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ARTICLE

# The Common Law Powers of the Presidency

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*Abstract. The Supreme Court this past term curbed administrative agencies' ability to conduct enforcement actions before administrative tribunals, increased the ability of regulated entities to challenge regulations in court, and limited the deference that agencies previously received for their interpretations of ambiguous language in statutes they administer. Those rulings may well persuade agencies that social change at times can best be attained not through traditional regulation but rather by encouraging the President to attach conditions to federal contracts and funds that protect covered employees' benefits, their welfare, and right to a healthy environment—after all, over twenty percent of the nation's workforce is employed by federal contractors. In the last generation, presidents used statutory procurement authority to direct federal contractors to ensure that their workforces be integrated, that they follow affirmative action policies, that their workers be paid a particular minimum wage, and even that their workers be shielded from DEI instruction. But lower courts recently have pushed back at Presidents' authority to enhance employee welfare through federal contracting, including President Biden's mask or vaccinate mandate, reasoning that Congress did not delegate to the President the power through procurement to enhance employee welfare not closely tied to the efficient performance of federal contracts.*

*In so doing, such courts have ignored that Presidents since the Founding have deployed an inherent common law-type authority to exercise both contractual and proprietary authority in managing the country's funds and property. Such authority—albeit subject to congressional abridgement—plainly extends beyond ensuring the efficient performance of federal contracts. Just as private corporations and landowners have pursued non-profit maximization through Environmental, Social, and Governance initiatives, so the executive branch in managing the nation's funds and property has*

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*sought social objectives as well. Indeed, in comparison to private proprietors, the executive branch pursuant to delegations from Congress has a much more variegated mission than do private corporations, not just to conduct efficient procurement but also to administer environmental protection laws, health laws, and so much more. Accordingly, this Article is the first to investigate the history of such common law presidential powers. It then addresses the constitutional limits of such powers, and concludes by examining their contemporary significance.*

## Table of Contents

## Introduction

In its 2023 term, the Supreme Court curtailed administrative agencies' ability to conduct enforcement actions before administrative tribunals,[1] increased the ability of regulated entities to challenge regulations in court,[2] and limited the deference that agencies previously received for their interpretations of ambiguous statutory language.[3] Those rulings may well persuade agencies, no matter which political party occupies the White House, to pursue social change instead by encouraging the President to attach conditions that protect employees' benefits, health, and right to a healthy environment to federal contracts and disbursements of funds.

Indeed, recent cases have explored the extent to which the President can alter domestic policy by predicating such change on the authority granted under the 1949 Federal Property and Administrative Services Act (FPASA).[4] That statute articulates a goal of an "economical and efficient system for . . . procurement and supply,"[5] and provides that the "President may prescribe such policies and directives . . . as he shall deem necessary to effectuate the provisions of said Act."[6] Accordingly, under FPASA, presidents have imposed a wide variety of conditions on governmental contractors. Presidents in the past have used such authority to direct federal contractors to ensure that their workforces be integrated,[7] that their workers are paid a particular minimum wage,[8] that they follow affirmative action policies,[9] and even that their workers be shielded from DEI instruction.[10] Most courts applying FPASA have required merely that the conditions imposed by the President under FPASA in some way contribute to an "economical and efficient system" for procurement.[11]

1 SEC v. Jarkesy, 603 U.S. 109, 125–28 (2024) (holding that agency adjudication of claims asserting violations similar to common law causes of action must proceed in court before a jury as opposed to before an agency tribunal).

2 Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 603 U.S. 799, 807–09 (2024) (litigants can challenge agency rules years after rulemaking has completed, as long as they can show injury); *see also* Axon Enter., Inc. v. FTC, 143 S. Ct. 890, 897 (2023) (private parties can immediately raise structural constitutional challenges to agency structure in federal court for resolution).

3 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (formally overruling the *Chevron* doctrine).

4 Federal Property and Administrative Services Act of 1949, ch. 288, 63 Stat. 377.

5 40 U.S.C. § 471.

6 40 U.S.C. § 486(a).

7 *See, e.g.*, Exec. Order No. 11,141, 29 Fed. Reg. 2477 (Feb. 15, 1964).

8 *See, e.g.*, Exec. Order No. 14,026, 86 Fed. Reg. 22835 (Apr. 30, 2021).

9 Exec. Order No. 11,246, 30 Fed. Reg. 12319 (Sept. 28, 1965).

10 Exec. Order No. 13,950, 85 Fed. Reg. 60683 (Sept. 28, 2020).

11 *See* Bradford v. U.S. Dep't of Lab., 101 F.4th 707, 727, 729 (10th Cir. 2024) (summarizing prior decisions holding that FPASA authorized the President to regulate contractors if the President

Given that federal contractors employ approximately twenty percent of the U.S. workforce,[12] the President's reach under FPASA is potentially vast.[13] Indeed, President Biden might have used authority under FPASA to protect the reproductive rights of federal contractors' employees, despite *Dobbs v. Jackson Women's Health Organization*,[14] or to forbid federal contractors from deploying "do not compete" clauses despite the FTC's failed efforts to prohibit such clauses.[15] President Trump's initial batch of executive orders included directives prohibiting federal contractors from deploying DEI programming and from engaging in affirmative action.[16]

Lower courts, however, have recently questioned whether an expansive construction of FPASA can survive continued judicial scrutiny. For instance, a number of courts struck down President Biden's Order under the aegis of FPASA that federal contractors require their employees either to be masked or vaccinated. In blocking the administration's effort, the Eleventh Circuit chided the administration, stating that FPASA is "worlds away from conferring general authority for every agency to insert a term in every solicitation and every contract establishing health standards for contractors' employees."[17] Although the statutory language seems to instill wide ranging discretion in the President, the court did not believe that Congress had intended to vest the President with the power to alter the lives of employees of federal contractors that dramatically.[18] The Sixth Circuit similarly struck down the mandate, reasoning that a broad reading of FPASA would grant the President transformative power

considered it necessary to promote economical and efficient procurements). Moreover, through the Federal Acquisition Regulations (FAR), the executive branch has placed a myriad of other conditions on federal contractors, such as establishing a "Contractor Code of Business Ethics and Conduct." 48 C.F.R. § 3.1003 (2008).

[12] *History of Executive Order 11246*, U.S. DEP'T OF LAB., https://perma.cc/6ZXJ-WGR8.

[13] Executive orders must be consistent with statutory commands. *See, e.g.*, Chamber of Com. v. Reich, 74 F.3d 1322, 1332 (D.C. Cir. 1996) (striking down Executive Order banning replacement of striking employees as inconsistent with statute); *see infra* Part II.

[14] 597 U.S. 215 (2022). Protecting reproductive choice can lead to a more productive workforce.

[15] Non-Compete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 912); *see* Daniel A. Crane, *Predicting the Fate of the FTC's Non-Compete Ban*, YALE J. ON REGUL.: NOTICE & COMMENT (Apr. 26, 2024), https://perma.cc/D268-R5GK. Prohibiting "do not compete" clauses can enhance competition and hence efficiency in contracting. Early returns in court were not favorable. *See* Ryan LLC v. FTC, 739 F. Supp. 3d 496, 514 (N.D. Tex. 2024).

[16] Exec. Order No. 14,173, 90 Fed. Reg. 8633 (Jan. 31, 2025).

[17] Georgia v. President of the U.S., 46 F.4th 1283, 1296 (11th Cir. 2022) (affirming preliminary injunction against the order). President Biden next attempted to implement the mask or vaccination requirement through an OSHA rule. The Supreme Court shot that second effort down in *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 142 S. Ct. 661, 663 (2022).

[18] *Georgia*, 46 F.4th at 1297.

over the U.S. economy without a clear statement from Congress.[19] The Fifth Circuit followed suit.[20]

Moreover, a circuit split has recently emerged over whether the Department of Labor pursuant to FPASA can implement an executive order[21] mandating that recreational outfitters working on federal lands pay employees at least a fifteen-dollar per hour minimum wage. In *Bradford v. United States Department of Labor,*[22] the Tenth Circuit upheld the measure, reasoning that the executive branch has long exercised the power to shape how federal contracts are implemented and federal lands are managed.[23] In contrast, the Ninth Circuit in *Nebraska v. Su*[24] sharply disagreed, holding that the Biden Administration could not impose a minimum wage condition on contractors using federal lands, reasoning that the President could not use the lever of a procurement contract to pursue goals unrelated to the specific activities listed in FPASA, such as remodeling offices or retaining furniture.[25] The Ninth Circuit read the statutory language narrowly to afford the President only modest discretion to attach conditions to federal procurement contracts.[26] Given the potential financial and social ramifications of presidential orders under FPASA, more challenges to presidential policymaking through FPASA are sure to come, no matter which party is in office.

Lost in the debates over FPASA, however, has been consideration of whether presidents can exercise comparable authority outside of the statute. Presidents long before FPASA wielded similar authority in managing the country's funds and property. That authority included conditioning governmental projects on terms not directly related to efficient performance of the projects. In other words, the President's inherent authority arguably extends well beyond the traditionally

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19 Kentucky v. Biden, 23 F.4th 585, 606 (6th Cir. 2022); *see also* AFL-CIO v. Kahn, 618 F.2d 784, 803 (D.C. Cir. 1979) (MacKinnon, J., dissenting) (arguing that the FPASA does not give the President authority to set voluntary wage and price standards).

20 Louisiana v. Biden, 55 F.4th 1017, 1031 (5th Cir. 2022). The Fifth Circuit, however, has recently shifted course, upholding a broad construction of the statutory text in upholding an executive order requiring that federal contractors pay a fifteen dollar an hour minimum wage. *See* Texas v. Trump, 127 F.4th 606, 608, 617 (5th Cir. 2025).

21 Exec. Order No. 14,026, 86 Fed. Reg. 22835 (Apr. 30, 2021). President Trump has repealed the Order. Exec. Order No. 14,236, 90 Fed. Reg. 13037 (Mar. 20, 2025).

22 101 F.4th 707 (10th Cir. 2024).

23 *Id.* at 726–27. Judge Eid in dissent provocatively wrote that FPASA violates Article I of the Constitution by granting the President "nearly unfettered power to create any policy he considers necessary . . . under the guise of economy and efficiency." *Id.* at 733 (Eid, J., dissenting).

24 121 F.4th 1 (9th Cir. 2024).

25 *Id.* at 9, 17. The Fifth, Sixth, and Eleventh Circuits also curbed the President's discretion under FPASA but on the ground that presidential authority could not be derived merely from FPASA's stated policy objectives. *Id.* at 8–9.

26 *See supra* text accompanying notes 24–25.

recognized areas of national defense, international relations, and internal management of the executive branch.[27] These common law proprietary powers[28] exceed the authority subsequently granted by Congress under FPASA. From that vantage point, FPASA merely reinforced the broad common law authority the executive branch already possessed.

Accordingly, Part I traces the history of executive branch authority to enter into contracts and to manage the funds and the lands that Congress has directed the executive branch to superintend. Although Congress can limit such common law powers, the executive branch's authority is broader than currently realized. Just as private entrepreneurs or landowners can permit use of their resources and land under the conditions they specify, so can the President. The Environmental, Social, and Governance ("ESG") movement reflects the non-monetary goals that private corporations can and do pursue. And, in comparison to private parties, the executive branch has far greater reason to protect the general health and welfare of the citizenry in light of Congress's many prior delegations of relevant authority, which have directed the executive branch to ensure that workplaces and medicines are safe, that individual health is protected through social insurance, and much more.[29]

Part II then explores the limitations of this common law authority, limits that take on renewed importance in light of President Trump's recent executive order restricting diversity initiatives in federal contracting.[30] The executive orders and contracts predicated on the President's common law authorities must strive for goals lying within the President's sphere of authority; they must be consistent with the President's duty to "Take Care" that the laws be faithfully executed; they cannot create private enforceable rights; they cannot impose unconstitutional conditions; and most importantly, they cannot tread upon congressional directives—consistent with Justice Jackson's justly famed separation of powers framework in *Youngstown Sheet & Tube Co. v. Sawyer*.[31] Judicial review of executive branch conditions on governmental

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[27] In using the term "inherent" power, this Article is not referring to the broader historical notion of executive prerogative. *See, e.g.*, PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE & ABUSE OF EXECUTIVE DIRECT ACTION 5–9 (2d ed. 2014). For a conventional overview of the inherent presidential powers, see also HAROLD J. KRENT, PRESIDENTIAL POWERS 133–59 (2005).

[28] By "common law" powers, this Article refers to those ancillary powers that presidents can deploy (subject to congressional abridgment) that do not flow directly from the Constitution itself but rather inhere in the executive branch as a function of its sovereign responsibility to carry out laws enacted by Congress. This Article focuses on the powers to engage in contracting, manage property, and manage funds, but there may well be other powers implied in the necessary duties undertaken by the sovereign, such as the powers incident to employing a large workforce. *See, e.g.*, DANIEL P. GITTERMAN, CALLING THE SHOTS: THE PRESIDENT, EXECUTIVE ORDERS, AND PUBLIC POLICY (2017).

[29] *See, e.g.*, 42 U.S.C. § 247d(a); *see also* 50 U.S.C. § 1621.

[30] *See* Exec. Order No. 14,173, *supra* note 16.

[31] 343 U.S. 579 (1952); *id.* at 635–37 (Jackson, J., concurring).

contracts and projects, therefore, can ensure that such actions do not transgress the limits previously sketched.

Part III turns back to FPASA, arguing that, despite the recent circuit court decisions sharply limiting the reach of FPASA, Congress in passing the Act in no way intended to restrict presidents' more general use of their common law authority based on stewardship of federal governmental funds and property, but rather wished to empower them to use greater efforts to centralize federal government procurement. This Article concludes first that the common law antecedents of FPASA militate for a more expansive construction of the statutory directive, and second that, even if FPASA is read to narrow the President's discretion in procurement as the Fifth, Sixth, Ninth, and Eleventh Circuits recently held, Congress in enacting FPASA left comparable presidential common law powers outside the statute untouched.

## I. The President's Inherent Common Law Authority

This Section initially explores the extent to which Presidents have used their contractual authority to accomplish goals only loosely connected to that of contractual efficiency. It then traces a similar dynamic arising from the executive branch's role in managing the nation's funds and lands—the executive branch, as is true for any private business, can pursue social as well as financial efficiency goals in conducting its operations. Viewed slightly differently, the executive branch to a significant extent can pursue regulatory aims through its oversight of federal funds, lands, and projects.

### A. *The Power to Contract*

With respect to the power to contract, courts have viewed the right to contract as an incident of the executive branch's sovereignty. In managing federal lands and in procuring goods and services, the executive branch can use its power to contract to shape behavior. In a series of cases in the nineteenth century, the Supreme Court held that such powers—principally the right to impose conditions on government contracting—fell within the inherent authority of the executive branch. Through these conditions, the executive branch sought greater efficiency in contracting even when not authorized by Congress. The imposition of social conditions would arise in the following century.

In *United States v. Tingey*,[32] the United States attempted to collect on a bond entered into between a purser in the Navy and the Department of the Navy, which the purser entered into as a pledge that he would exercise

[32] 30 U.S. 115 (1831).

his official duties responsibly.[33] In the nineteenth century, requiring subordinate officials to post a bond to guarantee performance represented one key means of ensuring a subordinate's faithful execution of his or her duties. The question in *Tingey* turned on whether the United States could enter into that agreement, which Congress had not authorized. The Court framed the issue as "whether the United States have, in their political capacity, a right to enter into a contract, or to take a bond in cases not previously provided for by some law."[34] The Court, per Justice Story, concluded that "the United States have such a capacity to enter into contracts. It is, in our opinion, an incident to the general right of sovereignty."[35] Indeed, he continued that "[t]he right to take such a bond is in our view an incident to the duties belonging to such a department; and the United States having a political capacity to take it, we see no objection to its validity in a moral or legal view."[36] The executive branch enjoyed the right to superintend its officers, and ensuring such supervision through contracting thus lay within its discretion. The Court in *United States v. Bradley*[37] explicitly followed *Tingey* in stressing that "the United States being a body politic, as an incident to their general right of sovereignty, have a capacity to enter into contracts, and take bonds in cases within the sphere of their constitutional powers . . . whenever such contracts or bonds are not prohibited by law."[38] Indeed, the Court stressed that "we have not the slightest inclination to depart" from that principle.[39]

Other cases followed suit. For instance, in *Jessup v. United States*,[40] the Court stated that the "United States can, without the authority of any statute, make a valid contract, and that when the form of a contract is prescribed by the statute a departure from its directions will not render the contract invalid."[41] Thus, not only did the executive branch enjoy the inherent right to contract, but it also could shape those contracts despite conflicting congressional direction. And in *United States v. Hodson*,[42] also involving performance of a bond, the Court upheld the contract despite the fact that its provisions departed from a congressional template, summarizing that the prior cases "are conclusive of the question before us. Their authority has not been shaken by any later adjudication; we think they rest upon the soundest principles, and are in accordance with

33 *Id.* at 127.

34 *Id.* at 128.

35 *Id.*; *accord* Moses v. United States, 166 U.S. 571, 586 (1897).

36 *Moses*, 166 U.S. at 586.

37 35 U.S. 343 (1836).

38 *Id.* at 359.

39 *Id.* at 360.

40 106 U.S. 147 (1882).

41 *Id.* at 152.

42 77 U.S. 395 (1870).

a wise and salutary policy."[43] Presidents in the nineteenth century did not impose conditions on contractors similar to those more recently, but they added conditions to contracts outside of congressional approval and entered into contracts without specific authorizing language from Congress. As will be elaborated upon later,[44] the executive branch could choose among means that executives traditionally used in their corporations to carry out congressional objectives, including contracting and conditioning contracts on behavior that the executive branch deemed beneficial. The Court's use of the term "sovereignty" signals that the executive branch enjoys the inherent power to take certain traditional measures—such as contracting—in carrying out its delegated authority.

The Third Circuit, generations later, invoked the "implied authority of the President" in upholding an executive order requiring affirmative action in federal governmental contracts,[45] one of the executive orders President Trump recently rescinded.[46] The court explained that, when

> Congress authorizes an appropriation for a program of federal assistance, and authorizes the Executive branch to implement the program . . . in the absence of specific statutory regulations it must be deemed to have granted to the President a general authority to act for the protection of federal interests.[47]

Presidents may enter into contracts and add conditions to those contracts as long as their objectives are consistent with responsibilities delegated by Congress.[48] The court did not clarify how close the line must be between the prior congressional delegation and the condition imposed on the contract, but some nexus was required.[49]

Although the presidential contractual powers upheld in the nineteenth century cases were modest, the Supreme Court decisions staked out considerable room for the executive branch to exercise contractual powers. Perhaps these decisions should not be surprising. After all, Congress did not pass its first procurement measure until three years after the nation's Founding, when empowering the Postal Service to enter into contracts only after ensuring public notice in the state or states in which the contract was to be performed.[50] Shortly thereafter, Congress authorized the Department of Treasury to make purchases for the War Department.[51] And, in 1795, Congress created a Purveyor of Public

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43 *Id.* at 408.

44 *See infra* text accompanying notes 45–48.

45 Contractors Ass'n of E. Pa. v. Sec'y of Lab., 442 F.2d 159, 171 (3d Cir. 1971).

46 Exec. Order No. 14,173, *supra* note 16.

47 *Contractors Ass'n*, 442 F.2d at 171.

48 *See id.*

49 *See id.*

50 Act of Feb. 20, 1792, ch. 7 § 6, 1 Stat. 232, 234; *see* JAMES F. NAGLE, A HISTORY OF GOVERNMENT CONTRACTING 62 (1992).

51 Act of May 8, 1792, ch. 37 § 2, 1 Stat. 279, 280.

Supplies to oversee the process.[52] Indeed, Congress did not enact its first government-wide procurement measure until 1809, requiring all governmental contracts to be made by open purchase or by advertising for proposals.[53] Despite the lack of congressional action, the executive branch carried out procurement to the best of its ability, contracting for supplies for the Armed Forces, material for government buildings, carriages for the Post Office, and more.[54] By default, the executive branch decided when and how to procure the goods and services the new nation needed to carry out congressional measures. Congress itself apparently recognized that the powers to contract and, indeed, to procure goods and services, were implicit in the establishment of an executive branch designed to carry out Congress's directives.[55]

A century later, the President's common law contract authority became even more critical with the advent of industrialization and increased regulatory activity. President Theodore Roosevelt issued an executive order in 1905, forbidding convict labor on public projects.[56] The Order provided in part that all public contracts should, "unless otherwise provided by law, contain a stipulation forbidding, in the performance of such contracts, the employment of persons undergoing sentences of imprisonment."[57] The limitation imposed by President Roosevelt may or may not have been consistent with efficient procurement, but it more directly strove either to protect against misuse of prisoners or to preserve opportunities for competition in the private sector. And, the following year, President Roosevelt issued an executive order requiring reporting of every instance in which a federal contractor permitted work on federal construction projects in excess of eight hours a day to enable his administration to take corrective measures.[58] In issuing the Executive Order, President Roosevelt cited no statute in support.[59] These initiatives stemmed from his administration's effort to protect the health and safety of workers in the private sector, despite the lack of specific direction from Congress. Indeed, the fact that the Executive Order followed on the heels

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52 *See* NAGLE, *supra* note 50, at 64.

53 Act of Mar. 3, 1809, ch. 28 § 5, 2 Stat. 535, 536.

54 *See* NAGLE, *supra* note 50, at 62–63.

55 *See supra* notes 50–54 and accompanying text.

56 Exec. Order No. 325A (May 18, 1905).

57 *Id.* Many Executive Orders, unlike President Roosevelt's on convict labor, stem from authority delegated from Congress directly to the President. For an excellent discussion, see generally Kevin M. Stack, *The Statutory Presidency*, 90 IOWA L. REV. 539 (2005) (addressing how a court should determine when the President acts "pursuant to" a statute).

58 Exec. Order No. 504 (Sept. 19, 1906).

59 *See id.* To be sure, Congress in the past had restricted the number of hours worked on particular federal projects. *See* Act of June 25, 1868, ch. 72, 15 Stat. 77. And President Grant, in reliance on that statute, issued an order that the pay for such employees could not be reduced commensurately with the reduction in hours. Proclamation No. 3, 16 Stat. 1127 (May 19, 1869).

of the Supreme Court's decision in *Lochner v. New York*,[60] which held that such protective labor legislation when passed by a state violated Due Process, highlights President Roosevelt's commitment to pursue social goals through executive orders instead of awaiting congressional action.[61]

Earlier, a congressional committee in 1893 decried the lack of centralized control in procurement.[62] Frustrated with the slow pace of congressional change, however, President Roosevelt appointed his own commission, which recommended steps to standardize contracting. President Roosevelt's successor, President Taft, followed that lead, issuing Executive Order 1071[63] to create a General Supply Committee in the executive branch to make procurement more efficient. The Order asserted that the goal was "to systematize the purchase of supplies needed in common by two or more of the several Departments and Government Establishments hereinafter mentioned, to secure such supplies at lower and uniform prices, and to more effectively carry out the spirit of the Act of January 27th, 1894."[64] The President directed the Committee, whose members were drawn from executive branch agencies, to "prepare one general schedule of all supplies needed in common by any two or more Departments and said establishments," and also to "formulate a uniform method of inspection and testing of all supplies delivered to the Government."[65] Although the Committee was not created by Congress, Congress acquiesced.[66] Presidents Roosevelt and Taft, therefore, both predicated action on the executive branch's right—in the absence of congressional direction to the contrary—to create rules governing federal government contracting and general procurement. Indeed, it was Franklin Delano Roosevelt, not Congress, who dismantled the General Supply Committee a generation later in 1933, replacing it with a Procurement Division in the Treasury Department.[67]

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[60] 198 U.S. 45, 64 (1905) (invalidating legislative effort to restrict number of hours in a working day). Indeed, Roosevelt issued the order despite Congress's insistence that work be allocated to the lowest responsible bidder, and despite an earlier Attorney General opinion questioning whether such a rule would clash with Congress's direction that work be allocated to the lowest responsible bidder. *See* Nagle, *supra* note 50, at 265.

[61] *Lochner*, 198 U.S. at 64. This is not to argue that the Roosevelt Executive Order was consistent with Due Process as then understood, but rather that presidents flexed their common law authority in ways in which today many would find surprising. During World War I, the government set labor standards for sectors of government contractors. NAGLE, *supra* note 50, at 319–20. Of course, the government can set prices as well. *See id.* at 296.

[62] NAGLE, *supra* note 50, at 263.

[63] Exec. Order No. 1,071 (May 13, 1909).

[64] *Id.* The Act referenced, however, focused only on improving the methods of accounting in the Post Office. Act of Jan. 27, 1894, ch. 21, 28 Stat. 30.

[65] Exec. Order No. 1,071, *supra* note 63.

[66] *See* NAGLE, *supra* note 50, at 263–65.

[67] *Id.* at 374.

Moreover, President Wilson issued an executive order in 1915[68] directing the Secretary of the Interior to adopt a system of compensation for persons injured when engaging in construction of an Alaska railroad authorized by Congress.[69] An Attorney General Opinion justified the Order, reasoning in part that, although Congress had not directed implementation of the compensation scheme, "[r]ecognition of this policy is already to be found in government action at Panama, and in legislation enacted and pending in Congress, in the direction of employees' compensation."[70] The Wilson Order, in other words, conformed to congressional policy even if not found in the legislation authorizing construction of the Alaska railroad.

As is more widely remembered, FDR relied extensively on the authority over federal procurement in an effort to help the country recover from the Great Depression and prepare for, and fight, the Second World War. Early in his administration, FDR, through Executive Order 6246 in 1933,[71] required government contractors to comply with codes of fair competition issued under the National Industrial Recovery Act ("NIRA")[72] "without regard to whether the contractor is himself a party to such code or agreement."[73] The Executive Order thus went beyond the terms of the NIRA itself, but the contractual condition was consistent with congressional policy. In administering the Hoover dam construction project, Roosevelt required limiting laborers to an eight-hour work day, again in the absence of any direct legislative authority.[74] Through Executive Order 6917,[75] FDR created the Federal Prison Industries—departing from his namesake's example—to market products to the federal government.[76] Establishment of the Federal Prison Industries may not have flowed directly from prior congressional delegations on procurement, but it responded to the federal government's need for goods. Of even greater salience, Executive Order 8802,[77] for the first time in history, required a pledge of nondiscrimination in defense contracts and created a commission to enforce it. The nondiscrimination order

68 Exec. Order Alaskan Railroad No. 2 (Apr. 10, 1915).

69 Act of March 12, 1914, ch. 37, 38 Stat. 305, *repealed by* Alaska Railroad Transfer Act, Pub. L. No. 97–468, Title VI, § 615(a)(1), 96 Stat. 2556, 2577 (1983).

70 Alaskan R.R–Comp. for Accidents, 30 Op. Att'ys Gen. 402, 405 (1915).

71 Exec. Order No. 6,246 (Aug. 10, 1933).

72 National Industrial Recovery Act, Pub. L. No. 67, 48 Stat. 195 (1933).

73 Exec. Order No. 6,246 (Aug. 10, 1933).

74 *See* NAGLE, *supra* note 50, at 387–88.

75 Exec. Order No. 6,917 (Dec. 11, 1934).

76 *See* NAGLE, *supra* note 50, at 378.

77 Exec. Order No. 8,802, 6 Fed. Reg. 3109 (June 27, 1941).

rested within the President's common law procurement authority,[78] even while striving to help unify the country to confront the impending war.[79]

These early twentieth century examples highlight the extent to which Presidents used their authority over public lands and projects to seek ends unspecified by Congress, as long as the contractual conditions fell within the zones of authority otherwise entrusted to them by Congress or directly by the Constitution.[80] Historically, the power to enter into contracts was viewed as an incident of sovereignty, and presidents set conditions that furthered social goals while pursuing their procurement mission.[81] Long before FPASA, therefore, presidents asserted substantial authority not only to shape governmental contracts, but also to pursue significant social goals other than efficient procurement through such contracts. The two Executive Orders under President Theodore Roosevelt in particular presage the executive orders issued later in the century under FPASA.

As Attorney General Robert F. Kennedy later wrote in an Attorney General Opinion in 1961 defending the presidential mandate of nondiscrimination clauses in federal contracts,[82] "except to the extent that [Congress] has either required or prohibited certain types of Government contracts or certain provisions to be included in such contracts, the executive branch of the Government has discretion to contract in such manner and on such terms as it considers appropriate."[83] The Attorney General then cabined the President's power by asserting that the nondiscrimination order was consistent with "[t]he public policy of opposition to discrimination because of race, creed, color, or national origin" flowing both from the Constitution and prior acts of Congress.[84] Moreover, the Opinion continued that Congress's acquiescence in presidential imposition of a nondiscrimination clause in public contracts "is strong confirmation of its validity."[85]

A more straightforward example of the executive branch's power to condition contracts based on prior congressional mandates can be found in President Nixon's later order[86] requiring that prior violators of the Clean

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78 President Truman after the war issued the justly famed Executive Order requiring integration of the Armed Forces. *See* Exec. Order No. 9,981, 13 Fed. Reg. 4313 (July 28, 1948).

79 Indeed, as a historical matter, FDR evidently issued the order to quell growing civil rights unrest. *See* KENNETH R. MAYER, WITH THE STROKE OF A PEN, 187–88 (2001). FDR attempted to help unify the country as it was about to embark in armed hostilities.

80 For other limitations, see *infra* Part II.

81 *See* GITTERMAN, *supra* note 28, at 3; *see also* U.S. CONST. art. I, § 1.

82 *See* 42 U.S. Op. Att'y Gen. 97 (Sept. 26, 1961).

83 *Id.* at 100.

84 *Id.* at 103.

85 *Id.* at 106 (citing United States v. Midwest Oil Co., 236 U.S. 459, 472–75 (1915)).

86 *See* Exec. Order No. 11,602, 36 Fed. Reg. 12475 (July 1, 1971).

Air Act be prohibited from working on federal projects even when otherwise eligible. Through contracting, President Nixon sought not just efficient performance of projects, but also compliance with environmental statutes and implementing regulations. In short, presidents have the inherent ability to engage in procurement and, through procurement, can strive for non-procurement goals drawn either from prior congressional acts or directly from the Constitution.

## B. *The Proprietary Authority of the Executive Branch*

Courts in the twentieth century utilized the concept of inherent powers in procurement to bolster the executive branch's more general proprietary authority. Courts held that the President's duty to superintend federal governmental property and funds carried with it the ability to attach conditions to others' use of such resources.

Although Congress enjoys the power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States,"[87] the President as manager of such resources enjoys the same rights as any landowner or proprietor at common law—absent congressional restrictions to the contrary. Given that the federal government owns over twenty-five percent of the land in the nation,[88] the President's influence in determining how best to steward federal land is substantial.

One manifestation of this common law right emerged in President Taft's famous proclamation withdrawing from use a large area of federal land in California containing oil preserves, even after Congress had permitted the exploration.[89] The federal government brought suit after the Midwest Oil Company began extracting oil. The Supreme Court in *United States v. Midwest Oil Co.*[90] upheld the President's Order, stressing that the President "has[,] during the past 80 years, without express statutory authority—but under the claim of power so to do—made a multitude of Executive Orders which operated to withdraw public land that would otherwise have been open to private acquisition. They affected every kind of land—mineral and nonmineral."[91] The Court recognized that management of land resources called for discretion. Indeed, the Court continued that

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87 U.S. CONST. art. IV, § 3, cl. 2.

88 *Public Lands 101*, CONG. W. CAUCUS, https://perma.cc/78PP-42DD.

89 Act of Feb. 11, 1897, ch. 216, 29 Stat. 526. President Theodore Roosevelt similarly had withdrawn federal lands from private development. *See* EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 120 (4th ed. 1957).

90 236 U.S. 459 (1915).

91 *Id.* at 469. The Court reasoned principally that Congress's acquiescence to the executive's past practices justified the withdrawal of the land. In so doing, however, the Court predicated the executive's past practice on its traditional role to steward public lands.

> prior to the initiation of some right given by law the citizen had no enforceable interest in the public statute and no private right in land which was the property of the people. The President was in a position to know when the public interest required particular portions of the people's lands to be withdrawn from entry or location; his action inflicted no wrong upon any private citizen.[92]

The Court thereby recognized the President's unique role in managing federal lands. The Court acknowledged Congress's predominant role but added that the executive could implicitly take steps in managing public lands to the same extent as could private parties.[93]

Earlier, in *Grisar v. McDowell*,[94] the Court stated that

> from an early period in the history of the government it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses.[95]

The President enjoyed the common law right to steward public lands, at least absent direction from Congress to the contrary. Moreover, the presidential practice of withdrawing public lands from private use was so consistent that in *Midwest Oil* the Court upheld the practice despite the earlier Congressional statute opening up federal lands to oil exploration.[96]

When engaging in procurement, the executive branch must similarly exercise discretion, much as does any private business. In *Perkins v. Lukens Steel Co.*,[97] for example, the Supreme Court (before FPASA) upheld an executive branch contractual provision requiring contractors to pay the prevailing minimum wage when working on federal governmental projects.[98] Although the President acted in part pursuant to the Public Contracts Act,[99] the Court explained that "[l]ike private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases."[100] The Court continued that "the Government may for the purpose of keeping its own house in order lay down guide posts by which its agents are to proceed in the procurement of supplies, and which create duties to the

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92 *Id.* at 471.

93 *See id.* at 474.

94 73 U.S. 363 (1867).

95 *Id.* at 381.

96 United States v. Midwest Oil Co., 236 U.S. 459, 482–83 (1915).

97 310 U.S. 113 (1940).

98 *Id.* at 127.

99 41 U.S.C. §§ 6501–6511.

100 *Perkins*, 310 U.S. at 127; *see also* Atkin v. Kansas, 191 U.S. 207, 222–23 (1903) (purchasing decisions of a state are proprietary when "prescrib[ing] the conditions upon which it will permit public work to be done on its behalf"); Heim v. McCall, 239 U.S. 175, 192 (1915) (following *Atkin*). For a more recent decision see American Yearbook Co. v. Askew, 339 F. Supp. 719, 722 (M.D. Fla. 1972) (affirming a "state's right to dictate the specifications for its own work").

Government alone."[101] In other words, just as a private developer can determine which goods to purchase and whether to insist that contractors pay a particular wage to employees, so can the executive branch, absent any limitations affixed by Congress.[102]

One illustrative example lies in President Clinton's decision that all handguns purchased by the federal government be equipped with child safety locks.[103] Only Congress could impose that requirement nationwide, but President Clinton hoped his Order nevertheless would have a profound effect by spurring gun manufacturers to develop child safety locks and, thus, make guns with such locks more readily available on the market. Through purchasing, President Clinton sought the social good of greater gun safety. Both in purchasing and in procurement more generally, therefore, the executive branch has enjoyed a common law right to impose conditions to pursue non-procurement goals consistent with its overall responsibilities.

The D.C. Circuit in *Building & Construction Trades Department v. Allbaugh*[104] later echoed that view. In that case, the court considered the legality of Executive Order 13,202,[105] which provided that no entity receiving federal funds for a construction project may require contractors to enter, or prohibit them from entering, into a project labor agreement. Without reaching the statutory authorization issue, the court held that the President could exercise the authority to attach conditions to federal funds: "[T]he Government unquestionably is the proprietor of its own funds, and when it acts to ensure the most effective use of those funds, it is acting in a proprietary capacity."[106] Thus, the proprietary theory extends beyond the inherent contractual authority theory recognized in the nineteenth century cases discussed previously because it is coextensive with federal funding, and not just federal construction projects. Indeed, the court in *Allbaugh* stressed that, just because "the Government is a lender to or a benefactor of, rather than the owner of, a project" does not preclude the Government from "acting just as would a private entity [because] a private lender or benefactor also would be concerned that its financial backing be used efficiently."[107]

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101 *Perkins*, 310 U.S. at 127.

102 Of course, unlike private parties, the executive branch as proprietor must abide by constitutional restrictions. *See infra* Part II for further limitations.

103 William J. Clinton, *Remarks on Signing the Memorandum on Child Safety Lock Devices for Handguns and an Exchange with Reports*, THE AMERICAN PRESIDENCY PROJECT (Mar. 5, 1997), https://perma.cc/CY5T-79GP; *see also* GITTERMAN, *supra* note 28, at 31.

104 295 F.3d 28 (D.C. Cir. 2002).

105 Exec. Order No. 13,202, 66 Fed. Reg. 11225 (Feb. 17, 2001).

106 *Allbaugh*, 295 F.3d at 35.

107 *Id.*

The approach in *Allbaugh* asks whether private companies or developers could impose similar conditions upon the vendors with whom they do business.[108] For instance, if private developers can insist that contractors with whom they do business pay a particular minimum wage, then so can the federal government. If private developers can require that their contractors wear masks or do not bring guns to work, then so can the federal government. An easy case in point is the Clinton Executive Order banning smoking in federal governmental buildings,[109] something a private party can do as well. Whether managing federal lands, buildings, or funds, the President has substantial discretion to attach conditions.

In *Allbaugh*, the court continued, however, that the question is whether the government is acting as "a private contractor would act," and not seeking instead to "affect conduct unrelated to the employer's performance of contractual obligations."[110] The court attempted to craft a distinction between steps a government could take in managing property as opposed to using its control of property as a means of regulating unrelated private conduct. The difficulty with applying a standard differentiating between the government acting as a proprietor as opposed to a regulator is that private contractors can do both at the same time. Just as the federal government has done, private contractors can agree to use only union or nonunion labor. Private contractors can insist on buying parts made only in the United States. Certainly, landowners and factory owners can both require that visitors wear masks. To assess the probity of a distinction between contractual and noncontractual goals, the following sub-subsections briefly consider the salience of the ESG movement both with respect to private corporate activities generally, and more specifically with loan agreement provisos.

1. General Corporate ESG Movement

Consider Disney. Disney uses its authority as a private owner to accomplish a variety of goals, several of which in the past earned the wrath of Florida Governor Ronald DeSantis.[111] Disney (at least until recently), in its own words, strives to "drive economic opportunity, access, and equity in communities in which [it] operate[s]."[112] Moreover, Disney, again in its own words, "has set labor standards for the tens of thousands of facilities

108 *See id.*

109 Exec. Order No. 13,058, 62 Fed. Reg. 43451 (Aug. 13, 1997).

110 *Allbaugh*, 295 F.3d at 34 (citation omitted).

111 In large part, the dispute escalated over Disney's opposition to the Florida law circumscribing discussion of sexuality in the classroom. *See, e.g.*, Elisabeth Buchwald & Samantha Delouya, *Disney and DeSantis Have Settled Their Yearslong Dispute*, CNN (March 27, 2024, 2:55 PM), https://perma.cc/F9MG-VXGT.

112 THE WALT DISNEY CO., 2022 CORPORATE SOCIAL RESPONSIBILITY REPORT 23 (2022).

that make Disney-branded products" worldwide.[113] Disney, at least publicly, does not only pursue profit.

More broadly, the corporate ESG movement reminds us that private corporations routinely pursue more than the narrow goal of profitability.[114] Environmental goals include responsible conservation measures not required by current regulations. Microsoft, for instance, touts that it "is committed to using their technolog[ies] and influence to help solve the world's biggest environmental challenges."[115] Costco as well articulates the imperative "to create a sustainable supply chain that benefits our members, our suppliers, and the environment."[116] Some corporations pledge to honor animal welfare, despite the potential financial impact.[117] Social goals include the extent to which corporations give back to the communities in which they are located. GlaxoSmithKline relates that it strives to enhance public health outcomes by providing access to affordable medicines.[118]

To be sure, there has been strong pushback to the ESG movement in some quarters due to the tension with the goal of shareholder profit maximization.[119] Although pursuit of social goals may be justified on the ground that corporate directors should implement shareholder values and not merely profit,[120] the ESG movement remains controversial.[121]

As in the corporate sector, the President should enjoy leeway to pursue social goals while carrying out the tasks delegated by Congress, as long as those social goals can be tied to legislative delegations. The

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113 *Operating Responsibly*, THE WALT DISNEY CO., https://perma.cc/BUK7-YX4Q.

114 For an early analysis, see FRESHFIELDS BRUCKHAUS DERINGER, A LEGAL FRAMEWORK FOR THE INTEGRATION OF ENVIRONMENTAL, SOCIAL AND GOVERNANCE ISSUE INTO INSTITUTIONAL INVESTMENT (2005). Indeed, the pursuit of ESG goals may mute the goal of profitability. *See, e.g.*, Lamar Johnson, *Disney Says ESG Policies Could Cut Into Profits*, ESG DIVE (Dec. 4, 2023), https://perma.cc/4UU7-5YDX.

115 Carolina Gomez, *6 ESG Examples Driving Success in Business*, EVERGREEN, https://perma.cc/T5BL-6LQA.

116 *Id.*

117 Corporations from Walmart to McDonald's have promised to reduce animal suffering in their supply chains, including eliminating cages for egg-laying hens, ending the sourcing of pork from operations that use gestation crates, and mandating better treatment of chickens in the poultry industry. The Humane Society in fact grades how well corporations live up to their pledges. *See* Kitty Block, *HSUS Grades Companies on Animal Welfare Pledges: See how McDonald's, Subway, Starbucks and Others Performed*, HUMANE WORLD FOR ANIMALS (Mar. 10, 2020), https://perma.cc/SCP8-Z7TU.

118 GSK, ESG PERFORMANCE REPORT 2023 10 (2024).

119 *See, e.g.*, Julie Bykowicz & Angel Au-Yeung, *Conservatives Have a New Rallying Cry: Down with ESG*, WALL ST. J. (Feb. 26, 2023), https://perma.cc/HN5N-3AFC; *see also* Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 403–05 (2020).

120 *See, e.g.*, Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J. L. FIN. & ACCT. 247, 260–61 (2017).

121 Quinn Curtis, Jill Fisch & Adriana Z. Robertson, *Do ESG Mutual Funds Deliver on Their Promises?*, 120 MICH. L. REV. 393, 408–10 (2021).

President need not adhere to any profit maximizing goal unless Congress so dictates, and pursuant to Congress's many delegations, the executive branch today exercises responsibility over almost every sector of the economy as well as the health, security, and welfare of the general citizenry. Profit maximization is not the federal government's *sine qua non.* For one example, an executive branch condition that contractors publish their own carbon emissions dovetails at least with the spirit of prior congressional delegations to the EPA to regulate such emissions.[122] Although Congress's delegations have focused predominately on the EPA to implement such goals, there is little doubt as to the executive branch's overall role in protecting the environment, as the Nixon Executive Order attests.[123] Similarly, an executive branch condition on paid sick leave comports with prior congressional delegations to ensure health through Obamacare, Medicaid, and similar measures. In pursuing procurement at the behest of Congress, presidents can simultaneously attempt to accomplish other goals consistent with authority delegated from Congress to the executive branch. President Clinton, for another example, prohibited federal contractors from purchasing goods manufactured abroad through forced child labor.[124] In implementing procurement and in managing land, the President therefore may insist on conditions consistent with the thrust of prior congressional delegations.

2. Credit Agreements

ESG principles have also loomed large in credit agreements. Funding can be predicated on key performance indicators, such as reduction in greenhouse gas emissions or in the amount of renewable energy generated or used by the borrower. Interest payments may increase depending upon attainment of such goals, or interest payments may decrease as an incentive if the goals are exceeded.[125] Funders thereby can use the power of their funds to ensure that the recipients take socially responsible actions with respect to the environment.[126]

For example, on Sept. 29, 2021, Ford updated and publicly announced a $13.5 billion corporate credit facility and a $2 billion supplemental revolving credit facility to link the amount of interest and fees that Ford is required to pay commensurate with three sustainability Key

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[122] *See* Federal Acquisition Legislation: Disclosure of Greenhouse Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68312 (proposed Nov. 14, 2022) (to be codified at 48 C.F.R. pts. 1, 4, 9, 23, 52).

[123] Exec. Order No. 11,602, *supra* note 86.

[124] Exec. Order 13,126, 64 Fed. Reg. 32383 (June 16, 1999).

[125] *See, e.g.*, Stericycle, Inc., Current Report (Form 8-K) (Sept. 30, 2021).

[126] KING & SPALDING, ESG AND SUSTAINABLY-LINKED PROVISIONS IN US CREDIT AGREEMENTS 2, https://perma.cc/JX9J-K2YU.

Performance Indicators: greenhouse gas emissions, renewable electricity consumption, and carbon monoxide emissions for its European fleet of passenger vehicles.[127] If Ford beat its targets, its interest obligations decreased, and if it lagged behind, its interest obligations increased.[128] TEVA and other major companies have followed course.[129]

Given the mix of profit maximization and social goals, the implicit proprietary-regulatory distinction drawn by the *Allbaugh* court does not result in a workable test, despite the surface appeal. Public and private proprietors have pursued a wide range of financial and social goals through contracts. Instead, just as the legitimacy of ESG should be connected in some way to shareholders' expectations or values, the President's imposition of social conditions in procurement deals or land management contracts should be tied back in some way to prior congressional delegations. With that limitation, the executive branch thus can use its contracting authority to attain a wide array of goals.

The addressed common law powers are more circumscribed than an open-ended "completion power" that would entitle a President to do whatever is necessary to discharge a delegation from Congress.[130] Rather, the common law powers described encapsulate the authorities historically incident in sovereignty—principally the powers to contract and to take related steps in managing federal funds and property. Through such common law powers, for instance, the President could have in no way justified seizure of the steel mills that led to the Supreme Court's decision in *Youngstown Steel*.[131] The common law powers inhere in the sovereign by virtue of the very function of an executive branch, and thus are far more cabined than a more general power to complete whatever tasks Congress has delegated.

### C. *The Lack of Probity of the Proprietary-Regulatory Distinction in the Preemption Context*

The proprietary-regulatory distinction has undergirded not only the *Allbaugh* court's focus on the executive branch's ability to attach conditions to contracts but also cases assessing when actions by *state* governments are preempted by federal regulation. Although the context is different, the concepts used are parallel. In a series of cases the Court

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127 Benjamin Stango, Elizabeth Goldberg & Andrew Budreika, *ESG in the Credit Agreement: A Closer Look at Sustainability Linked Loan Mechanics*, REUTERS (June 10, 2022), https://perma.cc/QS49-4M85.

128 *Id.*

129 *Id.*

130 Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2282 (2006).

131 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582 (1952).

has held that, when states act within their proprietary capacity, as through contracting, there is no preemption under federal law even when a federal regulation would otherwise apply. Most notably, in *Building & Construction Trades Council v. Associated Builders & Contractors* ("*Boston Harbor*"),[132] the Court held that decisions of state actors relating to funding or contracting could not be preempted because they did not arise in a regulatory context.[133] The Court reasoned that, "[w]hen a State owns and manages property . . . it must interact with private participants in the marketplace. In so doing, the State is not subject to preemption by the NLRA, because preemption doctrines apply only to state *regulation*."[134] The Court continued that, when the state government,

> acting in the role of purchaser of construction services, acts just like a private contractor would act, and conditions its purchasing upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find, it does not "regulate" the workings of the market forces that Congress expected to find; it exemplifies them.[135]

Similarly, in *Allied Construction Industries v. City of Cincinnati*,[136] the Sixth Circuit held that bidding specifications imposed by Cincinnati were not preempted by ERISA,[137] and in *Hotel Employees and Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC*,[138] the Third Circuit held that Pittsburgh was not preempted from requiring developers receiving federal funds to sign labor neutrality agreements.[139] State and local governments, no less than the federal government, are free to vindicate their proprietary interests even in the face of federal regulatory interests to the contrary.[140]

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132 507 U.S. 218 (1993).

133 *Id.* at 227.

134 *Id.*

135 *Id.* at 233.

136 879 F.3d 215 (6th Cir. 2018).

137 *Id.* at 224.

138 390 F.3d 206 (3d Cir. 2004).

139 *Id.* at 207–08. These cases parallel the market participant exception under the Dormant Commerce Clause, under which state forays into the marketplace, even if discriminatory against other states' commercial interests, do not violate the Commerce Clause in light of the states' ability to fashion their own proprietary, as opposed to regulatory, policies. *See, e.g.*, Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976); *see also* Reeves v. Stake, 447 U.S. 429, 438–39 (1980).

140 Prior to *Boston Harbor*, 507 U.S. 218 (1993), the Supreme Court was more suspicious of the proprietary argument. In *Wisconsin Department of Industry, Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282 (1986), a Wisconsin statute provided that state procurement officers were statutorily forbidden to purchase "any product known to be manufactured or sold by any person or firm included on the list of labor law violators." *Id.* at 284. Notably, the prohibition was not limited to firms that violated labor laws on a particular state-funded project, or even on a number of state-funded projects. Rather, the measure debarred contractors who had violated labor laws on projects inside or outside the state. The Court rejected the claim that the statute "escapes pre-emption because it is an exercise of the State's spending power rather than its regulatory power." *Id.* at 287. Observing the fact that debarment could be triggered by misconduct wholly unrelated to transactions with the state itself,

In other preemption settings, appellate courts more recently have applied two principal factors to distinguish proprietary from regulatory actions. The first of the two is whether the "challenged funding condition . . . serves to advance or preserve the state's proprietary interest in a project or transaction, as an investor, owner, or financier."[141] In other words, like FPASA itself, this factor assesses whether the state's financial interests would be furthered by the condition. A condition striving to keep labor peace clearly satisfies this factor, as does a condition aimed at preventing discrimination in the workforce. The second factor focuses on the breadth of the condition, and the broader the condition, the more likely it is considered regulatory.[142] Or, as the Fifth Circuit articulated the second factor in *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*,[143] "does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem?"[144] From this vantage point, as will be addressed,[145] the proprietary-regulatory distinction in essence mirrors the debate over how tight the nexus must be in FPASA between the President's condition and the efficiency of the procurement system. If the nexus is loose, then the President would be acting too much in a regulatory role and usurping congressional prerogatives.

Of course, the regulatory-proprietary distinction in the prior cases attempts to strike an appropriate balance between the states and an enactment of Congress. In contrast, in the executive order context, the issue concerns presidential action when no conflicting congressional measure exists. The *Allbaugh* court missed that a different test should be deployed to assess the deference due the exercise of presidential common law powers in the absence of legislation than to state governments acting in the face of an explicit congressional directive. In short, courts should defer—subject to the limitations summarized *infra* in Part II—to presidential efforts to pursue social goals while contracting for the goods and services the government needs, as long as the social goals can be tied to prior congressional delegations. Leaving aside the question of how close the nexus must be, there is no constitutional or statutory provision

the Court held that "by flatly prohibiting state purchases from repeat labor law violators Wisconsin simply is not functioning as a private purchaser of services; for all practical purposes, Wisconsin's debarment scheme is tantamount to regulation." *Id.* at 289 (citation omitted). Perhaps because the state's labor measure in *Gould* was so clearly related to the labor policy addressed in the NLRA, the Court took a harder line, concluding that the state was acting as a regulator, not proprietor.

141 Associated Builders & Contractors v. Jersey City, 836 F.3d 412, 418 (3d Cir. 2016).

142 *Id.*

143 180 F.3d 686 (5th Cir. 1999).

144 *Id.* at 693. *See also* Mich. Bldg. & Constr. Trades Council v. Snyder, 729 F.3d 572, 577 (6th Cir. 2013) (upholding state's effort to foster competition as proprietary).

145 *See infra* Part III.

preventing the executive branch from pursuing social goals through procurement and proprietorship as long as that connection exists.

Return to the *Bradford* and *Su* cases in which the executive branch required recreational outfitters on government land to pay a particular minimum wage.[146] Whether viewed from a contract or proprietary perspective, those cases lie comfortably within the President's common law authority, despite the Ninth Circuit's holding to the contrary.[147] As discussed, the federal government as landowner—absent any congressional prohibition—can condition private individuals' use of that land, including what private vendors pay to their own employees. In removing the exception for recreational services, the Biden Administration acted as could any private landowner, conditioning the terms under which its land could be used for recreational purposes.

In short, presidents have exercised far wider common law authority than is often recognized. Their power to superintend contracting, federal lands, and federal funds more generally permits them to impose conditions to ensure that contracts are carried out efficiently, funds used wisely, and social goals pursued when consistent with prior congressional delegations of authority. Indeed, even private proprietors and landowners have attached a myriad of conditions limiting use of their facilities that appear to fall in the "regulatory" camp. The substantial number of corporations that pursue social change while pursuing profit as well attest to the non-monetary goals that private corporations pursue.[148] Perhaps ironically, those arguing that presidential action under FPASA is constitutionally problematic have ignored that Presidents have long enacted similar policies outside of FPASA and that private proprietors

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146 *See supra* notes 22–26 and accompanying text.

147 Nebraska v. Su, 121 F.4th 1, 17 (9th Cir. 2024).

148 Whether viewed as a common law precedent or an incident of sovereignty, such inherent power of the presidency should not be surprising. There has long been recognition of the common law powers of other executive branch actors, with litigation most frequently arising over the common law authority of state attorneys general. Such state attorneys general exercise authority that comparable officials exercised in England before the Revolution. Issues have arisen, for example, whether such executive officers can file fraud suits absent statutory authority, conduct grand jury investigations, or bring an action in contempt. Some states have confirmed such common law authorities by statute. *See, e.g.*, State *ex rel.* McKittrick v. Pub. Serv. Comm'n, 175 S.W.2d 857, 861 (Mo. 1943) (stating that the statute adopting common law powers "has been construed as adopting not only the common-law rights and remedies of litigants, but also such common law *powers* of public officers as were possessed by similar officers in England"); Commonwealth *ex rel.* Minerd v. Margiotti, 188 A. 524 (Pa. 1936) (summarizing that such common law powers include "the right to investigate criminal acts, to institute proceedings in the several counties of the Commonwealth, to sign indictments, to appear before the grand jury and submit testimony, to appear in court and to try criminal cases on the Commonwealth's behalf"); *see also* Robert Stewart, *The Common Law Powers of the Nevada Attorney General:* Ryan v. Eighth Judicial District Court, 14 NEV. L.J. 1023, 1023–24 (2014); Bennett Liebman, *The Common Law Powers of the New York State Attorney General*, 23 N.Y.U. J. LEGIS. & PUB. POL'Y 95, 118 (2020). The recognition of inherent powers in other executive branch officials bolsters the argument for recognition of the President's common law powers.

have attached similar conditions before approving work on their own projects.[149]

## II. Limitations on the Common Law Powers of the Presidency

The President's common law powers assuredly have limits. This Part explores five limitations drawn from the Constitution.

First, Presidents cannot impose a condition on a federal contract or land lease that relates to a power outside their constitutional purview. The federal government as a whole can only regulate within the areas specified in Article I of the Constitution or in those discrete areas tied directly to the President under Article II, such as the Commander in Chief authority. For instance, the President could not likely impose a condition on a federal contractor that its employees be permitted to obtain a no-fault divorce, given that neither the Constitution nor Congress has given the President a direct role in the family law field.[150] Similarly, the President could not impose a condition on contractors that their employees leave at least fifteen percent of their estates to charity because, again, neither the Constitution nor Congress has provided the President with any role in that context. Presidents cannot bootstrap common law powers to reach fields otherwise outside their reach—the common law power as addressed in *Tingey* stems from the President's need for leeway in discharging duties delegated by Congress.[151] Presidents, therefore, must be able to track some relationship between any social condition attached to a prior delegation from Congress or exercise of a constitutionally grounded power.

At times, Presidents and, to a certain extent, courts have not attempted to tie social goals pursued through procurement with prior delegations of congressional authority. Certainly, President Theodore Roosevelt made no effort to forge a link between protecting the health of employees working on federal projects by limiting them to an eight-hour day with a relevant congressional delegation. And a number of courts have generally "acknowledged the validity of the use . . . of the procurement

149 Congressional conditions on federal spending somewhat analogously permit Congress to effectuate goals not squarely within its Article I purview. Although the conditions set by Congress must promote the general welfare, they need not be closely tied to the purpose underlying the congressional disbursement of funds, although some connection must exist. *See* United States v. Butler, 297 U.S. 1, 65–66 (1936); *see also* South Dakota v. Dole, 483 U.S. 203, 207 (1987) (observing that "[o]ur cases have suggested . . . that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs'" (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978)). As long as there is some connection between the condition and the purpose for which the funds are granted, the condition passes muster.

150 Congress, of course, can only legislate formally for the ends articulated in Article I, and the President lacks the inherent authority to act in the family relations field.

151 *See supra* text accompanying notes 34–39.

process to achieve social and economic objectives."[152] A link, however, is critical. Presidents can only pursue social objectives implicit in prior congressional delegations. Presidents would face difficulty in tracing a condition that employees of federal contractors study Latin, take pickleball lessons, or stay in Trump hotels when on business to a prior congressional delegation.

Second, the conditions imposed must be consistent with the President's underlying duty to "Take Care" that the laws be faithfully executed. In other words, the conditions cannot undermine the goals set out in the specific congressional delegation underlying the procurement or land lease. If Congress, for instance, delegates to the executive the authority to build a dam, then whatever conditions are imposed must allow the executive branch to fulfill that mission. And a delegation to administer lands as a public park can only permit conditions consistent with a park-type venue. Whatever contractual conditions the executive adds to a construction project, in other words, must be consistent with the President's responsibility to "Take Care" that the project be carried out according to congressional goals. As with any steward, presidents must preserve the assets delegated to them consistent with congressional direction. The addition of social goals in those contract conditions, by themselves, in no way defeats the President's constitutional responsibilities.

Third, Presidents through their common law authority cannot impose rights or liabilities directly upon third parties. For one example, such conditions cannot create private rights of action that have not been previously conferred by Congress. Executive orders in general instead act as "managerial tool[s] for implementing the President's personal economic policies and not as a legal framework enforceable by private civil action."[153] If an executive order fleshes out a congressionally created right of action, then private individuals can enforce that right.[154] Otherwise, the executive branch can only enforce those presidential orders through executive branch mechanisms such as debarment from further federal contracting.[155]

For instance, President Kennedy, through EO 10,925, purported to create a right of action for employees harmed by discrimination.[156] That right of action, however, could only be sustained if it stemmed from a

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[152] *See, e.g.*, United States v. New Orleans Pub. Serv., Inc., 553 F.2d 459, 466–67 (5th Cir. 1977), *vacated on other grounds,* 436 U.S. 942 (1978).

[153] Indep. Meat Packers Ass'n v. Butz, 526 F.2d 228, 236 (8th Cir. 1975).

[154] *See, e.g.*, Wallace v. Chi. Hous. Auth., 298 F. Supp. 2d 710, 720 (N.D. Ill. 2003).

[155] Indeed, courts will not even require the executive branch to follow what executive orders provide. *See* Zhang v. Slattery, 55 F.3d 732, 747–48 (2d Cir. 1995) (refusing to compel the executive branch to abide by the terms of an order pledging to grant asylum to protect individuals from China's coercive family planning program).

[156] Exec. Order No. 10,925, 26 Fed. Reg. 1977 (March 8, 1961).

statute and not from the President's inherent authority.[157] In refusing to recognize the cause of action, the Third Circuit noted that, in the government contracts context, "[n]o statute in terms confers a private remedy."[158] Rather, "enforcement of the nondiscrimination provisions . . . has been entrusted to one or more of the Governmental agencies."[159] Consider as well the D.C. Circuit's decision in *In re Surface Mining Regulation Litigation.*[160] There, plaintiffs alleged that the Department of the Interior failed to assess the inflationary impact of mining rules as required under an Executive Order.[161] The court stated that executive orders deriving from Article II of the Constitution "are not judicially enforceable in private civil suits."[162] Rather, they are only enforceable to the extent that the President, not the courts, determine.[163] Presidents through executive orders stemming from Article II inherent authority can only enforce rights through the executive branch, not the courts.

As a practical matter, this limitation carries significant consequences. If private contractors do not extend the sick leave required by an Executive Order, the employees must seek relief from the executive branch unless, of course, the private contractor has inserted such provisions in its contracts with employees.[164] Similarly, no third party can sue a federal contractor for failing to comply with a presidentially imposed environmental requirement such as an emissions report card[165]—that requirement as well can only be enforced by the executive branch as through suspension or debarment from work as a federal contractor.

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157 Farmer v. Phila. Elec. Co., 329 F.2d 3, 8 (3d Cir. 1964); *see also* Farkas v. Tex. Instrument, Inc., 375 F.2d 629, 632–33 (5th Cir. 1967).

158 *Farmer*, 329 F.2d at 8.

159 *Id.*

160 627 F.2d 1346 (D.C. Cir. 1980).

161 *Id.* at 1353.

162 *Id.* at 1357.

163 *See also* Meyer v. Bush, 981 F.2d 1288, 1290, 1296 n.8 (D.C. Cir. 1993); Manhattan-Bronx Postal Union v. Gronouski, 350 F.2d 451, 457 (D.C. Cir. 1965); Utah Ass'n of Cntys. v. Bush, 316 F. Supp. 2d 1172, 1200 (D. Utah 2004) ("'[T]o assert a . . . private cause of action under an executive order, a plaintiff must show . . . that the President issued the order pursuant to a statutory mandate or delegation of authority from Congress.'" (quoting Centola v. Potter, 183 F. Supp. 2d 403, 413 (D. Mass. 2002))).

164 More generally, the executive order cannot be considered a "statute" on which a private party can predicate a Section 1983 action. As one court has stated, "agency regulations cannot independently create rights enforceable through [the civil rights statutes]. Our conclusion should surprise no one, as it results directly from the broader, venerated constitutional law principle that Congress, rather than the executive, is the lawmaker." Save Our Valley v. Sound Transit, 335 F.3d 932, 939 (9th Cir. 2003).

165 *See* Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68312 (proposed Nov. 14, 2022) (to be codified at 48 C.F.R. pts. 1, 4, 9, 23, 52).

Fourth, presidential administrations cannot use the contracting power to impose unconstitutional conditions, whether an agreement not to practice religion or to refrain from speaking about certain subjects of national importance. The Supreme Court has stated that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests."[166] The doctrine generally arises in the context of Free Speech, but the Court has also used it to strike down a condition on a housing permit that would have resulted in a Taking.[167]

Consider President Obama's Executive Order 13,673,[168] which required contractors to post publicly allegations of labor law violations before the allegations had been subjected to administrative or judicial scrutiny. A district court judge enjoined the Order, finding in part that the Order likely violated the First Amendment by requiring public disclosure of non-final allegations.[169] The first Trump Administration reversed the Order,[170] but the controversy illustrates one limit on presidential action via executive orders.

Given the recent executive orders targeting law firms at least in part based on their prior speech,[171] this limitation on executive orders is critical. One can certainly imagine federal contractor or grant conditions that require recipients to disavow particular views. Presidents have great leeway to influence behavior through procurement and grants but not to suppress speech.[172]

Fifth, and perhaps of greatest practical relevance, Congress can explicitly or implicitly limit the executive branch's contractual authority. For instance, the Supreme Court in *Chrysler Corp. v. Brown*[173] held in part that an executive order based on FPASA could not override the Trade Secrets Act[174] earlier passed by Congress, which had recognized employers' rights to keep categories of information confidential.[175] And, in *Chamber*

[166] Perry v. Sindermann, 408 U.S. 593, 597 (1972).

[167] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).

[168] Exec. Order No. 13,673, 79 Fed. Reg. 45309 (Aug. 5, 2014).

[169] Associated Builders & Contrs. of Se. Tex. v. Rung, No. 1:16-CV-425, 2016 U.S. Dist. LEXIS 155232, at *33 (E.D. Tex. Oct. 24, 2016).

[170] Exec. Order No. 13,782, 82 Fed. Reg. 15607 (Mar. 30, 2017).

[171] *See, e.g.*, Exec. Order No. 14,246, 90 Fed. Reg. 13997 (Mar. 28, 2025).

[172] *See, e.g.*, Perkins Coie LLP v. U.S. Dep't of Just., 783 F. Supp. 3d 105 (D.D.C. 2025) (striking down executive order on grounds that it chilled protected speech); see also Hale v. Executive Office of the President, 784 F. Supp. 3d 127 (D.D.C. 2025) (same); Jenner v. DOJ, 784 F. Supp. 3d 76 (D.D.C. 2025) (same); Susman Godfrey LLP v. Exec. Office of the President, 789 F. Supp. 3d 15 (D.D.C. 2025) (same).

[173] 441 U.S. 281 (1979).

[174] 18 U.S.C. § 1905 (1948).

[175] *Chrysler*, 441 U.S. at 295, 306.

*of Commerce v. Reich*,[176] the D.C. Circuit refused to accord weight to an executive order[177] banning replacement of striking employees of federal contractors in light of the inconsistency with the National Labor Relations Act.[178] Similarly, courts held that Executive Order 11,246,[179] requiring affirmative action, could not override a bona fide seniority system because such systems were protected under Title VII.[180] In the parlance of Justice Jackson's seminal concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, presidential power as reflected in an inherent executive order is at its "lowest ebb"[181] when issued in the face of countervailing legislation. He concluded that a "Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."[182] More concretely, with possible rare exceptions, an executive order cannot conflict with a statute.[183]

Aside from legislation, Congress can also deploy its appropriations power to prohibit the expenditure of funds to carry out executive orders, as it did in blocking President Nixon's Executive Order to revive the Subversive Activities Control Board[184] and preventing President Clinton from carrying out an executive order on federalism.[185] Congress in fact has criminalized executive branch expenditure of funds not appropriated by Congress.[186] The President's common law powers cannot brush aside a statutory command.

Thus, the Constitution shapes the President's common law powers in various ways, most importantly by cabining such powers in the face of a congressional action to the contrary. Yet, absent congressional action, the President's common law powers afford a lever with which to advance social policies, as long as such policies implement in some way a goal consistent with a prior congressional delegation. The pertinent history from the Founding and thereafter amply reveals the broad common law

[176] 74 F.3d 1322 (D.C. Cir. 1996).

[177] Exec. Order No. 12,954, 60 Fed. Reg. 13023 (Mar. 10, 1995).

[178] *Reich*, 74 F.3d at 1339.

[179] Exec. Order No. 11,246, 30 Fed. Reg. 12319 (Sept. 28, 1965).

[180] *See, e.g.*, United States v. Trucking Mgmt., Inc., 662 F.2d 36, 44 (D.C. Cir. 1981); United States v. E. Tex. Motor Freight Sys., Inc., 564 F.2d 179, 185 (5th Cir. 1977).

[181] *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

[182] *Id.* at 638.

[183] One can imagine contracts entered pursuant to Article II to defend the Nation's security, which might present an exception, as might a contract to advise the President on the extent of the pardon power.

[184] Exec. Order No. 11,605, 36 Fed. Reg. 12831 (July 8, 1971); *see* LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 108–09 (Univ. Press Kan., 5th ed. 2007).

[185] FISHER, supra note 184, at 109 (addressing Exec. Order 13,083).

[186] 31 U.S.C. § 1341 (1982).

authority enjoyed by the President in pursuing the tasks delegated by Congress, namely to choose among various tools to carry out delegated functions. However, Congress retains the right to curb such exercise of common law authority.

Indeed, such interstitial common law authority should not be surprising. Federal judges fashion common law as well, albeit in relatively circumscribed areas, when defining the rights of governmental entities[187] or in fashioning procedures to resolve cases.[188] Those common law rulings are, of course, subject to congressional revision, just as are the President's actions in managing federal funds and projects. In deciding cases or controversies under Article III, judges must exercise a common law authority to determine procedural questions that arise—including abstention, preclusion, and more—absent direction from Congress.[189] As then-Professor Amy Coney Barrett expressed, "the judiciary functions only as a placeholder for Congress. If Congress subsequently adopts conflicting regulation, federal common law must give way to federal statute."[190] Thus, just as the federal judiciary must—in light of its Article III responsibility to decide cases and controversies—exercise common law authority, so must the President under Article II in managing federal lands and funds.

## III. FPASA's Ambit

As discussed, even if the executive branch possesses an inherent right to contract and to manage federal governmental property, Congress can limit or channel that authority, much as it can with foreign affairs, the conduct of war, environmental regulation, or any other executive authority. And, given that the President's common law authorities are not explicitly grounded in the Constitution, Congress has great leeway in confining those powers.

At first blush, FPASA can be read as a restriction on presidential power by requiring that only conditions leading to an "economical and efficient system for" procurement and supply[191] can be imposed on federal contractors. Congress included within the statutory scope "procuring and supplying property and nonpersonal services, and performing related functions including contracting, inspection, . . . transportation and traffic

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[187] *See, e.g.*, Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981).

[188] *See* Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 829 (2008).

[189] *See, e.g.*, Melkonyan v. Sullivan, 501 U.S. 89, 101 (1991) ("[N]ormally courts have inherent power, among other things, to remand cases."); Landis v. N. Am. Co., 299 U.S. 248, 254 (1936) (asserting that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket").

[190] BARRETT, *supra* note 188, at 821.

[191] 40 U.S.C. § 101 (1949).

management . . . [and] management of public utility services."[192] One might strain to link conditions aimed at limiting global warming or making handguns safer to an economical system of procurement.

Congress through FPASA, however, evinced no such intent. Rather, the genesis for FPASA arose from a congressionally mandated bipartisan study of how best to make the federal government's procurement program more efficient.[193] Challenges of procurement plagued the nation's efforts during World War II. Congress responded initially by enacting the Armed Services Procurement Act in 1947.[194] Congress then considered reforms outside the military and created what became known as the Hoover Commission, named for its chairman, former President Herbert Hoover.[195] The Commission relied on outside experts and created twenty-four task forces in an effort to study how best to strengthen the federal procurement process.[196]

One of the Commission's principal takeaways, perhaps anachronistic in this era of the Unitary Presidency, was that Congress had not encouraged the presidency to be sufficiently centralized. The Hoover Commission's report stressed that "[r]esponsibility and accountability are impossible without authority—the power to direct. The exercise of authority is impossible without a clear line of command from the top to the bottom, and a return line of responsibility and accountability from the bottom to the top."[197] The first three findings of the Commission are telling: First, "[t]he executive branch is not organized into a workable number of major departments and agencies which the President can effectively direct, but is cut up into a large number of agencies, which divide responsibility and which are too great in number for effective direction from the top."[198] The Commission continued: "Second Finding. The line of command and supervision from the President down through his department heads to every employee, and the line of responsibility from each employee of the executive branch up to the President, has been weakened, or actually broken, in many places and in many ways."[199] The third finding was that "[t]he President and the heads of departments lack the tools to frame programs and policies and to supervise their

192 *Id.*

193 Commission on Organization of the Executive Branch of the Government Act, Pub. L. No. 80–162, 61 Stat. 246 (1947).

194 Armed Services Procurement Act of 1947, Pub. L. No. 80–413, 62 Stat. 21 (1948).

195 THE HOOVER COMMISSION REPORT ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, at v, vi (McGraw-Hill 1949) [hereinafter HOOVER COMMISSION].

196 *Id.* at vi.

197 *Id.* at 3.

198 *Id.* at 4.

199 *Id.* at 5.

execution."[200] From the perspective of the Hoover Commission, Congress needed to prompt the President to wield greater authority to manage the executive branch. Although the Commission and legislative history do not reflect any congressional recognition of the President's common law authority in superintending procurement, Congress articulated no intent to limit previously exercised authority.

Congress, through FPASA, implemented much of the Hoover Commission's recommendations.[201] The House Report accompanying FPASA stressed that "[t]hree major internal activities of the Federal Government now suffer from a lack of central direction."[202] And the Report continued that "[b]y reason of impact of this legislation upon all agencies in the executive establishment, this subsection authorizes the President, if he deems it advisable, to prescribe over-all policies and directives . . . ."[203] As the D.C. Circuit later noted in *AFL-CIO v. Kahn*,[204] "[w]e believe that by emphasizing the leadership role of the President in setting Government-wide procurement policy on matters common to all agencies, Congress intended that the President play a direct and active part in supervising the Government's management functions."[205]

Viewed in context, therefore, Congress intended FPASA to prod the exercise of Presidential authority. Congress wished to create a mechanism empowering the executive branch to become more efficient in procurement rather than limiting the common law authority the President could otherwise exercise: "The problem faced by the Government in 1949 was the disorderly administration of mammoth federal supply operations that were uncoordinated, duplicative, and without rational procedures. The legislative history of the 1949 Act is replete with indications of congressional concern about the absence of central management."[206]

To be sure, looking only to the statutory text, Congress arguably set an implicit limitation in FPASA that the presidential conditions imposed further an "economical and efficient system for . . . procurement and supply."[207] But, as recounted above, no evidence exists that Congress thereby was attempting to *limit* power the President previously wielded in

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200 *Id.*

201 *See* H.R. REP. NO. 81-670, at 2 (1949).

202 *Id.* at 3.

203 *Id.* at 17.

204 618 F.2d 784 (D.C. Cir. 1979).

205 *Id.* at 788.

206 *Id.* at 799 (MacKinnon, J., dissenting). Judge MacKinnon, however, would have confined the President's discretion under FPASA to "streamline federal government procurement" as opposed to accomplishing broader goals consistent with prior congressional delegations of authority. *Id.* at 800. He did not canvas the scope of conditions that presidents had imposed prior to FPASA.

207 40 U.S.C. § 101.

the procurement context.[208] FPASA itself states that "the authority conferred . . . is in addition to any other authority conferred by law."[209]

Indeed, the above analysis accords with the general canon that legislation should be construed narrowly when in derogation of the common law.[210] One need not be an adherent of the canon, however, to conclude that a congressional measure designed to encourage the President to exercise *more* power did not, *sub silentio*, thereby restrict presidential authority.

Nonetheless, courts understandably have scrutinized executive orders to determine whether they comply with FPASA and have all but ignored the existence of the President's residual common law authority to attach conditions to contracts and leases in furtherance of prior congressional delegations. In construing FPASA, the courts have focused on the link between the Presidential conditions imposed and an "economic and efficient system for" procurement and supply.[211]

The leading pre-COVID case illustrating the nexus requirement is *AFL-CIO v. Kahn*. In entertaining a challenge to an executive order requiring federal contracts to include clauses mandating compliance with wage and price standards, the court found a sufficient nexus between complying with wage and price standards and an economical procurement system because compliance with the standards could reduce costs in the future.[212] Similarly, in *UAW-Labor Employment and Training Corp. v. Chao*,[213] the court determined there was a reasonable connection between the goal of efficiency and an executive order requiring all contracts in excess of $100,000 to include a provision obligating contractors to post notices informing employees of their rights not to be required to join a union. The court reasoned that the Order could enhance job satisfaction and hence efficiency.[214] Similarly, a court upheld President George W. Bush's imposition of an E-Verify system on contractors under EO 13,465[215] on the ground that the disincentive to employ undocumented workers would result in a more stable procurement system in the long run.[216]

Although courts until recently have mandated only a loose connection between executive branch conditions and the efficiency of procurement generally, they have nonetheless held that some connection

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208 *See also* NAGLE, supra note 50, at 471–72.

209 40 U.S.C. § 113.

210 *See, e.g.*, Pierson v. Ray, 386 U.S. 547, 561 (1967).

211 40 U.S.C. § 101; *see infra* notes 212–216 and accompanying text.

212 *Kahn*, 618 F.2d at 792.

213 325 F.3d 360 (D.C. Cir. 2003); *id.* at 362.

214 *Id.* at 366–67.

215 Exec. Order No. 13,465, 73 Fed. Reg. 33285 (June 11, 2008).

216 Chamber of Com. v. Napolitano, 648 F. Supp. 2d 726, 738 (S.D. Md. 2009).

must be shown under the statute.[217] An order imposing a condition that employees contribute to the United Way would presumably flunk the test, as would an order requiring government contractors to practice meditation, unless the court were convinced that the meditation would lead to efficient work.[218] Similarly, the Fourth Circuit determined that the nexus between contracting efficiency and recordkeeping requirements imposed on subcontractors under EO 11,246[219] to encourage affirmative action to be "simply too attenuated to . . . [satisfy] the requisite connection between procurement costs and social objectives."[220]

In *Kentucky v. Biden*[221] the Sixth Circuit concluded that the Biden Administration's COVID contractor requirement was not authorized under FPASA not only because of the breadth of the Executive Order but also because there was a "dearth of analogous historical examples" to back the Administration's assertion that vaccination would reduce absenteeism.[222] The court concluded that the executive branch's underlying purpose was to promote health, not make the workforce more productive or to streamline the federal system of procurement.[223] The Sixth Circuit in that case thus construed FPASA to require that any presidential conditions fall within the purpose delineated by FPASA of making the procurement system "economical and efficient," which at least that court defined to cover an efficient *system* of procurement but not the efficient performance of a contract by employees.[224]

Future judges, as in *Kentucky v. Biden*, might draw a similar line under FPASA as that recognized in the preemption context to expand the category of actions characterized as "regulatory"[225] and therefore outside the President's authority. From that perspective, the prior Executive Orders on affirmative action and DEI in particular would be in jeopardy, given that such orders empirically are only loosely tied to an efficient procurement system. Judges would have to assess whether the predominant purpose of the order was to enhance efficiency or attain some other goal.

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217 *See supra* notes 212–216 and accompanying text.

218 *But see* Shalev Roisman, *The President's Subjective and Objective Legal Obligations*, 91 FORD. L. REV. 2195, 2242 (2023) (arguing that FPASA imposes only a subjective obligation on the President to deem procurement conditions efficiency-enhancing, regardless of whether they are objectively so).

219 Exec. Order No. 11,246, 30 Fed. Reg. 12319 (Sept. 28, 1965).

220 Liberty Mut. Ins. Co. v. Friedman, 639 F.2d 164, 171 (4th Cir. 1981).

221 23 F.4th 585 (6th Cir. 2022).

222 *Id.* at 608.

223 *Id.* at 607.

224 *Id.* at 604.

225 *See* Am. Trucking Ass'ns v. City of Los Angeles, 569 U.S. 641, 651 (2013) ("[T]he line between regulatory and proprietary conduct has soft edges").

For instance, skeptical judges might decide that any condition that seeks not to preserve federal assets directly but rather to affect the rights and interests of third parties should be considered regulatory. Presidential and agency officials' comments might be scrutinized, as well as any materials that the executive branch relied upon in crafting the condition to determine which goal predominates. Indeed, the Sixth Circuit in *Kentucky v. Biden* focused on the presidential rationale for imposing the vaccine (or mask and testing) mandate on federal contractors, noting that the President "announced that his patience with unvaccinated Americans . . . is wearing thin."[226] The court concluded that the executive branch's underlying purpose was to promote health, not make the workforce more productive.[227] Under this and similar analyses, requiring employees to attend training sessions on weapons safety could well be seen as regulatory, while minimum wage conditions would still pass muster.[228]

The Ninth Circuit in *Nebraska v. Su* construed FPASA even more narrowly, reasoning that the statute vested the President only with the power to carry out specific ends elsewhere listed in the statute, such as remodeling governmental offices[229]—a connection with an efficient system of procurement would not suffice. According to the court, the statute's inclusion of a "purpose section," namely "to provide the Federal Government with an economical and efficient system,"[230] should not be construed to empower the President to impose any conditions in procurement or property management that the President believes leads to efficiency.[231] Rather, the President can issue rules and conditions only pertaining to the specific activities listed later in the statute, such as keeping furniture when moving to a new office unless "the Administrator determines . . . that it would not be more economical and efficient to make suitable replacements."[232] The court continued that FPASA similarly empowers the President to "repair, alter, or improve rented premises if the Administrator determines that doing so is advantageous to the Government in terms of economy, efficiency, or national security."[233] This reading of FPASA radically curbs the President's power in procurement

[226] *See Kentucky v. Biden*, 23 F.4th 585, 589 (6th Cir. 2022).

[227] *Id.* at 607.

[228] Even if courts ultimately conclude that FPASA sets a limitation, then FPASA at the most would curtail executive branch discretion in procurement but not disturb any other executive common law power such as that flowing from stewardship of federal funds and lands, as reflected in *Bradford*. The executive branch, after all, can pursue general health and welfare goals more broadly than can Disney in light of the multitudinous delegations to the executive branch to protect the well-being of its citizenry.

[229] *Nebraska v. Su*, 121 F.4th 1, 9–10 (9th Cir. 2024).

[230] 40 U.S.C. § 101.

[231] *Su*, 121 F.4th at 10.

[232] *Id. at* 9 (citing 40 U.S.C. § 588(c)).

[233] *Id.* at 9 (citing 40 U.S.C. § 581(c)(4)).

and in exercising proprietary authority.[234] The Ninth Circuit did not even speculate why the Congress that wished to empower the President after the Second World War to rationalize government procurement would only have granted the President such scant authority, vastly less than what Presidents had exercised previously. Nor did the court justify such a radical departure from the practice of presidents of both political parties.[235]

From the vantage point of the common law powers of the presidency, however, the debate over how tightly the President must draw the nexus between conditions in an executive order under FPASA and efficiency in procurement (or, as the Ninth Circuit would have it, to an activity specifically listed in FPASA) seems beside the point. Given that courts in the nineteenth and early twentieth centuries recognized the President's broad common law authority to contract and act as a proprietor in carrying out congressional directives, FPASA should not be read to constrain the President's authority, but rather to channel it. The common law backdrop to FPASA reinforces reading the statute to instill considerable flexibility in the President. And, outside of FPASA, the President would only need to articulate a sufficient connection between the condition imposed and either efficiency in procurement *or* consistency with a goal derived from a separate delegation from Congress. In the COVID context, the President could have pointed to a raft of delegations from Congress designed to keep citizens healthy, including Obamacare and Medicaid.

Nonetheless, judicial review remains fundamental to ensure that the condition imposed finds support either in the Constitution itself or in a prior congressional delegation. Although presidents need not articulate findings at the time that the condition was set,[236] they must after the fact be able to justify the condition based on prior delegated authority. Judges no doubt will differ on how tight a nexus there must be, but, at a minimum, the condition must further a responsibility that the Constitution or Congress has entrusted with the executive branch. The very prospect of review may serve to ensure that presidents only impose such conditions when they can articulate how the goals cohere with presidential responsibilities.

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234 The Ninth Circuit further held that FPASA's authorization in 41 U.S.C. § 3101 that "agencies shall award contracts 'to the responsible source whose proposal is most advantageous to the Federal Government considering . . . [the] cost or price' of the contract 'and the other factors included in the solicitation'" does not entitle the government to issue general binding rules in procurement, just to exercise discretion on a case by case basis to award a contract. *Id.* at 11 (citing 41 U.S.C. § 3703(c)). The court similarly held that, even though the government has the authority to "specify [its] needs" when preparing a solicitation, the operating provision does not permit imposition of general conditions on procurement. *Id.* at 12 (citing 41 U.S.C. § 3706(a)(1)(A)).

235 The dissent raised both objections. *Id.* at 25, 27–28 (Sanchez, J., dissenting).

236 Such findings, however, are preferable from a standpoint of transparency.

Irrespective of FPASA, Congress unquestionably can override or delimit further the President's common law authority. In considering Justice Jackson's concurring opinion in *Youngstown Steel*,[237] the President's reliance on inherent contractual or proprietary authority would place the action in the "zone of twilight,"[238] in which its exercise would not be clearly constitutional. Yet, Justice Jackson continued that "congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility."[239] The presidential track record in stewarding public contracts, funds, and lands opens a broad path for executive action in the future. Thus, even if FPASA ultimately is not construed as a broad delegation of authority to the President to impose conditions on federal contractors, Presidents can attain similar objectives in reliance on their inherent common law authority. With the few exceptions noted previously, Congress has not disturbed presidents' innovative use of FPASA to achieve broad social goals, as well as more efficient procurement processes. And the President's common law authority is arguably broader still.

Of course, Congress could endeavor to channel the President's authority more directly in the future. Congress, for example, could forbid the executive branch from addressing minimum wages in government contracts.[240] It could similarly place issues such as sick leave off limits. Under *Reich*, direct limitations would override any executive order imposing such conditions—in the *Youngstown Steel* framework, the President's power would be "at its lowest ebb," given that courts could uphold the President "only by disabling the Congress from acting upon the subject."[241] As in so many other contexts, Congress and the President share authority to determine the extent to which presidents can attach conditions to federal governmental contracts and use federal property to pursue goals other than the narrow goal of economic efficiency. But, what has been missed is that, in light of the President's common law authority, Congress must act if it wishes to block or limit presidential control over federal government contractors and federal land. In essence, presidential initiative in procurement and managing lands shifts the burden of overcoming inertia to Congress. Throughout our history, presidents have relied on their common law authorities to pursue a wide array of goals when acting as a proprietor in the face of congressional silence. As at the Founding, presidents may utilize their common law powers—absent

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237 *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

238 *Id.*

239 *Id.*

240 President Trump has left undisturbed President Obama's Executive Order 13,658, which imposed a lesser minimum wage. *See* Exec. Order No. 13,658, 79 Fed. Reg. 9851 (Feb. 12, 2014).

241 *Youngstown*, 343 U.S. at 637–38 (Jackson, J., concurring).

congressional direction to the contrary—in carrying out delegated authority.

## Conclusion

The President's common law powers have perhaps been lost in history. But the Supreme Court's decisions of the nineteenth century strikingly reveal that, as an incident of executive power, the President possessed the right—subject to congressional abridgement—to contract and attach conditions to contracts in carrying out delegated authority from Congress. And in disbursing funds and managing lands, the President can impose terms not set by the legislature, as clearly exemplified by the Theodore Roosevelt Executive Orders forbidding convict labor on government projects and limiting work to eight hours a day.[242] Through such powers, presidents outside of FPASA have strived to accomplish broader social objectives consistent with delegated authority. This rich tradition can independently justify many executive orders issued by twentieth and twenty-first century presidents under FPASA and bolster a broad reading of the statute. Moreover, even if FPASA ultimately is interpreted as a limit on presidential power and therefore requires the President to impose only those conditions closely linked either to the efficiency of the procurement system or, in the view of the Ninth Circuit, to specific activities listed in the statute, presidents could nevertheless rely on common law authority—as they have in the past—to further social policy goals consistent with prior congressional delegations.

[242] *See supra* notes 56, 57 and accompanying text.