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LISA SCHULTZ BRESSMAN, *The Jurisprudence of "Degree and Difference": Justice Breyer and Judicial Deference*, 132 Yale L.J. F. 729 (Nov. 21, 2022)

This essay is included in the scholarly production related to Stephen Breyer's recent retirement from the U.S. Supreme Court. In it, professor Schultz Bressman analyzed Breyer's contribution to the *Chevron* doctrine resulting from a 1986 article of his[1]. As Schultz Bressman points out, then-Judge Breyer adopted a "context-specific approach", according to which a court was allowed to grant an agency interpretation "binding deference, some deference, or no deference at all"(730), depending on the legal issue and the specific statutory provision considered. In particular, he identified a series of criteria, the application of which enabled a court to recognize the right amount of deference on a case-by-case basis. The criteria were the following (734): a) the agency's special expertise; b) either the agency or the court's ability to give a more correct answer to a certain legal issue; c) the existence of a "major question", which Congress most likely intended to address itself, instead of leaving it to an agency, which usually regulates or decides anyway "interstitial" issues, arising "in the course of the statute's daily administration"; d) imprecision or broadness of statutory language; e) the ability of the answer to the question to provide elucidation to the law to apply; f) the exclusion of the risk of "tunnel vision", i.e., of an agency's tendency to expanding its authority beyond the one Congress assigned to it; g) the ability of an agency interpretation to

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[1] S. Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363 (1986).

be deemed binding, from both a procedural and a substantive perspective, in conformity with congressional intent[2].

Schultz Bressman considers the major questions doctrine as the most prominent of those criteria, in light of its future impact on the Supreme Court, and this doctrine, therefore, has to be ascribed to Breyer. In a 2000 decision[3], the Supreme Court excluded that the Food, Drug, and Cosmetic Act delegated the Food and Drug Administration (FDA) rulemaking power concerning nicotine and cigarettes, because it was a very significant question from economic and political perspectives. In such cases, delegation is legitimate only if it is express. The Court detected "tunnel vision" (736) in the FDA's decision to regulate tobacco products on the basis of its statutory mission to protect public health. In a 2015 decision[4], instead, the Court held that a statutory provision on tax credits did not assign the Internal Revenue Service (IRS) the power to adopt a rule extending the tax-credit provision to federal exchanges, in addition to State ones. The IRS, indeed, was deemed to lack "specialized expertise" (738). By contrast, in a 2007 case[5], the Court identified such expertise. The case was concerned with a provision delegating the authority to define the concept of "equalization" to the Secretary of Education in granting subsidies to school districts. In a 2002 decision[6], the Court opted for *Chevron* deference towards the Social Security Administration's interpretation of the Social Security Act. Schultz Bressman defines *Barnhart* "the Court's most forthright application of Justice Breyer's factor-based, context-specific approach to judicial deference" (743).

When Breyer retired from the bench, the Supreme Court had already showed its new – and still ongoing – approach. The conservative majority has adopted a "simple rule: no deference" (744). In doing so, it has applied a much stronger version of the major questions doctrine than the one devised by Breyer. This new approach emerges clearly from a 2021 per curiam opinion[7]. The Court denied the Centers for Disease Control and Prevention (CDC) the ability to establish a nationwide eviction moratorium in

[2] See S. Breyer, *Judicial Review of Questions of Law and Policy*, cit. at 1, 370-372.
[3] *Food & Drug Adm'n v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).
[4] *King v. Burwell*, 576 U.S. 473 (2015).
[5] *Zuni Public School District No. 89 v. Dep't of Education*, 550 U.S. 81 (2007).
[6] *Barnhart v. Walton*, 535 U.S. 212 (2002).
[7] *Alabama Ass'n of Realtors v. Dep't of Health & Human Services*, 141 S. Ct. 2485 (2021) (per curiam).

favor of certain tenants living in counties with high COVID-19 transmission levels. According to the Court, Congress has to "speak clearly when authorizing an agency to exercise powers of vast economic and political significance"[8]. Breyer, however, dissented, by arguing that it was not "demonstrably clear" that the CDC lacked the required authority to issue the moratorium, and pointing out that this agency has the power to adopt measures, such as quarantines, capable of affecting individuals rights and freedoms significantly[9]. Similarly, in a 2022 per curiam opinion[10], the Court deemed unlawful a vaccine mandate imposed by the Occupational Safety & Health Administration (OSHA) in workplaces covered by the Occupational Safety and Health Act for two reasons. Firstly, such an issue is of great economic and political significance, thus presumedly left to Congress. Secondly, OSHA's primary mission, this public interest, is workplace safety and not public health. Overall, Congress had to delegate legislative power to agencies expressly. Justice Gorsuch wrote a concurrent opinion, which meant the major questions doctrine as "a clear-statement super rule: no deference *and* no delegation"[11] (746). Breyer and other Justices dissented, by observing that the vaccine mandate falls within the relevant statutory provision. In another very recent decision, the Court rejected an Environmental Protection Agency's (EPA's) rule on electric-power generation by using the major questions doctrine[12]. Justice Kagan, joined by Justices Breyer and Sotomayor, wrote a dissenting opinion, which considered that of the majority as having the purpose of replacing the ordinary method of statutory interpretation with a "two-step inquiry". The first step is aimed at assessing whether agency action has an extraordinary character. The second step is to ascertain the existence of a congressional authorization to exercising that power. More generally, *West Virginia* certified that the major questions doctrine "is now an official canon of construction that prohibits agencies from issuing interpretations that address matters of significance absent clear congressional authorization" (749). Overall, the Supreme Court's

[8] *Alabama Ass'n of Realtors v. Dep't of Health & Human Services*, cit. at 7, 2489.
[9] *Alabama Ass'n of Realtors v. Dep't of Health & Human Services*, cit. at 7, respectively 2490 and 2492.
[10] *Nat'l Federation of Independent Business (NFIB) v. Occupational Safety & Health Adm'n (OSHA)*, 142 S. Ct. 661 (2022) (*per curiam*).
[11] Italics in original.
[12] *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

current conservative majority has dismantled Justice Breyer's context-specific – i.e., case-by-case – approach and turned his conception of the major questions doctrine into a rule substantially prohibiting any deference. Therefore, when the doctrine applies, "*Chevron* drops from the analysis" (754).

THOMAS B. GRIFFITH, HALEY N. PROCTOR, *Deference, Delegation, and Divination: Justice Breyer and the Future of the Major Questions Doctrine*, 132 Yale L.J. F. 693 (Nov. 21, 2022)

This article falls within the same scholarly production as the essay reviewed above, and it focuses on one of the issues the latter deals with, i.e., the major questions doctrine. After an analysis of it, the article investigates its relation with the *Chevron* doctrine. It underlines (700) that, in the absence of the major questions doctrine, *Chevron* works as a two-step test. The first step requires the court to assess whether the statutory provision is ambiguous. If it is not, the court applies the provision, according to its ordinary meaning. If it is, on the contrary, the court proceeds to Step Two, where the assessment to carry out is whether the agency's interpretation of the provision is reasonable. Scholars have also identified a Step Zero, which requires a preliminary test, aimed at establishing whether the case under consideration may be encompassed within the *Chevron* doctrine's scope. In a 2007 case[13], the Supreme Court applied the major questions doctrine to the definition of "air pollutant", by arguing consequently that the inclusion of greenhouse gases in this definition derived from the plain meaning of the term, so there was no room for the *Chevron* doctrine. In other words, the Court's conclusion was "consistent with an understanding of the doctrine as a *Chevron* Step-Zero rule". The article observes that the major questions doctrine was conceived of as "a refinement of *Chevron*'s approximation of congressional intent", based on the assumption that Congress routinely "does not vest significant policy-making authority in agencies because Congress should not do so" (702). The doctrine, therefore, requires the latter "to speak clearly if it wishes to delegate decisions of great political or economic significance to an administrative agency" (703).

[13] *Massachusetts v. EPA*, 549 U.S. 497 (2007).

Breyer formulated flexible standards as a reaction to the rigid way *Chevron* used to be applied, for he believed – and still does – that Congress and agencies should be free to determine the allocation of decision-making powers, even as far as the formulation of policies is concerned, "in a way that best promotes the public good" (705). Accordingly, except for one case[14], he dissented (708) from the Supreme Court's opinions considering the major questions doctrine as a sort of high threshold for allowing Congress to delegate legislative – *rectius*, regulatory – powers to agencies on matters of great economic and political significance. Breyer, indeed, believes that agencies exercising policy-making powers may be "held democratically accountable through the President" (710). Breyer's flexible approach and his major questions doctrine became dominant within the Supreme Court in the early 2000s, when *Chevron*'s soundness was being questioned. However, he progressively ended up being a defender of the *Chevron* doctrine (712). In a 2014 decision[15], the Court revised its former conception of the definition of "air pollutant" as used in the Clear Air Act. By applying the major questions doctrine and using an argument based on the separation of powers, the Court meant this definition not to include greenhouse gases. As for this argument, however, Breyer observed that the EPA should be able to use its "technical expertise and administrative experience". He also deemed the precise determination of the content of the statutory definition mentioned above to be an "interstitial" question, which "Congress typically leaves to the agencies"[16].

As the article points out, some Supreme Court's decisions concerning the COVID-19 pandemic resulted in a closer relation between the major questions doctrine and the nondelegation doctrine. In the decision on the OSHA's vaccine mandate, the majority substantially shifted the burden of proof. Instead of imposing the burden upon who claims the unlawfulness of a given regulatory – or policy-making – power exercised by an agency, the majority required the agency to pinpoint a provision expressly assigning itself that power. The close relation between the two doctrines is realized by means of a reference to the separation of powers and to the principle of democratic accountability. In this

[14] *Gonzales v. Oregon*, 546 U.S. 243 (2006).
[15] *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014).
[16] *Utility Air Regulatory Group v. EPA*, cit. at 15, 341-342 (Breyer, J., concurring in part and dissenting in part).

perspective, only those chosen by the people through a democratic process are allowed to make the "difficult trade-offs" (715) between public health and individual freedoms that the COVID-19 pandemic implied. Justice Breyer and other dissenters developed a reasoning, which "flipped the majority's presumption, asking not whether Congress had clearly conferred this authority, but instead whether Congress had clearly denied it" (716). Finally, the *West Virginia* decision somehow closed the circle, by expressly recognizing the major questions doctrine. According to Justice Gorsuch's concurrence, the need for a clear authorization to answer a major question, given by Congress to a certain agency, has its constitutional foundation in Article I's Vesting Clause. Breyer joined Justice Kagan's dissent, which the essay here under review defines "a tribute to Breyer's administrative-law jurisprudence" (717).

The final part of the essay seeks to envision what role Breyer's view will play in the next future. Firstly, the contrast between Justices Breyer and Kavanaugh on the meaning and implications of the separation of powers is highlighted (721). Secondly, the essay points out that Justice Kavanaugh laid down some standards, aimed at identifying when a rule is encompassed in the scope of the major questions doctrine, such as the monetary quantification of the effects of the rule and the number of people affected by it. He conceives of the doctrine "as a simple inversion of *Chevron*" (722). Meant this way, the doctrine prevents an agency from relying on statutory ambiguity to adopt rules on major issues. Therefore, the *Chevron* doctrine, if applied, may go almost never further than Step One. Recently, the Supreme Court has showed to embrace Justice Kavanaugh's interpretation of the major questions doctrine. The essay argues that this view appears to be moderate, if compared to the one expressed by other justices, who would rather put the *Chevron* doctrine out of the picture completely (723). Overall, the Justices objecting to the *Chevron* doctrine on the basis of the separation of powers may indeed be deemed to have cured the former's side effects and other problems related to the delegation of legislative power to agencies. Yet at the same time, by turning to the major questions doctrine – the essay concludes – they may be causing "another unintended imbalance" (727).

ALLISON M. WHELAN, *Executive Capture of Agency Decisionmaking*, 75 Vand. L. Rev. 1787 (2022)

This essay focuses on internal agency capture, a concept encompassing all the measures, methods, and instruments, whereby an administration in the United States may try to influence federal agencies' action, namely technical assessments, by imposing its political views. The article begins with underlining that the President or other high-ranking White House officials may seek to direct technical – or scientific – decisionmaking even when the outcome is "contrary to the agency's mission and the public interest" (1791). Despite recognizing the President the authority to exercise some influence on administrative activities and admitting that this authority may expand during national emergencies, the essay considers the executive interference in that kind of decisionmaking as "a uniquely problematic issue, particularly when it occurs covertly" (1793). A much more traditional issue is external agency capture, whose most famous example is lobbying and which is exacerbated by the practice known as "revolving door" (1798). It consists in individuals usually starting their career in the private industry, then working with an agency with rulemaking powers for some years, and finally taking back their position in the same business, usually with a promotion.

The executive interference with agency action may not be ruled out beforehand (1806-1807). Not only do some federal statutes provide for such interference, but, in a 2019 decision, the Supreme Court excluded that an agency's decision concerning policymaking is unlawful just because "it might have been influenced by political considerations or prompted by an Administration's priorities"[17]. Furthermore, some interference appears to be inherent, considering the President's power to appoint persons sharing his political views as agency heads, a power that is completed by that of removal, unless a statutory provision establishes otherwise (1809-1810). However, political influences should not extend to scientific decisions, since the latter are neither policies not rules (1813). If such influences occur, they usually bring about a violation of the principles of impartiality and objectivity in making that kind of decisions, and they may also compromise agencies' credibility, thus the public trust in administrative activities (1814).

[17] *Dep't of Commerce v. New York*, 139 S. Ct. 2573 (2019).

Then, the article provides some examples of executive interference, taken mainly from the Trump Administration but also from former ones, as well as from the current administration. One example dating back to the George W. Bush Administration is concerned with emergency contraception. The FDA's long-lasting opposition to make emergency contraceptives over-the-counter drugs, i.e., drugs that may be sold without a prescription, other than without age restrictions, shows how political values may affect scientific – namely, purely medical – evaluations (1818-1825). A second example is given by the in-person dispensing requirement for mifepristone, thus for access to abortion (1826-1834).

A third example is the executive's massive involvement in scientific decisionmaking during the COVID-19 pandemic. In this regard, the article quite extensively dwells on President Trump's pressures on the FDA for approving the usage of hydroxychloroquine as a drug against COVID-19. However, while the article stresses that the executive interference with agency action is particularly dangerous when it occurs indirectly, this is hardly the case with President Trump's stance on the issue. The President's frequent tweets urging the FDA to subject hydroxychloroquine to an emergency use authorization, indeed, made such interference manifest. Accordingly, the President's contrast with Dr. Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases at the National Institutes of Health (NIH), was evident, as well, as the latter radically excluded that drug's effectiveness as a cure for COVID-19 (1836-1840). The controversy between the Administration and scientists at the NIH also led to the removal of the Director of the Biomedical Advanced Research and Development Authority (1841). The article maintains that this controversy and, more generally, the executive's pressures and influences concerning scientific assessments generated "a worrisome tone early in the pandemic, raising significant concern about the credibility of the FDA's subsequent decisions and fostering an 'anti-expert instinct' that continued throughout the pandemic" (1841-1842).

As said above, however, the Biden Administration did not abstain from political pressures on this issue, either, even though they were made in a less direct manner. The article refers to the Administration's announcement of a plan offering booster shots to all Americans, a plan that was set to start in September 2021. The ability of this decision to serve as an instrument of indirect political

interference derived from its timing. The decision, indeed, came before the FDA and the CDC carried out a review and considered adopting recommendations concerning the COVID-19 vaccination campaign (1847). As the article observes, other ways to guide the booster shot plan might have been devised, "without giving the appearance that the Administration overstepped into matters of science". To put it differently, the right sequence of the two activities was reversed. The announcement of the Administration's plan should have come after the FDA's and the CDC's decisions (1848). In particular, the CDC Director overruled the agency's advisory panel decision establishing the criteria identifying the population eligible for booster shots to enhance the classes of citizens included in that population. Similarly to what had occurred during the Trump Administration, and despite the FDA's resistance to the executive's pressures, such a situation brought about some effects, not only in the short term. Among those effects, the article pinpoints "vaccine hesitancy, diminished public trust and confidence, and potentially long-lasting reputational damage" (1850), especially to the FDA itself.

In light of the high likelihood of such executive interference, the article proposes the establishment, through a statutory provision, of a Scientific Integrity Office (SIO), conceived of as an independent body with an oversight function. Its primary purpose is to ensure not only accountability, but also the credibility of agencies entrusted with scientific decision-making functions, and thus public trust in the federal government comprehensively (1853-1854). The author identifies the source of inspiration for this proposal in a 2014 essay, which crafted the conception of so-called "Offices of Goodness"[18]. While those offices were devised as a component of individual agencies' internal structure, the SIO is meant as an "external entity", having the mission of "promoting the scientific integrity of agency scientific decisionmaking" (1854). Essentially, the SIO's oversight function consists in guarding against possible political interference with agencies with such an authority and, more broadly, in preventing both the external capture and the internal one (1855). The SIO is deemed to be able to carry out its function not only proactively but also upon an agency employee's or a member of the general public's request or report.

[18] See M. Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 Cardozo L. Rev. 53 (2014)

However, such an element makes the SIO's functioning quite similar to whistleblowing. It is demonstrated by the fact that the specific legislation should enjoin "retaliation" against those who report an attempt of political influence on scientific decisionmaking (1857). Furthermore, the author envision the SIO's reports to be subject to a twofold obligation: They have to be submitted to Congress and made available to the public, thus published online (1859). The proposal at issue is accompanied by the identification of a series of flaws of congressional oversight function, which constitutes another instrument of preventing political interference with agencies' technical assessments. In exercising this function through its committees and subcommittees, for instance, Congress, too, may suffer from capture (1862-1866). As for judicial review meant as an instrument thereof, the author stresses the courts' traditional deferential approach (1866-1869). However, it does not appear convincing the argument, according to which the SIO would be better suited than courts for "prob[ing] the mental processes" of the persons involved in political interference just because the former would not be limited to consider on-the-record material during its investigation (1870).

Finally, the article points out that another remedy against the political pressures under discussion may be turning the FDA into an independent agency. However, as is observed, the fact that a given agency is independent does not make it "immune from executive interference" (1873). Independent agencies are also subject to the risk of external capture (1874). Furthermore, to include the FDA among independent agencies would require "significant restructuring" (1875), because just ensuring the Commissioner, i.e., the agency head, protections from the President's removal power would not suffice. Overall, agencies' internal capture seems to be a problem hard to solve.

ALEXANDER NABAVI-NOORI, *Agency Control and Internally Binding Norms*, 131 Yale L.J. 1278 (2022)

This essay is aimed at analyzing the binding nature of agencies' guidance documents as a means of restricting officials' and employees' discretion in exercising decision-making powers. First of all, the essay points out that, unlike the rulemaking power, agencies' power to adopt guidance is not subject to notice-and-comment procedures. The APA, indeed, provides for just few

procedural requirements when an agency formulates a policy or an interpretation of general applicability. Furthermore, since agency guidance is not tantamount to rulemaking, guidance documents do not have legislative force. Accordingly, at least in general terms, those documents may not produce binding effects on individuals outside the agency (1281-1282). The study investigates the internal binding effects of agency guidance, which constitute an instrument an agency usually deploys to direct and control the exercise of decision-making powers by the agency personnel at different levels of the internal hierarchy. However, not always do courts recognize the ability of agency guidance to produce such effects on officials and employees (1284-1285). Agency guidance encompasses various classes of documents, such as "compliance manuals, field manuals, enforcement guidance, policy guidance, policy statements, management directives, enforcement memoranda, standard interpretations, and fact sheets" (1291). These and other types of documents are often deemed to be binding by agency officials (1295).

Guidance documents usually are aimed at realizing "agency self-regulation" (1297), which may be relevant from both a substantive and a procedural perspective. As for the former, the specific purpose is to restrict administrative discretion in the enforcement of statutory provisions. As far as procedural aspects are concerned, a typical example is guidance, whereby agency leadership establishes criteria lower-level officials have to follow in conducting investigations (1298). The substantive perspective is followed when an agency intends to ensure uniformity in the exercise of discretion by frontline staff. To achieve this purpose, indeed, the agency head or another top-level organ may adopt guidance laying down policies, principles, and standards, which bind subordinate staff in making discretionary decisions. If provided for as binding, such guidance results in "an internal 'law' of the agency" (1298-1299). It has been argued that agency officials usually approve of this solution, for they "prefer to enforce rules written down to an amorphous set of informal practices"[19]. However, even when not formally binding, guidance may be *de facto* perceived as such by agency staff, whose position lies at the low levels in the chain of hierarchy. The hierarchical – or anyway top-down – character of internal relationships and the fact that an

[19] E. Magill, *Foreword*, *Agency Self-Regulation*, 77 Geo. Wash. L. Rev. 887 (2009).

agency has an "interest in providing 'consistent answers to contested questions that arise in similar cases'[20] encourage agency actors to follow guidance" (1299). Case-law shows that there is not an univocal approach in the application of the so-called binding-norm test by courts. It means that they infer different implications from the fact that certain guidance is binding only internally, i.e., towards the agency personnel (1304).

The second part of the article analyzes the internal effects of guidance adopted by three different agencies. The first one considered is the U.S. Equal Employment Opportunity Commission (EEOC), an independent agency, whose main function is to conduct investigations on alleged workplace discrimination cases (1313). Within this agency, the Office of Legal Counsel has the power to draft the guidance the EEOC has to approve. Such guidance is aimed at ensuring that the legal views it expresses are consistently applied by the whole agency personnel (1315). As the article underlines, therefore, those guidance documents are not just an instrument for the oversight of lower-level agency staff. Their primary purpose, indeed, is to ensure that the interpretations of antidiscrimination law provisions the EEOC provides have uniform implementation. Evidence is found in the fact that guidance documents on merely procedural issues receives less adherence by the agency personnel than those containing legal interpretations (1318). Even when frontline officials depart from this kind of guidance, their behavior may be characterized as a sort of excess of zeal. In those cases, indeed, the officials intend "to pursue more expansive interpretations of antidiscrimination law in ways that comported with the spirit of the guidance" (1319).

The second agency, whose guidance the article reviews, is the OSHA. This agency is a component of the Department of Labor, and its mission is to enforce obligations concerning job safety and health standards. This mission is accomplished by the conduction of inspections, but, unlike the EEOC, this agency does not express its own legal views. Relevant statutory interpretations, indeed, are provided by the department's attorneys (1320-1321). The agency adopts various types of guidance documents establishing rules, methods, and standards for carrying out those investigations. The – more or less – binding effect of those types of documents depends

[20] B. Emerson, *The Claims of Official Reason: Administrative Guidance on Social Inclusion*, 128 Yale L.J. 2150 (2019).

on the addresses' specific position within the internal organization of the agency, as "each stage of the agency hierarchy has distinct levels of rigidity". In any case, the most important guidance document having this purpose is the OSHA Field Operations Manual, which is very detailed and "includes precise instructions that channel the discretionary decisions of inspectors across the country" (1322). As is the case with the EEOC, guidance concerning substantive issues is deemed to have binding effects on the agency officials by the OSHA itself (1325). However, if compared with that agency, the OSHA guidance appears to be "more preoccupied with establishing procedural consistency" (1327).

The third agency the article considers is the U.S. Citizenship and Immigration Services (USCIS), which is a component of the Department of Homeland Security. Its main function is to adjudicate immigration-related benefits (1327-1328). The article identifies two peculiar features of the USCIS. Firstly, its mission is politically sensitive. Secondly, a significant margin of discretion is necessarily assigned to the agency officials having the decision-making power upon conclusion of adjudication proceedings, as the financial resources the agency may employ are not enough to respond to all the applications for benefits it receives (1329). Guidance, therefore, is an essential tool to guide and thus restrict the exercise of administrative discretion by agency staff. The main guidance document is the USCIS Policy Manual (1330). In light of those features, guidance is also aimed at ensuring agency officials' political accountability. To this end, furthermore, the Attorney General is assigned not only an oversight function but also the power to select and review adjudications at the Board of Immigration Appeals (1332).

The third and last part of the article discusses judicial review of the guidance ai issue. One of the existing approaches is based on a presumption that guidance documents do not have binding effects on the affected persons, unless they have been subject to notice and comment. This approach has the advantage of overcoming the difficult issue of the binding character of guidance. A different position has been expressed mainly by a scholar. He has maintained that an agency is entitled to adopt guidance that is binding on its staff without carrying out a notice-and-comment procedure, but only "if persons affected by the document will have a fair opportunity to contest the document at a later stage in the

implementation process"[21]. However, this solution does not clarify how courts should treat cases, in which certain guidance is *de facto* binding, for an agency considers it instrumental to ensuring consistency in the interpretation and application of statutory provisions by the agency staff. Anyway, the article underlines that courts seldom "go beyond the language on the face of the guidance itself and to the underlying agency practice" (1338-1339). Then, the article proposes an approach that, on the basis of the analysis previously conducted, balances the needs of each agency to ensure consistency in the carrying out of its functions and tasks, on the one hand, and the need of regulated parties not to be bound to agency guidance devised only for internal purposes, on the other hand (1340-1344). However, as the author justly stresses in the conclusion, the topic addressed by this article needs further research (1345).

BLAKE EMERSON, *The Binary Executive*, 132 Yale L.J. F. 756 (Nov. 21, 2022)

This article constitutes a coherent continuation of the discussion on the implications of Justice Breyer's retirement from the Supreme Court reported above. The premise of the article is the current critical approach followed by the Court's conservative majority towards the delegation of rulemaking and especially policymaking powers to federal agencies by Congress. This approach, together with the unitary executive theory, according to which the whole executive power is vested in the President, who therefore has the authority to direct all agencies, leads Professor Emerson to argue that the Court ends up exercising executive power. The court's approach results in the emergence of a new regime, characterized by "two chief executives: the President and the Court". Therefore, the theory mentioned above is not correct, as the "Executive is not unitary; it is binary" (757). By conducting de novo review of agency policymaking, indeed, the Justices adopting the approach at issue "are taking a share of executive power for themselves and acting collectively as the President's cochief of the federal government" (764).

[21] R.M. Levin, *Rulemaking and the Guidance Exemption*, 70 Admin. L. Rev. 305 (2018).

Note, *Addressing Challenges to Affordable Housing in Land Use Law: Recognizing Affordable Housing as a Right*, 135 Harv. L. Rev. 1104 (2022)

This note addresses an issue that has gained importance in recent years: the need to increase affordable housing by using instruments that are compatible with U.S. land use law. Currently, such housing is usually located in disadvantaged areas. States often delegate to local governments the authority to plan land use development. However, members of local planning boards are political appointees, "subject to capture by homeowners", who oppose the construction of affordable housing on a regular basis (1108). Furthermore, even if individuals are recognized standing to challenge zoning decisions, courts usually adopt a deferential approach towards those decisions whenever some voices against affordable housing, such as those of homeowners, were expressed in the relevant public hearings (1109). The note proposes recognizing affordable housing as a right to prevent municipalities from exercising their discretion to reduce its availability (1114). The note deems this solution to be able to promote "a more democratic form of local governance that considers the housing needs of less wealthy and less politically influential residents" (1115). To be effective, this right should be enforceable before a court by those potentially eligible for affordable housing (1117). The burden of proof should be divided between the two main parties: The Plaintiff has to show that a certain zoning or land use decision has the effect of causing shortage of such housing, while the municipality has to prove that the decision at issue "is necessary to achieve a legitimate government interest and could not be achieved through an alternative, less burdensome approach" (1119). Finally, the note argues that the ideal solution would be to include the right to affordable housing in a constitutional provision at state level (1124).

JOSHUA C. MACEY, BRIAN M. RICHARDSON, *Checks, Not Balances*, 101 Texas L. Rev. 89 (2022)

This essay is concerned with a topic analyzed by other essays already reviewed, i.e., the widespread criticism of rulemaking and policymaking powers assigned to federal agencies on the basis of the separation of powers and the unitary executive theory. From a historical perspective, the essay reaches the conclusion that the administrative State is fully legitimate and has to be defended by

endorsing a peculiar conception of the separation of powers, meant as aimed at "pursu[ing] the end of anti-domination between the branches" (99). First of all, the essay points out that the nondelegation doctrine is usually conceived of as related to the problem with ensuring agencies' accountability, and that the Supreme Court has applied the unitary executive theory to multiple contexts in the past few years (103-104). According to many scholars (106), the constitutional foundation of the administrative State, which therefore justifies its legitimacy, is the Necessary and Proper Clause[22]. Other constitutional foundations have been identified, such as the Opinion Clause (108), included in Article II, devoted to the powers of the President of the United States[23]. The delegation of administrative discretion to agencies may also be seen as a means to face the exigencies Congress pinpoints (109-110). The essays deems the logic underlying the separation of powers to be "each branch's *capacity* to check the others"[24] (114). It also argues that the Founding Fathers did not establish rigid boundaries among the three branches of the federal government. In particular, most of them believed that "a precise taxonomy of each branch's powers would fail to prevent Congress or the President from acting despotically" (123). Therefore, the authors object to the traditional conception of the separation of powers as "a system of checks *and* balances"[25], by maintaining that the Framers actually devised just "a system of checks" (129).

After a series of historical examples, the authors apply their conception of the separation of powers to the main doctrines used to question the legitimacy of the administrative State. Firstly, they consider the nondelegation doctrine, as well as the major questions doctrine, inconsistent with that conception (154-155). In particular, the nondelegation doctrine lacks any soundness, to the extent that each of the three branches of the federal government is not conceived of as having a rigid, independent scope. They further stress, indeed, that the Framers "abandoned the Anti-Federalists' separationist ideal" to embrace a view acknowledging that each branch may have a part of the authority theoretically vested in the others. Therefore, a statute delegating a broad policy-making power to a certain federal agency is constitutionally valid, provided

[22] Article I, § 8, cl. 18, U.S. Const.
[23] Article II, § 2, cl. 1, U.S. Const.
[24] Italics in original.
[25] Italics in original.

that it does not violate "the principle of anti-domination", i.e., it does not prevent one branch from being able to exercise a check on the other (156-157). As far as the theory of the unitary executive is concerned, the conception of the separation of powers the authors champion implies that the Executive's – and thus the agencies' – powers are legitimate if they fall within either a specific delegation decided by Congress or the authority established by Article II of the constitution, namely by the Take Care Clause[26] (157-158). The President has a general authority to oversee the executive branch, and this clause may be considered as the constitutional foundation of the President's power to remove agency officials. This power may lawfully be exercised when it is necessary to take care that statutes are faithfully executed, thus when those officials are not performing their duties (159-160). At the same time, restrictions to the removal power established by Congress are lawful, as well. Indeed, a statutory provision, pursuant to which the President may remove agency officials only in case of neglect of duty by them, prevents the President himself from "dominat[ing] the other branch" (160). Finally, statutory provisions assigning agencies adjudication powers are compatible with the Judiciary's authority established by Article III, for the Constitution does not rule out radically the possibility that the other two branches have the power to decide individual cases (161-162).

Law Reviews' Abbreviations
Yale L.J. F.: The Yale Law Journal Forum
Vand. L. Rev.: Vanderbilt Law Review
Yale L.J.: Yale Law Journal
Harv. L. Rev.: Harvard Law Review
Texas L. Rev. : Texas Law Review

[26] Article II, § 3, U.S. Const.