Cross & Gluck, *supra* note 9, at 1543–44.

41. *See* Legislative Reorganization Act of 1946, § 203, Pub. L. No. 79-601, 60 Stat. 812; *see also* STEPHEN W. STATHIS, *CRS at 100*, *in* CRS AT 100: THE CONGRESSIONAL RESEARCH SERVICE: INFORMING THE LEGISLATIVE DEBATE SINCE 1914, at 9, 25 (2014).

42. *See* Legislative Reorganization Act of 1970, Pub. L. No. 91-510, 84 Stat. 1140 (codified at 2 U.S.C. § 281-282e) (House office); Revenue Act of 1918, § 1303(a), Pub. L. No. 254, 40 Stat. 1057, 1141–42 (Senate office).

- *Office of the Law Revision Counsel (OLRC)*: Staff who turn Congress's enacted public laws into the U.S. Code.[43]
- *Congressional Budget Office (CBO)*: Economists and analysts who provide influential economic analysis, including estimates of the cost of all significant legislation.[44]
- *Joint Committee on Taxation (JCT)*: Committee with nonpartisan staff that assists with all aspects of tax legislation, including policy analysis, drafting assistance, and all revenue estimates.[45]
- *Offices of the House and Senate Parliamentarians (Parliamentarians)*: The arbiters of congressional procedure and rules in each chamber.[46]
- *Government Accountability Office (GAO)*: Congress's "watchdog" over the executive branch that conducts audits, performs policy research, and informs Congress about the implementation of its laws.[47]
- *Medicare Payment Advisory Commission (MedPAC) & Medicaid and CHIP Payment and Access Commission (MACPAC)*: Commissions with nonpartisan staff that function as Congress's overseers and advisors on the Medicare, Medicaid, and CHIP programs.[48]

The staff in these eleven offices are distinct from the sizeable partisan staff that populates the modern Congress,

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43. *See* Committee Reform Amendments of 1974, H.R. Res. 988, 93d Cong. § 405 (1974); Pub. L. No. 93-554, 88 Stat. 1771, 1777 (1974) (codified at 2 U.S.C. § 285c (2018)).

44. *See* Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, tit. II, 88 Stat. 297 (1974).

45. *See* I.R.C. § 8001; *see also* Cross & Gluck, *supra* note 9, at 1545.

46. *See* Legislative Branch Appropriation Act of 1978, Pub. L. No. 95-94 § 115, 91 Stat. 653, 668 (1977). The Senate Parliamentarian's Office has no organic statute specifying its responsibilities. *See* Cross & Gluck, *supra* note 9, at 1584.

47. *See* 31 U.S.C. §§ 701–705, et seq; *see also About GAO: Overview*, GOV'T ACCOUNTABILITY OFF., https://perma.cc/P8TJ-DRW6; Cross & Gluck, *supra* note 9, at 1545.

48. *See* Balanced Budget Act of 1997, Pub. L. 105–33, § 5022(c), 111 Stat. 251 (1997) (MedPAC); Children's Health Insurance Program Reauthorization Act of 2009, Pub. L. No. 111-3, § 1900(a), 123 Stat. 8 (MACPAC).

which are not the focus of this Article.[49] This partisan staff similarly could be viewed as a legislative bureaucracy, of course. Partisan congressional staff, however, lack certain features that have motivated much conversation about bureaucratic governance in the executive branch context, including nonpartisanship,[50] professionalization in expert fields,[51] and long tenures.[52] For purposes of this Article, the term "bureaucracy" therefore refers specifically to staff who are employed in a nonpartisan capacity to contribute professionalized expertise to the legislative process.

In recent years, the scholarly neglect of this congressional bureaucracy has finally begun to change. This shift has coincided with the rise of what Justice Barrett has labeled the "process-based turn"[53] in legislation scholarship: a movement to investigate the inner workings of the modern Congress and theorize its implications for statutory interpretation and legislative reform.[54] In the past several years, members of this

49. For the size and structure of partisan staffs, see R. ERIC PETERSEN & AMBER HOPE WILHELM, CONG. RSCH. SERV., R43946, SENATE STAFF LEVELS IN MEMBER, COMMITTEE, LEADERSHIP, AND OTHER OFFICES, 1977–2016 (2016); R. ERIC PETERSEN & AMBER HOPE WILHELM, CONG. RSCH. SERV., R43947, HOUSE OF REPRESENTATIVES STAFF LEVELS IN MEMBER, COMMITTEE, LEADERSHIP, AND OTHER OFFICES, 1977–2016 (2016).

50. *See, e.g.*, SKOWRONEK, *supra* note 19, at 47 (citing "political neutrality" as a "hallmark" of civil service); *see also* Jesse M. Cross, *Legislative History in the Modern Congress*, 57 HARV. J. ON LEGIS. 83 (2019) [hereinafter Cross, *Legislative History*]; Cross & Gluck, *supra* note 9.

51. *See, e.g.*, SKOWRONEK, *supra* note 19, at 47 (citing "recruitment by criteria of special training or competitive examination" as "hallmark" of civil service). On professionalized expertise differences between partisan and nonpartisan congressional staffs, see Cross, *Legislative History*, *supra* note 50, at 102–22; Cross & Gluck, *supra* note 9. On role of professionalized expertise in executive branch, see Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1, 50 (2018) ("As Stephen Skowronek and other historians have argued, the birth of the administrative state during the last decades of the nineteenth century coincided with a new faith in professionalism and expertise . . . .").

52. *See, e.g.*, SKOWRONEK, *supra* note 19, at 47 (citing "tenure in office" as "hallmark" of civil service). On tenure differences between partisan and nonpartisan staff, see Cross, *Legislative History*, *supra* note 50, at 106–08 (outlining differences between partisan and nonpartisan staffs); Cross & Gluck, *supra* note 9, at 1552 (same).

53. *See* Barrett, *supra* note 17, at 2193.

54. This movement is widely viewed as having been inaugurated by a two-part study in 2014 by Abbe Gluck and Lisa Bressman. *See* Abbe R. Gluck

movement have directed attention to individual offices in the congressional bureaucracy, highlighting the role that one office or another now plays in shaping legislation for Congress.[55] These efforts have been buttressed as scholars in other legal fields have directed attention to individual offices, such as observations about OLRC in law library studies[56] and JCT in tax scholarship.[57] A few scholars also have looked at multiple

& Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 901 (2013) [hereinafter Gluck & Bressman, *Part I*]; Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 725 (2014) [hereinafter Bressman & Gluck, *Part II*].

55. *See, e.g.*, Cross, *Legislative History*, *supra* note 50; Jesse M. Cross, *The Staffer's Error Doctrine*, 56 HARV. J. ON LEGIS. 83 (2019) [hereinafter Cross, *The Staffer's Error*]; Jesse M. Cross, *When Courts Should Ignore Statutory Text*, 26 GEO. MASON L. REV. 453 (2018) [hereinafter Cross, *When Courts Should Ignore*]; Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways that Courts Can Improve on What They Are Already Trying to Do*, 84 U. CHI. L. REV. 177 (2017); Gluck & Bressman, *Part I*, *supra* note 54; Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789 (2015); Jonathan S. Gould, *Law Within Congress*, 129 YALE L.J. 1946 (2020); Jarrod Shobe, *Enacted Legislative Findings and Purposes*, 86 U. CHI. L. REV. 669 (2019); Daniel B. Listwa, Comment, *Uncovering the Codifier's Canon: How Codification Informs Interpretation*, 127 YALE L.J. 464 (2017); Jarrod Shobe, *Codification and the Hidden Work of Congress*, 67 UCLA L. REV. 640 (2020); Tobias A. Dorsey, *Some Reflections on* Yates *and the Statutes We Threw Away*, 18 GREEN BAG 2D 377 (2015); Tobias A. Dorsey, *Some Reflections on Not Reading the Statutes*, 10 GREEN BAG 2D 283 (2007); Rebecca M. Kysar, *Dynamic Legislation*, 167 U. PA. L. REV. 809 (2019); Rebecca M. Kysar, *Interpreting by the Rules*, 99 TEX. L. REV. 1115 (2021).

56. *See* Shawn G. Nevers & Julie Graves Krishnaswami, *The Shadow Code*, 112 LAW LIBR. J. 213, 215 (2020); Mary Whisner, *The* United States Code*, Prima Facie Evidence, and Positive Law*, 101 LAW LIBR. J. 545, 554 (2009).

57. *See, e.g.*, Rebecca M. Kysar, *Tax Law and the Eroding Budget Process*, 81 LAW & CONTEMP. PROBS., no. 2, 2018, at 61; Clinton G. Wallace, *Congressional Control of Tax Rulemaking*, 71 TAX L. REV. 179 (2017); Ellen P. Aprill & Daniel J. Hemel, *The Tax Legislative Process: A Byrd's Eye View*, 81 L. & CONTEMP. PROBS., no. 2, 2018, at 100; George K. Yin, *Crafting Structural Tax Legislation in a Highly Polarized Congress*, 81 J.L. & CONTEMP. PROBS., no. 2, 2018, at 241, 251–54; George K. Yin, *How Codification of the Tax Statutes and the Emergence of the Staff of the Joint Committee on Taxation Helped Change the Nature of the Legislative Process*, 71 TAX L. REV. 723, 725–26 (2018) (describing the growth of the JCT staff and the staff's work on codifying the tax statutes); George K. Yin, *James Couzens, Andrew Mellon, the*

offices of the congressional bureaucracy, although not necessarily to study the offices themselves.[58] Against this backdrop, Abbe Gluck and I recently published a comprehensive look at this bureaucracy ("Cross-Gluck study").[59] The Cross-Gluck study worked to systematically document the traits, practices, and culture that spanned these nonpartisan offices. That study provides the foundation for much of the comparative examinations in Parts II through VII.

II. DUAL-ALLEGIANCE PROBLEM

By turning to ongoing discussions in executive-branch scholarship, we can begin to understand how the congressional bureaucracy generates new cross-disciplinary insights. For example, several scholars have contended that bureaucracy in America is inevitably subject to what might be termed the "dual-allegiance problem." This scholarship observes that bureaucracy in America—here, assumed to be an administrative agency—is subject to competing allegiances to Congress and the President.[60] This is believed to create a host of vexing problems,

"Greatest Tax Suit in the History of the World," and the Creation of the Joint Committee on Taxation and its Staff, 66 TAX L. REV. 787, 788 (2013) (explaining how JCT became intertwined with complex tax issues).

58. *See generally, e.g.*, Yin, *supra* note 34; Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807 (2014).

59. Cross & Gluck, *supra* note 9, at 1543–44.

60. *See* Bruce Ackerman, *Good-bye, Montesquieu*, *in* COMPARATIVE ADMINISTRATIVE LAW. 38, 41 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010) [hereinafter Ackerman, *Good-bye*] ("[P]residents must compete for control with an independently elected Congress. Legislative leaders have their own weapons for pushing the bureaucracy in their direction . . . . "); Kagan, *supra* note 4, at 2273; Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 816 (2013); Ali Farazmand, BUREAUCRACY & ADMIN. 185 n.9 (2009); Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 554 (2015) [hereinafter Michaels, *Evolving Separation of Powers*]; Randall L. Calvert et al., *A Theory of Political Control and Agency Discretion*, 33 AM. J. POL. SCI. 588, 589 (1989). Kagan also cites political scientists on this cross-pressure. *See* Kagan, *supra* note 4, at 2385; *see also* Synar v. United States, 626 F. Supp. 1374, 1398 (D.D.C. 1986).

including loss of presidential control over the bureaucracy,[61] insertion of presidential loyalists into the bureaucracy,[62] opportunities for strategic behavior by bureaucrats,[63] undermining of presidential policies,[64] and problematic shifts of power within Congress.[65] Bruce Ackerman has argued that this dual-allegiance problem is so severe that it renders bureaucracy fundamentally incompatible with our tripartite system of government.[66] The dual-allegiance problem therefore appears, in this literature, both serious and unavoidable.

However, the dual-allegiance problem is specific to the executive branch. As the Cross-Gluck study documented, the congressional bureaucracy is solely accountable to Congress.[67] With respect to appointment[68] and removal[69] of office heads, hiring and firing of staff,[70] funding of offices,[71] day-to-day

61. *See* Ackerman, *Good-bye*, *supra* note 60, at 41; *see also* ANDREW B. WHITFORD & GARY MILLER, ABOVE POLITICS: BUREAUCRATIC DISCRETION AND CREDIBLE COMMITMENT 102 (2016).

62. *See* Ackerman, *Good-bye*, *supra* note 60, at 41; Ackerman, *New Separation of Powers*, *supra* note 3, at 700; Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227, 246 (2016) [hereinafter Michaels, *Of Constitutional Custodians*].

63. *See* Kagan, *supra* note 4, at 2273.

64. *See, e.g.*, Aziz Z. Huq, *The President and the Detainees*, 165 U. PA. L. REV. 499, 500 (2017) (observing a "bureaucratic-legislative alliance" that obstructed President Obama's efforts to close the Guantanamo Bay detention facility).

65. *See generally* J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443 (2003).

66. *See* Ackerman, *New Separation of Powers*, *supra* note 3, at 702; Ackerman, *Good-bye*, *supra* note 60, at 41; Katyal, *supra* note 5, at 2346.

67. *See* Cross & Gluck, *supra* note 9, at 1606, 1613.

68. The lone exception is GAO. *See* 31 U.S.C. § 703(a)(1) (explaining how GAO's Comptroller General is appointed by the President and subject to Senate confirmation after the congressional commission recommends a list of at least three candidates). The commissioners of MedPAC and MACPAC are also selected by the Comptroller General. SOURCE.

69. GAO again provides the exception. *See* 31 U.S.C. § 703(e)(1) (providing that the head of GAO is removable only by impeachment or, for specified reasons, by joint resolution); *see also* Cross & Gluck, *supra* note 9, at 1606.

70. *See* Cross & Gluck, *supra* note 9, at 1613.

71. The congressional bureaucracy is subject to a legislative branch appropriations process that, while requiring presidential signature, has historically received significant presidential deference. *See* L. Anthony Sutin,

supervision,[72] and regular use of its services,[73] a convergence of rules and practices has created a bureaucracy that is single-mindedly responsive to Congress.[74] As a result, the congressional bureaucracy is generally immune to the cross-pressures that worry executive-branch scholars.

This basic observation opens up a variety of useful lessons. First, it reveals new bureaucratic possibilities in our tripartite system. If we are troubled by the dual-allegiance problem, we might consider relocating additional bureaucratic tasks and roles from the executive branch into the legislative branch. As the Cross-Gluck study demonstrated, this is precisely how most of the existing congressional bureaucracy came into existence: the performance of certain tasks by the executive branch was seen as problematic for one reason or another, and so Congress reclaimed their performance.[75] In this way, the congressional bureaucracy opens new and unexplored solutions to existing separation-of-powers problems, such as dual-allegiance.

It is important not to overstate the promise of this solution, of course. For several reasons, the federal bureaucracy could never be entirely relocated into Congress. The subset of agency work that involves actual execution of laws—awarding grants, conducting inspections, and so on—obviously must be performed by executive branch actors. In rulemaking, nuanced application of the law often entails varied application across regions and evolving application over time—both aspects that, due to the general and prospective nature of legislation, would be difficult to assign to the congressional bureaucracy.[76] Institutionally, the congressional bureaucracy also has retained much of its current

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Check, Please: Constitutional Dimensions of Halting the Pay of Public Officials, 26 J. LEGIS. 221, 242 (2000).

72. Cross & Gluck, *supra* note 9, at 1613.

73. Use of the bureaucracy is generally dependent upon congressional demand, as its services are mostly optional. The nearest possible exceptions are when enacted statutes mandate the involvement of an office, which raises complicated questions about executive-branch authority to create points of order in Congress. *See id.* at 1628–30.

74. *See id.* at 1546.

75. *See generally* Cross, *The Staffer's Error*, *supra* note 55. *See also* Cross & Gluck, *supra* note 9, at 1555–60.

76. *See* Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015, 1016 (2006) (observing that in its "ideal form[], legislation is prospective and general" while noting exceptions).

influence by developing close working relationships with the legislators and partisan staffs in Congress[77]—relationships that would be difficult to establish and preserve at a size anywhere near that of the executive branch bureaucracy.[78] Ackerman therefore is correct to observe that, to some extent, the dual-allegiance problem is unavoidable in our system. That does not mean, however, that fatalism is justified. If the dual-allegiance problem is concerning, expansion of the congressional bureaucracy provides a means to minimize it.

Second, prior scholarship on the dual-allegiance problem provides new ways to understand the congressional bureaucracy. For example, the Cross-Gluck study documented that nonpartisan hiring practices have flourished in the congressional bureaucracy, even beyond what is required by law.[79] Scholarship on the dual-allegiance problem provides a partial explanation for this phenomenon (which will be discussed further in Part III). In the executive branch, Ackerman has argued, the dual-allegiance problem is a key motivating factor for Presidents to insert partisan loyalists into executive agencies.[80] Since Congress is immune to this dual-allegiance problem, it stands to reason that it would have less incentive to politicize its own bureaucracy. In this way, dual-allegiance scholarship provides some explanation for an otherwise unexplained dimension of the congressional bureaucracy. At the same time, the lesson also runs in the opposite direction: the congressional bureaucracy provides new evidence to support Ackerman's diagnosis of executive agency politicization.

Third, the dual-allegiance problem creates new ways of thinking about statutory doctrine. For example, Magill and Vermeule have argued that courts should be sensitive to the ways that interpretive doctrines create incentives for shifts of

77. *See* Cross & Gluck, *supra* note 9, at 1615–16.

78. The counterpoint, and one that might be used to think about how a significant expansion of the congressional bureaucracy might operate, is GAO, which has approximately 3,000 employees (and once had nearly 15,000). *See id.* at 1588.

79. *See* Cross & Gluck, *supra* note 9, at 1613–14.

80. *See id.*

work and responsibility in the executive bureaucracy.[81] The congressional bureaucracy raises the question: should courts similarly be sensitive to the impact of their doctrines on inter-branch bureaucratic arrangements? For instance, should they incentivize arrangements that avoid problems such as dual allegiance?

Courts often do—many times unwittingly—take approaches to interpreting legislation that create incentives for Congress to assign tasks either to the congressional bureaucracy or to an executive-branch agency.[82] Sometimes, for instance, courts punish Congress for creating lengthy and intricate statutes—such as when they adopt an unforgiving approach to statutory errors, thereby transforming every statutory detail into a potential weapon to undermine the statute.[83] In so doing, courts effectively incentivize Congress to produce more brief, open-ended statutes—and to thereby shift work to executive branch agencies. Other times, courts might punish Congress for vague statutory language that delegates a decision to an administrative agency—for example, under a robust nondelegation doctrine.[84] In so doing, they incentivize Congress to create long, detailed statutes, and to thereby shift work to the congressional bureaucracy. In other words, the level of specificity in a federal statute is, in part, a decision about which bureaucracy should handle policy specification. When statutory doctrine encourages a particular level of specificity, therefore, it incentivizes use of one bureaucracy over another.

This is not how interpretive and other statutory doctrines typically are understood. Consider the nondelegation doctrine. Often viewed as a vessel for conservative frustrations with the

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81. *See* Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032 (2011); *see also* Ingber, *supra* note 7, at 181 ("Like Congress, the courts also allocate power to different actors within the executive branch both implicitly and explicitly. They do so through a variety of doctrinal mechanisms and canons of interpretation."); Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51; Michaels, *Of Constitutional Custodians*, *supra* note 62, at 273–74.

82. *See* Cross & Gluck, *supra* note 9, at 1646.

83. *See id. See generally* King v. Burwell, 576 U.S. 473 (2015).

84. For recent opinions signaling that the Court is interested in reviving a strict nondelegation doctrine, see Gundy v. United States, 139 S. Ct. 2116, 2137–42 (2019) (Gorsuch, J., dissenting); *id.* at 2131 (Alito, J., concurring in the judgment).

rise of the administrative state, the nondelegation doctrine is assumed to be a judicial tool to return to a smaller—and perhaps even pre-bureaucratic—version of federal government.[85] Once the congressional bureaucracy is taken into account, however, it becomes clear that the much-anticipated revival of this doctrine[86] instead (or additionally) could have a hydraulic effect: by forcing a reduced use (and perhaps concomitant shrinking) of the executive branch bureaucracy, it may lead to increased use and expansion of the congressional bureaucracy.

Given these dynamics, should courts design doctrines with the aim of incentivizing a healthy federal bureaucracy? If we define such a bureaucracy as one that is immune to the dual-allegiance problem, for instance, should courts therefore grant Congress greater leeway when errors appear in highly detailed statutes,[87] or craft a harsher nondelegation doctrine?

With respect to inter-branch bureaucratic allocations, it is not clear that courts should be doing this. The Constitution emphasizes insulating congressional practice from outside influence.[88] This is one way the Magill-Vermeule framework changes when widened to the congressional context: it entails judicial tinkering with internal congressional dynamics that arguably are meant to be left alone.

If courts are going to account for these dynamics, however, they must do so responsibly. Consider the concurring opinion in a recent Sixth Circuit case.[89] That opinion cited the Cross-Gluck

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85. *See, e.g.*, Noah Feldman, *This Supreme Court Decision Should Worry the EPA and FDA*, BLOOMBERG (June 22, 2019); *see also Gundy*, 139 S. Ct. at 2117 ("Indeed, if SORNA's delegation is unconstitutional, then most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs."). *But see* Daniel E. Walters, *Decoding Nondelegation After* Gundy*: What the Experience in State Courts Tells Us About What to Expect When We're Expecting*, 71 EMORY L. REV. 417 (2022).

86. *See supra* notes 84 & 85 and accompanying text; s*ee also* Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1294 (2021).

87. For a methodology to accomplish this, see Cross, *The Staffer's Error*, *supra* note 55 (outlining a "staffer's error doctrine" based on Court's interpretation in *King*).

88. *See infra* note 329 and accompanying text.

89. Tiger Lily, LLC v. U.S. Dep't of Hous. & Urb. Dev., 5 F.4th 666, 675 (6th Cir. 2021) (Thapar J., concurring).

study to suggest that its findings straightforwardly support a robust nondelegation doctrine (since it showed that Congress has the internal capacity to assume executive branch bureaucratic tasks). Yet this argument has several issues. First, as already mentioned, not all tasks delegated to agencies could be performed by a congressional bureaucracy—and we have seen no effort by courts to limit the doctrine to those that could be so performed. This undermines the concurrence's views about the continuity of good governance that could be achieved under a robust nondelegation doctrine. Second, courts have not reckoned with the impacts that these bureaucratic shifts would have on legislation. That relocation of expertise into the legislative process could change the nature of federal legislation: more statutes might resemble the Medicare statute[90] (an over-1,000 page labyrinth of hyper-detailed payment formulas) than, for example, the Natural Gas Act (a more readable but cryptic statute with open-ended terms, such as references to "just and reasonable" rates).[91] Such a change would significantly reduce the readability of federal statutes for ordinary readers—a value the Court has touted, as seen in its recent emphasis on preserving fair notice in statutory interpretation.[92] In this area, in other words, judicial doctrine simultaneously impacts the allocation of tasks across bureaucracies and the nature of federal statutory law. As the courts consider wading back into nondelegation jurisprudence, it is not clear that they have a firm grasp on how to balance those effects to provide both a functional bureaucratic government and a stable, accessible legal regime.[93] An introduction of the congressional bureaucracy into the conversation, and a realistic understanding of its distinctive traits and limitations, makes all this visible.

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90. *See generally* Social Security Act of 1935, Pub L. No. 74-271, 49 Stat. 620 (codified at 42 U.S.C. §§ 301–1397mm).

91. 15 U.S.C. § 717c(a).

92. *See, e.g.*, Niz-Chavez v. Garland, 141 S.Ct. 1474, 1481–82 (2021) ("[A]ffected individuals and courts alike are entitled to assume statutory terms bear their ordinary meaning."); Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1825 (2020) (Kavanaugh, J., dissenting) ("Citizens and legislators must be able to ascertain the law by reading the words of the statute.").

93. *See supra* notes 84, 85–86 and accompanying text.

III. BUREAUCRATIC RESISTANCE

In executive-branch scholarship, a wide-ranging discussion has unfolded about bureaucratic resistance—that is, about the capacity of nonpartisan bureaucrats to pursue an agenda at odds with that desired by their partisan superiors.[94] This discussion has been both descriptive and normative.[95] On the descriptive side, it has examined the civil servant protections that have enabled bureaucratic resistance, and it has catalogued the toolkit that bureaucrats can use to resist the wishes of their political bosses.[96] On the normative side, it has debated the merits and demerits of bureaucratic resistance, weighing whether it should be viewed as a positive or negative aspect of our system.[97] Each of these discussions sheds light on, and is illuminated by, the congressional bureaucracy.

A. *Descriptive Questions: Bureaucratic Protections*

First, consider the ongoing effort to catalogue and understand the institutional protections that enable bureaucratic resistance. Initially, this dimension of the congressional bureaucracy appears confusing. Offices in the congressional bureaucracy are not all afforded the same statutory protections from partisan tampering.[98] Of the eleven offices, six have statutory requirements for nonpartisan appointment of office heads,[99] six have such requirements for staff hiring,[100] eight provide a role for political actors in the

94. I borrow the term "bureaucratic resistance" most directly from Rebecca Ingber. *See generally* Ingber, *supra* note 7. For her part, Ingber suggests that some accounts of this resistance are too simplistic in their depiction of a powerful bureaucracy untethered from constraint and uniformly positioned to resist the President. *See id.* at 54, 162–63.

95. *Id.*

96. *Id.*

97. *Id.*

98. *See* Cross & Gluck, *supra* note 9, at 1614.

99. *See id.* at 1613. Commissioners of MedPAC and MACPAC are appointed by the Comptroller General, and staff are appointed by the commissioners, subject to Comptroller General oversight. *Id.* Neither has statutory requirements for nonpartisan appointment or hiring. *Id.*

100. *Id.*

appointment of office heads,[101] and five provide a role for such actors in staff hiring, while three explicitly omit such a role.[102] One office—the Senate Parliamentarian—simply has no organic statute to protect it whatsoever.[103] Nonetheless, interviewees in the Cross-Gluck study reported consistent displays of nonpartisan autonomy across all of these offices.[104] The Cross-Gluck study therefore presents a puzzle: why has the congressional bureaucracy developed a relatively uniform capacity for nonpartisan bureaucratic resistance, despite varied statutory protections?

This puzzle is deepened by situations in which the congressional bureaucracy has retained statutory protections yet lost real-world powers. The GAO experience with demand letters furnishes an example.[105] GAO has statutory authority to take agencies to court to access requested documents from them and, prior to doing so, GAO typically issues a "demand letter" requesting the documents and otherwise threatening to pursue judicial remedy.[106] While GAO previously exercised this power with regularity, Vice President Cheney refused to comply with one such demand letter—and GAO subsequently stopped issuing demand letters.[107] While GAO's statutory authority was unchanged, it seemingly lost a real-world tool of bureaucratic resistance.[108] This again begs the question: why the mismatch between statutory protection and actual power?

Executive-branch scholarship can help solve this puzzle. Not surprisingly, some executive-branch literature has examined the hard statutory protections afforded to civil

101. *Id.*

102. *Id.*

103. *See* 2 U.S.C. § 6539. The Senate Parliamentarian exists under the statutory authority of the Secretary of the Senate. *Id.* There also is a statutory provision setting forth the maximum compensation for the Senate Parliamentarian. *Id.* § 6535.

104. *See* Cross & Gluck, *supra* note 9, at 1614.

105. *See* Walker v. Cheney, 230 F. Supp. 2d 51, 66, 73 n.19 (D.D.C. 2002).

106. Interview with Staffer (on file with author).

107. *See Walker* 230 F. Supp. 2d at 57–58; Interview with Staffer (on file with author).

108. *But see* U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-55G, GAO'S AGENCY PROTOCOLS 24 (2019), https://perma.cc/J8NH-S7QS (PDF) (asserting continued demand letter authority and citing 2017 congressional reiteration of it).

servants[109]—protections against partisan hiring, salary determinations, and removal[110] created in response to the spoils system of the late 1800s,[111] as well as additional statutory protections for whistleblowers, among others.[112] This scholarship has noted, however, that statutory protections in the executive branch have a similarly uneven quality: not all agencies have them, or have them in same measure, and the protections furnish insufficient explanations of the real-world autonomy possessed by executive branch bureaucrats.[113] In the context of the Department of Justice, one study described this as the "historical puzzle" and "historical paradox" of DOJ: namely, that the Department is "structurally accountable to presidential power . . . and yet it has developed strong norms of

109. Rachel Barkow notes, for example, that an "obsessive focus on removal as the touchstone of independence" has "spawned countless law review articles." Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 16–17 (2010); *see also* SKOWRONEK, *supra* note 19, at 47 (citing Max Weber, *Bureaucracy*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 196, 196–244 (H.H. Gerth & C. Wright Mills eds. & trans., 1958)). *But see* Michaels, *Of Constitutional Custodians*, *supra* note 62, at 286.

110. For relevant protections, see Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended at 5 U.S.C. §§ 7321–7326); Pendleton Act, ch. 27, 22 Stat. 403 (1883) (codified as amended at 5 U.S.C. §§ 3104–7212); Hatch Act of 1939, Pub. L. No. 76-252, 53 Stat. 1147 (codified as amended at 5 U.S.C. § 118 & 18 U.S.C. § 61); 5 U.S.C. § 2102(a)(1); 5 U.S.C. §§ 7513(a), 7521(a)–(b); 5 U.S.C. § 4303; 5 U.S.C. §§ 2301–2302. For office-specific protections, see, e.g., 15 U.S.C. § 41 (removal protections for FTC head); 29 U.S.C. § 153 (removal protections for NLRB head). *See also* JARED P. COLE, CONG. RESEARCH SERV., R44803, THE CIVIL SERVICE REFORM ACT: DUE PROCESS AND MISCONDUCT-RELATED ADVERSE ACTIONS 1 (2017), https://perma.cc/K34S-D5WQ.

111. *See* COLE, *supra* note 110, at 1; Ingber, *supra* note 7, at 176; Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121, at 143–59 (2014); Green & Roiphe, *supra* note 51, at 51.

112. *See* Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended at 5 U.S.C. §§ 7321–7326); Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (codified as amended in scattered sections of 5 U.S.C.); 5 U.S.C. § 2302(b)(8) (protection against retaliation); *see also* LOUIS FISHER, CONG. RESEARCH SERV., RL33215, NATIONAL SECURITY WHISTLEBLOWERS (2005).

113. *See* Datla & Revesz, *supra* note 60, at 772; Andrew Kent, *Congress and the Independence of Federal Law Enforcement*, 52 U.C. DAVIS L. REV. 1927, 1940 n.48 (2019); *see also* Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2222 (2018); Green & Roiphe, *supra* note 51, at 37.

professional independence."[114] Scholars also have noted the inverse puzzle in the executive branch context: real-world bureaucratic autonomy often can be undermined even as statutory protections persist.[115]

To solve this historical puzzle, executive-branch scholars have directed attention to the non-statutory forces that also contribute to bureaucratic autonomy.[116] To this end, they have examined the "norms"[117] and "conventions"[118] that often supplement statutory protections. This work has studied agencies and offices where non-statutory protections play an especially prominent role, including the DOJ,[119] FBI,[120] and what Margo Schlanger terms "Offices of Goodness" inside individual agencies.[121]

To appreciate the relevance of this work to the congressional bureaucracy, consider the recent suggestion by Jonathan Gould, in his outstanding study of the Parliamentarians' offices in Congress, of extending civil servant statutory protections to the employees of these offices.[122] This

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114. *See* Shugerman, *supra* note 111, at 125.

115. *See* Katyal, *supra* note 5, at 2332.

116. *See, e.g.*, Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 430 (2009) ("Internal constraints can also take a 'soft' form, being rooted more in agency traditions and culture than 'hard' structural features."); Daniel Hemel, *President Trump vs. the Bureaucratic State*, YALE J. ON REG.: NOTICE & COMMENT (Feb. 18, 2016), https://perma.cc/KF42-3YW8 ("[W]e should think not only in formal separation-of-powers terms but also in practical terms of bureaucratic drift."); Daniel A. Farber & Anne Joseph O'Connell, *Agencies as Adversaries*, 105 CALIF. L. REV. 1375, 1393 (2017); Ingber, *supra* note 7, at 161; Ackerman, *New Separation of Powers*, *supra* note 3, at 690.

117. *See* Renan, *supra* note 113, at 2189.

118. *See* Vermeule, *supra* note 7, at 1166.

119. *See id.* at 1201–03; Renan, *supra* note 113, at 2207–14; Ingber, *supra* note 7, at 188 (noting the "powerful norms under which DOJ and the offices within it expect—and are expected—to be shielded to differing degrees from partisan politics"); Kent, *supra* note 113, at 1930; Shugerman, *supra* note 111, at 125; Todd David Peterson, *Federal Prosecutorial Independence*, 15 DUKE J. CONST. L. & PUB. POL'Y 217, 262 (2020); Green & Roiphe, *supra* note 51, at 6 ("[L]awyers' professional norms provide a basis for internal limits on the President's power.").

120. Renan, *supra* note 113, at 2210–11; Ingber, *supra* note 7, at 184–86.

121. Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53, 54–55 (2014).

122. Gould, *supra* note 55, at 2026–27.

may indeed be wise, and some have suggested similar extensions in the executive branch.[123] Yet the executive-branch literature also cautions that civil service protections may be inadequate to generate an independent and energized bureaucracy,[124] and its scholars have done important work to widen our understanding of what protects real-world autonomy beyond civil service rules. Efforts to protect or expand the congressional bureaucracy can benefit from this widened lens and think beyond statutory protections.

For example, scholars have emphasized a structural feature that can be as important as statutory protections: locating bureaucracy in a centralized "institutional home" rather than scattering it across partisan operations.[125] Jed Shugerman has argued that the Department of Justice was founded specifically around this idea, with a centralized legal office that replaced attorneys scattered across various agencies.[126] The Cross-Gluck study did not find similar intent in the design of the congressional bureaucracy, but it did find a similar effect:[127] Congress's bureaucrats today are clustered into nonpartisan offices rather than embedded in partisan structures such as committees or Leadership,[128] and this has contributed to bureaucratic autonomy for the staffers in these offices.[129] On the one hand, therefore, the experience of the congressional bureaucracy adds to the work done by Shugerman and others: it suggests that their lessons about institutional structure apply beyond the executive branch. On the other hand, their theories help us understand bureaucratic autonomy in the congressional bureaucracy—and they pinpoint elements beyond statutory protections that should be borne in mind by those who wish to preserve this autonomy, or to create additional spaces for

123. *See, e.g.*, Kent, *supra* note 113, at 1974–82; Peterson, *supra* note 119, at 285; Peter M. Shane, *Prosecutors at the Periphery*, 94 CHICAGO-KENT L. REV. 241, 241–45 (2019); *see also* Ackerman, *New Separation of Powers*, *supra* note 3, at 692.

124. Katyal, *supra* note 5, at 2332; Vermeule, *supra* note 7, at 1166.

125. *See* Schlanger, *supra* note 121, at 54–55.

126. Shugerman, *supra* note 111, at 150; *id.* at 163; *see also* Green & Roiphe, *supra* note 51, at 49.

127. Cross & Gluck, *supra* note 9, at 1609.

128. *Id.*

129. *Id.*

nonpartisan expertise inside Congress. Such individuals may want to think not in terms of creating positions in Congress, it suggests, but of creating offices.

In these studies of norms that buttress bureaucratic autonomy, it also has been observed that such norms are "more robust" when supported by norm enforcers.[130] Applied to the congressional bureaucracy, this observation generates insights regarding norm enforcers both inside and outside Congress. Regarding those outside Congress: unlike the civil service, the congressional bureaucracy benefits from almost no outside norm enforcers. Each of the most likely candidates, lobbyists and the executive branch, has a competitive interest in taking over the work of the congressional bureaucracy, a fact that typically prevents each from loudly insisting on the preservation and steady use of this bureaucracy.[131] The general public, which also might serve as a norm enforcer (though perhaps a less effective one),[132] is largely unaware of the congressional bureaucracy, and therefore is ill-equipped to enforce norms regarding its use.[133] This defies some recent executive-branch scholarship, which has argued that a norm-dependent bureaucracy cannot survive without significant support from outside norm enforcers.[134]

What about norm enforcers inside Congress? Here, the primary norm enforcers are powerful partisans. Typically, these partisans have required—or formally urged—use only of those offices in the congressional bureaucracy that play adjudicatory roles. This is seen, for example, in formal directions to gather

130. Renan, *supra* note 113, at 2203 ("Structural norms may be more robust, then, when they come to be expected and desired by pluralistic communities or potential norm enforcers.").

131. *See* Cross & Gluck, *supra* note 9.

132. Renan, *supra* note 113, at 2205. Renan does believe that media education about breaches of norms can help the public play the role of norm enforcement, however. *See id*. at 2215, 2241.

133. This ignorance is actively fostered by Members of Congress, who often perform the steps of lawmaking from a generation ago—referring to bills they "wrote," acting as though hearings are spontaneous factfinding sites—and thereby obscure the bureaucracy's contributions. On the repurposed role these legislative steps now fill, see Cross, *supra* note 50, at 139–50; Cross & Gluck, *supra* note 9, at 1641–42.

134. *See, e.g.*, Schlanger, *supra* note 121, at 59; *see also* Ingber, *supra* note 7, at 189.

and use CBO and JCT cost estimates.[135] This trend is understandable: nonpartisan experts are useful referees for otherwise contentious partisan disputes.[136] However, unfavorable adjudications impose costs on partisans in these situations,[137] and this inevitably provokes partisans to examine whether those costs are worth the benefits.[138] By contrast, when the congressional bureaucracy plays information-sharing[139] and advisory roles,[140] it offers benefits with little cost, other than possible delay. This highlights an additional pathway for strengthening the norm of bureaucratic autonomy and resistance in Congress: powerful partisans could more formally urge the use of the congressional bureaucracy in its advisory and information-sharing roles. This might resemble the instruction issued by the House Appropriations Committee that amendments should be drafted by House Legislative Counsel,[141] and the formal urging by the House Rules Committee of the same.[142] Here, executive-branch scholarship once again

135. *See* Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 402, 88 Stat. 297; RULES OF THE HOUSE OF REPRESENTATIVES XIII.3(c)(3) (116th Cong.). For tax legislation, CBO publishes the JCT estimate. *See* Pub. L. No. 99-177 § 273 (codified at 2 U.S.C. § 601(f) (2018)).

136. *See* Staffer Interview (on file with author) (noting the use of Legislative Counsel as useful tool to adjudicate otherwise contentious competing interpretations of bill language).

137. *See* Ingber, *supra* note 7, at 186; *see also* Jennifer Nou, *Bureaucratic Resistance from Below*, YALE J. ON REG.: NOTICE & COMMENT (Nov. 16, 2016); Schlanger, *supra* note 121, at 94–95; Vermeule, *supra* note 7, at 1210.

138. *See, e.g.*, Alan Rappeport, *C.B.O. Head, Who Prizes Nonpartisanship, Finds Work Under Attack*, N.Y. TIMES (June 19, 2017), https://perma.cc/GZ44-WRAN.

139. CRS is an example of an office that plays a more straightforward information-developing and information-sharing role. *See* 2 U.S.C. § 166(d) (listing CRS functions).

140. Legislative Counsel is an example of an office with a more strictly advisory role. *See* 2 U.S.C. § 281a (2018) (providing for the office to have an "attorney-client relationship" with Members and committees).

141. *See Amendment Resources*, HOUSE OF REPRESENTATIVES COMM. ON RULES, https://perma.cc/DE6Z-GHVE ("The assistance of the Office of the Legislative Counsel . . . should be sought in drafting [all amendments submitted to the House Committee on Rules].").

142. *See id.*; *Amending Appropriations Bills—A Basic Guide Presented by the Committee on Rules*, HOUSE OF REPRESENTATIVES COMM. ON RULES BLOG https://perma.cc/2678-FUZY (last visited Jan. 28, 2021).

highlights new pathways to bolstering congressional bureaucratic resistance.

Rachel Barkow has noted another element that, in the agency context, buttresses bureaucratic resistance.[143] Much scholarship on agency leaders, she notes, has focused on the different statutory protections for appointees in independent versus politically accountable agencies.[144] In her effort to broaden this lens, Barkow has observed: "One way to create greater independence is to specify qualifications for appointees so that the pool of potential candidates from which the President picks is more limited and he or she cannot select solely on the basis of partisan leanings."[145] She notes that the constraints can be endemic to the position (for example, the President is practically limited in selecting FDA heads to those with scientific expertise) or statutorily imposed (for example, some members of Surface Transportation Board statutorily must have a professional background in transportation).[146]

This analysis partly explains the autonomy of office heads in the congressional bureaucracy. Most of these office heads are selected by a partisan actor. Only three office heads in the congressional bureaucracy are not appointed directly by a partisan actor; the majority are appointed by the House Speaker,[147] the Senate President Pro Tempore,[148] or both.[149] Yet these appointments have remained largely resistant to partisan pressure, and tellingly, they are subject to both statutory and endemic constraints. Statutorily, selections are often subject to a requirement to hire without regard to partisan

143. Barkow, *supra* note 109, at 47–48.

144. *See id.* at 17.

145. *Id.*

146. *Id.*

147. Those appointed by House Speaker: House Legislative Counsel; Law Revision Counsel; House Parliamentarian.

148. Appointed by Speaker Pro Tempore: Senate Legislative Counsel.

149. Appointed by House Speaker and Senate President pro tempore, with recommendations from Budget Committee: CBO. The head of GAO is appointed by the President with Senate confirmation after congressional submission of recommendations, the head of the JCT staff is appointed by the Joint Committee, and the head of CRS is appointed by the Librarian of Congress.

affiliation[150]—a requirement that presumably could not be applied to many executive branch positions, though at least one scholar has argued for their extension to the FBI Director and to U.S. Attorneys.[151] In the congressional bureaucracy, however, it is difficult to see how these provisions would be meaningfully enforced. The more illuminating constraints, therefore, may be endemic.

In the congressional bureaucracy, a practical constraint does often limit these appointments: in many cases, few outside the office have the requisite expertise to perform—or meaningfully oversee—the office's work. In this sense, parts of the congressional bureaucracy are subject to an even more extreme version of the endemic constraints that Barkow identifies. As a result, office heads in the congressional bureaucracy often are selected through internal promotion of existing employees.[152] This is not uniformly true, and Barkow's analysis provides a rationale for the pattern: offices with skills that can be cultivated elsewhere are more likely to sometimes have outside leadership. For example, the economic analysis performed by CBO is not unique to that office,[153] and the auditing and analysis practiced by GAO can be learned elsewhere.[154] By contrast, there is virtually nowhere to learn congressional drafting practices other than Legislative Counsel, to learn chamber procedure and precedent other than a Parliamentarian's office, or to master codification outside OLRC. As a result, these latter offices particularly have constraints endemic to the position.

This practical limitation changes the dynamics of bureaucratic resistance. Consider the Senate Parliamentarian in the 1980s and 1990s. This was a rare situation in which partisans, due largely to political frustrations, exercised removal power over an office head. When party control of the Senate shifted in the 1980s and 1990s, the incoming leadership

150. For list of these offices and the applicable statutory requirements, see Cross & Gluck, *supra* note 9, at 1613.

151. *See, e.g.*, Kent, *supra* note 113, at 1975–76.

152. Cross & Gluck, *supra* note 9, at 1606.

153. For a description of CBO economic analysis, see *About CBO: Processes*, CONG. BUDGET OFF., https://perma.cc/22WN-Y9S5.

154. *See Role as an Audit Institution*, GOV'T ACCOUNTABILITY OFF., https://perma.cc/67F5-JZQD.

regularly installed a new Parliamentarian.[155] This practice began when Republicans regained control of the Senate in 1981 after decades in the minority, during which they had come to view the preceding Parliamentarian as overly congenial to the Democrats.[156] Democrats similarly would remove the Republican-installed Parliamentarian upon regaining the Senate in 1987, creating a practice that would continue through the 1990s.[157] In each instance, the replacement Parliamentarian was taken from inside the (exceedingly small) Senate Parliamentarian's office.[158] Admittedly, there was one documented effort to install an outsider—a partisan aide—in the position, with the outsider refusing.[159] Yet the role would be difficult for an outsider to perform in a meaningful way; mastery of chamber procedural precedent is a skill cultivated almost exclusively in the Parliamentarian's office.[160] As a result, a trend of partisan removal in the 1980s led to the position simply alternating between two long-tenured members of the office, Robert Dove and Alan Frumin,[161] a practice that did not seem to significantly alter the office's work product[162] or undermine its long-term credibility.[163]

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155. *See* ANDREA C. HATCHER, MAJORITY LEADERSHIP IN THE U.S. SENATE 32 (2010); Gould, *supra* note 55, at 2005; James I. Wallner, *Parliamentary Rule: The U.S. Senate Parliamentarian and Institutional Constraints on Legislator Behavior*, 20 J. LEGIS. STUD. 380, 392 (2014); David E. Rosenbaum, *Rules Keeper is Dismissed by Senate, Official Says*, N.Y. TIMES (May 8, 2001), https://perma.cc/HP9X-9GBP. In 2001, Senate Majority Leader Trent Lott also dismissed the Parliamentarian after disagreeing with rulings on tax and budget bills and reinstalled a prior Parliamentarian. *See* STUART ALTMAN & DAVID SHACTMAN, POWER POLITICS, AND UNIVERSAL HEALTH CARE (2011); Gould, *supra* note 55, at 2006. Since then, the position has stabilized, with each of the next two Senate Parliamentarians surviving party transitions. *See* Gould, *supra* note 55, at 2006.

156. *See* Gould, *supra* note 55, at 2005.

157. *See id.*

158. The office currently consists of three people. *See* Cross & Gluck, *supra* note 9, at 1600.

159. *See* Gould, *supra* note 55, at 2005.

160. As one member of a Parliamentarian's office has put it: "Our knowledge isn't replicated anywhere else." Cross & Gluck, *supra* note 9, at 1583.

161. *See supra* note 155 and accompanying text.

162. *See* ALTMAN & SHACTMAN, *supra* note 155.

163. *See* Cross & Gluck, *supra* note 9, at 1583.

In this way, the congressional bureaucracy confirms and extends Barkow's thesis about the relationship between endemic appointment limitations and functional independence. Barkow's thesis also helps explain why, unlike most presidential appointments, the heads of the offices in the congressional bureaucracy are widely viewed as nonpartisan.[164] And Barkow's thesis provides important lessons for creators of future legislative offices, who should not assume that a culture of nonpartisan appointments will necessarily translate to future offices if those offices will deploy forms of expertise more readily cultivated elsewhere (for example, expertise in the form of substantive policy knowledge found in agencies). For such offices, more detailed statutory constraints on selection of office heads, or at least informal commitments to promote leadership from within, may be especially valuable.

B. *Descriptive Questions: Tools of Bureaucratic Resistance*

Scholars also have documented the different tools of resistance that, in the executive branch, nonpartisan bureaucrats have at their disposal.[165] For the congressional bureaucracy, several factors conspire to make one such tool uniquely important: the persuasive power.[166]

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164. *See id.* at 1613–16.

165. *See, e.g.*, Ingber, *supra* note 7, at 205

> The potential mechanisms of resistance . . . range from the anodyne (asking a question, raising a concern), to the more assertive (seek to slow-roll, 'build a record,' bring to the attention of superiors or 'offices of goodness' inside the government), to the most aggressive (refuse to act, bring to the attention of congressional overseers, leak).

id. at 163–65 (noting additional features identified by Albert Hirschman, and by John Brehm and Scott Gates); Nou, *supra* note 137 (listing tools of slowing down, record-building, leaking, enlisting internal inspectors general, using allies, suing the agency, and resigning); Michaels, *Of Constitutional Custodians*, *supra* note 62, at 237 (noting the tool of "exercising discretion when implementing and administering programs on the ground"); Schlanger, *supra* note 121, at 58–59 (noting tools of "Offices of Goodness" as "inclusion in policy formulation working groups, clearance authority, giving advice, providing training and technical assistance, undertaking program or operational review, complaint investigation, outreach to outside groups, generation of documents, and congressional reporting").

166. *See* Cross & Gluck, *supra* note 9, at 1625–28 (discussing where congressional bureaucracy offices fall on the authoritative-versus-permissive scale).

In part, this reliance on persuasion is because the congressional bureaucracy does not have access to other tools available in the executive branch context. For example, civil servants often have the power to undertake unilateral action that, as a practical matter, their partisan superiors cannot review.[167] This sometimes occurs because they are frontline implementers, and therefore are the last relevant actors.[168] It also occurs because civil servants significantly outnumber their political overseers, a fact which makes it functionally impossible to perform oversight of all of their actions.[169] Neither typically is true of the congressional bureaucracy. In most instances, the congressional bureaucracy provides an intermediate step before final partisan action (legislative voting), so it is not the last relevant actor.[170] And the congressional bureaucracy is matched

167. *See* Michaels, *supra* note 62, *Of Constitutional Custodians*, at 236

> Agency leaders cannot run agencies by themselves. Because an agency's responsibilities are sufficiently great, complex, and variegated, the relatively small and often inexperienced group of appointed leaders must necessarily rely on lower-level government employees to help with the research, design, promulgation, implementation, and enforcement of administrative policies.

Ingber, *supra* note 7, at 191 ("Constant oversight creates more work for superior officers, who cannot possibly watch over the shoulder of every line official beneath them as they go about their daily tasks." (citing JOHN BREHM & SCOTT GATES, WORKING, SHIRKING, AND SABOTAGE: BUREAUCRATIC RESPONSE TO A DEMOCRATIC PUBLIC 25–46 (1997))); Kagan, *supra* note 4, at 2250 ("[N]o President (or his executive office staff) could, and presumably none would wish to, supervise so broad a swath of regulatory activity."); STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 110 (2010).

168. *See* Ingber, *supra* note 7, at 175 ("It is well understood that even lower-level bureaucrats have a certain degree of functional power, whether or not it is described as such, simply by virtue of their frequent position on the front lines . . . "); Michaels, *supra* note 62, *Of Constitutional Custodians*, at 237 (noting that "one way they help shape that policy is by exercising discretion when implementing and administering programs on the ground"); Michaels, *supra* note 62, at 542 ("[T]he coterie of agency leaders cannot actually administer programs on the ground, where, once again, heavily relied-upon civil servants have some say over how policy is actually implemented and enforced.").

169. *See* Michaels, *supra* note 62, *of Constitutional Custodians*, at 542 ("On their own, agency leaders simply are not numerous enough or, in many cases, experienced or sophisticated enough to conduct research or promulgate rules.").

170. *See* Cross & Gluck, *supra* note 9, at 1632–33.

by an even larger partisan staff inside Congress.[171] While this staff does not always have the expertise to review the work of the congressional bureaucracy,[172] it does typically have the time and the manpower. These differences often eliminate the tool of unilateral action.

Agency bureaucrats also can possess the tool of unilateral action when Congress specifically empowers these bureaucrats to act by statute, thereby removing the issue from presidential discretion.[173] By contrast, it is more complicated to remove the congressional bureaucracy's work from congressional discretion. Insofar as these offices are woven into congressional procedure, that procedure is constitutionally entrusted to Congress.[174] This further removes unilateral action as a tool.

Consequently, the tool of persuasion is particularly important in the congressional context. In this sense, the congressional bureaucracy resembles Margot Schlanger's "Offices of Goodness," which she describes as offices internal to a larger institution that operate primarily through the tool of persuasion.[175]

For the congressional bureaucracy, this tool also serves a secondary function not seen in the executive context—one grounded in the different nature of the partisan principal. While this bureaucracy typically assists all Members and staffs,[176] it is subordinate only to congressional leadership.[177] That partisan leadership differs from its executive-branch counterparts[178] in an important respect: congressional leaders typically have spent decades working in their branch of government and interacting

171. *See supra* note 49 and accompanying text.

172. *See* Cross, *Legislative History*, *supra* note 50, at 99–102 (describing expertise differences between partisan and nonpartisan staffs); Cross & Gluck, *supra* note 9, at 1612–13 (same).

173. *See* Ingber, *supra* note 7, at 289 (identifying congressional statute as an authority permitting action "even against the President's professed will").

174. U.S. CONST. art. I, § 5.

175. *See* Schlanger, *supra* note 121, at 60.

176. *See* Cross & Gluck, *supra* note 9, at 1611–12.

177. *See supra* notes 147–150.

178. *See* Michaels, *Of Constitutional Custodians*, *supra* note 62, at 236 n.21 (noting and citing discussions of "the short tenure of most politically appointed agency leaders"); *see also* Ackerman, *New Separation of Powers*, *supra* note 3, at 706 ("[P]olitical appointees do not stay in office long enough to operate productively.").

with its bureaucracy.[179] This strengthens the opportunity for persuasion by the congressional bureaucracy, which uses this tool to perform and display its expertise for these partisans over time, gradually illustrating for them the value their expertise contributes to partisan work.[180]

In the 1995 Republican Revolution, this legitimation effect of persuasion likely saved some of the congressional bureaucracy from elimination.[181] As Republicans retook control of the House, there was significant desire among some newer Republican staffers to eliminate much of the congressional bureaucracy.[182] Newt Gingrich and his staff, however, had come to appreciate the bureaucracy's value after seeing and benefitting from its work over many years.[183] In the end, only one office was eliminated (the Office of Technology Assessment), though others suffered cuts.[184] Those that survived have attributed their survival specifically to the cumulative effect of many years of persuasive work with key high-ranking partisans.[185] This simply would not have been possible if political leadership in Congress had no experience in the branch.

This role of persuasion offers lessons for executive-branch research. In that research, it has been argued that the transience of political appointees might be a source of bureaucratic power, since it highlights the expertise accrued by entrenched civil servants.[186] The experience of the congressional bureaucracy tells the other side of this story: the non-transience of congressional political leadership (and of its staff)[187] also is a

179. This is uniformly true at the Member level, and it also typically is true at the staff level. *See* Cross, *Legislative History*, *supra* note 50, at 106–07.

180. *See* Schlanger, *supra* note 121, at 60.

181. *See* Cross & Gluck, *supra* note 9, at 1615–16 ("In fact, we were told that this steadfast commitment to nonpartisanship is what saved the offices of the House Legislative Counsel and Parliamentarian in 1995, when Speaker Newt Gingrich and the new Republican majority revamped many other congressional operations."); *see also* Gould, *supra* note 55, at 2008.

182. *See* Cross & Gluck, *supra* note 9, at 1615–16; *see also* Interview with Staffer (on file with author).

183. *See* Cross & Gluck, *supra* note 9, at 1615–16.

184. *See id.*

185. *See id.* at 1616.

186. *See* Ingber, *supra* note 7, at 190.

187. *See* Cross, *Legislative History*, *supra* note 50, at 106–07 (noting four features of the legislative staff position indicating policy expertise).

source of bureaucratic power—at least, when it is approached as an opportunity to build long-term reputations as indispensable value-adds.

This analysis also offers lessons for legislative reformers. In order for persuasion to accomplish the aforementioned secondary goals for the congressional bureaucracy, offices typically must be both small and advisory. If these offices are too large, it becomes difficult for their many experts to establish and maintain persuasive relationships with influential partisans in Congress—though exceptions do exist, such as the GAO workforce of 3,000.[188] If they are not advisory, they lose the ability to display their expertise in action, showing partisans how their conclusions result from the application of analyses and methodologies that add value along the way.[189] These factors may impose limits on the type and size of office that reformers want to consider for addition or relocation into the congressional bureaucracy.

C. *Normative Questions: Is Bureaucratic Resistance Desirable?*

In the executive-branch literature, there also is ongoing debate about whether bureaucratic resistance is desirable. For some, it problematically undermines an energetic,[190] accountable,[191] unitary[192] executive. According to others, it

188. For the size of each office in the congressional bureaucracy, see Cross & Gluck, *supra* note 9, at 1599–60.

189. On the advisory role played by all offices in the congressional bureaucracy, see *infra* Part V.

190. *See, e.g.*, Kagan, *supra* note 4, at 2263; *see also* Ingber, *supra* note 7, at 144–45.

191. *See* THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 311 (2d ed. 1979). On accusations of a "deep state," see MARC AMBINDER & D.B. GRADY, DEEP STATE: INSIDE THE GOVERNMENT SECRECY INDUSTRY 4 (2013); MIKE LOFGREN, THE DEEP STATE: THE FALL OF THE CONSTITUTION AND THE RISE OF A SHADOW GOVERNMENT 34–36 (2016); Peggy Noonan, *The Deep State*, WALL ST. J. (Oct. 28, 2013, 9:10 PM), https://perma.cc/Y7VV-8KPM; Jack Goldsmith, *Paradoxes of the Deep State*, *in* CAN IT HAPPEN HERE?: AUTHORITARIANISM IN AMERICA 105 (Cass R. Sunstein ed., 2018).

192. *See generally* STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008).

creates an internal separation of powers[193] inside the executive branch that serves both traditional separation-of-powers

193. *See* Metzger, *supra* note 116, at 425 (discussing the rise of this internal separation literature); Katyal, *supra* note 5, at 2318; Magill & Vermeule, *supra* note 81, at 1059 (complicating unitary executive theory by noting that agencies "are not unitary actors" and are "fractured internally"); Michaels, *Evolving Separation of Powers*, *supra* note 60, at 551–60; Michaels, *Of Constitutional Custodians*, *supra* note 62, at 229 (on the "tripartite *administrative* separation of powers" in executive branch); Ingber, *supra* note 7; Morrison, *supra* note 7, at 1524; Green & Roiphe, *supra* note 51, at 5–6 (2018) ("[The article] adds to the voices of a growing number of scholars who see the Executive not as unitary, but as a complex whole, whose parts serve as checks on one another."); Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1692 (2011); *see also* Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 391 (2016) (noting that the "complex ecosystem of intrabranch and entirely external actors [is] not traditionally accounted for in the separation-of-powers literature"); Metzger, *supra* note 116, at 428 (noting that "the focus of internal separation of powers scholarship is overwhelmingly on the Executive Branch"); Ackerman, *Good-bye*, *supra* note 60, at 39 ("Almost three centuries later, it is past time to rethink Montesquieu's holy trinity. Despite its canonical status, it is blinding us to the world-wide rise of new institutional forms that cannot be neatly categorized as legislative, judicial, or executive."); Ackerman, *New Separation of Powers*, *supra* note 3, at 689 ("[T]his second separationist doctrine should begin by cordoning off vast areas of concrete decisionmaking from those few questions that imperatively require the attention of democratic statesmen.").

values[194] and additional values.[195] For yet others, resistance is mixed—existing on a spectrum that ranges from reasonable to unreasonable, for example.[196]

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194. *See* Huq & Michaels, *supra* note 193, at 420 ("As the internal political surround of intra-agency lawyers, civil servants, and ALJs has become denser, [and] as civil-service protections have taken root . . . the case for [Courts creating rigid separation-of-powers rules] requiring strict, uniform, and conforming practices within the executive has become weaker."); Metzger, *supra* note 116, at 426 (noting "the important separation of powers function that internal constraints can serve"); Ackerman, *Good-bye*, *supra* note 60, at 39–40 (arguing that executive-branch bureaucracy advances the values of functional specialization and of shielding law implementation from politics, values sought by Founders through separation of courts into a separate branch); Katyal, *supra* note 5, at 2319–20 (arguing that rise of bureaucracy in executive branch creates new opportunity to realize separation-of-powers values such as deliberativeness via intra-branch separation in an era when interbranch checks are failing due to congressional acquiescence); M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 605 (2001) (noting that internal separation accomplishes the goal of fragmenting power); Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655, 1689 (2006) ("[T]he most effective [national intelligence] structure probably would have redundant components as well as components that coordinate and centralize certain efforts."); LANDIS, *supra* note 22, at 46; Green & Roiphe, *supra* note 51, at 5–6 (noting that the executive branch's "parts serve as checks on one another"); Michaels, *supra* note 62, *Of Constitutional Custodians*, at 229; Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2375 (2006) ("[C]onstitutional engineering might focus on insulating the administrative bureaucracy more fully from the partisan pressures of unified government. The idea would be to take seriously the metaphor of the bureaucracy as a 'fourth branch' of government . . . ."). *But see* Bijal Shah, *Response: Toward an Intra-Agency Separation of Powers*, 92 N.Y.U. L. REV. 101 (2017) (arguing against the comparison to external separation of powers).

195. *See, e.g.*, Metzger, *supra* note 116, at 440 (arguing that it can depoliticize governmental administration, and noting its unique benefits as an ex ante, continuous, and non-adversarial method of providing competing views); Ingber, *supra* note 7, at 150 (noting it can provide continuity); *see also* Nou, *supra* note 137 (noting that "the costs [of resistance] may help to ensure that what resistance remains is more often evidence of a canary in a coal mine than a bureaucracy run amok"); Matthew C. Stephenson, *The Qualities of Public Servants Determine the Quality of Public Service*, 2019 MICH. ST. L. REV. 1177, 1180 (2019) ("I argue that we should want to attract and empower bureaucrats who are not only technically competent, but who can function as an effective counterweight to their agency's politically-appointed leadership and its overseers in the White House and Congress."); Michaels, *Of Constitutional Custodians*, *supra* note 62, at 230 (arguing that administrative separation of powers makes agencies "responsive to the fuller range of democratic, technocratic, and rule-of-law values we expect to inform State

To date, these normative assessments of bureaucratic resistance mostly have been grounded in the particular facts of the executive branch.[197] Extended to the congressional bureaucracy, they reveal a different calculus—one that generally is more approving of resistance in the congressional context.

This revised calculus results from several factors. On the one hand, many of the benefits touted by celebrators of internal separation have indeed carried over into the congressional context, as the Cross-Gluck study documented.[198] The deliberation-enhancing benefits and the salutary dispersal of power do appear to have resulted from the creation of a nonpartisan bureaucracy, for example.[199] Admittedly, the latter value may be less prized in the congressional context, which lacks the intense concerns about consolidation of power that worry some presidential scholars.[200] Nonetheless, the virtues

power as exercised through administrative or any other set of actors"); Schlanger, *supra* note 121, at 65 (arguing that "Offices of Goodness" in agencies enhance considerations of civil rights and civil liberties); Brian D. Feinstein & Abby K. Wood, *Divided Agencies*, 95 S. CAL. L. REV. 731, 737 (2022) (arguing that civil servants may pull agencies toward views of the median voter).

196. *See generally* Ingber, *supra* note 7.

197. For articles noting Congress's internal separation of powers, see Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1314–16 (2001) (noting that internal separation "leads to more balanced presentation of information" and allows Congress to collectively fund and retain more skilled people, keep additional power from already-powerful committee chairs, and "gain credibility with constituents"); Mark Tushnet, *The Ambiguous Legacy of Watergate for Separation of Powers Theory: Why Separation of Powers Law Is Not "Richard Nixon" Law*, 18 NOVA L. REV. 1765, 1771–72 (1994) (arguing that the rise of bureaucracies, including in Congress, has fractured the unitary branch interests that separation-of-powers assumes); Huq & Michaels, *supra* note 193 (arguing that internal separation across the branches creates a contestation over the values that separation-of-powers itself should advance, and that the Court should find ways to promote that ongoing contestation); Metzger, *supra* note 116, at 457 n.21 (noting internal separation in Congress while focusing on it in the executive branch context); Magill, *supra* note 194, at 605–06 (arguing that, due to internal separation, there is no single "interest" of each branch).

198. Cross & Gluck, *supra* note 9, at 1608–12.

199. *See id.*

200. *See, e.g.*, Katyal, *supra* note 5, at 2316 (framing the concern as one of "an executive that subsumes much of the tripartite structure of government"); Renan, *supra* note 113, at 2231 ("Authority-allocating norms in the main,

hypothesized in the executive branch context have rung true in the congressional experience.

On the other hand, several observed downsides of bureaucratic resistance either do not apply to the congressional context or do not apply as strongly. First, some have argued that bureaucratic resistance undermines an executive branch envisioned as unitary by the Constitution.[201] The merits of this much-debated claim aside, this concern does not extend to the congressional context. As legislation scholars are fond of noting, Congress is not meant to be a unitary institution.[202] Bicameralism explicitly fractures legislative power,[203] and the tradition of congressional committees furthers this internal separation.[204] As such, there is no equivalent downside to potentially fracturing an otherwise unitary branch by introducing bureaucratic resistance in Congress. And while the legislative branch may have its own unique constitutional imperatives and concerns, such as nondelegation concerns,[205] the congressional bureaucracy has not to date triggered these parallel concerns among legislation scholars.

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however, have accreted power to the presidency."); Green & Roiphe, *supra* note 51, at 49 ("The effort to install professional lawyers and rationalize an increasingly splintered system provided a way to justify, or at least address, concerns about the increase in power at the executive level."); Metzger, *supra* note 116, at 457.

201. *See generally* CALABRESI & YOO, *supra* note 192.

202. *See* Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 241–44 (1992) (coining the oft-repeated phrase that "Congress is a 'they,' not an 'it'").

203. *See* I.N.S. v. Chadha, 462 U.S. 919, 951 (1983) ("The division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings.").

204. *See* JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 285 (2017) (noting that rise of standing committees "naturally tended toward a certain diffusion of power," especially when party leaders did not control appointments); Magill, *supra* note 194, at 652 ("State power is diffused . . . [w]ithin Congress: a house committee chair; a ranking member of a Senate committee; and the deputy whip in the Senate or the majority leader in the House."); Metzger, *supra* note 116, at 457 n.21 (noting committees and parties achieve dispersion of power).

205. *But see generally* Nicholas Bagley & Julian Davis Mortenson, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021) (arguing that the nondelegation doctrine did not actually exist to constrain Congress at the founding); Parrillo, *supra* note 86 (same).

Second, Justice Kagan in particular has worried that bureaucratic resistance problematically undermines the energy of the executive branch.[206] And, despite its justified reputation as an often-gridlocked institution, Congress often does act with speed and energy when vetogate-proof majorities coalesce around a legislative policy.[207] Due to the congressional bureaucracy's largely advisory and non-binding character, however, it lacks the power to undermine that energy.[208] If partisans in Congress decide they must act expeditiously and energetically on legislation, and if the bureaucracy is not providing input in line with the desired policy or its timelines, Congress simply will act without its input. That, in turn, puts pressure on the bureaucracy to align its energy with that of partisans. In this way, the non-binding character of the congressional bureaucracy's work, and the fact that its work is a prelude to formal partisan action rather than a consequence of it, largely precludes it from creating the drag on branch energy that worries Kagan.

In a similar vein, Justice Kagan also has argued that bureaucratic resistance undermines the development and implementation of effective policy in the executive branch.[209] As a result, Kagan argues that greater partisan control of, and intervention into, the bureaucracy increases effectiveness.[210] In making this argument, Justice Kagan provocatively challenges the consensus view that, while accompanied by downsides, bureaucratic resistance at least increases effectiveness through its infusion of expertise.[211] Setting aside the validity of this argument in the presidential context, it does not appear to translate to the congressional bureaucracy. As the Cross-Gluck study showed, partisan interventions into the congressional

206. Kagan, *supra* note 4, at 2263 (noting that "bureaucracy also has inherent vices (even pathologies), foremost among which are inertia and torpor").

207. On the idea of vetogates, see ESKRIDGE ET AL., *supra* note 31, at 80.

208. *See* Cross & Gluck, *supra* note 9, at 1628–29 (observing that "one difference across the board from the executive bureaucracy is that most of the work of the congressional bureaucracy does not have formal legal effect without some additional action from Congress").

209. Kagan, *supra* note 4, at 2339.

210. *Id.*

211. *See* Cross & Gluck, *supra* note 9, at 1602–03.

bureaucracy typically have been attempts to shallowly politicize it, not to render it more effective.[212]

Finally, when assessing the normative value of bureaucratic resistance, scholars have debated the relationship between internal and external separation of powers.[213] Much scholarship on internal separation of powers is premised on the notion that bureaucratic resistance weakens or checks a branch's aggregate power relative to other branches. This is one reason why internal separation is viewed as a replacement for external checks.[214] However, the opposite argument also has been advanced: namely, that even as bureaucracies separate power within a branch, they also bolster the overall power of that branch.[215] Which is correct?

In the congressional context, there is perhaps less ambiguity on the relationship between internal and external separation. The congressional bureaucracy was consciously created to reclaim powers from the executive branch, so the external separation-of-powers dynamic was clearer.[216] While outside studies may always reveal this congressional idea to be misplaced, it at least is relevant that those in Congress widely believed, and still believe, their interbranch power to be enhanced by—or at least not eroded by—these internal separations.

Still, this debate remains relevant. Here, interestingly, the takeaway for Congress will be the opposite from that in the executive branch. Since scholars' overriding concern is that too much power has accreted to the executive branch at Congress's expense, if bureaucratic resistance swells a branch's power, that is concerning for bureaucracy in the executive branch—but it is welcome in Congress. And the opposite may also be true. The

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212. *See id.* at 1615–16, 1626–28 (reviewing major instances of intervention).

213. For a study focused specifically on this relationship, see generally Metzger, *supra* note 116.

214. *See, e.g.*, Katyal, *supra* note 5, at 2316 ("The first-best concept of 'legislature v. executive' checks and balances must be updated to contemplate second-best 'executive v. executive' divisions.").

215. Ingber, *supra* note 7, at 144–45 (citing Rebecca Ingber, *The Obama War Powers Legacy and the Internal Forces that Entrench Executive Power*, 110 AM. J. INT'L L. 680, 687 (2016)); *see also* MICHAEL J. GLENNON, NATIONAL SECURITY AND DOUBLE GOVERNMENT 91–99 (2015).

216. Cross & Gluck, *supra* note 9, at 1555–60.

findings of this debate therefore may not generate conclusions that bureaucracy should be expanded or contracted, but rather that it should be shifted across branches—an approach that might preserve the expertise-generating function of bureaucracy while redoubling the desired effects for external separation of powers.

IV. ADVISING AND ADJUDICATING: ON DUAL ROLES

In executive-branch scholarship, concern also has been raised over bureaucratic offices with dual roles. Neal Katyal particularly has raised concerns about the dual role performed by the Office of Legal Counsel (OLC).[217] According to Katyal, the combination of adjudicatory and advisory functions in OLC undermines the office's neutrality.[218] He therefore advocates for making OLC purely advisory, while creating a new adjudicatory office (also housed in the executive branch).[219] Similar arguments have been made about the Office of Information and Regulatory Affairs (OIRA).[220] These arguments are grounded in the premise that a hybrid advisory/adjudicatory office likely cannot preserve a reputation of neutrality.

The congressional bureaucracy challenges this premise. Many of its offices successfully navigate this dual

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217. *See* Katyal, *supra* note 5, at 2337 ("The client-driven advisory function, however, infects its adjudicatory role. Just as the trend in the government has been to split the litigation function from the advisory function (so that there is no longer a Solicitor General who both litigates and advises), a new split between the advisory and adjudicatory functions of OLC is necessary.").

218. *See id*. (arguing that "in this climate, there is simply no way that OLC's aspiration to be a neutral decision-maker can play out in practice").

219. *See id.* ("Instead of a compromised OLC, OLC should be stripped of its adjudicatory role and permitted to function only as an adviser to the administration. . . . The adjudication function would be transferred to a separate official, a Director of Adjudication, who would resolve inter-agency disputes."). *Cf*. Renan, *supra* note 7, at 813–14 (arguing that the "shift to a more informal, diffuse, and porous brand of legalism creates opportunities for blended judgment" that "might ultimately present a more modest, but perhaps also more honest vision of what law can and should achieve outside the courts").

220. *See* Stuart Shapiro, *OIRA's Dual Role and the Future of Cost-Benefit Analysis*, 50 ENV'T L. REP. 10385 (2020); Stuart Shapiro, *Unequal Partners: Cost-Benefit Analysis and Executive Review of Regulations*, 35 ENVTL. L. REP. 10433 (2005).

advice-and-adjudication role. All four of its offices that adjudicate disputes additionally function as advisors, guiding partisans on how best to reach their desired results in any ultimate adjudication.[221] Despite this dual role, these offices have generally retained strong reputations as neutral adjudicators inside Congress.[222] For the Parliamentarians' offices, Jonathan Gould has posited that the dual role even has had the opposite effect: it has buttressed their reputation for neutrality.[223] This suggests that a hybrid advice-and-adjudication role actually is possible, and that other elements of OLC and OIRA are potentially contributing to the erosion of their adjudicatory neutrality.

For example, the challenge faced by OLC in particular may be more fully explained by Rebecca Ingber's distinction between "entrenched" and "transient" bureaucracy.[224] As Ingber observes, OLC is a transient bureaucracy: its leader and staff typically change with a new administration.[225] By contrast, the nonpartisan congressional offices with adjudicatory roles are mostly entrenched bureaucracy. Their staff—and usually their leadership—serve across multiple transitions of partisan

221. The four offices are: the House Parliamentarian, the Senate Parliamentarian, CBO, and JCT. *See generally* Cross & Gluck, *supra* note 9 (documenting that all offices in congressional bureaucracy advise).

222. *See* Kevin R. Kosar, *Legislative Branch Support Agencies: What They Are, What They Do, and Their Uneasy Position in Our System of Government*, *in* CONGRESS OVERWHELMED: CONGRESSIONAL CAPACITY AND PROSPECTS FOR REFORM 128 (Timothy M. LaPira et al. eds., 2020) (noting high rankings among congressional staff of congressional bureaucracy offices on neutrality); Gould, *supra* note 55, at 2008; Cross & Gluck, *supra* note 9, at 1613–16.

223. *See* Gould, *supra* note 55, at 2008 ("This example shows how the advisory role can support the parliamentarians' reputations as neutral brokers who treat both parties fairly.").

224. Ingber, *supra* note 7, at 161 ("This is the dynamic between what I will call the entrenched and the transient bureaucracy, that is, those actors within the bureaucracy who tend to remain in the government through ideologically-opposed presidential administrations, and those who swap out when their President or party is out of power.").

225. *Id.* at 168–69

> OLC itself is an office more likely to be on board with the President's general agenda than opposed . . . the office is typically led by a carefully chosen political appointee and staffed with career lawyers who tend to change over at a much higher frequency than those in agency general counsel offices, and are thus more likely to have chosen to work in the office under the contemporaneous President.

power.[226] This entrenched quality seems to have helped to cement the reputation of these offices as neutral arbiters, with each party recalling the fair dealing they received when in the majority.[227] Admittedly, this explanation may be partly qualified by the experience of OIRA, which largely consists of career staff, though important leadership positions are political appointees.[228] Still, when the congressional bureaucracy is added into the analysis, an emphasis on the unique challenges of transient bureaucracy may provide a more compelling explanation than an emphasis simply on the inherent problems of dual roles.[229]

Viewed in this light, it is not surprising that the most noteworthy instance of politicization in the congressional bureaucracy, the partisan removal of the Senate Parliamentarian in the 1980s,[230] arose when Republicans assumed control of the chamber for the first time in twenty-six years.[231] In that instance, Republicans had come to see the Parliamentarian as biased toward the opposing party.[232] This occurred partly because, after being in the minority so long, Republicans had only witnessed the office's staff assisting the Democrats in the accomplishment of their legislative goals.[233]

The benefits of being an entrenched bureaucracy may also be buttressed by an element of the congressional bureaucracy

226. There are some exceptions. The head of CBO serves for only a four-year term, though the staff typically does not also turn over. 2 U.S.C. § 601(a)(3)–(4). As previously noted, the Senate Parliamentarian would turn over with party change in the Senate during the 1980s and 1990s, though this practically led simply to a switching of roles between two different figures. Gould, *supra* note 55, at 2006.

227. *See* Cross & Gluck, *supra* note 9, at 1615–16 (noting the existence of an ostensibly neutral "Congressional bureaucracy"); Gould, *supra* note 55, at 2008.

228. *See* Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1845 (2013).

229. *See* Ackerman, *New Separation of Powers*, *supra* note 3, at 698 (arguing that "the Weberian ethic of bureaucratic neutrality" can function "as a vital insurance policy" for entrenched bureaucracies, allowing them to plausibly claim to partisans that they will serve new governing majorities with the same energy).

230. *See* Gould, *supra* note 55, at 2005.

231. *See Party Control*, U.S. SENATE, https://perma.cc/QE32-UH2Y.

232. *See* Gould, *supra* note 55, at 2005.

233. *Id.*

that presumably is not replicable in OLC or OIRA. Due to the multi-principal structure of a legislature, the minority party is present in Congress to receive assistance and advice from the congressional bureaucracy.[234] This means that, even when out of power, partisans receive assistance from the bureaucracy and witness its deployment of expertise.[235] This can help support impressions of its neutral character, including when these partisans come into the majority.[236] As previously noted, this element helped save several offices of the congressional bureaucracy in the Gingrich era, with Newt Gingrich's inner circle recalling the value added by the bureaucracy.[237] Moreover, assisting the minority party may help prevent bias and partisan capture in these bureaucratic offices, as it consistently exposes the bureaucracy to competing arguments and agendas. It may therefore be that office neutrality can survive a hybrid adjudicating-and-advising role, but that it requires specific conditions that either have not, or cannot, be replicated in OLC or OIRA.

V. AGENCY CAPTURE

Scholars also worry that the executive branch bureaucracy is vulnerable to the problem of "agency capture" by interest groups.[238] In this view, administrative agencies are meant to

234. *See* Cross & Gluck, *supra* note 9, at 1621 ("Unlike the executive branch bureaucracy, the congressional bureaucracy performs its tasks for both the majority party and the party not in control.").

235. *See id.*

236. *See* Kosar, *supra* note 222.

237. *See* Cross & Gluck, *supra* note 9, at 1615–16; Gould, *supra* note 55, at 2008.

238. *See, e.g.*, Kagan, *supra* note 4, at 2264–65

> One purpose, even if unfulfilled, of efforts to place institutional controls on agency action relates to the prospect that, in the absence of these safeguards, regulated entities and other organized interests themselves will grasp the reins of regulatory authority. The view that firms subject to regulation had 'captured' the agencies gained wide currency beginning in the 1960s. Although the thesis often was stated too crudely, few could argue with its basic insight—that well-organized groups had the potential to exercise disproportionate influence over agency policymaking by virtue of the resources they commanded, the information they possessed, and the long-term relations they maintained with agency officials.

see also Datla & Revesz, *supra* note 60, at 816

provide relatively autonomous zones for bureaucratic, expert decision-making in pursuit of democratically-determined goals, which may conflict with the goals of the private industries and interest groups that are to be regulated.[239] Structural features of the executive branch bureaucracy, however, provide opportunities for these interest groups to insert themselves into the agency decision-making process and warp it to their ends.[240] In this way, the design of the executive branch bureaucracy is seen as containing vulnerabilities that allow concentrated, well-funded interests to steer (or "capture") agency decision-making processes.[241] This phenomenon of agency capture has cast doubt on early aspirations by figures such as James Landis, who believed that bureaucratic expertise might create the possibility of pushing back against concentrated corporate power.[242]

The congressional bureaucracy provides a useful, unexplored comparison in the effort to understand agency capture. Here, a fundamentally different relationship has emerged between bureaucracy and special interests. Not only has the congressional bureaucracy avoided capture by interest groups—it functions as a counterweight against legislator capture by these special interests.[243]

Some offices in the congressional bureaucracy do occasionally make themselves available to interest groups, it

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> The phenomenon of interest group influence is commonly referred to as agency capture. The capture thesis recognizes that because interest groups representing regulated entities tend to be overrepresented in the agency decision-making process compared to interest groups representing public interests, the outputs of agencies will tend to be biased in favor of those interests.

239. *See* Wendy E. Wagner, *A Place for Agency Expertise: Reconciling Agency Expertise with Presidential Power*, 115 COLUM. L. REV. 2019, 2023–32 (2015).

240. *See, e.g.*, Datla & Revesz, *supra* note 60, at 816. The most notable of these is the requirement for notice-and-comment rulemaking. *See* 5 U.S.C. § 553(c).

241. *See* Datla & Revesz, *supra* note 60, at 816.

242. *See* LANDIS, *supra* note 22; *see also* Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463, 2470 (2017) ("The role of expertise in [Landis's work] is twofold. Trivially, causal, scientific, and policy knowledge are necessary for ongoing administrative supervision of concentrated corporate power.").

243. *See* Cross & Gluck, *supra* note 9, at 1603.

should be noted. JCT staff seeks out conversations with trade associations, companies, and other taxpayers to develop an understanding of the real-world impacts of tax policies, and they also will respond to requests for conversations with these actors.[244] OLRC, in a process that mimics notice-and-comment periods in agencies, will reach out to private actors when assembling codification bills and invite feedback on whether proposed language captures the consensus understanding of existing legislation.[245] And while the staffs at MedPAC and MACPAC are permanent nonpartisan staffs, their commissioners were meant to bring perspectives to Congress that it lacked—a democratic corrective of the sort also envisioned in agency practices.[246] At least some corners of the congressional bureaucracy therefore do interact with special interest groups and account for their viewpoints.

Most of the congressional bureaucracy does not interact with outside interest groups, [247] however, and the bureaucracy typically functions as a key actor inside Congress that checks interest group involvement in the legislative process.[248] As the head of the CRS employees' union testified to Congress in 2019:

> Members of this committee and your staff receive many sources of facts and opinion. They are often useful. But whether they come from the Alzheimer's Association or Big Pharma, they support the goals of the sources. Seasoned CRS analysts can help sort through the facts and opinions and provide an unbiased overview.[249]

Similarly, Legislative Counsel often is the key point of resistance to straightforward insertion of legislative language

244. Interview with Staffer (on file with author).

245. *Positive Law Codification*, OFF. OF THE L. REVISION COUNS., https://perma.cc/L2NC-94HQ.

246. Interview with Staffer (on file with author).

247. *Id.* For example, Legislative Counsel does not respond to requests or contacts from non-congressional actors, and even when partisan congressional staff invite interest groups to attend legislative drafting sessions, Legislative Counsel typically obliges only if the partisan staff also is present. *Id.*

248. *See* Cross & Gluck, *supra* note 9, at 1603.

249. Written Statement of Susan Thaul, President, Cong. Rsch. Emps. Ass'n, Statement to Committee on House Administration 4–5 (June 20, 2019), https://perma.cc/38G5-84JA (PDF).

drafted by lobbyists.[250] MedPAC and MACPAC were founded specifically in the effort to resist interest groups,[251] as was the now-defunct independent technology agency, the OTA.[252] Throughout the congressional bureaucracy, there is an understanding that the bureaucracy is insulated from interest group contact and is expected to provide an expert, nonpartisan counterbalance to the partial information entering the legislative process via interest groups.[253]

When we look at bureaucracy across Congress and the executive branch, we therefore see two very different modes of interacting with interest groups. This can offer lessons in both directions.

For example, scholars have pointed to factors that may contribute to the problem of agency capture.[254] One key contributing factor, they have suggested, has been the

250. *See* Cross & Gluck, *supra* note 9, at 1567.

251. *See* John Reichard, *Make Way for MacPAC, the New Kid on Washington's Health Policy Block*, COMMONWEALTH FUND (Aug. 2, 2010), https://perma.cc/Q3D9-DAVJ (reporting Senator Rockefeller's description of MedPAC and MACPAC as a conscious effort to take decision-making "out of the hands of Congress and the lobbyists"); *see also* Thomas R. Oliver, *Analysis, Advice, and Congressional Leadership: The Physician Payment Review Commission and the Politics of Medicare*, 18 J. HEALTH POL., POL'Y & L. 113, 149 (1993) (noting that "the commission's own research and analysis made it possible to test the empirical claims of the interest groups with greater rigor" and that the "expertise of the PPRC commissioners and staff diminished the informational power of lobbyists"); HOLLY STOCKDALE, CONG. RESEARCH SERV., R40915, AN OVERVIEW OF PROPOSALS TO ESTABLISH AN INDEPENDENT COMMISSION OR BOARD IN MEDICARE 5 (2020) (noting that the two advisory commissions that would be merged to form MedPAC operated to "buffer members of Congress from pressures from interest groups").

252. *See* CHRIS MOONEY, THE REPUBLICAN WAR ON SCIENCE (2005) ("In OTA's absence, however, the new Republican majority in Congress freely called upon its own favorable scientific 'experts' and relied upon analyses prepared by lobbyists and ideologically committed think tanks. . . ."); Katherine Tully-McManus, *House Members Call for Office of Technology Assessment Revival*, ROLL CALL (Apr. 2, 2019), https://perma.cc/WC67-ZSHV (noting House members complaining about Congress's use of "non-governmental groups that are often advocating a position on technological issues, rather than an unbiased perspective").

253. *See* Written Statement of Susan Thaul, President, Cong. Rsch. Emps. Ass'n, Statement to Committee on House Administration 4–5 (June 20, 2019), https://perma.cc/38G5-84JA (PDF).

254. *See, e.g.*, Kagan, *supra* note 4, at 2265 (citing "the resources they commanded, the information they possessed, and the long-term relations they maintained with agency officials").

legitimation problem faced by agency rule-makers.[255] According to this account, career bureaucrats are troublingly unmoored from the democratic accountability that legitimates most decisions in our system. In response to this legitimation anxiety, agency processes were created to mimic democratic participation by interested parties. Agencies therefore were required to invite outside groups to participate in their rulemaking processes,[256] which would function as a "perfected legislative process for the formulation of policy"[257] and as "a surrogate political process within the bureaucratic sphere,"[258] as scholars have put it. This solution to agency legitimation problems invited powerful interest groups into the agency

255. Ackerman, *New Separation of Powers*, *supra* note 3, at 697 (noting that "regulatory decision-making needs special forms of legitimation that enhance popular participation"); Katyal, *supra* note 5, at 2317 ("In short, the executive is the home of two different sorts of legitimacy: political (democratic will) and bureaucratic (expertise)."); *id.* at 2346 ("The President will play a more powerful role than his European counterparts by being able to trump bureaucratic decision-making. That approach suffuses the bureaucracy's expertise-laden legitimacy with political legitimacy."); Metzger, *supra* note 116, at 454 ("[A]t the same time as they serve the constitutional goal of checking excessive Executive Branch power, such constraints arguably undermine political accountability . . . ."); Kagan, *supra* note 4, at 2252 ("I aver that in comparison with other forms of control, the new presidentialization of administration renders the bureaucratic sphere more transparent and responsive to the public . . . ."); Vermeule, *supra* note 242, at 2463 (noting "the administrative state's legitimation problem" and discussing notable attempts by Landis, Jaffe, and Kagan to solve it); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 465 (2003) ("It is no accident that the model emerging contemporaneously with the countermajoritarian difficulty was the 'interest group representation' model, which consciously characterized the administrative process as a perfected legislative process for the formulation of policy."); *id.* at 475 ("Through an interest group representation model, agencies' decisions would gather legitimacy 'based on the same principle as legislation.'"); *see also* Kagan, *supra* note 4, at 2261 (explaining how the narrative used to defend "the legitimacy of bureaucratic power" has evolved over the past century). *But see generally* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985).

256. As Justice Kagan puts it: "The interest group model . . . attempted to ensure accountability by creating a surrogate political process within the bureaucratic sphere, even if at some cost to administrative efficiency." Kagan, *supra* note 4, at 2331.

257. Bressman, *supra* note 255, at 465.

258. Kagan, *supra* note 4, at 2331.

decision-making process, however, and thereby created the risk of agency capture.

The contrasting experience of the congressional bureaucracy supports this diagnosis of agency capture. Unlike administrative agencies, the congressional bureaucracy provides its input during a larger democratically-engaged legislative process (that is, pre-enactment),[259] and it provides that input to a group of legislators that arguably are more available than executive branch elected officials for direct lobbying by interest groups and constituents.[260] As a result, the congressional bureaucracy would be expected to avoid legitimation concerns that might press it to relinquish its confidential relationships with legislators, and thereby expose itself to possible agency capture.[261] This is precisely what has occurred.

Several lessons grow from this. First, as explained above, it provides a better understanding of executive-branch agency capture, providing support for the thesis that it is partly caused by agencies' unique legitimation challenges.[262] Second, it highlights another potential benefit of shifting some bureaucratic work from the executive to the legislative bureaucracy: that work does not suffer the same legitimation concerns or risks of capture at the bureaucratic level.[263] Of course, it is possible that legislator capture is an even greater concern.[264] Insofar as the concern is specifically about insulation of nonpartisan expertise from interest group pressure, however, the congressional bureaucracy offers a promising alternative to executive branch options.

Third, it provides some explanation for why the congressional bureaucracy has largely avoided agency capture, and thereby also provides lessons about how to ensure that it continues to avoid it. Under this thesis, the congressional bureaucracy's connections to the legislative process—and that

259. *See* Cross & Gluck, *supra* note 9, at 1632–33.

260. On interest group involvement in legislative process, see generally ESKRIDGE ET AL., *supra* note 31, at 77–79.

261. *But see* Cross & Gluck, *supra* note 9, at 1630.

262. *See supra* notes 255–258 and accompanying text.

263. *See* Ackerman, *New Separation of Powers*, *supra* note 3, at 697.

264. *See generally, e.g.*, LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT (2011).

process's larger democratic openness—have helped protect the congressional bureaucracy.[265] This suggests a potential limit on the extent to which the congressional bureaucracy could be expanded into post-enactment roles while still preserving its beneficial traits. Interestingly, two of the offices in the congressional bureaucracy that do post-enactment work—JCT[266] and OLRC[267]—also interact with private interests.

Fourth, it validates and extends James Landis's notion that bureaucratic expertise might create the possibility of pushing back against concentrated corporate power.[268] It suggests that the setbacks American governance has experienced in this project may be specific to executive branch institutional design, rather than a bureaucratic inevitability. Again, this thesis would need to be tested in a larger project to weigh the overlapping problems of capture among political principals and career bureaucrats—but, at a minimum, it shows that the challenges administrative agencies have faced on this front do not simply replicate across different bureaucratic structures in our federal government.

VI. CONGRESSIONAL BUREAUCRACY AND THE JUDICIAL BRANCH

The rise of the modern administrative state also has led scholars to compare and contrast the bureaucracy and the judiciary. This work has offered lessons about comparative institutional competence, and about the proper relationship and division of labor between the branches.[269] This Part examines two dimensions on which bureaucracy and the judiciary are regularly compared: neutrality and expertise. As this Part shows, introducing the congressional bureaucracy into the

265. *See* Written Statement of Susan Thaul, President, Cong. Rsch. Emps. Ass'n, Statement to Committee on House Administration 4–5 (June 20, 2019), https://perma.cc/38G5-84JA (PDF).

266. Most notably, JCT publishes the Blue Book, their general explanation of the tax legislation enacted in the prior year. *See Publication Search: Bluebooks*, JOINT COMM. ON TAXATION, https://perma.cc/MK29-JHTT.

267. *See supra* note 245 and accompanying text.

268. *See supra* note 242 and accompanying text.

269. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 168–74, 1009–10 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

conversation changes how we think about these dimensions—and about the relationship of the political branches to the judiciary.

A. *Neutrality*

It has been observed that, in both the bureaucracy and the judiciary, there is a shared goal of institutional neutrality.[270] Jon Michaels describes the civil service as the "closest administrative ally" to the judiciary, for example, since both "judges and civil servants tend to emphasize impartial, reasoned decision making."[271] Michaels was not the first[272] or last[273] to note this similarity, and it was self-consciously embraced at times in the creation of the executive-branch bureaucracy.[274]

This observation has led to comparative assessments of the branches based on their progress toward the goal of neutrality. Two decades ago, for example, Bruce Ackerman diagnosed the American political system as largely successful in achieving this desired neutrality for the judiciary, but as having failed with respect to bureaucracy.[275] In making this diagnosis, Ackerman was focused specifically on the executive branch bureaucracy, which he saw as politicized by the dual allegiances discussed in Part II.[276]

By contrast, the congressional bureaucracy appears more successful on this dimension. In a recent survey of partisan congressional staff, Kevin Kosar found offices in the congressional bureaucracy repeatedly receiving the highest

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270. This Article uses the term "neutrality" as a shorthand for the idea of drawing conclusions via application of accepted professional methodologies that are orthogonal to normative political considerations. For different conceptions of neutrality, see Cross & Gluck, *supra* note 9, at 1621–24.

271. Michaels, *Of Constitutional Custodians*, *supra* note 62, at 250.

272. *See, e.g.*, Ackerman, *New Separation of Powers*, *supra* note 3, at 715–16 ("The challenge [is] to define the conditions under which the claims of functional specialization by judges and bureaucrats deserved constitutional protection against . . . predictable efforts to erode the rule of law."); *see also* SKOWRONEK, *supra* note 19, at 47.

273. *See, e.g.*, Ingber, *supra* note 7, at 188.

274. Shugerman, *supra* note 111, at 125.

275. *See* Ackerman, *New Separation of Powers*, *supra* note 3, at 641.

276. *See id.* ("The ongoing competition between House, Senate, and Presidency for control over the administrative apparatus has created an excessively politicized style of bureaucratic government.").

ratings for trustworthiness among a variety of institutions—with all three surveyed offices (GAO, CBO, and CRS) easily outpacing the administration and bureaucratic agencies, among others, in trustworthiness.[277] The Cross-Gluck study supported this conclusion, finding the congressional bureaucracy to be widely perceived inside Congress as a highly trusted source of professional and unbiased analysis.[278] In the pursuit of institutional neutrality, it seems that the congressional bureaucracy may have been relatively successful.

In fact, although a provocative thesis, it is worth inquiring whether the congressional bureaucracy might now be considered a more reliably neutral institution than the federal judiciary. Since Ackerman published his assessment twenty years ago, the federal judiciary has undergone significant, highly-visible efforts at politicization. In lower courts, the appointment of judges deemed "not qualified" by the American Bar Association has raised serious concerns that appointments have been driven by political allegiance rather than neutral competence.[279] On the Supreme Court, the appointment of three Justices who previously served on President Bush's defense

277. Kosar, *supra* note 222, at 129. Professional committee staff ranked very close to CBO—professional staff received a mean score for trustworthiness on a scale from zero to three that was .01 higher than the score for CBO for budget analysis, whereas CBO's mean score was .02 higher for healthcare. However, CBO still scored much more highly than all of the other actors, and CRS and GAO both beat professional committee staff on both budget and healthcare by large margins. *Id.*

278. *See* Cross & Gluck, *supra* note 9, at 1613–16 ("[T]he [congressional] bureaucracy offices emphasized nonpartisanship as *the* defining characteristic of their work.").

279. *See* Philip Bump, *How Unusual Are Trump's 'Not Qualified' Judicial Nominations?*, WASH. POST (Dec. 15, 2017, 8:45 AM), https://perma.cc/3KT3-37DY (noting that a higher percentage of President Donald Trump's nominees to the judiciary were determined "not qualified" within his first year of office than his predecessors); *see also* Jordain Carney, *Senate Confirms Trump Judicial Pick Labeled 'Not Qualified' by American Bar Association*, THE HILL (Oct. 24, 2019, 3:40 PM), https://perma.cc/5FDM-SCQV (reporting that Justin Walker was confirmed as a judge for the Western District of Kentucky in a 50–41 party-line vote despite being labeled "not qualified" by the American Bar Association); Reis Thebault, *Trump Nominee Who Is Anti-IVF and Surrogacy Was Deemed Unqualified. She Was Just Confirmed.*, WASH. POST (Dec. 4, 2019), https://perma.cc/8RM9-UEAM (reporting that Sarah Pitlyk was confirmed as a judge for the Eastern District of Missouri despite being labeled as "not qualified" by the American Bar Association).

team in the politically-fraught case of *Bush v. Gore*[280] have raised similar concerns,[281] as did Justice Kavanaugh's openly partisan testimony at his confirmation hearings.[282] The removal of the filibuster for judicial appointments has allowed more appointments to proceed along party lines, deepening these worries about a politicized appointment process.[283] In the wake of these changes, scholars have noted an erosion in the trustworthiness and legitimacy of the courts as a neutral arbiter.[284] Recent public opinion polls have generally supported

280. 531 U.S. 98 (2000).

281. *See* Joan Biskupic, *Supreme Court Is About to Have 3* Bush v. Gore *Alumni Sitting on the Bench*, CNN (Oct. 17, 2020, 8:07 AM), https://perma.cc/K557-P2BD (highlighting that Justices Amy Coney Barrett, Brett Kavanaugh, and Chief Justice John Roberts assisted George W. Bush's legal team in *Bush v. Gore*).

282. *See* Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2242 (2019) (reviewing RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018)).

283. *See* Li Zhou, *Senate Republicans Have Officially Gone "Nuclear" in Order to Confirm More Trump Judges*, VOX (Apr. 3, 2019, 4:42 PM), https://perma.cc/DK8H-NFW7 (reporting that Republicans had invoked "the so-called 'nuclear option' . . . [to amend] Senate rules in order to further limit the amount of time lower-level [judicial] nominees could be debated on the floor").

284. *See* Grove, *supra* note 282, at 2250 (arguing that during "politically charged moments [such as the present], the Justices may not be able to protect the Court's sociological legitimacy without sacrificing the legal legitimacy of their decisions (or vice versa)"); Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 150 (2019) (warning that "[r]ecent events have already taken a toll on perceptions of the Court's legitimacy"); Aziz Z. Huq, *Why Judicial Independence Fails*, 115 NW. U. L. REV. 1055, 1056 (2021) (opining that "[t]o judge from polemics of the day, judicial independence is beset by enemies upon all sides"); Lee Epstein & Eric Posner, Opinion, *If the Supreme Court Is Nakedly Political, Can It Be Just?*, N.Y. TIMES (July 9, 2018), https://perma.cc/T8C6-C2GQ (cautioning that soon "it will become impossible to regard the court as anything but a partisan institution"); Erwin Chemerinsky, *With Kavanaugh Confirmation Battle, the Supreme Court's Legitimacy Is in Question*, SACRAMENTO BEE (Oct. 7, 2018), https://perma.cc/9XTR-R6RH (noting "the cloud over the court's legitimacy"); Justin Wise, *Holder: Supreme Court's Legitimacy Can Be Questioned After Kavanaugh Confirmation*, THE HILL (Oct. 8, 2018, 8:03 AM), https://perma.cc/5TJ6-7T2D (reporting tweet by former Attorney General Holder stating, "With the confirmation of Kavanaugh and the process which led to it, (and the treatment of Merrick Garland), the legitimacy of the Supreme Court can justifiably be questioned"); *see also* RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 148 (2018) (noting that we

these observations.[285] Ackerman himself warned in 2018 that, without significant reforms, political partisanship "will predictably destroy the court's legitimacy in the coming decade."[286] It is important not to conflate sociological and legal legitimacy, of course, and perhaps the factors that have led to perceptions of politicization of the judiciary have not actually undermined its neutrality.[287] If these assessments are correct, however, and if the judiciary has indeed undergone a diminution in neutrality in the last several decades, then it is plausible that the congressional bureaucracy now actually surpasses the judiciary on the metric of neutrality.

If true, this may have implications for statutory interpretation. For example, several scholars have argued that courts should adopt canons of statutory interpretation that defer to prior interpretations or conclusions offered by offices in the congressional bureaucracy, such as CBO,[288] JCT,[289] or the

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live in "an era of hermeneutic suspicion" while arguing for a broadened understanding of legal legitimacy).

285. *See* Jeffrey M. Jones, *Approval of U.S. Supreme Court Down to 40%, A New Low*, GALLUP (Sept. 23, 2021), https://perma.cc/FDT6-4BFL ("[O]pinions of the U.S. Supreme Court have worsened, with 40%, down from 49% in July, saying they approve of the job the high court is doing. This represents, by two percentage points, a new low in Gallup's trend, which dates back to 2000."); *see also Positive Views of Supreme Court Decline Sharply Following Abortion Ruling*, PEW RSCH. CTR. (Sept. 1. 2022), https://perma.cc/CW3J-5327 ("Americans' ratings of the Supreme Court are now as negative as—and more politically polarized than—at any point in more than three decades of polling on the nation's highest court.").

286. Bruce Ackerman, Opinion, *Trust in the Justices of the Supreme Court Is Waning. Here Are Three Ways to Fortify the Court*, L.A. TIMES (Dec. 20, 2018, 3:15 AM), https://perma.cc/UL6J-DHVB.

287. *See* FALLON, *supra* note 282.

288. *See* Bressman & Gluck, *Part II*, *supra* note 54, at 782 (suggesting that a "CBO score could help courts reflect congressional expectations" for statutes); Gluck, *supra* note 55, at 187–91 (discussing how the CBO canon can improve statutory interpretation); *see also* Abbe R. Gluck, *The "CBO Canon" and the Debate Over Tax Credits on Federally Operated Health Insurance Exchanges*, BALKINIZATION (July 20, 2012), https://perma.cc/TV63-7CJX (positing that the CBO "budget score offers better evidence of congressional 'intent' than other commonly consulted non-textual tools, including legislative history").

289. *See* Wallace, *supra* note 57, at 183.

Parliamentarians' offices.[290] Typically, these arguments have been grounded in an intent-based logic—that is, on the idea that the congressional bureaucracy, because it is closer to Congress, has a comparative advantage to the judiciary in its ability to access and report congressional intent.[291] These arguments, however, might further be grounded in a neutrality-based logic—that is, on the idea that the congressional bureaucracy currently is the best-equipped actor to offer neutral, good-faith assessments of legislation. Courts would be unlikely to expressly adopt this logic, of course, since it entails recognition of the erosion of neutrality within the courts themselves. Yet it might provide an implicit reason for outsiders to more strongly advocate for judicial use of, and deference to, these nonpartisan congressional assessments.[292]

B. *Expertise*

The congressional bureaucracy also changes how we think about the comparative capacity of the branches to cultivate and use expertise. Traditionally, the executive has been viewed as the outlier in federal governance: with its administrative agencies, it has been viewed as uniquely equipped to develop and use expertise.[293] The congressional bureaucracy changes this view. At a minimum, it reframes the branches along a spectrum that ranks the branches as: executive (most expertise), Congress (medium expertise), and courts (least expertise). Arguably, it even supports a view of the judiciary as outlier: a branch uniquely ill-equipped to develop and evaluate expert

290. *See* Gould, *supra* note 55, at 2023 (discussing the rationale for relying on certain parliamentary procedures, such as rulings of the chair, when judicially interpreting statutes).

291. *But see* Wallace, *supra* note 57, at 224–30.

292. On courts' slow but growing use of these documents, see Cross & Gluck, *supra* note 9, at 1650–51, 1676.

293. *See, e.g.*, Wagner, *supra* note 239, at 2023 (describing the "agency-as-expert" view and noting that "the basic concept that the agencies should preside over specialized information is hard-wired into the design of the administrative state"); William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 122 (2001) ("[O]ne of the key justifications for the administrative state is to allow expert agencies to exercise their judgment and experience in resolving tasks delegated by Congress." (citing Sunstein, *supra* note 19)).

information.[294] This revised understanding of comparative institutional competence has several implications.

First, it suggests that courts should display greater deference to congressional expertise. In the administrative law context, courts broadly recognize that their comparative expertise deficit provides reason for greater deference to the executive branch.[295] The same should be true when Congress uses its bureaucracy. Recently, for example, the Supreme Court faced the question of whether the individual mandate[296] was severable from the larger Affordable Care Act (ACA).[297] The Court avoided this question on standing grounds,[298] but Justice Alito's dissent squarely addressed it—and argued that was not severable.[299] In reaching this conclusion, Justice Alito ignored the fact that CBO concluded in 2017 that the provision was

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294. On judiciary as an outlier, see A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 391 (2001) ("Regarding competency, there can be little doubt that federal judges, and particularly appellate court judges, are singularly ill suited to make the kinds of factual determinations and predictive judgments that must be made in assessing whether legislation answers a real, rather than merely perceived, national problem.").

295. *See, e.g.*, Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687, 703–04 (1995) ("The latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary's reasonable interpretation."); *see also* Bryant & Simeone, *supra* note 294, at 371–72 ("[T]he modern administrative state's claim to legitimacy has been, from the outset, one of expertise rather than political accountability. Accordingly, judicial review, and particularly review based on the formal administrative record, is necessary to ensure that agency decision making is genuinely a product of that expertise."); Renan, *supra* note 113, at 2255–56

> Underlying a range of doctrines of judicial deference is an antecedent question of institutional choice: which is the more competent institutional actor to decide the legal question at issue, the courts or the President? The answer to that question is predicated (sometimes implicitly, sometimes explicitly) on a set of assumptions about how these institutions actually work.

296. The mandate is currently a zero-dollar tax. *See* I.R.C. § 5000A(c)(3)(A).

297. *See* California v. Texas, 141 S. Ct. 2104, 2113 (2021).

298. *See id.*

299. *See id.* at 2140 (Alito, J., dissenting).

severable[300]—that is, the ACA could survive without it.[301] Yet, not only is CBO closer to Congress, it also has economic expertise that Justice Alito (and the rest of the Court) lacks.[302] In such situations, an expertise-based rationale supports deference to the CBO assessment, thereby supplementing the intent-based and neutrality-based rationales for deference discussed in Subpart VI.A.

Deference to congressional expertise is additionally important due to the judicial practice that Buzbee and Schapiro have labeled "legislative record review."[303] Under this practice, the Court requires legislation to be supported by sufficient factfinding documented in the legislative record.[304] This practice made a notable appearance in *Shelby County v. Holder*,[305] the 2013 case that struck down a key provision in the Voting Rights Act.[306] By adopting this practice in the last few decades,[307] the

300. *See generally* CONG. BUDGET OFF., REPEALING THE INDIVIDUAL HEALTH INSURANCE MANDATE: AN UPDATED ESTIMATE (2017), https://perma.cc/74HG-3VV3 (PDF). *See also* Brief for Jonathan H. Adler et al. as Amici Curiae Supporting Petitioners at 20, California v. Texas, 141 S. Ct. 2104 (2021) (Nos. 19-840, 19-1019) ("Before Congress acted in 2017, the Congressional Budget Office had analyzed the effects both of repealing the individual mandate and of eliminating the penalties while keeping the mandate in place.").

301. On the severability standard, see Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 329 (2006) (noting that courts should "try not to nullify more of a legislature's work than is necessary . . . [since] a 'ruling of unconstitutionality frustrates the intent of the elected representatives of the people'" (quoting Regan v. Time, Inc., 468 U.S. 641, 652 (1984)).

302. *See Organization and Staffing*, CONG. BUDGET OFF., https://perma.cc/UY5P-QPFW ("The [CBO] has about 275 staff members, mostly economists or public policy analysts with advanced degrees . . . . Many of them have extensive experience in their subject areas, including years of work at CBO.").

303. Buzbee & Schapiro, *supra* note 293, at 89 (noting that recent jurisprudence has "raised legislative record review to new, dispositive significance").

304. *See* Bryant & Simeone, *supra* note 294, at 330 ("[T]he Court has, in recent years, become increasingly aggressive in striking down federal statutes *because* the formal legislative record inadequately supports a factual judgment underlying congressional action.").

305. 570 U.S. 529 (2013).

306. *Id.*

307. Most commentators trace the emergence of this practice to a string of cases in the 1990s and early 2000s. *See* Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 122–23 (2001) (describing how the Rehnquist Court "largely abandoned" its traditional deferential standard and

Court has dramatically narrowed its deference to Congress[308]—and also has shifted its underlying logic. Once anchored in ideas about democratic accountability,[309] this deference now appears to rely on ideas about publicly documented exercises of expertise.[310]

Legislative record review strongly resembles a review practice already applied to administrative agencies,[311] and

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replaced it with "a more constrained version in which Congressional factfinding [is] subject to searching, skeptical review"). *See generally, e.g.*, Buzbee & Schapiro, *supra* note 293; Bryant & Simeone, *supra* note 294.

308. *See* Colker & Brudney, *supra* note 307, at 99 ("Congress under existing precedent merely needed to establish that there was a 'rational basis' for concluding that a regulated activity sufficiently affected interstate commerce."). For statement of typical approach under prior precedent, *see* Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc., 452 U.S. 264, 276 (1981) ("The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding.").

309. *See* United States v. Lopez, 514 U.S. 549, 604 (1995) (Souter, J., dissenting) ("The practice of deferring to rationally based legislative judgments . . . reflects . . . our appreciation of the legitimacy that comes from Congress's political accountability in dealing with matters open to a wide range of possible choices."); *see also* Colker & Brudney, *supra* note 307, at 119

> [T]his dynamic and regularly recorded tension between Congress and its constituencies contributes importantly to the legitimacy of the lawmaking process, and helps explain the presumption of judicial deference to the final product. The Court's insistence on a type of pristine 'substantial evidence' approach slights another of Congress's distinctive institutional virtues—the politically accountable nature of its record building enterprise.

see also Maria Ponomarenko, *Administrative Rationality Review*, 104 VA. L. REV. 1399, 1424 (2018) ("Often what bridges the gap—and justifies the highly deferential standard of review—–is the idea that legislatures, unlike courts, are accountable to the majority will."); Renan, *supra* note 113, at 2256 n.383 (noting that "the Court defers to the legislature because of its democratic pedigree" and removes deference at signs of democratic malfunction); Buzbee & Schapiro, *supra* note 293, at 154 (noting that "the lack of democratic checks on judges' questioning of legislative judgments is problematic"). *But see* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 196 (1997) (noting that "the deference to Congress is in one respect akin to deference owed to administrative agencies because of their expertise," but courts also "owe Congress' findings an additional measure of deference out of respect for its authority to exercise the legislative power").

310. *See* Bryant & Simeone, *supra* note 294, at 385 (criticizing record review because "Congress grounds its claim to legitimacy on knowledge of and accountability to the citizens it represents, not on an assertion of neutrality or technical expertise").

311. *See, e.g.*, Colker & Brudney, *supra* note 307, at 83 (noting that "the new activist majority has treated the federal legislative process as akin to

many prominent scholars have observed the inappropriateness of its extension to Congress.[312] Awareness of the congressional

agency or lower court decisionmaking"); Margaret B. Kwoka, *Setting Congress Up to Fail*, 16 BERKELEY J. AFR.-AM. L. & POL'Y 97, 97 (2015) ("The Court has increasingly required Congress to meet procedural standards akin to those required of administrative agencies promulgating rules, in particular by measuring legislation against the record Congress created."); Harold J. Krent, *Turning Congress into an Agency: The Propriety of Requiring Legislative Findings*, 46 CASE W. RES. L. REV. 731, 733 (1996) (explaining how legislative findings "might transform the legislature into a type of administrative agency, monitored and controlled by the superintending judiciary"); Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1751 (2002) (describing how legislative record review "forc[es] Congress to behave like an administrative agency"); Bryant & Simeone, *supra* note 294, at 331 (critiquing record review because "Congress is simply not an administrative agency"); Buzbee & Schapiro, *supra* note 293, at 90 (asserting that "[r]eference to administrative law . . . helps to clarify the scope and purpose of the new legislative record review and to illustrate its flaws," while also noting important differences); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 826 (1996) (comparing the judicial review standard based on "the 'hard look' doctrine in administrative law" to the "background principle of federalism that informs what is 'proper'" that is required of Congress before exercising its preemption power); *see also* Kwoka, *supra*, at 97–98 (viewing *Shelby County* as creating a Chenery principle for legislatures).

312. This review has been criticized because it: is unsupported by precedent, *see, e.g.*, Buzbee & Schapiro, *supra* note 293, at 90; violates the separation of powers, *see, e.g.*, Bryant & Simeone, *supra* note 294, at 372–73 ("notions of separation of powers suggest that the judiciary has little authority to impose [such] requirements"); ignores the constitutional autonomy of Congress in its procedures, *see, e.g.*, Frickey & Smith, *supra* note 311, at 1749–50 (detailing how judicial influence over congressional review "seems in tension with the Constitution itself, which provides that each house is responsible for making its own rules"); is grounded in incorrect understanding of legislative factfinding, *see, e.g.*, Kwoka, *supra* note 311, at 98–99 (describing how legislative record review "ignores the reality of the legislative process" which "inherently occurs in large part off the record"); ignores that legislatures can ground decisions in political factors, *see id.* at 101 (nothing legislative record review as "inappropriate for decisions made by a body of elected representatives who, by their nature, are not simply exercising objective expertise, are not expected to act as neutral decision makers"); and undermines other legitimate democratic functions served by congressional procedures such as informing the public, *see, e.g.*, Bryant & Simeone, *supra* note 294, at 384 (suggesting that a court-imposed legislative record review "threatens to limit the other legitimate purposes served by congressional proceedings").

bureaucracy deepens these critiques.[313] As the congressional bureaucracy reveals, the deployment of expertise changes across the political branches—and does so in ways that legislative record review problematically overlooks.

For example, expertise in the congressional bureaucracy has a unique connection to legislative supremacy. Administrative record review polices a bureaucracy that is difficult for Congress to oversee and correct, given that bureaucracy's post-enactment role and dual allegiances. In this context, legislative supremacy may require courts to ensure bureaucratic fidelity to legislative directives, including via record review.[314] By contrast, legislative record review polices a congressional bureaucracy that Congress is structurally competent to oversee without assistance, as Part II explained. Legislative record review therefore does not address a comparable need to bolster legislative supremacy.

Expertise in the congressional bureaucracy also is subject to unique statutory mandates. Congress has imposed transparency requirements on the executive-branch bureaucracy: agencies must publish records under the APA,[315] and courts must review them.[316] By contrast, statutory mandates for the congressional bureaucracy often include confidentiality requirements: several offices in this bureaucracy

313. For mention of the congressional bureaucracy in prior work on legislative record review, see Bryant & Simeone, *supra* note 294, at 385–87.

314. *See* Buzbee & Schapiro, *supra* note 293, at 121 ("By exercising a variety of reviewing functions in overseeing agency actions, courts ensure that agencies abide by the authority conveyed by the legislature.").

315. 5 U.S.C. § 553(c) (requiring a "concise general statement of [the] basis and purpose" to accompany each final rule); *see also* 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 7.4, at 596 (5th ed. 2010) ("The courts have replaced the statutory adjectives, 'concise' and 'general' with the judicial adjectives 'detailed' and 'encyclopedic.'"). For relevant agency procedural requirements generally, see 5 U.S.C. §§ 551–559, 701–706. Agencies may have additional procedural requirements in their enabling acts. *See* Buzbee & Schapiro, *supra* note 293, at 131 ("Judicial review of agency action is required by the Administrative Procedure Act and most enabling acts."); *see also* Bryant & Simeone, *supra* note 294, at 370 ("[T]he Court's emerging approach to the legislative record resembles nothing so much as the careful, on-the-record review of agency action that has developed under the APA.").

316. Administrative Procedure Act (APA) § 2, 5 U.S.C. § 706; *see also* Buzbee & Schapiro, *supra* note 293, at 141 ("To the extent suspicion is justified, the suspicion stems from a congressional choice to confer a skeptical role on the courts.").

are statutorily required to operate confidentially and no statute requires judicial review of them.[317] It is puzzling that the Court could treat the resulting bureaucratic records as equally comprehensive, given these different statutory foundations.

Expertise in the congressional bureaucracy also may be dependent upon institutional dynamics that are uniquely undermined by judicial review. Scholars have noted that agency record review beneficially entrenches the executive bureaucracy since it effectively requires public use of this bureaucracy's expertise.[318] Legislative record review threatens to have the opposite effect for the congressional bureaucracy, however. The Cross-Gluck study found that confidentiality is key to the legitimacy of the congressional bureaucracy, and its institutional threats often have arisen from public performance of its expertise.[319] Legislative record review therefore threatens to undermine the very expertise it ostensibly seeks in ways its executive-branch counterpart does not.

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317. Congress has written confidentiality obligations into the organic statutes of CRS, House Legislative Counsel, and CBO. 2 U.S.C. § 166(i) (requiring the Director of CRS to prepare and file a separate and special report covering all phases of activity by CRS for the preceding fiscal year and any efforts to make additional, nonconfidential products or services available to the Librarian of Congress for publication); 2 U.S.C. § 281(a); 2 U.S.C. § 603(d); *see also* Buzbee & Schapiro, *supra* note 293, at 90 (noting that legislative record review differs in that it "lacks any legislative imprimatur").

318. *See* Michaels, *supra* note 62, at 251

> Judges can (and do) bolster the position of civil servants vis-à-vis their administrative rivals by using various administrative tools and doctrines . . . to encourage and endorse well reasoned agency actions appropriately influenced by career staffers, and to more aggressively scrutinize (if not categorically reject) agency actions undertaken without much expert input or procedural rigor.

Ingber, *supra* note 7, at 181 (noting that "the courts also allocate power to different actors within the executive branch both implicitly and explicitly" through rules such as deference doctrines); Magill & Vermeule, *supra* note 81, at 1056 ("Courts are inclined to defer to executive officials, especially the President, and afford the barest rational basis scrutiny to administrative and presidential action."); Renan, *supra* note 113, at 2254–65 (noting and critiquing the Court's practice of "indirect enforcement" of agency norms).

319. *See* Cross & Gluck, *supra* note 9, at 1626–28 (illustrating how congressional staff and bureaucratic entities will frequently rely on holistic informal and confidential consultation, where "the more transparent the bureaucracy work has been, the greater the public oversight and the more it has come under . . . pressure").

In its deployment of legislative record review, the Court makes no effort to account for these differences in the operation of bureaucratic expertise across the branches.[320] The congressional bureaucracy therefore adds to the catalogue of problems with this judicial practice, further suggesting that the Court should not continue it.[321] If the Court does continue this practice, however, it should take greater notice of the congressional bureaucracy, which it has made little effort to understand to date.[322] The Court's insistence on judicial review of congressional factfinding, when paired with minimal interest in understanding it, only reinforces concerns among scholars[323] and Justices[324] that legislative record review is a

320. If anything, it is more stringently applied to Congress. *See* Buzbee & Schapiro, *supra* note 293, at 119–20 ("[I]n many ways, legislative record review embodies a more probing, less deferential kind of scrutiny.").

321. For a list of other problems with practice, see supra note 312 and accompanying text.

322. *See* Cross & Gluck, *supra* note 9, at 1650–51 (listing the Court's rare citations to bureaucracy's materials); *id.* at 1668–70 (noting the Court's lack of awareness of congressional bureaucracy in *Yates v. United States*); Transcript of Oral Argument at 39–42, Lockhart v. United States, 577 U.S. 347 (2016) (No. 14-8358) (recording Justice Breyer citing the role of staff in Congress and Justices Scalia and Roberts expressing skepticism of such staff involvement); *see also* Bryant & Simeone, *supra* note 294, at 383 ("[I]n the last thirty years the number and quality of these extra-record sources have increased significantly. The Court's failure to acknowledge these sources has, not surprisingly, resulted in decisions characterized by an impoverished appreciation of the legislative process."); Colker & Brudney, *supra* note 307, at 118 (demonstrating how legislative record review shows "the Court's unwillingness to recognize or respect how Congress educates itself").

323. *See* Colker & Brudney, *supra* note 307, at 123–26 (noting that "the Court's rigorous approach to the legislative history may [sometimes] be windowdressing"); *id.* at 136 (describing how recent Supreme Court decisions reveal a standard that could portend "a Court determined to withdraw authority from Congress"); Buzbee & Schapiro, *supra* note 293, at 154 ("The prospect of such massive legislative documentation . . . supports the view that the Court is actually masking broad political distrust with ostensible record scrutiny."); Mitchell N. Berman, Guillen *and Gullibility: Piercing the Surface of Commerce Clause Doctrine*, 89 IOWA L. REV. 1487, 1499 n.51 (2004) (asserting that "*Morrison* revealed the absence-of-findings criticism to be close to a make-weight").

324. *See* United States v. Lopez, 514 U.S. 549, 614 (1995) (Souter, J., dissenting) ("Such a legislative process requirement would function merely as an excuse for covert review of the merits of legislation under standards never expressed and more or less arbitrarily applied.").

politically-motivated project, not a good-faith effort to confirm the factfinding of Congress.

Moving beyond the topic of deference, the revised view of congressional expertise also counsels courts to adopt a different understanding of legislation. Due largely to the congressional bureaucracy, the crafting of legislation now is a formidable bureaucratic undertaking that is informed by a variety of specialists and experts. In the agency context, courts have long recognized that this requires a shift in how it approaches agency materials. In statutory interpretation, however, the Court continues to advance doctrines which assume that federal legislation is a generalist's endeavor. These include its recent emphasis on ordinary public meaning in statutory interpretation[325] and its reduced deference to expert agency interpretations.[326] There may be valid reasons for courts to approach legislation this way, of course.[327] In the era of the congressional bureaucracy, however, this approach does have

325. *See, e.g.*, Bostock v. Clayton County, 140 S. Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment.").

326. *See, e.g.*, King v. Burwell, 576 U.S. 473, 485–86 (2015) (applying the major questions doctrine to deny deference); *see also* Kisor v. Wilkie, 139 S. Ct. 2400, 2432–34 (2019) (Gorsuch, J., concurring) (arguing that Section 706 of the APA forbids judicial deference to administrative interpretations); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (describing *Chevron* as an "abdication of judicial duty"); Marla D. Tortorice, *Nondelegation and the Major Questions Doctrine: Displacing Interpretive Power*, 67 BUFF. L. REV. 1075, 1089–1101 (2019) (discussing the major questions doctrine and Justice Gorsuch's rejection of *Chevron* deference during his judicial career).

327. For example, textualists cite the notice-providing function of statutes as a reason to interpret from the vantage of ordinary citizens. *See, e.g.*, ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 17 (Amy Gutmann ed., 1997) (emphasizing notice as an essential quality advanced by statutes); Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 981 (2017) (observing scholars' focus on notice and arguing on behalf of it); OFF. OF LEGAL POL'Y, DEP'T OF JUST., J 1.96:H 62, USING AND MISUSING LEGISLATIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION 52 (1989) (making an argument for notice by analyzing presumption of knowledge of the law and legislative history). For a critique of this approach, see generally Jesse M. Cross, *Disaggregated Legislative Intent*, 90 FORDHAM L. REV. 2221 (2022). On nondelegation argument against *Chevron* deference, see Tortorice, *supra* note 326.

the collateral effect of widening the gap between Congress and the courts. In so doing, it inhibits the construction of a shared linguistic context between Congress and courts, a goal some textualists have sought.[328] While these textualists have argued for Congress to bear the burden of constructing this shared context,[329] it is unclear why this burden should not fall instead on the courts, given the Constitution's emphasis on insulating congressional practice from outside influence.[330] One modest way for courts to assist in the construction of shared context would be to shift away from this focus on a generalist lens and instead understand the ways that bureaucratic expertise shapes modern legislation.

More drastic methods of constructing a shared linguistic context exist as well. If the courts increasingly are outliers in an otherwise specialized federal government, it raises the question of whether there should be greater specialization in the courts, for example.[331] Agencies already specialize by subject matter, and Congress has long divided work by topic through the

328. *See* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 433–36 (2005) (describing textualists' desire to understand legislative language and intent "as accurately as possible"); Doerfler, *supra* note 327, at 983 (arguing that "context consists of information salient to both author and audience").

329. *See* Manning, *supra* note 328, at 433 ("If one cannot accurately ascertain what the body as a whole would have done . . . then perhaps the best one can do is to approximate the way a reasonable person in the legislator's position would have read the words actually adopted.").

330. *See* Bryant & Simeone, *supra* note 294, at 369–73 (noting that "the Constitution itself both expressly and implicitly imposes limits on judicial intrusion into the workings of Congress" and citing the bicameralism-and-presentment provision, Rules and Journal Clauses, the Speech or Debate Clause, and the political question doctrine); Frickey & Smith, *supra* note 311, at 1749–50 ("[T]he judicial intrusion into internal congressional processes seems in tension with the Constitution itself, which provides that each house is responsible for making its own rules . . . . It is [deeply problematic] for the Court to impose procedural obligations upon Congress going far beyond the Constitution or the houses' own rules.").

331. For the argument that generalist courts already use case assignment to specialize somewhat, see Edward K. Cheng, *The Myth of the Generalist Judge*, 61 STAN. L. REV. 519, 550–51 (2008) (detailing how judges are exposed to different types of cases, allowing an informal system of opinion specialization to develop at their discretion in particular areas and degrees of specialization).

committee system.[332] The Cross-Gluck study showed that, throughout the congressional bureaucracy, specialization by subject matter also is the norm.[333] Drafters in Legislative Counsel specialize by topic, for example, allowing them to draft with deep and detailed knowledge of the relevant statutory regime.[334] Would judicial interpreters benefit from a correspondingly deep knowledge of the statutory regime in a subject area, one that mirrored the knowledge of the statutory drafters and agency implementers? This would be another way to foster a shared linguistic context between Congress and courts.[335] Specialized courts may raise their own concerns, of course.[336] But in the era of a specialized congressional bureaucracy, they also may have more benefits than previously realized.

CONCLUSION

Legislation scholarship is only beginning to understand a congressional bureaucracy that, for many years, has been overlooked and under-theorized. Executive-branch scholarship has developed a wealth of theories about bureaucracy—theories that cry out for testing in contexts outside the executive branch. Neither has devoted attention to the lessons each can offer the other—or to the larger institutional design possibilities that exist when we examine bureaucratic possibilities not only within branches, but across them. Such a collaborative approach

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332. *See* LIBR. OF CONG., *Official U.S. Executive Branch Web Sites*, https://perma.cc/7R82-H5B5 (last updated Mar. 30, 2022) (listing agencies); *Committees of the U.S. Congress*, https://perma.cc/EF7F-67AD.

333. *See* Cross & Gluck, *supra* note 9, at 1618.

334. *See id.*

335. *See* Manning, *supra* note 328, at 434; Doerfler, *supra* note 327, at 983.

336. *See* Cheng, *supra* note 331, at 554–57 (discussing politicization, myopia, loss of prestige, and other concerns); Jed Rakoff, Judge, U.S. Dist. Ct. (S.D.N.Y.), The Eleventh Annual Albert A. DeStefano Lecture on Corporate Securities & Financial Law at the Fordham Corporate Law Center: Are Federal Judges Competent? Dilettantes in an Age of Economic Expertise, *in* 17 FORDHAM J. CORP. & FIN. L. 4, 7–14 (2012) (noting that specialization in courts can obscure reasoned elaboration, introduce problems of capture and ideology, promote improper professional concerns among judges, promote judicial tunnel vision, and prevent fresh examination of ideas); *see also* Sapna Kumar, *Patent Court Specialization*, 104 IOWA L. REV. 2511, 2519–527 (2019) (discussing problems arising from Federal Circuit specialization in patents).

holds significant promise for any who seek a larger understanding of how bureaucracy operates, and can operate, in our presidentialist system.