Neither Safe, Nor Legal, Nor Rare: The D.C. Circuit's Use of the Doctrine of Ratification to Shield Agency Action from Appointments Clause Challenges

*Damien M. Schiff**

ABSTRACT

Key to the constitutional design of the federal government is the separation of powers. An important support for that separation is the Appointments Clause, which governs how officers of the United States are installed in their positions. Although the separation of powers generally, and the Appointments Clause specifically, support democratically accountable government, they also protect individual citizens against abusive government power. But without a judicial remedy, such protection is ineffectual—a mere parchment barrier.

Such has become the fate of the Appointments Clause in the D.C. Circuit, thanks to that court's adoption—and zealous employment—of the rule that agency action, otherwise unconstitutional under the clause, may be "ratified" by a constitutionally competent officer. This ratification precludes a court from addressing a plaintiff's constitutional claims against the original agency action. It is deemed effective regardless of whether it comports with the procedural and substantive limitations applicable to the original action. It is effective as well even if the ratifying federal actor makes no effort to abandon the decision-making procedures that led to the alleged constitutional violation.

The D.C. Circuit's ratification defense should be abandoned. It cannot be squared with United States Supreme Court ratification jurisprudence in analogous contexts, the doctrine of ratification as traditionally understood at common law, or an appropriately vigorous judicial enforcement of the separation of the powers. But if the D.C. Circuit (or the Supreme Court, once it has the opportunity to address the question) does not wish to discard the doctrine altogether, at the very least it should limit the doctrine's application to cases where the official's

* Senior Attorney, Pacific Legal Foundation. Several of my colleagues and I represented the plaintiff-appellants in *Moose Jooce v. FDA*, 981 F.3d 26 (D.C. Cir. 2020), discussed *passim*.

ratification adheres to all of the substantive and significant procedural requirements that typically govern the type of action being ratified.

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INTRODUCTION

The separation of powers among the legislative, executive, and judicial branches is a fundamental part of the Constitution's design for the federal government.[1] This separation is protected by a number of checks

1. *See* U.S. CONST. arts. I, II, III; INS v. Chadha, 462 U.S. 919, 951 (1983) ("The Constitution sought to divide the delegated powers of the new federal government into three defined categories,

on how the three branches of government may exercise their assigned power. One of those checks is the Appointments Clause,[2] which sets forth how officers of the United States are installed in their positions. Among other things, the Appointments Clause limits who among the executive and judicial branches may appoint officers, while also reserving some legislative oversight (through the Senate confirmation process) for officer appointments.[3] Securing an appointment consistent with the Appointments Clause is important because officials who have not been properly appointed are precluded from validly executing the powers assigned to their offices.[4]

Although the separation of powers helps secure democratically responsive government, it does more than that. The doctrine also protects liberty, and, to that extent, it establishes a legal right that citizens may use to defend themselves against abusive governmental action.[5] Over the last several decades, litigation concerning the Appointments Clause—and the United States Supreme Court's interest in those lawsuits—has increased sharply,[6] due in part to a concern that the blending of supposedly separate powers of the federal government has occurred too often.[7]

Without a remedy, there is no legally protectable right.[8] Thus, if a citizen is wronged by a federal official who holds office unconstitutionally—for example, a career civil servant wielding

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legislative, executive and judicial, to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.").

2. U.S. CONST. art. II, § 2, cl. 2.

3. *See id.*

4. *See, e.g.*, Lucia v. SEC, 138 S. Ct. 2044, 2055 (2018) ("This Court has also held that the 'appropriate' remedy for an adjudication tainted with an appointments violation is a new 'hearing before a properly appointed' official." (quoting Ryder v. United States, 515 U.S. 177, 183, 188 (1995))).

5. Bond v. United States, 564 U.S. 211, 222 (2011) ("Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well.").

6. *See infra* notes 39–50.

7. *See* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 115–16 (2015) (Thomas, J., concurring) ("We have not always been vigilant about protecting the structure of our Constitution. Although this Court has repeatedly invoked the 'separation of powers' and 'the constitutional system of checks and balances' as core principles of our constitutional design, essential to the protection of individual liberty, it has also endorsed a 'more pragmatic, flexible approach' to that design when it has seemed more convenient to permit the powers to be mixed. As the history shows, that approach runs the risk of compromising our constitutional structure." (citations omitted)).

8. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.").

significant and independent authority who has not been nominated by the President and confirmed by the Senate—but the citizen is precluded from obtaining redress for that wrong, then the safeguards of the Appointments Clause might as well not exist. That unfortunate state of affairs is fast approaching in the D.C. Circuit. For entrenched in that circuit's case law is the principle that a constitutionally competent officer's ratification can cure an Appointments Clause violation.[9] Such a rule seems innocuous if one interprets "ratification" to mean doing correctly the same thing that was originally done incorrectly. But this is not what the D.C. Circuit intends. Rather, the D.C. Circuit means that, so long as a constitutionally competent officer makes a good faith affirmance of an action allegedly taken in violation of the Appointments Clause, the validity of the original action will be upheld retroactively.[10] That consequence follows even if the ratifying act is a mere "rubberstamp"[11] that would not satisfy the procedural and substantive rules governing the original action, such as those imposed by the Administrative Procedure Act.[12] It also follows even if the ratifying principal has shown no interest in abandoning the procedures that led to the alleged constitutional violation.[13]

This incredibly government-friendly and Appointments-Clause-evading rule derives from two D.C. Circuit decisions[14] from the 1990s: *FEC v. Legi-Tech, Inc.*[15] and *Doolin Security Savings Bank, F.S.B. v. Office of Thrift Supervision*.[16] Although followed (and expanded upon) in the D.C. Circuit and in other jurisdictions, the rule stands on rather slim grounds; it could not, for example, be justified under the common law of ratification.[17] Given the importance of the Appointments Clause to the Constitution's structure,[18] as well as administrative law's emphasis on

9. *See, e.g.*, Moose Jooce v. FDA, 981 F.3d 26, 28 (D.C. Cir. 2020); Wilkes-Barre Hosp. Co. v. NLRB, 857 F.3d 364, 371–72 (D.C. Cir. 2017); Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 796 F.3d 111, 117–18 (D.C. Cir. 2015).

10. *See, e.g.*, FEC v. Legi-Tech, Inc., 75 F.3d 704, 708–09 (D.C. Cir. 1996).

11. *See id.* at 709.

12. 5 U.S.C. §§ 701–706; *see Moose Jooce*, 981 F.3d at 29–30.

13. *See Moose Jooce*, 981 F.3d at 29–30.

14. *See Intercollegiate*, 796 F.3d at 117–18. Other circuits, citing the same D.C. Circuit precedents, have followed course. *See, e.g.*, Consumer Fin. Prot. Bureau v. Gordon, 819 F.3d 1179, 1191–92 (9th Cir. 2016); Advanced Disposal Servs. E., Inc. v. NLRB, 820 F.3d 592, 603–05 (3d Cir. 2016).

15. *Legi-Tech, Inc.*, 75 F.3d 704.

16. Doolin Sec. Sav. Bank, F.S.B. v. Off. of Thrift Supervision, 139 F.3d 203 (D.C. Cir. 1998).

17. *See infra* Section V.B.

18. Edmond v. United States, 520 U.S. 651, 659 (1997).

following correct procedure,[19] there is no compelling reason to loosen the requisites of common law ratification when dealing with attempted agency ratifications. Yet the decisions adopting the ratification defense do precisely that, holding that the rules should be less strict when ratification is employed to save agency action from an Appointments Clause attack.[20]

In this Article, I endeavor to make three basic points. First, the D.C. Circuit's ratification defense to Appointments Clause challenges cannot be reconciled with the U.S. Supreme Court's handling of ratification in analogous contexts. Second, the D.C. Circuit's ratification defense cannot be reconciled with the doctrine of ratification as traditionally understood at common law. Third, eliminating or at least sharply narrowing the D.C. Circuit's ratification defense—to cases in which, for example, the proposed ratification comports with all of the substantive and significant procedural limitations normally applicable to the government act to be ratified—will more effectively police agency misbehavior under the Appointments Clause.

The Article begins with a review of the Appointments Clause and the Supreme Court's decisions interpreting it.[21] Next, the Article assesses the doctrine of ratification as initially expounded at common law in various treatises and then examines the Supreme Court's application of the doctrine in a variety of contexts.[22] Following that, the Article evaluates the D.C. Circuit's employment of ratification, giving special attention to the court's mishandling of the doctrine as a fool-proof defense against Appointments Clause lawsuits.[23] Finally, the Article attacks the D.C. Circuit's misuse of the doctrine as inconsistent with Supreme Court precedent, as well as the common law, and then rounds off the discussion with a policy-based critique of the doctrine.[24]

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19. *See* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962))).

20. *See, e.g.*, Moose Jooce v. FDA, No. 18-cv-203 (CRC), 2020 WL 680143, at *6 (D.D.C. Feb. 11, 2020) ("Agency ratifications, which by definition come *after* a final action has been taken, are not governed by standard APA rules."); Alfa Int'l Seafood v. Ross, 264 F. Supp. 3d 23, 44 (D.D.C. 2017) ("[T]he question presented is one of administrative law, i.e., whether the current Secretary can ratify a rule that his agency, under the stewardship of his predecessor, had the legal authority to promulgate. The Restatement of Agency seems ill-suited to answer that question."); State Nat'l Bank of Big Spring v. Lew, 197 F. Supp. 3d 177, 184 (D.D.C. 2016) (declining to impose "formalistic procedural requirements before a ratification is deemed to be effective").

21. *See infra* Part I.

22. *See infra* Parts II–III.

23. *See infra* Part IV.

24. *See infra* Part V.

I. A BACKGROUND ON THE APPOINTMENTS CLAUSE

The Appointments Clause provides that the President:

> [S]hall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[25]

In the form we know it today, the Appointments Clause did not incite controversy during the Constitutional Convention.[26] Despite the lack of attention, the clause "reflects more than a 'frivolous' concern for 'etiquette or protocol.'"[27] The Founders wanted to ensure political accountability for appointees and to impose a check on the accumulation of power.[28] The clause therefore is "among the significant structural safeguards of the constitutional scheme,"[29] functioning as "a bulwark against one branch aggrandizing its power at the expense of another branch" and thereby "preventing the diffusion of the appointment power."[30] As a key to

25. U.S. CONST. art. II, § 2, cl. 2

26. As to the first part of the Clause, see Brent Wible, *Filibuster vs. Supermajority Rule: From Polarization to a Consensus- and Moderation-Forcing Mechanism for Judicial Confirmations*, 13 WM. & MARY BILL RTS. J. 923, 940 (2005) ("Curiously, without further discussion, the Convention as a whole approved the clause unanimously on September 7, just ten days before it adopted the new Constitution."). As to the concluding "Excepting Clause," see Edmond v. United States, 520 U.S. 651, 660 (1997) (noting that the clause "was added to the proposed Constitution on the last day of the Grand Convention, with little discussion"). There were, however, leading up to the Convention's final votes, a number of competing proposals for allocating the appointment power, Theodore Y. Blumoff, *Separation of Powers and the Origins of the Appointment Clause*, 37 SYRACUSE L. REV. 1037, 1062 (1987) ("Like the states themselves, their representatives in the Convention had almost as many ideas about the rightful locus of the appointing prerogative as there were representatives."), although the debates over them mainly concerned the appointment of judges, *id.* at 1062–65.

27. Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 74 (2007) (quoting Buckley v. Valeo, 424 U.S. 1, 125 (1976) (per curiam)).

28. Note, *Congressional Restrictions on the President's Appointment Power and the Role of Longstanding Practice in Constitutional Interpretation*, 120 HARV. L. REV. 1914, 1917–18 (2007); *see* Blumoff, *supra* note 26, at 1066 ("Rather, the debate focused largely on two questions: Was the Executive or the Legislature more likely to abuse its power? And which entity, the Executive or the Legislature, was more likely to be jealous and create discord if it was not given a role in the process?").

29. *Edmond*, 520 U.S. at 659.

30. Ryder v. United States, 515 U.S. 177, 182 (1995) (citing Freytag v. Comm'r, 501 U.S. 868, 878 (1991)).

preserving the separation of powers, the clause serves "to protect individual liberty."[31]

The Appointments Clause creates two sets of distinctions: one between "Officers of the United States" and non-officer federal employees; and another between principal (or, better, non-inferior)[32] officers and inferior officers. For the first distinction, to be considered an officer rather than an employee, a person must occupy a continuing position established by law and wield significant federal authority.[33] As to the second distinction, an inferior officer is one whose work is directed and supervised by a non-inferior officer.[34] Whether such direction and supervision is present depends on a number of factors, including the extent to which (1) the official is protected from removal, (2) the official's day-to-day work is overseen by others, and (3) the official has the power to render a final decision without approval from the official's superiors.[35]

Whether one is a non-officer employee, an inferior officer, or a non-inferior officer determines how easily one can be dismissed from government service, as well as the manner by which one assumes an office. For example, a federal employee typically enjoys substantial protection against loss of employment.[36] Federal officers, however,

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31. NLRB v. SW Gen., Inc., 137 S. Ct. 929, 949 (2017) (Thomas, J., concurring) (quoting NLRB v. Noel Canning, 573 U.S. 513, 571 (2014) (Scalia, J., concurring in the judgment)).

32. Most cases refer to non-inferior officers as "principal officers," but the term does not appear in the Appointments Clause. It is used elsewhere in the Constitution, but the way in which it is employed suggests that there can be only one "principal" officer in each department of the government. *See* U.S. CONST. art. II, § 2, cl. 1 ("The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices . . . ."). Does that mean that there are only a handful of non-inferior officers in the federal government? By no means. Madison's notes from the Constitutional Convention reveal that there are really three classes of officers: principal officers, "superior" officers, and inferior (or "minute") officers, and only for the last category may their appointments be vested in the President, the courts of law, or the heads of departments. Steven G. Calabresi & Gary Lawson, *Why Robert Mueller's Appointment as Special Counsel Was Unlawful*, 95 NOTRE DAME L. REV. 87, 135–38 (2019).

33. *E.g.*, Lucia v. SEC, 138 S. Ct. 2044, 2051 (2018) (first citing United States v. Germaine, 99 U.S. 508, 510 (1878); and then Buckley v. Valeo, 424 U.S. 1, 125 (1976) (per curiam)). A powerful originalist argument has recently been made that an officer of the United States is "one whom the government entrusts with ongoing responsibility to perform a statutory duty of any level of importance." Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443, 454 (2018). In a recent decision, the Supreme Court held that administrative patent judges are non-inferior officers largely (if not entirely) because, by statute, they have been granted the power to issue final decisions in *inter partes* patent challenges. United States v. Arthrex, Inc., 141 S. Ct. 1970, 1985–86 (2021).

34. *Edmond*, 520 U.S. at 662.

35. *Id.* at 663–66.

36. *See, e.g.*, 5 U.S.C. §§ 7503, 7513(b) (outlining notice and hearing requirements for disciplinary action). *See generally* U.S. MERIT SYS. PROT. BD., WHAT IS DUE PROCESS IN FEDERAL CIVIL SERVICE EMPLOYMENT? 27–31 (2015).

generally enjoy much less (or even no) protection.[37] As between inferior and non-inferior officers,[38] the appointment of the former may be vested by Congress in the President alone, the courts of law, or the heads of departments,[39] thereby avoiding Senate confirmation, whereas the latter must receive the Senate's advice and consent. Thus, the distinctions among officer types that the Appointments Clause creates can affect the President's ability to implement policies to effectively govern the entire Executive Branch, as well as Congress's ability to exercise meaningful control over Executive Branch appointments.

Appointments Clause challenges and related claims are now a fairly regular part of the Supreme Court's docket. Since the re-emergence of Appointments Clause litigation in the modern era in *Buckley v. Valeo*[40] (which concerned the constitutionality of congressionally appointed voting members of the Federal Election Commission), the Court has addressed challenges to the appointments, or limitations on removal from

37. *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2211 (2020) (explaining that the President's duty to take care that the laws be faithfully executed forbids removal protections for officers who wield significant executive power). Some degree of protection against removal is, however, permissible for inferior officers. *See id.* at 2199 (first citing United States v. Perkins, 116 U.S. 483 (1886); and then Morrison v. Olson, 487 U.S. 654 (1988)).

38. As discussed above, it is more accurate to speak of inferior and non-inferior officers than of inferior and "principal" officers because there are a number of non-principal officers who nevertheless are non-inferior, i.e., superior, and who can be appointed only by the President with the Senate's advice and consent. *See supra* text accompanying note 32.

39. Interestingly, the Excepting Clause was "the least discussed portion of the Appointments Clause" during the Constitutional Convention. Blumoff, *supra* note 26, at 1068. The authorization for inferior appointments by the "courts of law" has generally been interpreted to allow for appointment by a single judge of the pertinent court (for example, the chief judge of the Tax Court, Freytag v. Comm'r, 501 U.S. 868, 870–71, 891–92 (1991)), although there is some academic dissent from that position. *See* James E. Pfander, *The Chief Justice, the Appointment of Inferior Officers, and the "Court of Law" Requirement*, 107 NW. U. L. REV. 1125, 1131 (2013) ("An inferior officer must be inferior to a superior and Article III makes clear that the Court, rather than the Chief Justice, occupies the relevant position of superiority."). The term "heads of departments" denotes the chief officers of "'a part or division of the executive government, as the Department of State, or of the Treasury,' expressly 'creat[ed]' and 'giv[en] . . . the name of a department' by Congress." *Freytag*, 501 U.S. at 886 (quoting United States v. Germaine, 99 U.S. 508, 510–11 (1878)).

40. *Cf.* Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 86 (2007) (observing that *Buckley* was "the Court's first treatment of the basic requirements of the Appointments Clause since *Auffmordt v. Hedden*, 137 U.S. 310 (1890), *see* Buckley v. Valeo, 424 U.S. at 125–26, n.162, and its first decision finding a violation of that Clause").

office,[41] of the following: administrative patent judges,[42] the director of the Consumer Financial Protection Bureau,[43] members of the Financial Oversight and Management Board of Puerto Rico,[44] administrative law judges within the Security and Exchange Commission,[45] the acting General Counsel of the National Labor Relations Board,[46] the Public Company Accounting Oversight Board,[47] the National Labor Relations Board,[48] the Coast Guard Court of Criminal Appeals,[49] special trial judges within the Tax Court,[50] and the Office of Independent Counsel.[51]

With this background on the Appointments Clause, we may now proceed to consider the common law origins of the ratification doctrine.

II. THE COMMON LAW OF RATIFICATION

The common law of ratification, like the common law of agency[52] of which it is a part, derives from Roman law.[53] Traditionally, ratification has been understood as a defense that an agent has against a charge that the

41. In addition to issues concerning the Appointments Clause, the Court has shown considerable interest in the extent to which the President's power to remove federal officials from their positions may be circumscribed. Although the latter issue directly concerns the President's obligation to execute the laws of the United States under the Take Care Clause, U.S. CONST. art. II, § 3, *see* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 492–93 (2010), the Appointments Clause nevertheless typically looms large in such removal cases. That is because limitations on the President's power to remove *are* allowed for non-officer civil servants, *see id.* at 506, as well as for some inferior and (perhaps a handful of) non-inferior officers, *see Seila Law*, 140 S. Ct. at 2192.

42. United States v. Arthrex, Inc., 141 S. Ct. 1970 (2021).

43. *Seila Law*, 140 S. Ct. 2183. The Court recently applied the rule of *Seila Law* to invalidate removal protections for the Director of the Federal Housing Finance Agency. Collins v. Yellen, 141 S. Ct. 1761, 1783–84 (2021).

44. Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020).

45. Lucia v. SEC, 138 S. Ct. 2044 (2018).

46. NLRB v. SW Gen., Inc., 137 S. Ct. 929 (2017).

47. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010).

48. NLRB v. Noel Canning, 573 U.S. 513 (2014).

49. Edmond v. United States, 520 U.S. 651 (1997).

50. Freytag v. Comm'r, 501 U.S. 868 (1991).

51. Morrison v. Olson, 487 U.S. 654 (1988).

52. Interestingly, the "title agency, as the name of a distinct subject, belongs to a comparatively recent period in our law[;] Blackstone scarcely refers to it." FLOYD R. MECHEM, A TREATISE ON THE LAW OF AGENCY § 11, at 5 (2d ed. 1914); *cf. id.* § 4, at 6 (referencing English law prior to Edward I, "there is no current word that is equivalent to our *agent;* John does not receive money or chattels 'as agent for' Roger; he receives it to the use of Roger (*ad opus Rogeri*)") (quoting 1 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 228 (2d ed. 1898)). Professor Mechem was the original reporter for the First Restatement of Agency, and his treatise was widely recognized as the leading work on the subject in the first decades of the twentieth century. Deborah A. DeMott, *The First Restatement of Agency: What Was the Agenda?*, 32 S. ILL. U. L.J. 17, 18 (2007).

53. JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY § 239, at 299–301 (8th rev. ed., N. St. John Green ed. 1874).

agent exceeded the principal's mandate.[54] It is founded upon the maxim *omnis ratihabitio retrotrahitur*, *et mandato priori aequiparatur*, that is, every ratification relates back and is equivalent to a prior authorization[55]—in Justice Story's estimation, a "most useful and convenient rule."[56]

There are, however, limitations on the power to ratify, which Justice Story's well-regarded treatise on agency elaborates.[57] First, a principal cannot achieve more through ratification than the principal could if the principal had done the agent's act in the first instance.[58] Second, a ratification "cannot . . . stand upon a higher ground, than an original authority,"[59] i.e., a principal's ratification is effective only if it is subject to the same procedures and constraints that governed the agent's action. Third, the principal must have full knowledge of all the material circumstances of the original transaction.[60] Fourth, the ratification cannot operate so as to subject a third party to damages or other injury, or to defeat a vested right or estate.[61] Fifth, a principal must accept or reject the act in its entirety to be ratified.[62] Finally, a ratification is ineffective if the agent did not commit the act with the explicit intent of doing so on the principal's behalf.[63]

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54. *Id.* § 239, at 298; *see* 1 SAMUEL LIVERMORE, A TREATISE ON THE LAW OF PRINCIPAL AND AGENT; AND OF SALES BY AUCTION § 4, at 50 (1818).

55. STORY, *supra* note 53, § 239, at 299; LIVERMORE, *supra* note 54, § 4, at 44; 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 616 (12th ed. O.W. Holmes, Jr., ed.) (1896). Even without actual authorization, a principal can be liable for the actions of his agent. Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 565–66 (1982) ("[U]nder general rules of agency law, principals are liable when their agents act with apparent authority . . . .").

56. STORY, *supra* note 53, § 239, at 299–300.

57. *See, e.g.*, FRANCIS B. TIFFANY, HANDBOOK OF THE LAW OF PRINCIPAL AND AGENT v (1903) ("The author desires to express his obligation to the many writers who have contributed to formulate and classify this branch of the law,—and particularly to Story, whose Commentaries are still indispensable to the student . . . .").

58. *See* STORY, *supra* note 53, § 241, at 302. As the maxim provides, "Quod ab initio non valet, tractu temporis non convalescit." *Id.* So, for example, a principal has no power to ratify an agent's act that was and is illegal.

59. *Id.* § 242, at 303; TIFFANY, *supra* note 57, at 61–62; MECHEM, *supra* note 52, § 419, at 309–10.

60. STORY, *supra* note 53, §§ 242–43, at 303–04; TIFFANY, *supra* note 57, at 72; MECHEM, *supra* note 52, § 393, at 285–86; KENT, *supra* note 55, at 616 n.1.

61. STORY, *supra* note 53, § 246, at 307; TIFFANY, *supra* note 57, at 77–78; MECHEM, *supra* note 52, §§ 486–87, at 356–58.

62. STORY, *supra* note 53, § 250, at 310; TIFFANY, *supra* note 57, at 61; MECHEM, *supra* note 52 § 410, at 301.

63. STORY, *supra* note 53, § 251a, at 311; TIFFANY, *supra* note 57, at 54; MECHEM, *supra* note 52, § 377, at 275. As the maxim provides, "Ratum quis habere non potest, quod ipsius nomine non est gestum." STORY, *supra* note 53, § 251a, at 311.

The doctrine of ratification as explicated by Justice Story and other classic treatise writers (who are in accord with Story[64]) has been preserved by and large in the Restatements of Agency.[65] For example, the Second Restatement defines ratification as "the affirmance by a person of a prior act which did not bind him but which was done, or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him."[66] Ratification is not effective "unless the one acting purported to be acting for the ratifier."[67] Ignorance of material facts also precludes ratification.[68] Ratification is precluded as well if it occurs outside of the time allowed for the original act, or otherwise works to deprive third parties of rights already tested in litigation,[69] or is not subject to the same formalities governing the original act.[70]

The Third Restatement, although much shorter in its treatment of ratification than the Second, more or less maintains the latter's approach. "Ratification is the affirmance of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority."[71] Among the requirements for ratification are that the person ratifying must have the capacity to do so,[72] the ratification must be timely,[73] and the agent must have purported to act on the principal's behalf.[74] The Third Restatement does, however, depart from the Second in a few ways. For example, the Third Restatement does not require a principal to have the

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64. *See supra* notes 53–62.

65. The First Restatement on Agency, published in 1933, closely follows the law as stated in Tiffany (1903) and Mechem (1925). *See supra* notes 56–62; *see, e.g.*, RESTATEMENT (FIRST) OF AGENCY § 82 (AM. L. INST. 1933) ("Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him."); *id.* § 89 ("At the election of the third person, an affirmance of a transaction with him is not effective as ratification if it occurs after the situation has so materially changed that it would be inequitable to subject him to liability thereon."); *id*. § 91 ("If, at the time of affirmance, the purported principal is ignorant of material facts involved in the original transaction, he may elect to avoid the effect of the affirmance . . . ."); *id.* § 93(2) ("Where formalities are requisite for the authorization of an act, its affirmance must be by the same formalities in order to constitute a ratification."); *id.* § 96 ("A contract or other single transaction must be affirmed in its entirety in order to effect its ratification."); *id.* § 101(c) ("Ratification is not effective . . . in diminution of the rights or other interests of persons not parties to the transaction which were acquired in the subject matter before affirmance.").

66. RESTATEMENT (SECOND) OF AGENCY § 82 (AM. L. INST. 1958).

67. *Id.* § 85.

68. *Id.* § 91(1).

69. *See id.* § 90.

70. *Id.* § 93(2).

71. RESTATEMENT (THIRD) OF AGENCY § 4.01(1) (AM. L. INST. 2006).

72. *Id.* § 4.01(3)(b). Capacity is defined as the power to do the act of the agent oneself. *Id.* § 3.04(1).

73. *Id.* § 4.01(3)(c).

74. *Id.* § 4.03.

capacity to ratify at the time of the original action.[75] Further, in determining the timeliness of a ratification, the Third Restatement focuses on whether the interests of third parties have developed since the original act such that the act's ratification would have "adverse and inequitable effects on the rights of third parties."[76] And unlike the Second Restatement, the Third Restatement does not directly address whether the formalities of the original act must be repeated, although one could argue that this requirement is impliedly incorporated in the Third Restatement's discussion of capacity.[77] But aside from these small differences, the Third Restatement follows the Second, as well as the treatise writers, in viewing ratification as part of the law of agency. The Third Restatement also follows the Second in giving the doctrine a wide ambit of application but also in imposing a number of limitations on a principal's power to ratify, largely to protect the rights of third parties.

With this background on the common law rules governing ratification, we may now proceed to review how the U.S. Supreme Court has employed the doctrine.

III. THE SUPREME COURT'S USE OF THE DOCTRINE OF RATIFICATION

By far the Supreme Court's most common use of the term "ratification" is in the context of treaties, especially with respect to the Constitution and its amendments,[78] but also with respect to Native American tribes and foreign nations,[79] and compacts

75. *Id.* §§ 4.04(1)(b), § 4.04 cmt. b.

76. *Id.* § 4.05. The Third Restatement retreats somewhat from the Second in its handling of the limitation as applied to litigation. The Second Restatement generally approves of the rule precluding ratification when it "deprive[s] the other party to a transaction with an unauthorized agent of rights he otherwise would have and might defeat, as the normal effect of ratification does not, his legitimate expectations." RESTATEMENT (SECOND) OF AGENCY § 90 rep. note. Although acknowledging that "some courts treat the [aforementioned rule] as a basis for limiting defenses that may be asserted in litigation," the Third Restatement concludes that "the conceptual basis for so doing is not clear." RESTATEMENT (THIRD) OF AGENCY § 4.05 cmt. e.

77. *See* RESTATEMENT (THIRD) OF AGENCY § 3.04(1) ("An individual has capacity to act as principal in a relationship of agency . . . if, at the time the agent takes action, the individual would have capacity if acting in person.").

78. *See, e.g.*, Timbs v. Indiana, 139 S. Ct. 682, 687–88 (2019); *cf.* U.S. CONST. arts. V, VII.

79. *See, e.g.*, McGirt v. Oklahoma, 140 S. Ct. 2452, 2460 (2020); GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC, 140 S. Ct. 1637, 1645–47 (2020); *cf.* U.S. CONST. art. II, § 2.

among the states.[80] This usage of "ratification" is, however, largely irrelevant to our present inquiry.[81]

Occasionally and in a somewhat different setting, the Court will employ the so-called "ratification canon," according to which the Court will presume that when Congress reenacts a statute, Congress intends to codify any judicial constructions of the original text.[82] The Court also sometimes denotes as "ratification" the circumstance when Congress, acting as the principal, ratifies an otherwise unauthorized official action.[83]

There have been passing discussions of "ratification" in other contexts as well. For example, a decision concerning the Older Workers Benefit Protection Act discusses whether a discharged worker's retention of severance pay ratified her otherwise statutorily invalid promise not to sue over her discharge.[84] A few other decisions address ratification in the context of labor law, specifically the process whereby union members "ratify" a proposed collective bargaining agreement.[85]

With respect to ratification as a part of the law of agency, the Court has generally accepted, without much elaboration or citation, the

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80. *See, e.g.*, Texas v. New Mexico, 138 S. Ct. 954, 957 (2018); *cf.* U.S. CONST. art. I, § 10.

81. But it is not entirely irrelevant. For example, the process whereby the states "ratify" a constitutional amendment is somewhat analogous to a principal-agent relationship, with Congress or a Constitutional Convention serving as the agent of the people of the several states. *See generally* U.S. CONST. art. V. But it is not the same type of principal-agent relationship that ratification—in the sense that we are interested here—is concerned. For ratification, the act being ratified is something that the principal, by definition, could have done in the first instance. In contrast, the states as states (or the people acting through their state governments) cannot propose a constitutional amendment; only Congress or a convention convened by the states' legislatures can propose such an amendment. *See id.*

82. *E.g.*, Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2365–66 (2019). The term is also used to describe when, by virtue of congressional or executive action, just compensation is authorized for what otherwise would have been a non-compensable tort. *See* United States v. Goltra, 312 U.S. 203, 208–10 (1941).

83. *E.g.*, Swayne & Hoyt v. United States, 300 U.S. 297, 301–02 (1937); *accord* Charlotte Harbor & N. Ry. Co. v. Welles, 260 U.S. 8, 11 (1922) ("The general and established proposition is that what the Legislature could have authorized, it can ratify if it can authorize at the time of ratification."); Mattingly v. District of Columbia, 97 U.S. 687, 690 (1878) ("If Congress or the legislative assembly had the power to commit to the board the duty of making the improvements, and [the power] to prescribe that the assessments should be made in the manner in which they were made, it had power to ratify the acts which it might have authorized.").

84. Oubre v. Entergy Operations, Inc., 522 U.S. 422, 425–28 (1998). This is not ratification under the law of agency but rather the law of contract, whereby a contractual party may "ratify" an otherwise voidable contractual obligation. *See* RESTATEMENT (SECOND) OF CONTRACTS § 7 (AM. L. INST. 1981).

85. *E.g.*, Granite Rock Co. v. Int'l Brotherhood of Teamsters, 561 U.S. 287 (2010).

principles set forth by the treatise writers.[86] These principles include the following rules: (1) ratification operates as a retroactive authorization;[87] (2) a principal cannot ratify what the principal could not do directly;[88] (3) the transaction must be ratified in its entirety, if at all;[89] (4) the principal must have full knowledge of the material facts[90] (although acceptance of the benefits of an action can operate as an implied ratification[91]); (5) ratification cannot defeat the rights of third parties;[92] and, more generally, (6) a principal must have power to do the original act at the time of ratification.[93]

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86. *See, e.g.*, Clews v. Jamieson, 182 U.S. 461, 483 (1901) (citing, inter alia, Justice Story's treatise as well as Mr. Livermore's) (reciting the basic aspects of the doctrine and declaring that they "are well known, and may be found laid down in the following text-books and authorities"); Fleckner v. Bank of the U.S., 21 U.S. (8 Wheat.) 338, 363 (1823) ("No maxim is better settled in reason and law, than the maxim *omnis ratihabitio retrotrahitur*, *et mandato priori equiparatur* . . . ."). Sometimes the Court would combine citations to Justice Story and other treatise writers with citations to a variety of state court decisions. *See, e.g.*, Bd. of Supervisors v. Schenk, 72 U.S. (5 Wall.) 772, 781–82 (1866). And sometimes no citation at all would be given, presumably because the principles enunciated were commonly known and accepted. *See, e.g.*, Drakely v. Gregg, 75 U.S. (8 Wall.) 242, 267 (1868); Boyle v. Zacharie, 31 U.S. (6 Pet.) 648, 658 (1832).

87. Cook v. United States, 288 U.S. 102, 121 (1933) ("[R]atification is equivalent to antecedent delegation of authority . . . ."); Clark's Ex'rs v. Van Riemsdyk, 13 U.S. (9 Cranch) 153, 161 (1815) ("It will not be denied that the acts of an agent, done without authority, may be so ratified and confirmed by his principals as to bind them in like manner as if an original authority had existed."). A principal, however, retains the right to choose whether to ratify. William W. Bierce, Ltd. v. Hutchins, 205 U.S. 340, 346 (1907) ("So a man may ratify or repudiate an unauthorized act done in his name.").

88. Marsh v. Fulton Cnty., 77 U.S. (10 Wall.) 676, 684 (1870) ("It follows that a ratification can only be made when the party ratifying possesses the power to perform the act ratified."); United States v. Grossmayer, 76 U.S. (9 Wall.) 72, 75 (1869) ("[A] transaction originally unlawful cannot be made any better by being ratified."); *see* Bunch v. Cole, 263 U.S. 250, 254 (1923) ("These leases were made in violation of a congressional prohibition. They were not merely voidable at the election of the allottee, but absolutely void and not susceptible of ratification by him.").

89. Gaines v. Miller, 111 U.S. 395, 398 (1884) ("If a principal ratifies that which favors him, he ratifies the whole.").

90. *E.g.*, United States v. Beebe, 180 U.S. 343, 354 (1901); Owings v. Hull, 34 U.S. (9 Pet.) 607, 629 (1835); *see* Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 573 (1982) (rejecting ratification as the basis for assigning an agent's antitrust violation to its principal because such a standard would allow a principal to "avoid liability by ensuring that it remained ignorant of its agents' conduct, and the antitrust laws would therefore encourage [the principal] to do as little as possible to oversee its agents"); Knapp v. Alexander-Edgar Lumber Co., 237 U.S. 162, 170 (1915) ("To the suggestion that plaintiff has ratified the compromise, . . . it is sufficient to say that it is not found that he did this with full knowledge of the facts.").

91. Chi., Milwaukee, & St. Paul Ry. Co. v. United States, 244 U.S. 351, 358 (1917).

92. United States v. Midwest Oil Co., 236 U.S. 459, 477 (1915) ("A subsequent ratification could have related back to 1851, but if the withdrawal was originally void, the ratification, of course, could not cut out intervening rights of settlers.").

93. Cook v. Tullis, 85 U.S. 332, 338 (1873) ("[I]t is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, but also at the time the ratification was made.").

The Supreme Court's most pertinent decision regarding the relationship of ratification to the Appointments Clause is *FEC v. NRA Political Victory Fund*.[94] The FEC brought a lawsuit against a political action committee for violating various campaign finance laws. The district court held on the merits for the FEC, ruling that the PAC was guilty of campaign finance infractions. The D.C. Circuit reversed. Avoiding the merits, the court ruled for the PAC on the ground that the statutory allowance for two congressionally appointed non-voting members to serve on the FEC violates the Appointments Clause.[95] The FEC then sought review in the Supreme Court but did not obtain the Solicitor General's approval as required by the Judicial Code.[96] After the time for filing a petition for writ of certiorari had expired, the Solicitor General attempted to ratify the FEC's filing. The Supreme Court held that the Solicitor General's action came too late.[97] The Court acknowledged that the issue was "at least presumptively governed by principles of agency law, and in particular the doctrine of ratification."[98] The Court continued by observing

94. FEC v. NRA Pol. Victory Fund, 513 U.S. 88 (1994). In *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020), the Government argued that the petitioner should receive no relief because the challenged civil investigative demand had since been ratified by an officer properly accountable to the President. *Id.* at 2208. Noting that the question "turns on case-specific factual and legal questions not addressed below and not briefed here," the Court concluded that "the appropriate course" was to "remand for the lower Courts to consider those questions in the first instance." *Id.* (On remand, the Ninth Circuit affirmed the Bureau director's ratification, following its decision in *Consumer Financial Protection Bureau v. Gordon*, 819 F.3d 1179 (9th Cir. 2016), discussed *infra* n. 256, which relies heavily upon *FEC v. Legi-Tech, Inc.*, 75 F.3d 704 (D.C. Cir. 1996), discussed in Part IV.B., *infra*.) The Court in *Lucia v. SEC* also sidestepped ratification. There, the petitioner contested the validity of the SEC's ratification of its prior administrative law judge appointments but, because the government on remand did not propose to retry the petitioner before a "ratified" ALJ, the Court saw no reason to address the ratification's validity. Lucia v. SEC, 138 S. Ct. 2044, 2055 n.6 (2018).

95. FEC v. NRA Pol. Victory Fund, 6 F.3d 821, 826–27 (D.C. Cir. 1993).

96. *See* 28 U.S.C. § 518(a) ("[T]he Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court . . . ."); 28 C.F.R. § 0.20(a) (delegation from the Attorney General to the Solicitor General for "[c]onducting . . . all Supreme Court cases, including . . . petitions for . . . certiorari"). As a so-called independent agency, the FEC did not believe that it needed the Solicitor General's approval to litigate its own cases. *See NRA Pol. Victory Fund*, 513 U.S. at 97–98.

97. *NRA Pol. Victory Fund*, 513 U.S. at 98.

98. *Id.* That the principal-agent relationship between government officials should be covered by the same principles applicable to private principal-agent relationships is not without precedent. *See, e.g.*, United States v. Beebe, 180 U.S. 343, 354 (1901) ("Where an agent has acted without authority and it is claimed that the principal has thereafter ratified his act, such ratification can only be based upon a full knowledge of all the facts upon which the unauthorized action was taken. This is as true in the case of the government as in that of an individual."); Pickering v. Lomax, 145 U.S. 310, 314 (1892) ("[W]e know of no reason why the analogy of the law of principal and agent is not applicable here, *viz.*, that an act in excess of an agent's authority, when performed, becomes binding upon the principal,

that ratification applies only when the principal has the power to take the action to be ratified both at the time of the original action and at the time of the ratification.[99] Because the time for filing a petition for writ of certiorari had run when the Solicitor General attempted to ratify, the second requirement for ratification could not be satisfied.[100]

Thus, although not an Appointments Clause case, *NRA Political Victory Fund* provides some instruction for how the Supreme Court employs the doctrine of ratification when a government official uses it to retroactively justify a government action that is otherwise *ultra vires*. Perhaps the decision's most important guidance is its reliance on the doctrine's common law origins as well as its common law limitations to determine how the doctrine should apply to governmental acts.[101]

IV. THE ORIGINS AND DEVELOPMENT OF THE D.C. CIRCUIT'S RATIFICATION DEFENSE TO APPOINTMENTS CLAUSE CHALLENGES

Thus far, we have reviewed the common law's understanding of ratification and the Supreme Court's use of the doctrine in a variety of contexts. This section will address the D.C. Circuit's handling of the doctrine. It begins with an examination of the D.C. Circuit's early employment of ratification principles (mostly outside of the Appointments Clause context); then describes the court's creation of the ratification defense to Appointments Clause challenges in its 1996 decision, *FEC v. Legi-Tech*,[102] and its 1998 decision, *Doolin Security Savings Bank v. Office of Thrift Supervision*;[103] and then explains how later cases expanded the defense. It concludes with a discussion of the D.C. Circuit's rule that ratification ends an Appointments Clause lawsuit by providing a complete defense on the merits, rather than by mooting the action.

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if subsequently ratified by him. The treaty does not provide how or when the permission of the president shall be obtained, and there is certainly nothing which requires that it shall be given before the deed is delivered.").

99. *NRA Pol. Victory Fund*, 513 U.S. at 98.

100. *Id.* at 98–99. Only one justice dissented, and that dissent was limited to whether the FEC needed to obtain the Solicitor General's approval to file a certiorari petition. *Id.* at 100 (Stevens, J., dissenting). As we shall see in the following section, the D.C. Circuit has largely limited *NRA Political Victory Fund* to a timing question—namely, whether something like a statute of limitations or similar time bar precludes officials from ratifying because they no longer have the power to do in the first instance the act proposed to be ratified. *See, e.g.*, Doolin Sec. Sav. Bank, F.S.B. v. Off. of Thrift Supervision, 139 F.3d 203, 213 (D.C. Cir. 1998); *accord* Advanced Disposal Servs. E., Inc. v. NLRB, 820 F.3d 592, 604 (3d Cir. 2016).

101. *NRA Pol. Victory Fund*, 513 U.S. at 98–99 (citing, inter alia, the RESTATEMENT (SECOND) OF AGENCY § 90).

102. FEC v. Legi-Tech, Inc., 75 F.3d 704 (D.C. Cir. 1996).

103. Doolin Sec. Sav. Bank, F.S.B. v. Off. of Thrift Supervision,139 F.3d 203 (D.C. Cir. 1998).

A. The Search for Origins

The first time the D.C. Circuit credited a defense of ratification to an Appointments Clause claim was in its 1996 decision, *Legi-Tech*—a decision to be addressed shortly.[104] Although the ratification defense did not emerge out of thin air, it is fair to say that, until *Legi-Tech* and *Doolin*, it had little precedential support.

In the hundred years prior to *Legi-Tech*, the D.C. Circuit had addressed "ratification" in several contexts outside the Appointments Clause. In these cases, ratification came up in circumstances similar to those in the Supreme Court decisions discussed in the preceding section.[105] For example, these early D.C. Circuit cases address the general common law rules of ratification,[106] legislative ratification of otherwise unauthorized government actions,[107] and ratification of union labor agreements,[108] as well as ratification in the context of securities law.[109]

The first D.C. Circuit decision that entertained something like a ratification defense to a claim that government officials acted illegally was the court's 1966 per curiam decision in *Dumbrowski v. Burbank*.[110] A civil

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104. *See* Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 796 F.3d 111, 117–18 (D.C. Cir. 2015) (observing that "[t]his court has twice before considered the validity of decisions made after the replacement of an improperly appointed official" and then discussing *Legi-Tech* and *Doolin*).

105. *See supra* pp. 11–12.

106. Wittlin v. Giacalone, 171 F.2d 147, 148 (D.C. Cir. 1948) (discussing ratification with full knowledge); Thompson v. Park Sav. Bank, 96 F.2d 544, 548 (D.C. Cir. 1938); Wash. Times Co. v. Wilder, 12 App. D.C. 62, 67 (D.C. Cir. 1898) (holding that acquiescence or failure to repudiate can result in a ratification).

107. Associated Elec. Co-op, Inc. v. Morton, 507 F.2d 1167, 1174 (D.C. Cir. 1974) (discussing congressional ratification).

108. Am. Postal Workers Union, Headquarters Local 6885 v. Am. Postal Workers Union, AFL-CIO, 665 F.3d 1096, 1103–04 (D.C. Cir. 1981).

109. Drexel Burnham Lambert Inc. v. Commodity Futures Trading Comm'n, 850 F.2d 742, 750 (D.C. Cir. 1988) (discussing ratification as defense to unauthorized trading).

110. Dombrowski v. Burbank, 358 F.2d 821, 825 (1966) (per curiam). There are a few decisions articulating a similar defense of the de facto officer doctrine. *See, e.g.*, Nat'l Ass'n of Greeting Card Publishers v. U.S. Postal Serv., 569 F.2d 570, 579 (D.C. Cir. 1976) (per curiam). Under that doctrine as traditionally understood, a plaintiff cannot challenge a governmental action on the ground that an official lacking authority did it. Rather, a plaintiff's "recourse" is limited to a direct challenge to the official's holding of the office. Andrade v. Lauer, 729 F.2d 1475, 1496–97 (D.C. Cir. 1984). Nowadays, the de facto officer rule has been relaxed to allow for attacks on official action based on a defect in the responsible official's delegation of authority, if the plaintiff brought his lawsuit about the time of the challenged action and the agency was on notice of the alleged appointment defect. *Id.* at 1500. The Supreme Court has held that the doctrine is altogether inapplicable to at least some types of Appointments Clause challenges. Ryder v. United States, 515 U.S. 177, 182–83 (1995) ("We think that one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred."). Although the Court has occasionally applied the

rights organization brought a Section 1983 action[111] challenging a document subpoena issued by the chairman and chief counsel of the United States Senate's Internal Security Subcommittee.[112] The district court dismissed the action, and the D.C. Circuit affirmed the dismissal, ruling that, whatever the merits of the plaintiff's constitutional claims, the chairman and counsel were protected from suit by the doctrine of legislative immunity.[113] This conclusion was supported by the Subcommittee's "ratification and consequent validation" of the subpoena. In the D.C. Circuit's view, the subsequent Subcommittee action established that the defendants' actions were "within the mainstream of legislative effort to a degree adequate to protect against liability in damages for issuing and executing the subpoena."[114] The court did not, however, address whether the Subcommittee's ratification of the subpoena would be valid "for all purposes."[115]

After *Dumbroski*, the D.C. Circuit did not again consider a ratification defense to a challenge to government action until its 1987 decision in *Andrade v. Regnery*.[116] Demoted and laid off Department of Justice employees challenged the legality of that agency's reduction-in-force program.[117] Among other things, the plaintiffs argued that the program was illegal because it had been created by officials serving in violation of the Appointments Clause.[118] The district court rejected the Appointments Clause claim on a number of grounds, including that the program had been ratified by a properly appointed official.[119] The D.C.

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doctrine, the opinion in *Ryder* distinguishes those decisions on the ground that they do not concern a "'trespass upon the executive power of appointment,'" but rather "a misapplication of a statute." *Id.* at 182 (quoting McDowell v. United States, 159 U.S. 596, 598 (1895)). In any event, the de facto officer doctrine is distinct from ratification and perhaps a stronger defense because no subsequent governmental action is required.

111. 42 U.S.C. § 1983.

112. *Dumbrowski*, 358 F.2d at 822–24.

113. *Id.* at 826. The Supreme Court reversed in part, holding that there was a material question of fact as to whether the chief counsel was entitled to legislative immunity. Dombrowski v. Eastland, 387 U.S. 82, 84–85 (1967) (per curiam).

114. *Dumbrowski*, 358 F.2d at 825; *see* McSurely v. McClellan, 553 F.2d 1277, 1298 n. 78 (D.C. Cir. 1976) (following *Dumbrowski* on this point).

115. *Dumbrowski*, 358 F.2d at 825. It bears noting as well that what qualified as a "ratification" was essentially what would have been required in the first instance—namely, a vote of the full Subcommittee.

116. Andrade v. Regnery, 824 F.2d 1253 (D.C. Cir. 1987). In *National Ass'n of Greeting Card Publishers v. U.S. Postal Service*, the court raised, but did not decide, whether an agency may retroactively modify its rules to allow for ratification and then proceed to ratify. Nat'l Ass'n of Greeting Card Publishers v. U.S. Postal Serv., 569 F.2d 570, 601 n.138 (D.C. Cir. 1976).

117. *Andrade*, 824 F.2d at 1254.

118. *Id.* at 1255.

119. *Id.*

Circuit affirmed the district court's judgment in favor of the government but without addressing ratification.[120] Rather, the court held that, because the source of the plaintiffs' harm was the approval of the program and not the predicate steps taken to develop it, and because a properly appointed official approved the program, no violation of the Appointments Clause had injured the plaintiffs.[121] In other words, regardless of whether the program's approval might have impliedly ratified the steps taken to produce the program,[122] the plaintiffs lacked standing to challenge those predicate steps.[123] The plaintiffs could only attack the approval itself, which was an action taken by a constitutionally competent officer. Ratification was therefore irrelevant.

A few years later, the D.C. Circuit was presented with a true ratification defense to a charge of unconstitutional agency action. In *Robertson v. FEC*,[124] the plaintiff (a 1988 presidential candidate) challenged the FEC's determination that he had to repay certain campaign matching funds.[125] Among the plaintiff's grounds for contesting the repayment order was that the FEC's structure violated the Appointments Clause.[126] The plaintiff argued that the FEC's structure was unconstitutional because, as the D.C. Circuit held in *FEC v. NRA Political Victory Fund*[127] (a decision which, as we learned in the preceding section, the Supreme Court declined to hear because of the FEC's untimely cert petition), two commission (although non-voting) memberships were allotted to congressional appointees.[128] After *NRA Political Victory Fund* had been decided and while *Robertson* was still pending, the FEC voted "to ratify its past 'actions in audits of publicly funded presidential campaigns,' including this case."[129] The FEC therefore argued that any Appointments Clause defect in the enforcement action had been

120. *See id.* at 1256–57.

121. *Id.*

122. Of such a kind was the ratification approved in *Doolin Security Savings Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 213–14 (D.C. Cir. 1998), discussed in the following section.

123. *Andrade*, 824 F.2d at 1257 ("[T]he particularized injury that permitted appellants to have standing to raise their claim was the loss of their jobs, not the mere fact that the government-initiated plans that could have resulted in their demotion or termination. It is the actual implementation of the [reduction-in-force program] which we have power to redress, and that action, it is clear, came at the hands of a duly appointed official." (citation omitted)).

124. Robertson v. FEC, 45 F.3d 486 (D.C. Cir. 1995).

125. *Id.* at 488–89.

126. *Id.* at 489.

127. FEC v. NRA Pol. Victory Fund, 6 F.3d 821, 826–27 (D.C. Cir. 1993).

128. Those were the Secretary of the Senate and the Clerk of the House of Representatives. *Robertson*, 45 F.3d at 489.

129. *Id.*

remedied.[130] The D.C. Circuit ruled for the agency but sidestepped the ratification issue by concluding that the plaintiff's receipt of funds from the FEC estopped him from challenging the agency's constitutionality.[131]

In summary, the D.C. Circuit's treatment of ratification, prior to its adoption of the ratification defense to Appointments Clause claims in *Legi-Tech* and *Doolin*, was generally consistent with the doctrine's common law rules. Although the court occasionally considered application of the doctrine in the context of disputes about the propriety of official action, the court never during this period addressed the extent to which the doctrine would be available to defend against constitutional challenges to agency action.

B. Using the Doctrine of Ratification to Resolve an Appointments Clause Challenge Without Actually Determining if the Appointments Clause Has Been Violated

As this section will show, the Appointments Clause ratification defense arose from contested administrative enforcement actions.[132] The defense then expanded to claim the territory of agency adjudications.[133] Along the way, the defense incorporated the rather dubious concept of "self-ratification,"[134] whereby a properly appointed official seeks to validate actions that the same official took prior to the official's proper appointment.[135] Finally, the defense expanded to cover the entire field of administrative practice, including agency rule-making.[136]

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130. *See id.* The plaintiff argued that the FEC lacked the power to ratify because it was an agent-delegate of Congress, and hence only Congress as the principal could ratify by, presumably, amending the statute. Alternatively, the plaintiff argued that the FEC could not ratify its prior acts because its organic statute forbids delegation to agents, and, in any event, the ratification was not the result of an independent reconsideration. Brief for Petitioners at 50–52, Robertson v. FEC, 45 F.3d 486 (D.C. Cir. 1995) (No. 93-1698). The government responded that the plaintiff's arguments were without merit because the FEC was in good faith ratifying its own acts, not those of any agent. Brief for Respondent at 46–48, Robertson v. FEC, 45 F.3d 486 (D.C. Cir. 1995) (No. 93-1686).

131. *Robertson*, 45 F.3d at 490 ("Petitioner, after all, voluntarily accepted over $10 million in public funds disbursed at the Commission's direction. It is hardly open to it now, after having taken the money, to claim that the very statutory instrumentality by which the funds are dispensed may not seek reimbursement because its composition is unconstitutional.").

132. *See* FEC v. Legi-Tech, Inc., 75 F.3d 704 (D.C. Cir. 1996) (involving an FEC civil enforcement action); Doolin Sec. Sav. Bank, F.S.B. v. Off. of Thrift Supervision, 139 F.3d 203 (D.C. Cir. 1998) (involving an Office of Thrift Supervision administrative enforcement action).

133. *See* Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 796 F.3d 111 (D.C. Cir. 2015) (setting royalty rate for internet-based webcasting of digitally recorded music).

134. *See* Wilkes-Barre Hosp. Co. v. NLRB, 857 F.3d 364, 372 (D.C. Cir. 2017).

135. *Id.*

136. *See* Moose Jooce v. FDA, 981 F.3d 26 (D.C. Cir. 2020) (affirming ratification of FDA rule "deeming" vaping products to be subject to the Tobacco Control Act).

This jurisprudential story begins with *FEC v. Legi-Tech*. The FEC brought an enforcement action against Legi-Tech, a company that ran a computer database containing information on file with the agency.[137] The FEC contended that Legi-Tech's subscribers illegally used its database's information to solicit campaign contributions.[138] The district court dismissed the case on the ground that the D.C. Circuit in *NRA Political Victory Fund* had held the FEC's structure to be unconstitutional and that the "FEC could not 'circumvent' [that holding] through its reconstitution and ratification of its former actions."[139] The D.C. Circuit reversed.[140] Although the court acknowledged that "some effects of the unconstitutional structure of the FEC [were] to be presumed to have impacted on the action" despite the agency's ratification of its earlier decision to initiate an enforcement action against Legi-Tech, dismissal of the action to force the FEC to begin the enforcement process anew would be an improper remedy.[141] "Even were the Commission to return to square one—assuming the statute of limitations was not a bar—it is virtually inconceivable that its decisions would differ in any way the second time from that which occurred the first time."[142] The court admitted that its ratification test would validate a "rubberstamp,"[143] but concluded that a rule requiring anything more would necessitate a disfavored inquiry into the "internal deliberations" of government decision-making,[144] or would amount to no more than a delay of the inevitable.[145]

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137. *See Legi-Tech*, 75 F.3d 704.

138. *Id.* at 705–06.

139. *Id.* at 706. In the district court's view, refusing to dismiss would have been tantamount to failing to give full retroactive effect to the D.C. Circuit's decision in *FEC v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993). *Cf.* Harper v. Va. Dep't of Tax'n, 509 U.S. 86, 97 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.").

140. *Legi-Tech*, 75 F.3d at 709.

141. *Id.* at 708.

142. *Id.* The court's conclusion gives the impression that the predicate steps that were ratified were all ministerial or were driven by a record that could not change. Yet one of those predicate steps was "conciliation," a type of (presumably very judgment-laden) mediation that the Commission must engage in with an alleged violator before bringing an enforcement action. *See* 52 U.S.C. § 30109(a)(4)(A)(i).

143. *Legi-Tech*, 75 F.3d at 709.

144. *Id.*

145. *Id.* ("In any event, forcing the Commission to start at the beginning of the administrative process, given human nature, promises no more detached and 'pure' consideration of the merits of the case than the Commission's ratification decision reflected."). Notably, the FEC's ratification defense was the very last item in its opening brief, receiving cursory treatment in the final paragraph; and none of the cases the FEC cited to support its ratification defense concerns the Appointments Clause. Brief

After *Legi-Tech*, it did not take the D.C. Circuit long to signal that the ratification defense was here to stay. In *Doolin*, a savings and loan challenged an order issued by the Office of Thrift Supervision, which concluded that the plaintiff financial firm had committed unsafe and unsound banking practices.[146] The plaintiff argued that the order was invalid because, among other things, the original administrative complaint had been approved by an "acting" director who lacked the authority to initiate such an enforcement proceeding.[147] The D.C. Circuit avoided this question of authority by holding that, even assuming that the acting director's decision to file an administrative complaint was *ultra vires*, the action had been ratified when the acting director's permanent successor issued the order determining that the plaintiff was guilty of the charges alleged in the complaint.[148] The court reasoned that, by finding the plaintiff guilty, the permanent director had necessarily affirmed his predecessor's determination that probable cause existed to charge the savings and loan.[149] Although adverting to the Administrative Procedure Act's harmless error doctrine,[150] the court's ruling rests principally on *Legi-Tech*, in which, according to *Doolin*, the court "sustained the ratification despite misgivings about whether the new FEC had engaged in a 'real fresh deliberation.'"[151] The result in *Legi-Tech* followed *a fortiori* in *Doolin*, the latter opinion explains, because there was "no doubt" that the Office of Thrift Supervision's permanent director had "made a detached

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for Appellant at 36–37, FEC v. Legi-Tech, Inc., 75 F.3d 704 (D.C. Cir. 1996) (Nos. 94-5379, 95-5085) (citing Sullivan v. Carrick, 888 F.2d 1 (1st Cir. 1989) (holding that, in a First Amendment challenge to a disciplinary proceeding of state chiropractic board, the board could ratify an unauthorized notice of disciplinary hearing); Wirtz v. Atlantic States Const. Co., 357 F.2d 442 (5th Cir. 1966) (holding that, in an action to recover minimum wages under the Fair Labor Standards Act, the decision to initiate such an action was delegable by the Secretary of Labor); Bowles v. Wheeler, 152 F.2d 34, 38–41 (9th Cir. 1945) (holding that, in an action to recover treble damages under the Emergency Price Control Act, the decision to initiate such an action was delegable by the head of the Office of Price Administration)). Thus, Legi-Tech's appellate brief correctly observes that "the FEC has not cited a single case—because there is no such case—that supports the proposition that actions by an unconstitutional governmental agency can be insulated from challenge by the perfunctory ratification of a reconstituted governmental agency." Brief for Respondent at 16, FEC v. Legi-Tech, Inc., 75 F.3d 704 (D.C. Cir. 1996) (Nos. 94-5379, 95-5085).

146. Doolin Sec. Sav. Bank, F.S.B. v. Off. of Thrift Supervision, 139 F.3d 203, 204 (D.C. Cir. 1998).

147. *Id.* at 211.

148. *Id.* at 213–14.

149. *Id.* at 213, 213 n.11.

150. *Id.* at 212; *cf.* 5 U.S.C. § 706 ("[T]he court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.").

151. *Doolin*, 139 F.3d at 213 (quoting *Legi-Tech*, 75 F.3d at 709). As the *Doolin* opinion notes, the FEC "must engage in a lengthy, elaborate series of administrative steps involving investigation and deliberation before it votes to bring an enforcement action in court." *Doolin*, 139 F.3d at 213 n.9.

and considered judgment in deciding the merits against the Bank."[152] In reaching that conclusion, the court in *Doolin* distinguished its decision from the Supreme Court's ruling in *NRA Political Victory Fund*,[153] which the court construed as imposing merely a timing limitation on the power to ratify.[154] For that reason, *NRA Political Victory Fund* had no bearing on the plaintiff's anti-ratification arguments, the D.C. Circuit explained, because at the time of the permanent director's ratification, an initiation of the enforcement action still would have been timely.[155]

Thus, with *Legi-Tech* and *Doolin*, we were already dangerously off course from a doctrinally sound application of the ratification doctrine. True, these cases concerned ratifications that were directed to administrative decisions of whether to initiate an enforcement action, and such determinations typically are not independently subject to judicial review.[156] Thus, it might have been possible for later decisions to limit the rulings to contexts where a party's arguments appear to thwart legislative

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152. *Id.* at 213. As previously noted, the court concluded that such a determination necessarily operated as an (implied) affirmation of the original administrative complaint. *See id*. The court also suggested that *Andrade v. Regnery* reached a similar conclusion as to ratification. 824 F.2d 1253 (D.C. Cir. 1987). But as discussed above, *Andrade* did not hold that a prior action had been ratified, but rather that the plaintiffs had not suffered a legally cognizable injury as a result of any action taken by an improperly appointed officer. *Id.* at 1257.

153. FEC v. NRA Pol. Victory Fund, 513 U.S. 88 (1994).

154. *Doolin*, 139 F.3d at 213. The Ninth Circuit has adopted a somewhat broader (and in my view more accurate) interpretation of *NRA Political Victory Fund*. In *Consumer Financial Protection Bureau v. Seila Law, LLC* on remand from the Supreme Court, the Ninth Circuit upheld a ratification by the Bureau's director over the objection that the director could not ratify acts taken by the Bureau prior to the Supreme Court's ruling in *Seila Law, LLC v. Consumer Financial Protection Bureau*, which held the director's removal protections to be unconstitutional but also severable. Consumer Fin. Prot. Bureau v. Seila Law, LLC, 984 F.3d 715 (9th Cir. 2020); Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2207–11 (2020). Were the Ninth Circuit in agreement with the D.C. Circuit over how to apply *NRA Political Victory Fund*, the Ninth Circuit could simply have overruled the objection on the ground that it did not concern a timing issue—something undoubtedly in the court's mind because the defendant's second objection was that the director's ratification came outside of the applicable limitations period, an objection overruled on the ground that there was no applicable limitations period. *Seila Law*, 984 F.3d at 719–20. Instead, the Ninth Circuit entertained the *NRA Political Victory Fund* objection on the merits, ultimately however ruling for the agency based on a distinction between the power of the director to act (which prior to the Supreme Court's ruling was limited) and the power of the agency itself, which the constitutional infirmity of the former never limited. *See id.* at 718–19; *cf.* 12 U.S.C. § 5562(c)(1) (authorizing "the Bureau" to issue civil investigative demands).

155. *Doolin*, 139 F.3d at 213 ("The timing problem posed in [*NRA Political Victory Fund*] is not present here. No statute of limitations would have barred Retsinas from reissuing the Notice of Charges himself and starting the administrative proceedings over again.").

156. *See* FEC v. Legi-Tech, 75 F.3d 704, 709 (D.C. Cir. 1996) ("We must bear in mind that we have no statutory authority to review the FEC's decision to sue . . . ."); *cf.* FTC v. Standard Oil. Co., 449 U.S. 232, 239–47 (1980) (holding that issuance of an administrative complaint is not final agency action under the APA).

limitations on judicial review. But even if the D.C. Circuit had successfully done so, the ratification defense as it existed after *Legi-Tech* and *Doolin* would have been bad enough. Whether to bring an enforcement action is a decision that implicates a high degree of executive discretion or power.[157] Hence, forcing a redo of the actions that were ratified in *Legi-Tech* and *Doolin* would have vindicated one of the Appointments Clause's core purposes: preserving accountability for consequential executive action.[158] In any event, the ratification defense would soon be expanded beyond agency enforcement matters.

That expansion came with *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*.[159] The plaintiff web broadcaster challenged the Copyright Royalty Board's setting of webcasting royalty rates on the ground that the Board's members served in violation of the Appointments Clause.[160] The D.C. Circuit agreed,[161] after which a properly reconstituted Board affirmed its prior decision without conducting a new hearing.[162] The plaintiff objected that the Board's action still violated the Appointments Clause because the newly constituted Board merely reviewed the prior proceeding's record instead of conducting a new hearing; thus, the Board's affirmation of its prior determination was, the plaintiff argued, "still tainted by the Appointments Clause violation that originally led this Court to remand."[163] The D.C. Circuit disagreed, concluding that, under *Legi-Tech* and *Doolin*, the reconstituted Board did not need to restart the royalty

157. *See* Heckler v. Chaney, 470 U.S. 821, 831 (1985) ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.").

158. *See* Edmond v. United States, 520 U.S. 651, 660 (1997) ("[T]he Appointments Clause was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one.").

159. Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 796 F.3d 111 (D.C. Cir. 2015).

160. *Id.* at 115.

161. Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 684 F.3d 1332, 1336–41 (D.C. Cir. 2012).

162. *Intercollegiate Broad. Sys.*, 796 F.3d at 116–17. There is arguably some tension between the court's entertaining of the challengers' "taint" argument and *Andrade*. Andrade v. Regnery, 824 F.2d 1253, 1257 (D.C. Cir. 1987). Recall that, in the latter, the court held that the plaintiffs did not have cognizable injuries from the government's planning of the reduction-in-force program but rather only from its approval, which was done by a properly appointed official. *Id.* One could also say that Intercollegiate suffered a cognizable injury only from the final rate determination, which was made by properly appointed officials, and thus that the court's discussion of "taint" from a prior proceeding conducted in violation of the Appointments Clause was improper. *Andrade*, however, merely anticipates later decisions' requirement of a detached and considered judgment in holding that it was enough that the qualified officer had "final authority over the implementation of the governmental action." *Id.*

163. *Intercollegiate Broad. Sys.*, 796 F.3d at 117.

determination process from step one;[164] it was enough that the new Board had conducted an "independent evaluation of the merits."[165] The court also rejected the plaintiff's argument that the ratification defense created by *Legi-Tech* and *Doolin* was limited to the specific type of administrative actions at issue in those cases.[166]

Thus, some sixteen years or so after *Legi-Tech*, the D.C. Circuit had firmly established the rule that an administrative process (whether enforcement or adjudicatory) infected at some point by an Appointments Clause violation need not be restarted from that point if a properly appointed official ratifies the action taken by an improperly appointed predecessor.[167] But what of a "self-ratification"? That is, can the "independent evaluation of the merits"[168] and "detached and considered judgment"[169] standards be satisfied when the person ratifying is the same person who took the prior action in violation of the Appointments Clause?

"Yes," the D.C. Circuit concluded in its 2017 decision of *Wilkes-Barre Hospital Company, LLC v. NLRB*.[170] At issue was a determination by the National Labor Relations Board that the petitioner hospital had violated the National Labor Relations Act.[171] The hospital challenged the determination, in part, under the Appointments Clause, citing the Supreme Court's then recent decision in *NLRB v. Noel Canning*[172] holding that a majority of the Board members' appointments were invalid recess appointments.[173] After *Noel Canning*, a Board re-composed of properly appointed members voted to affirm all of its prior determinations, including the appointment of the regional director who had initiated the administrative action against the hospital.[174] That official in turn ratified all of his prior determinations.[175] The hospital contested these ratifications, but was rebuffed by the D.C. Circuit. Quoting from *Intercollegiate* and *Doolin*, the court reasoned that the "[h]ospital presents no evidence to

164. *Id.* at 118–19.

165. *Id.* at 117.

166. *Id.* at 119 ("Intercollegiate also seeks to distinguish both *Legi-Tech* and *Doolin* on the ground that they involved administrative enforcement actions—'an area of traditionally broad discretion'—rather than the exercise of judicial authority in an adversarial proceeding. . . . But neither *Legi-Tech* nor *Doolin* rested its holding on that ground.").

167. *See id.* at 117–21.

168. *Id.* at 117.

169. Doolin Sec. Sav. Bank, F.S.B. v. Off. of Thrift Supervision, 139 F.3d 203, 214 (D.C. Cir. 1998).

170. Wilkes-Barre Hosp. Co. v. NLRB, 857 F.3d 364 (D.C. Cir. 2017).

171. *Id.* at 367.

172. NLRB v. Noel Canning, 573 U.S. 513 (2014).

173. *Id.* at 556.

174. *Wilkes-Barre Hosp. Co.*, 857 F.3d at 371.

175. *Id.*

suggest that the Board failed 'to conduct an independent evaluation of the merits,' or make 'a detached and considered judgment,' when it ratified [the regional director's] appointment."[176] Reaching the same conclusion with respect to the regional director's self-ratification, the court explained, this time quoting from *Legi-Tech* and *Doolin*, that "the [h]ospital presented no evidence suggesting that [the regional director] failed to make a detached and considered judgment or that he was 'actually biased' against the [h]ospital."[177] Moreover, "forcing [the regional director] to reissue the complaint in this case would likely 'do nothing but give the [hospital] the benefit of delay.'"[178] The court acknowledged that the regional director's self-ratification "presents a more difficult question" than the Board's because the former acted as "both the principal and the agent,"[179] while the reconstituted Board was composed of different personnel. But the court then noted that it had flagged a similar issue in *Doolin* and *Legi-Tech* and yet had still affirmed the ratifications there at issue.[180] The court's remedial hands were tied: at most, the hospital could force the administrative process to return to step one, but only with the same regional director. The hospital could not absolutely prevent the regional director from re-initiating an enforcement action, and forcing him to do so would "not necessarily promise a 'more detached' and 'pure' consideration of the merits of the case."[181]

Let us pause now again to assess. With *Legi-Tech* and *Doolin*, the D.C. Circuit begot the ratification defense. With *Intercollegiate*, the court made clear that the defense would be available to remedy not just defects

176. *Id.* (first quoting Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 796 F.3d 111, 117 (D.C. Cir. 2015); and then Doolin Sec. Sav. Bank, F.S.B. v. Off. of Thrift Supervision, 139 F.3d 203, 213 (D.C. Cir. 1998)).

177. *Id.* at 372.

178. *Id.*

179. *Id.* It was not, however, precisely the same issue. In neither *Legi-Tech*, nor *Doolin*, nor *Intercollegiate* were the ratifiers responsible for the Appointments Clause violation: in *Legi-Tech*, the violation was caused by the presence of the congressional ex officio appointees, whom the FEC excluded when it voted to ratify its past actions; in *Doolin*, the acting, not the permanent, director was responsible for the alleged violation; and in *Intercollegiate*, the rate-making decision after remand was made by a fresh panel of properly appointed copyright judges. Hence, *Wilkes-Barre* was the D.C. Circuit's first decision upholding a ratification of an action for which the principal himself was responsible. The opinion in *Wilkes-Barre* notwithstanding, it is not implausible that there may be some material difference in the degree of authentic reconsideration between a principal who is ordered to do the act himself that was originally done by his agent, and a principal who is ordered to merely redo the act that was originally done by himself.

180. *Id.*

181. *Id.* (quoting FEC v. Legi-Tech, 75 F.3d 704, 709 (D.C. Cir. 1996)). The Third Circuit, following *Doolin* and *Legi-Tech*, reached the same result. Advanced Disposal Servs. E., Inc. v. NLRB, 820 F.3d 592, 602–06 (3d Cir. 2016). The Ninth Circuit as well has upheld a self-ratification without do-over. Consumer Fin. Prot. Bureau v. Gordon, 819 F.3d 1179, 1192 (9th Cir. 2016).

in agency enforcement actions but also agency adjudications.[182] Then with *Wilkes-Barre Hospital*, the court extended the defense further to include self-ratifications where even the pretense of a principal–agent relationship could not be maintained.[183] What, you may well ask, was left that the ratification defense had not yet claimed?

Two years later, *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives*[184] presented an as yet unaddressed scenario for the operation of a ratification defense to an Appointments Clause challenge. The plaintiff gun owners brought a pre-enforcement challenge to a Bureau rule classifying their weapons as machineguns.[185] They argued that the rule was invalid because, among other reasons, the Acting Attorney General lacked authority under the Appointments Clause to promulgate the rule.[186] While the case was pending, a duly appointed Attorney General ratified the rule.[187] The challengers accepted the validity of the ratification but argued that the court should still address the merits of the Appointments Clause challenge under either of two exceptions to mootness.[188] The D.C. Circuit declined, concluding that the Attorney General's ratification operated as a resolution of the Appointments Clause claim on the merits rather than a mooting of the same.[189]

Finally, we come to the circuit's most recent discussion of ratification—*Moose Jooce v. FDA*.[190] This case gave the court an opportunity to address what had escaped review in *Guedes*, namely, an Appointments Clause pre-enforcement challenge to an agency rule. A collection of vaping shops challenged the FDA's so-called Deeming Rule,[191] which subjects vaping products to the substantial regulatory strictures of the Tobacco Control Act.[192] FDA had determined that exempting vaping products from Tobacco Control Act regulation posed a

182. Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 796 F.3d 111, 119 (D.C. Cir. 2015).

183. *See Wilkes-Barre Hosp. Co.*, 857 F.3d at 372.

184. Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 920 F.3d 1 (D.C. Cir. 2019).

185. *Id.* at 6. The rule was later enjoined by the Sixth Circuit. Gun Owners of Am. v. Garland, 992 F.3d 446, 474–75 (6th Cir. 2021).

186. *Guedes*, 920 F.3d at 9.

187. *Id.* at 10.

188. *Id.* at 12.

189. *Id.* at 13. The court also went on to observe that, even if the ratification's effect should be understood through mootness, the court would still decline to address the Appointments Clause claim because neither of the plaintiffs' proffered mootness exceptions applied. *Id.* at 14–16.

190. Moose Jooce v. FDA, 981 F.3d 26 (D.C. Cir. 2020), *cert. denied*, 141 S. Ct. 2854 (2021).

191. Deeming Tobacco Products to Be Subject to the Federal Food, Drug, and Cosmetic Act, 81 Fed. Reg. 28,976, 28,979 (May 10, 2016) (amending portions of 21 C.F.R. pts. 1100, 1140, 1143).

192. 21 U.S.C. §§ 387–387(u).

danger to public health[193] and, therefore, those products should be subject to the Tobacco Control Act's provisions, including requiring pre-marketing approval of most covered products as well as pre-approval of certain types of product advertising.[194] The plaintiffs' lead claim was that the Deeming Rule violates the Appointments Clause because it was issued by the FDA's Associate Commissioner for Policy, a career civil service position.[195] About eighteen months after the litigation had commenced, then FDA Commissioner Scott Gottlieb purported to ratify the Deeming Rule.[196] The plaintiffs argued that Commissioner Gottlieb's ratification was invalid because (1) it had come only after suit had been filed and thus would have the effect of depriving the plaintiffs of their cause of action under the Administrative Procedure Act (APA), and (2) it did not comport with the APA's requirements for reasoned decision-making.[197] On the latter point, the plaintiffs argued that the Gottlieb ratification was invalid because it deliberately ignored a substantial body of material pertaining to the health effects of vaping, which had been produced since the Deeming Rule's issuance in 2016.[198] The ratification's failure to consider the recent health research therefore violated the fundamental APA principle that agencies must consider all available and relevant evidence and must explain why their decisions are reasonable in light of that evidence.[199]

In upholding the Gottlieb ratification, the D.C. Circuit concluded that the plaintiffs' attacks were precluded by circuit precedent.[200] As to the plaintiffs' first objection, the court ruled that its decision in *Legi-Tech* was apposite; there the court upheld a ratification that had occurred only after the plaintiff had raised its Appointments Clause objection in litigation.[201] As to the second objection, the court cited *Intercollegiate*, *Doolin*, and *Legi-Tech* for the proposition that the *only* limitations on a government principal's power to ratify are that the principal conduct an unbiased and independent evaluation of the merits using a detached and considered

193. *See* Deeming Tobacco Products to Be Subject to the Federal Food, Drug, and Cosmetic Act, 81 Fed. Reg. at 28,975.

194. *See* 21 U.S.C. §§ 387j(a)(2), 387k(b)(2)(A).

195. *Moose Jooce*, 981 F.3d at 28.

196. FDA also relied, successfully in the district court, upon a blanket and boilerplate ratification issued by former FDA Commissioner Robert Califf. *See* Moose Jooce v. FDA, No. 18-cv-203 (CRC), 2020 WL 680143, at *5 (D.D.C. Feb. 11, 2020). The D.C. Circuit, however, declined to address whether such a boilerplate affirmation would satisfy the standards articulated in *Legi-Tech*, *Doolin*, and *Intercollegiate*, given the court's decision to uphold the Gottlieb ratification under those standards. *See Moose Jooce*, 981 F.3d at 29.

197. *Moose Jooce*, 981 F.3d at 28–30.

198. *Id.* at 29.

199. *See id.* (discussing Butte County v. Hogen, 613 F.3d 190 (D.C. Cir. 2010)).

200. *Id.*

201. *Id.*

judgment—in other words, the normal rules of administrative procedure just do not apply.[202]

C. Ratification as Resolution of the Merits of an Appointments Clause Claim[203]

Thanks to *Legi-Tech*, *Doolin*, *Intercollegiate*, *Wilkes-Barre*, and *Moose Jooce*, agencies litigating in the D.C. Circuit have a powerful defense to avoid litigation of Appointments Clause challenges. What has made the ratification defense a nearly insuperable bar to reaching the merits in such litigation is how the D.C. Circuit has characterized the jurisprudential effect of the defense's successful employment.

As *Guedes* illustrates, when a government official lawfully ratifies an action, the D.C. Circuit considers the consequences of the official's act to be a resolution of the merits of any challenge to that agency action: "We have repeatedly held that a properly appointed official's ratification of an allegedly improper official's prior action, rather than mooting a claim, resolves the claim on the merits by 'remedy[ing] [the] defect' (if any) from the initial appointment."[204] That is so regardless of whether the Appointments Clause objection is raised in a defensive posture or as part of a pre-enforcement challenge to agency action.[205] The court has defended this rule by analogizing to cases where agency action was challenged because it had not been preceded by notice and comment, but the action was nevertheless upheld because the agency instituted a post-action comment period.[206]

Although perhaps superficially convincing, the D.C. Circuit's categorical merits-not-mootness rule falls apart under closer scrutiny. Take the *Moose Jooce* litigation as an example. As discussed above, the plaintiffs had brought a pre-enforcement challenge to a regulation allegedly issued in violation of the Appointments Clause.[207] After the regulation had been challenged, a properly appointed official ratified the rule, and the D.C. Circuit concluded that this ratification "cured any

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202. *See id.* at 29–30.

203. One circuit court has, without elaboration, described ratification of an alleged Appointments Clause violation as "an equitable remedy." Advanced Disposal Servs. E., Inc. v. NLRB, 820 F.3d 592, 603 (3d Cir. 2016).

204. Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 920 F.3d 1, 13 (D.C. Cir. 2019) (quoting Wilkes-Barre Hosp. Co. v. NLRB, 857 F.3d 364, 371 (D.C. Cir. 2017)).

205. *See Moose Jooce*, 981 F.3d at 30.

206. *Guedes*, 920 F.3d at 13. The analogy appears to be overdrawn. In the one case, what one has sued for—notice and comment—has been provided. In the other case, what one has demanded—proper promulgation of a rule—has not happened because, although ratification may legitimize an otherwise invalid action, it is not a redo of that action.

207. *Moose Jooce*, 981 F.3d at 28–29.

potential Appointments Clause defect," thereby "resolv[ing] the claim on the merits."[208] But despite the court's declaration, the purported ratification did not really resolve the alleged violation. The old rule issued by an officer serving in violation of the Appointments Clause still exists as originally promulgated, and the decision-making process that resulted in its issuance has never been conducted by a constitutional officer. Possibly one could argue that the *Moose Jooce* plaintiffs were no longer harmed by the rule once it had been ratified, but that point sounds much more like an argument for mootness than for a defense on the merits.[209] Yet the D.C. Circuit has shown no interest in carving out any exception to its understanding of ratification's effect on an Appointments Clause challenge.[210]

Ultimately, however compelling (or not) the D.C. Circuit's characterization of the ratification defense's impact is, its thwarting of the development of Appointments Clause case law cannot be doubted. So long as an agency ratifies at any point prior to final judgment, the agency can prevent the courts from addressing what may be flagrant and repeated violations of a key support for the separation of powers.[211] In the next section, I argue that, for this and other reasons, the D.C. Circuit's ratification doctrine should be discarded.

208. *Id.* at 30 (quoting *Guedes*, 920 F.3d at 13).

209. *See* Alexander v. Yale Univ., 631 F.2d 178, 183 (2d Cir. 1980) ("A party's case or controversy becomes moot either when the injury is healed and only prospective relief has been sought or when it becomes impossible for the courts, through the exercise of their remedial powers, to do anything to redress the injury.").

210. *E.g.*, *Moose Jooce*, 981 F.3d at 30. The court has, however, recognized "a narrow exception to ratification's curative effect for Appointments Clause challenges to the acts of 'purely decision recommending employees,'" on the ground that the constitutionality of such acts would "escape judicial review" without such an exception. *Guedes*, 920 F.3d at 13 (quoting Landry v. FDIC, 204 F.3d 1125, 1131–32 (D.C. Cir. 2000)). That explanation is strikingly similar to the rationale underlying the "capable of repetition yet evading review" exception to mootness. *See, e.g.*, Turner v. Rogers, 564 U.S. 431, 439–40 (2011) (explaining that a case is not moot "if (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again" (quoting Weinstein v. Bradford, 423 U.S. 147, 149 (1975))).

211. This under-enforcement and law-development-impediment dynamic is not unlike what the doctrine of qualified immunity has produced. *See generally Project on Immunity and Accountability*, INST. FOR JUST., https://ij.org/issues/project-on-immunity-and-accountability/ [https://perma.cc/R9WW-JSPA].

V. WHY THE D.C. CIRCUIT'S RATIFICATION DEFENSE SHOULD BE ABANDONED—OR, AT THE VERY LEAST, SUBSTANTIALLY CIRCUMSCRIBED

We have now reviewed the common law of ratification, its employment in the Supreme Court, and its unwarranted application to Appointments Clause challenges by the D.C. Circuit. This section explains why the D.C. Circuit's ratification defense is irreconcilable with *NRA Political Victory Fund*, which is the best guidance we have from the Supreme Court on how to use ratification in disputes concerning official action. This section also demonstrates that the ratification defense cannot be squared with the common law of ratification or with an appropriately vigorous enforcement of the doctrine of separation of powers, and that the ratification defense inhibits the ordered judicial development of that doctrine.

A. The Ratification Defense Cannot be Reconciled with NRA Political Victory Fund

The Supreme Court has cited *NRA Political Victory Fund* in only a handful of decisions.[212] Moreover, despite the Supreme Court's growing Appointments Clause docket, no decision has yet addressed how the common law doctrine of ratification should operate—if at all—in Appointments Clause challenges.[213] Thus, in assessing the propriety of the D.C. Circuit's ratification doctrine, our best guidance is *NRA Political Victory Fund*, amplified by the common law of ratification upon which it relies. How does the D.C. Circuit's rule stack up?

Not very well. Perhaps its biggest flaw is the ratification defense's watering down of *NRA Political Victory Fund*'s incorporation of a key limitation at common law on the power of the principal to ratify—namely, that the principal must have the power to take the action in question both originally and at the time of ratification.[214] Recall that the Supreme Court in *NRA Political Victory Fund* rejected an attempted ratification because

212. Rather, subsequent cases have relied on its holding that the time period for filing a petition for writ of certiorari in a civil case is jurisdictional, Bowles v. Russell, 551 U.S. 205, 212 (2007), and that decisions that do not discuss jurisdiction are not precedent for the existence of jurisdiction, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 91 (1998).

213. As noted above, *supra* note 94, the Court in *Seila Law* and *Lucia* adverted to ratification but in neither opinion did the Court address whether it may be applied to constitutional claims.

214. FEC v. NRA Pol. Victory Fund, 513 U.S. 88, 98 (1994). The logic of the D.C. Circuit's narrowing of *NRA Political Victory Fund* may ultimately render that decision a dead letter. *See* Consumer Fin. Prot. Bureau v. Navient Corp., No. 3:17-CV-101, 2021 WL 134618, at *11–15 (M.D. Pa. Jan. 13, 2021) (using the doctrine of equitable tolling to overrule a statute-of-limitations objection to an agency's ratification).

the purported principal (the Solicitor General) no longer had, at the time of ratification, the power to take the action to be ratified in the first instance: "His authorization simply came too late in the day to be effective."[215] As we have seen, the D.C. Circuit has construed this limitation on ratification as purely a timing problem like that presented by a statute of limitations.[216] Hence, in the absence of any such timing problem, a ratification should be upheld, per the D.C. Circuit, so long as it is the result of an "independent evaluation of the merits"[217] and a "detached and considered judgment"[218] based upon "full knowledge of the decision to be ratified."[219] Accordingly, all of the otherwise normally applicable procedural and substantive limitations governing agency action—not just small points like signature of a rule by the appropriate agency decision-maker,[220] but also really significant limitations, like the obligation to take into account all relevant evidence and to explain how the decision reached is justified by that evidence[221]—are irrelevant. The D.C. Circuit's ratification defense thus effectively eliminates what one might describe as *NRA Political Victory Fund*'s "power" proviso—a principal may ratify that which the principal could have done at the time the agent attempted to, *provided* that the principal still has the power when ratifying to do the original act.[222]

It is no answer to this critique of the ratification defense that agency officials in their public acts should be governed by different principles than those common law rules that govern private actors:[223] the ratification at issue in *NRA Political Victory Fund* concerned the acts of government officials, yet that aspect of the case did not stop the Supreme Court from

215. *NRA Pol. Victory Fund*, 513 U.S. at 98.

216. *See, e.g.*, Doolin Sec. Sav. Bank, F.S.B. v. Off. Thrift Supervision, 139 F.3d 203, 213 (D.C. Cir. 1998); Advanced Disposal Servs. E., Inc. v. NLRB, 820 F.3d 592, 603–04 (3d Cir. 2016).

217. Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 796 F.3d 111, 117 (D.C. Cir. 2015).

218. *Doolin Sec. Sav. Bank*, 139 F.3d at 213.

219. *Advanced Disposal*, 820 F.3d at 602.

220. *See, e.g.*, Huntco Pawn Holdings, LLC v. U.S. Dep't of Def., 240 F. Supp. 3d 206, 232 (D.D.C. 2016); Alfa Int'l Seafood v. Ross, 264 F. Supp. 3d 23, 46 (D.D.C. 2017).

221. *See, e.g.*, Moose Jooce v. FDA, 981 F.3d 26, 29 (D.C. Cir. 2020).

222. FEC v. NRA Pol. Victory Fund, 513 U.S. 88, 98 (1994) ("[I]t is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, *but also at the time the ratification was made*." (quoting Cook v. Tullis, 85 U.S. 332, 338 (1874))).

223. *See NRA Pol. Victory Fund*, 513 U.S. at 98 (discussing the issue of whether the Solicitor General could ratify the FEC's filing and concluding that it was "at least presumptively governed by principles of agency law, and in particular the doctrine of ratification"). *Contra Alfa Int'l Seafood*, 264 F. Supp. 3d at 44 ("The question in this case does not, however, arise under 'the law of agency' . . . . Instead, the question presented is one of administrative law . . . .").

applying the common law rules and limitations of ratification.[224] Moreover, nothing in the Supreme Court's decision indicates that the Court viewed the defect in the Solicitor General's attempted ratification as *necessarily* about timing.[225] Rather, the Court's inquiry was focused on authority; it just so happened that the Solicitor General's lack of authority was a function of the passage of time.

Perhaps the D.C. Circuit has been comfortable with weakening *NRA Political Victory Fund*'s power proviso because the concerns of Congress and the courts about arbitrary decision-making which underlie modern administrative law,[226] but which are expressly ignored when adjudicating the adequacy of an official's ratification, are impliedly considered by the "independent evaluation" and "detached and considered judgment" requirements of the ratification defense. Yet those standards are no real substitute in practice for the demands of the APA and other laws that ensure that government decision-making is public, rational, and competently explained.[227] The decision in *Moose Jooce* is a fine example of this shortchanging of the APA as applied to the common law rule that a principal's ratification must be subject to the same constraints as the agent's original act. Recall that, in *Moose Jooce*, the D.C. Circuit held that "the proposition that administrative officials must consider new evidence in order to make non-arbitrary, reasoned decisions" did not apply to the FDA Commissioner's ratification of the Deeming Rule because the ratification was issued after the original rule-making process had been completed and thus by definition was not subject to the procedures governing that process.[228] In other words, an important component of the obligation of reasoned decision-making[229] does not

224. *NRA Pol. Victory Fund*, 513 U.S. at 98–99.

225. *See id.*

226. *See* Dep't of Comm. v. New York, 139 S. Ct. 2551, 2575–76 (2019) ("The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise.").

227. *See* Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962))).

228. *Moose Jooce*, 981 F.3d at 29 ("Here, the rulemaking record closed in 2016 and consequently Commissioner Gottlieb had no such obligation to consider new evidence in 2019. Therefore, it was not arbitrary and capricious for him to ratify the Deeming Rule without considering the new evidence that appellants reference.").

229. *See, e.g.*, Butte County v. Hogen, 613 F.3d 190, 194 (D.C. Cir. 2010) ("[A]n agency's refusal to consider evidence bearing on the issue before it constitutes arbitrary agency action . . . .").

apply to the issue of whether to promulgate an industry-wrecking rule[230] so long as that decision comes in the form of a ratification rather than an initial approval. Thus, as the *Moose Jooce* decision illustrates, to allow the D.C. Circuit's standards for ratification to substitute for those established in the APA and other law inevitably undercuts safeguards against arbitrary administrative power.[231]

Even apart from *NRA Political Victory Fund*, Supreme Court case law strongly supports treating certain limitations on an official's power to act in the first instance as relevant to determining whether the official's attempt to ratify another's act is valid. This issue arose frequently in the latter half of the nineteenth century when the Court had quite a few cases regarding local governments' attempts to avoid paying on municipal bonds (typically issued to attract railroads to town). The usual defense advanced by the local governments was to point to some purported defect in the bonds' issuance.[232] A representative discussion can be found in *Marsh v. Fulton County*.[233] There, the plaintiff bondholders sued the County to collect on bonds that the latter had issued.[234] The County resisted in part on the ground that the County Clerk had illegally sold the bonds because the County's electorate did not have an opportunity to approve their sale. The bondholders replied that, even if such a vote had been required originally, the bonds were ratified by subsequent actions of the County's board of supervisors treating the bonds as legal.[235] In ruling for the County, the Supreme Court explained not only that a vote was required for the bonds to be legal, but that, precisely because such a vote was required, the County's purported ratification without such a vote was void.[236] The County's board of supervisors "could not, therefore, ratify a subscription without a vote of the county, because they could not make a

230. *See, e.g.*, Lauren H. Greenberg, Note, *The "Deeming Rule": The FDA's Destruction of the Vaping Industry*, 83 BROOK. L. REV. 777, 779 (2018) ("The high fees and burdensome regulatory scheme threaten to put small, previously booming businesses and vapor shops out of business for good.").

231. *See* AFL-CIO v. NLRB, 471 F. Supp. 3d 228, 238 (D.D.C. 2020) ("[I]n the APA, Congress fashioned a statutory cause of action, and a remedy, for the longstanding legal claim that the agency-defendant had unlawfully made the challenged policy determination in an 'arbitrary [or] capricious' fashion." (quoting 5 U.S.C. § 706(2)(A))).

232. *E.g.*, Bd. of Cnty. Comm'rs v. Beal, 113 U.S. 227 (1885); Daviess County v. Huidekoper, 98 U.S. 98 (1878); Citizens' Sav. & Loan Ass'n v. City of Topeka, 87 U.S. (20 Wall.) 655 (1874); Bd. of Supervisors v. Schenck, 72 U.S. (5 Wall.) 772 (1866); Bissell v. City of Jeffersonville, 65 U.S. (24 How.) 287 (1860).

233. Marsh v. Fulton County, 77 U.S. (10 Wall.) 676 (1870).

234. *See id.* at 681.

235. *Id.*

236. *Id.* at 682–83.

subscription in the first instance without such authorization."[237] As with municipal bonds, so with agency action: an officer may have the power to issue a rule or an adjudication, but that power is circumscribed by the APA. Thus, if the officer's ratification of an otherwise APA-defective rulemaking or adjudication would not itself satisfy the APA as a stand-alone action, then it follows that the officer's ratification cannot ratify the deficient action of the officer's agent. It is just as in *Marsh*. The County there undoubtedly had the power to issue the bonds, but only after going through the procedure of a vote of its electorate.

Another way in which the D.C. Circuit's ratification defense goes awry under *NRA Political Victory Fund* is its misunderstanding of the relevant frame of analysis. The decision in *Moose Jooce* again presents a good example. There, the D.C. Circuit affirmed an FDA Commissioner's ratification of a rule issued by a subordinate FDA employee three years earlier.[238] The court found no *NRA Political Victory Fund* problem in the fact that the ratification was expressly limited to the material contained in the 2016 record and thus that the ratification deliberately ignored post-2016 evidence bearing directly on the rule.[239] The court acknowledged the general APA principle that "administrative officials must consider new evidence in order to make non-arbitrary, reasoned decisions."[240] But the court considered that principle inapplicable to the dispute before it because "the rulemaking record closed in 2016 and consequently Commissioner Gottlieb had no such obligation to consider new evidence in 2019."[241] The trouble with the court's analysis is that it begs the question of whether the 2016 decision was proper. That is, the only reason why the record could

237. *Id.* at 684; *accord* Norton v. Shelby County, 118 U.S. 425, 451–52 (1886). But in a number of cases, the Court was willing to overlook certain procedural irregularities in the municipality's original transaction, such as whether proper notice of a qualifying election had been provided. *Beal*, 113 U.S. at 237–40. The rationale was not, however, that the local government had effected a valid ratification despite the alleged prior procedural irregularity, but rather that the local government was now estopped from relying upon the prior irregularity to avoid paying on the bonds, *id.* at 240. See *Board of Supervisors v. Schenk*, 72 U.S. at 781–85, for an example of the admixture of ratification and estoppel. But, just as with ratification, where there was clearly no authority to begin with, there also could be no estoppel. *Citizens' Sav. & Loan Ass'n*, 87 U.S. at 667; RESTATEMENT (SECOND) OF AGENCY § 103 ("A person may be estopped to deny that he has ratified an act or transaction."); *cf. Bissell*, 65 U.S. at 298–300 (factual predicate necessary to the power to ratify issuance of bonds cannot be attacked once the bonds have been issued and acquired by bona fide purchasers). *See generally Daviess County*, 98 U.S. at 101 ("There is no difficulty in appreciating the distinction stated; and we are now to ascertain whether the error we are considering, assuming it to be one, arises from an irregularity in the exercise of an existing power, or whether there is total want of authority to act.").

238. *See* Moose Jooce v. FDA, 981 F.3d 26, 28–30 (D.C. Cir. 2020).

239. *See id.* at 28–29.

240. *Id.* at 29.

241. *Id.*

be closed in 2016 would be if the 2016 rule issuance were proper. But the whole point of ratification is to rectify an otherwise invalid action. As one prominent treatise explains, "ratification is not a form of authorization" but is rather "a cure for the lack of authorization, or a substitute for authorization," for it "presupposes that there was no authority; and there can, in the nature of the case, be no authority to do an act given after the act is done."[242] Hence, to determine whether a ratification is effective, one must assume that the prior act is not valid and therefore is in need of some additional authorization in order to be validated. Again, in *NRA Political Victory Fund*, the Supreme Court did not apply a loosened standard for what constituted a timely cert petition. Rather, the Court addressed the question of the timeliness of the FEC's cert petition on the assumption that it had not actually been filed when originally submitted, and only then did the Court inquire as to whether the Solicitor General's authorization of that petition was timely according to the standard measure of timeliness.[243] Just so, in *Moose Jooce*, this principle should have led the D.C. Circuit to review the FDA Commissioner's attempted ratification on the assumption that the 2016 rule had never been issued and, thus, that the rulemaking record had not closed.[244]

B. The Ratification Defense Cannot be Reconciled with Traditional Ratification Principles

The preceding section[245] described how the D.C. Circuit's ratification defense runs afoul of *NRA Political Victory Fund* in at least two ways: (1) the defense improperly limits that decision to questions about a purported ratification's timeliness, and (2) the defense illogically adjudges the validity of a purported ratification while also assuming that the portion of the act to be ratified is already valid. But the faults of the D.C. Circuit's ratification defense run far deeper than a conflict with Supreme Court precedent. The defense cannot be squared with four basic principles undergirding the common law doctrine of ratification: (1) a valid principal-agent relationship must exist; (2) the agent must purport to act on behalf of a principal; (3) the principal must have the power to do the original act at the time of ratification and the power must be exercised

242. MECHEM, *supra* note 52, § 348, at 261.

243. FEC v. NRA Pol. Victory Fund, 513 U.S. 88, 98 (1994).

244. *See* Thompson v. U.S. Dep't of Lab., 885 F.2d 551, 555 (9th Cir. 1989) ("The 'whole' administrative record, therefore, consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position.").

245. *See supra* Section V.A.

consistent with the limitations that applied to the agent's act; and (4) no third-party rights may be disturbed.

First, ratification is a species of agency law, and thus presupposes that the act to be ratified is one not only that the principal could have done in the first instance, but also one that the principal could have authorized an agent to do on the principal's behalf.[246] Yet, in Appointments Clause challenges, the argument is always that the governmental agent was constitutionally incapable of doing the act, and thus that the governmental principal was constitutionally incapable of delegating to that agent the power that would otherwise enable a ratification.[247] Hence, because the lawfulness of the principal-agent relationship is directly challenged in an Appointments Clause case, a necessary predicate for ratification's operation will always be absent.[248] Put another way, either there is an Appointments Clause violation, in which case there is no valid principal-agent relationship that can sustain a ratification, or there is no Appointments Clause violation, in which case ratification is irrelevant.

A second reason why ratification is generally a poor fit in Appointments Clause cases derives from the traditional common law rule that ratification operates only when the agent, whose acts are to be ratified, purported to act for a principal.[249] Thus, although a ratification defense may in this regard be plausible as against a challenge to an official's authority to act with power that is expressly exercised in someone else's name,[250] it is a very poor fit when that official is attempting to exercise

246. *See* RESTATEMENT (SECOND) OF AGENCY § 84 cmt. a ("If . . . one can create a power in another to affect his rights by doing an act on his account, and such an act is purported to be done on his account by the other, or, if an act of service is intended to be done on his account, the act is ratifiable."); RESTATEMENT (THIRD) OF AGENCY § 3.04(3) ("If performance of an act is not delegable, its performance by an agent does not constitute performance by the principal.").

247. *See* Lucia v. SEC, 138 S. Ct. 2044, 2049–51 (2018).

248. Perhaps that might not be so in cases of so-called self-ratification, where a properly appointed government officer seeks to ratify acts that the officer took prior to appointment. A self-ratification would, however, likely fail on other grounds, such as the lack of a plausible principal-agent relationship.

249. RESTATEMENT (SECOND) OF AGENCY § 85(1); *see* Cent. Nat'l Bank v. Royal Ins. Co., 103 U.S. 783, 786 (1880) ("There is here no question of ratification. This can only arise where the borrowing is by the agent for the company without authority, and the company adopts by its acts what was done by the agent. Here the borrowing was by the agent for himself and not the company.").

250. This happens to be the precise scenario in the cases that the government relied upon in the initial D.C. Circuit decisions that gave birth to the Appointments Clause ratification defense, *viz*., a statute grants Official X the power to do something, but X instead delegates to Subordinate Y, who in turn exercises that power against Citizen A, who in turn objects on the ground that Y has no statutory authority to do so—only X does—but then A's objection is overruled when X ratifies Y's act. *See, e.g.*, Wirtz v. Atlantic States Constr. Co., 357 F.2d 442 (5th Cir. 1966) (holding that the decision to initiate an action to recover minimum wages under the Fair Labor Standards Act was delegable by the

authority in the official's own name.[251] Yet, in many Appointments Clause cases, the government "agents" were indeed acting for themselves, the trouble of course being that they did not have the constitutional authority so to act[252]—for example, the members of the NLRB in *Wilkes-Barre Hospital* or the commissioners of the FEC in *Legi-Tech*.[253] One might counter that, if "the United States government" is viewed as the principal and all of its officers as agents thereof, then there is no problem with a ratification by a properly deputized agent.[254] But this would be a strained way of interpreting how most federal action is understood to operate. Each federal office has certain powers attached to it, which under the Appointments Clause may be exercised by a person properly appointed to hold that office. Those powers, although ultimately derived from "the People," nevertheless still pertain to that office and are properly exercised by the occupant of that office.[255] This presumably explains why, in none

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Secretary of Labor); Bowles v. Wheeler, 152 F.2d 34, 38–41 (9th Cir. 1945) (holding that, in an action to recover treble damages under the Emergency Price Control Act, the decision to initiate such an action was delegable by the head of the Office of Price Administration).

251. Even setting aside the problem of the absence of a true principal-agent relationship, there is still the problem of capacity. A principal generally cannot ratify an agent's act if the act was done at a time when the principal lacked the power to do the act directly. *See* RESTATEMENT (SECOND) OF AGENCY § 84(2) ("An act which, when done, the purported or intended principal could not have authorized, he cannot ratify, except an act affirmed by a legal representative whose appointment relates back to or before the time of such act.").

252. Perhaps an exception exists when a person is serving as an "acting" officer under the Federal Vacancies Reform Act, in which case one might plausibly characterize the "acting" official as the agent for the as-yet not qualified permanent official. Notably, Congress has expressly allowed for some ratification of improper actions taken by "acting" officials. *See* 5 U.S.C. §§ 3348(e)(1)–(5). Congress has also implicitly recognized the general power of the President to ratify subordinates' actions. *See* 3 U.S.C. § 301.

253. Wilkes-Barre Hosp. Co. v. NLRB, 857 F.3d 364, 370 (D.C. Cir. 2017); FEC v. Legi-Tech, Inc., 75 F.3d 704, 706 (D.C. Cir. 1996).

254. The opinion in *Doolin* suggests this. *See* Doolin Sec. Sav. Bank, F.S.B. v. Off. of Thrift Supervision, 139 F.3d 203, 213 (D.C. Cir. 1998) ("On the other hand, the situation in this case is not easily characterized as between a principal—Retsinas—and an agent—Fiechter. They were never even at OTS together. Fiechter and Retsinas might both be viewed as agents of the United States."); *cf.* RESTATEMENT (SECOND) OF AGENCY § 93(3) ("The affirmance can be made by an agent authorized to do so.").

255. *See* Weiss v. United States, 510 U.S. 163, 174–76 (1994) (holding that military officers do not need a new appointment to serve as military judges because the duties of the latter are "germane" to those of the former). One might also object on this basis to employing ratification for actions taken pursuant to internal agency delegations of authority, although the objection could arguably be resolved if the delegate were to expressly state that the power being exercised is on behalf of a higher official. This, however, is rarely the case. See, for example, *Moose Jooce v. FDA*, 981 F.3d 26 (D.C. Cir. 2020), in which the Deeming Rule was published in the Federal Register as having been issued by the Associate Commissioner for Policy in her own name, 81 Fed. Reg. at 29,106, even though her action was pursuant to authority delegated by the Secretary of Health and Human Services, Brief for Appellees, at 7–8, Moose Jooce v. FDA, 981 F.3d 26 (D.C. Cir. 2020) (Nos. 20-5049, 20-5048, 20-5050).

of the D.C. Circuit cases that we have reviewed, the supposed governmental agents purported to act on behalf of any office other than the ones that the agents thought they lawfully occupied.

A third common law requirement for ratification, which we have seen at play in *NRA Political Victory Fund* and *Marsh*, is that the principal must have the power to authorize the transaction at the time of affirmance and that the principal must exercise that power according to the same formalities that would have governed the agent's action.[256] Yet, at least as ratification is usually employed in Appointments Clause cases, the principal is not subjected to the normal substantive or procedural constraints on the exercise of power.[257]

And finally, ratification is not typically allowed if it would deprive a party of rights or a cause of action that has already accrued.[258] For most litigation concerning federal administrative action, a party has a cause of action for redress if the party has suffered "legal wrong" or has been "adversely affected or aggrieved" by agency action.[259] Thus, for example, once a regulation has been issued allegedly in violation of the

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256. RESTATEMENT (SECOND) OF AGENCY §§ 86(1), 93(2). As noted above, the Third Restatement has eased the standard somewhat: now it is only necessary for a ratifier to have power at the time of ratification. RESTATEMENT (THIRD) OF AGENCY § 4.04(1). The change is not particularly relevant here, however, because all of the major Appointments Clause ratification cases concern instances where the principal undoubtedly had the power to ratify at the time of ratification, the question being whether the ratification was ineffective because, for example, it was not exercised in accord with the same substantive and procedural rules that normally govern the action being ratified. Some complications can arise where the principal and agent are the same person. For example, in *Consumer Financial Protection Bureau v. Gordon*, 819 F.3d 1179 (9th Cir. 2016), the director of the CFPB initiated many enforcement actions between the time that he was improperly recess-appointed and properly appointed. *Id.* at 1186. Although the panel majority saw no problem with the director's ratification of his own decisions to bring enforcement actions, *id.* at 1188–90, dissenting Judge Ikuta did, *id.* at 1200–01. In her view, the absence of a validly appointed enforcement officer meant that the agency had no basis to invoke the President's Take Care Clause power, and thus could not satisfy Article III standing. *Id.* at 1199–1203 (Ikuta, J., dissenting). That in turn meant that the agency's enforcement action had to be dismissed because standing must exist when an action is initiated. *See id.* at 1203 (citing, *inter alia*, FEC v. NRA Pol. Victory Fund, 513 U.S. 88, 90, 98–99 (1994)).

257. *See, e.g.*, *Moose Jooce*, 981 F.3d at 29; Huntco Pawn Holdings, LLC v. U.S. Dep't of Def., 240 F. Supp. 3d 206, 232 (D.D.C. 2016); Alfa Int'l Seafood v. Ross, 264 F. Supp. 3d 23, 46 (D.D.C. 2017).

258. RESTATEMENT (SECOND) OF AGENCY § 90; *see id.* rep. note ("Coming within the rule, also, are cases in which an attempt has been made, after action has been begun, to ratify an act which was a prerequisite to the suit."); *see, e.g.*, Wagner v. City of Globe, 722 P.2d 250, 255 (Ariz. 1986) (prohibiting ratification of otherwise wrongful discharge because discharged employee had commenced suit prior to ratification). The Second Restatement concedes that this litigation cut-off rule for ratification "has not always been recognized and has been severely criticized," but it concludes that "the current of judicial opinion is with the rule as stated herein." RESTATEMENT (SECOND) OF AGENCY § 90 rep. note.

259. 5 U.S.C. § 702. Such a cause of action may be provided by the APA, equity, or the Constitution directly. *See* Trudeau v. Fed. Trade Comm'n, 456 F.3d 178, 188–90 (D.C. Cir. 2006).

Appointments Clause, and the regulation injures a person, the injured party is vested with a right to judicial review of that regulation[260] to determine whether, among other things, the rule is "contrary to constitutional right, power, privilege, or immunity."[261] The same conclusion should apply in enforcement actions as well, to the extent that the Appointments Clause violation operates as an affirmative defense.[262] Yet the D.C. Circuit's ratification defense often deprives litigants of their right of judicial review and an opportunity for the courts to adjudicate whether a constitutional violation has occurred.

C. The Ratification Defense Inhibits the Enforcement of the Separation of Powers

Besides its inconsistency with Supreme Court precedent and traditional common law rules, the ratification defense is ill-conceived because it gives agency officials virtually no incentive to eliminate

260. *See* 5 U.S.C. § 704. The cause of action supplied by this provision of the APA is generally limited to "final agency action." *See, e.g.*, *Trudeau*, 456 F.3d at 188–89. Under the APA, an agency action is final when it marks the consummation of the agency's decision-making and when the action determines rights or obligations or otherwise has legal consequences. Bennett v. Spear, 520 U.S. 154, 177–78 (1997). If a rule is not "final," then the APA does not provide a cause of action to challenge to it. But such a rule must be a *rara avis*, given that all legislative regulations—which by definition have the force and effect of law, Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974) ("A properly adopted substantive rule establishes a standard of conduct which has the force of law.")—are necessarily final, as well as many interpretive rules, which do not have the force and effect of law, California Cmtys Against Toxics v. EPA, 934 F.3d 627, 635 (D.C. Cir. 2019) ("[I]nterpretive rules can be final, and, by implication, that the test for finality is independent of the analysis for whether an agency action is a legislative rule rather than an interpretive rule.").

261. 5 U.S.C. § 706(2)(B).

262. *Cf.* FEC v. Legi-Tech, Inc., 75 F.3d 704, 707 (D.C. Cir. 1996) ("We think Legi-Tech's analysis is faulty; its assertion that the FEC is unconstitutionally composed cannot be regarded as anything other than an affirmative defense against an enforcement proceeding."); RESTATEMENT (SECOND) OF AGENCY § 90 cmt. a ("If the other party to a transaction has acquired a right in property or in an employment, or if another has acquired a defense against an action by the principal, the right or defense cannot be destroyed by ratification."). *Moose Jooce* is the D.C. Circuit's first decision addressing the relationship between this aspect of the traditional ratification doctrine and the Circuit's ratification defense. The decision concludes that any objection to the employment of the ratification defense on the ground of its conflict with the traditional rule is precluded by *Legi-Tech*, "where the court held that the Federal Election Commission effectively ratified its prior actions even though its ratification occurred after Legi-Tech alleged an Appointments Clause violation." *Moose Jooce*, 981 F.3d at 29. The court's chronology is correct, but the decision in *Legi-Tech* does not discuss the traditional limitations on ratifications at all, so it can hardly stand as precedent for upholding ratification despite its inconsistency with those limitations. *Cf.* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 91 (1998) (decisions that do not discuss jurisdiction are not precedent for the existence of jurisdiction).

entrenched practices that are contrary to the Appointments Clause.[263] This lack of incentive runs contrary to the principle that maintenance of the separation of powers requires heightened judicial vigilance.[264] And, like similar review-denying doctrines, the ratification defense renders constitutional protections "hollow."[265]

To see the negative policy consequences of the D.C. Circuit's ratification defense, one need look no further than the actions of the FDA. Over the last two decades, non-officer career employees—who enjoy substantial protections against removal by politically appointed superiors—have routinely issued regulations, some of which have had immense economic and social consequences.[266] Yet what did the FDA do when, in *Moose Jooce*, its unconstitutional practice of delegating significant federal authority to non-officers was called out in litigation? Why, it ratified the action—not once but twice![267] In doing so, the FDA precluded the courts from ruling upon its aberrant rulemaking practice,[268]

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263. *See* Kent Barnett, *The Consumer Financial Protection Bureau's Appointment with Trouble*, 60 AM. U. L. REV. 1459, 1484 (2011) ("If such ratification were permissible, the Executive Branch would have little reason to comply with the Appointments Clause for either principal or inferior officers."). That the executive may be happy with a watering down of the Appointments Clause is no reason for the courts to let it happen. *See* Free Enter. Fund v. Pub. Co., Acct. Oversight Bd., 561 U.S. 477, 497 (2010) ("Perhaps an individual President might find advantages in tying his own hands. But the separation of powers does not depend on the views of individual Presidents, nor on whether the encroached-upon branch approves the encroachment." (quotations and citations omitted)). Consider again the example in *Moose Jooce* of the Deeming Rule, which "deemed" vaping products to be "tobacco products" subject to the Tobacco Control Act. Congress didn't make that controversial decision; neither did the Health and Human Services Secretary; neither did the FDA Commissioner; but rather a career civil servant.

264. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 (1995) ("[T]he doctrine of separation of powers is a *structural safeguard* . . . establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict.").

265. *Accord* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1814 (2018) ("[T]he Court's qualified immunity decisions have nevertheless made it increasingly difficult for plaintiffs to show that defendants have violated clearly established law, and increasingly easy for courts to avoid defining the contours of constitutional rights."); *cf.* Mullenix v. Luna, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting).

266. ANGELA C. ERICKSON & THOMAS BERRY, BUT WHO RULES THE RULEMAKERS? 2–3 (2019) (between 2001 and 2017, 98% of final rules promulgated by FDA were issued by career employees). These rulemaking employees were members of the career Senior Executive Service, and therefore enjoyed employment protections largely unavailable to politically appointed personnel. *See* Note, *The Civil Service and the Statutory Law of Public Employment*, 97 HARV L. REV. 1619, 1648 n.145 (1984).

267. To be fair, one of those ratifications happened before litigation commenced, but it was not clearly advanced by FDA as a ratification of an employee rule-making until the lawsuit challenging the rule had been filed. *See* Moose Jooce v. FDA, No. 18-cv-203 (CRC), 2020 WL 680143, at *2–3, *5 (D.D.C. 2020).

268. *See id.* at *7.

which in fact worsened soon after the *Moose Jooce* litigation began[269] (before it was ultimately abandoned through an agency policy change).[270] Thus, by virtue of the ratification defense, the D.C. Circuit ignores the Supreme Court's admonition that the "[s]eparation of powers, a distinctively American political doctrine, profits from the advice authored by a distinctively American poet: Good fences make good neighbors."[271] The defense also gives administrative officials a power that the Supreme Court has generally denied to a repeat defendant—namely, the power to get out of a case scot-free "simply by ending its unlawful conduct once sued,'" yet "then pick up where [it] left off, repeating this cycle until [it] achieves all [its] unlawful ends."[272]

Another lamentable consequence of the ratification defense is its impeding of the development of Appointments Clause case law, a phenomenon that in an analogous context has been called "constitutional stagnation."[273] As we have seen, when an official successfully ratifies an action, the inquiry ends and the courts do not address whether the ratified act violated the Appointments Clause.[274] And because these issues have not been decided, government actors may persist in decision-making practices that may well be unconstitutional.

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269. During the *Moose Jooce* litigation, the FDA announced that it had created a Principal Associate Commissioner for Policy. *See* Memorandum from Norman E. Sharpless, Acting Comm'r of Food and Drugs, to Officers of the Food and Drug Admin., on Delegation of Authority for General Redelegations of Authority § 1(H)(1) (May 2, 2019). Like the Associate Commissioner for Policy, the Principal Commissioner for Policy is appointed by the FDA Commissioner. Neither person is confirmed by the Senate or appointed by an officer constitutionally authorized to appoint inferior officers.

270. Press Release, U.S. Dep't of Health & Human. Servs., HHS Statement on Regulatory Process (Sept. 20, 2020), https://www.hhs.gov/about/news/2020/09/20/hhs-statement-on-regulatory-process.html [https://perma.cc/3ZMQ-WCK4] ("All rules will now be signed by the Secretary and by the head of the agency involved."). One of the last official acts of President Trump was to promulgate an executive order generally requiring all agency rules to be issued by politically accountable officials, i.e., "senior appointees." *See* Exec. Order No. 13,979, § 2, 86 Fed. Reg. 6,813 (Jan. 18, 2021). The order was revoked shortly thereafter by President Biden. Exec. Order No. 14,018, § 1, 86 Fed. Reg. 11,855 (Feb. 24, 2021).

271. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 240 (1995).

272. United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1537 n.* (2018) (alteration in original) (quoting Already, LLC v. Nike, Inc., 568 U.S. 85, 91 (2013)).

273. Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 6 (2015).

274. *See* Moose Jooce v. FDA, 981 F.3d 26, 28 (D.C. Cir. 2020) ("Even assuming for purposes of argument, as appellants object, that Kux's issuance of the Deeming Rule violated the Appointments Clause and that Commissioner Califf's general ratification of prior actions by the FDA as part of an agency reorganization was invalid, Commissioner Gottlieb's ratification cured any Appointments Clause defect.").

The D.C. Circuit's ratification defense to Appointments Clause challenges is inconsistent with Supreme Court precedent, the common law of ratification, an appropriately vigorous enforcement of the separation of powers, and the ordered development of constitutional law through case-by-case adjudication. The defense should be abandoned. This Article recognizes, however, that the D.C. Circuit may be reluctant to relinquish the doctrine, given its belief that the only benefit of eliminating the defense is "delay."[275]

Thus, as a compromise, this Article recommends, as a second-best outcome, that the defense should only be allowed to operate if the proposed ratification is subject to all of the substantive and significant procedural constraints that normally would apply. This narrowing would conform the defense to ratification's common law origins and its use in *NRA Political Victory Fund*. It would allow the defense to operate in some instances where delay really does seem to be the only consequence of a rejected ratification—for example, the failure to publish a ratification in the *Federal Register*.[276] But it would deny the defense to ratifications that did not meet the substantive requirements of rulemaking,[277] such as the rule that agencies must provide a reasoned explanation for their decisions, one which takes into account all of the available evidence.[278]

CONCLUSION

Administrative efficiency is a good thing, but it is not the only or most important thing. I suspect that the reason for the D.C. Circuit's embrace of the ratification defense is that it appears to save time—for private parties, government agencies, and the courts—without apparently prejudicing anyone, because it merely accelerates the inevitable.[279] That

275. Doolin Sec. Sav. Bank, F.S.B. v. Off. of Thrift Supervision, 139 F.3d 203, 214 (D.C. Cir. 1998).

276. *See, e.g.*, Alfa Int'l Seafood v. Ross, 264 F. Supp. 3d 23, 46 (D.D.C. 2017) ("Finally, Plaintiffs' contention that Secretary Ross' ratification is insufficient because it lacks the formality of rulemaking—i.e., publication in the Federal Register—is unfounded."); *cf.* 5 U.S.C. § 553(b), (d) (generally requiring publication in the *Federal Register* of proposed and final substantive rules). The Due Process Clause would, however, limit the extent to which the ratification could have retroactive effect and make conduct illegal that, at the time, was legal. *See* E. Enters. v. Apfel, 524 U.S. 498, 547–50 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) (explaining that retroactive imposition of liability to fund health benefits for retired workers violates due process).

277. Butte County v. Hogen, 613 F.3d 190, 195 (D.C. Cir. 2010) ("Reasoned decisionmaking is not a procedural requirement.").

278. *Id.* at 194.

279. *See, e.g.*, FEC v. Legi-Tech, Inc., 75 F.3d 704, 708–09 (D.C. Cir. 1996) ("Even were the Commission to return to square one—assuming the statute of limitations was not a bar—it is virtually inconceivable that its decisions would differ in any way the second time from that which occurred the

justification for the defense is, however, particularly out of place in Appointments Clause litigation. Even in run-of-the-mill administrative law cases, courts are exceedingly reluctant to credit agency claims that a remand would be pointless because its outcome is ordained;[280] and one would think that that reluctance should be greater and not less in cases alleging substantial violation of the separation of powers. Moreover, such "structural" constitutional errors in other contexts nearly always require a redo.[281] Yet, as we have seen with the D.C. Circuit's ratification case law, exemplified by its most recent decision in *Moose Jooce*, a ratification defense is by no means a true redo and replacement of the structural error. It is rather an admittedly perfunctory "rubberstamp" subject to few of the safeguards against arbitrary decision-making that are normally attendant on agency action.

A better approach would be to use ratification sparingly, consistent with its common law limitations. A fair argument could be made that ratification has no bearing at all in Appointments Clause cases, given the importance of strict enforcement of the separation of powers and the poor fit between a government official's "ratification" and the traditional principal-agent context of and limitations on ratification. But even if one were to give some place to ratification as a defense to Appointment Clause challenges to agency action, courts should insist, at the very least, that purported ratifications be subject to the same key substantive and

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first time. . . . In any event, forcing the Commission to start at the beginning of the administrative process, given human nature, promises no more detached and 'pure' consideration of the merits of the case than the Commission's ratification decision reflected.").

280. *E.g.*, Advocacy for Highway & Auto Safety v. Fed. Highway Admin., 28 F.3d 1288, 1292 (D.C. Cir. 1994) ("The touchstone of our inquiry is thus the agency's open-mindedness . . . .We therefore place the burden on the agency to make a compelling showing that the defects of its earlier notice [requesting public comment] were cured by the later one."); *cf.* Akins v. FEC, 101 F.3d 731, 738 (D.C. Cir. 1996) (en banc), ("[I]t has *always* been an acceptable feature of judicial review of agency action that a petitioner's 'injury' is redressed by the reviewing court notwithstanding that the agency might well subsequently legitimately decide to reach the same result through different reasoning."), *vacated on other grounds*, 524 U.S. 11 (1998); Andrade v. Lauer, 729 F.2d 1475, 1496 (D.C. Cir. 1984) ("[T]he gravamen of their charge is usually that they have a right that the government act in accord with due process principles when it takes action against them, even if such conformance may not change the substantive outcome. Causation is in fact present in these cases because it cannot be assumed that action in accord with the correct procedures would have produced the same result.").

281. *See* Landry v. FDIC, 204 F.3d 1125, 1131 (D.C. Cir. 2000) ("[D]emand for a clear causal link to a party's harm" would frustrate the "prophylactic" goal of the separation of powers—i.e., "establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict.") quoting Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 (1995))). The D.C. Circuit has limited *Landry* to "the acts of 'purely decision recommending employees.'" Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 920 F.3d 1, 13 (D.C. Cir. 2019) (quoting *Landry*, 204 F.3d at 1131–32).

procedural limitations as the original action and that the agency abandon the delegation or practice that gave rise to the violation.