

**ADMINISTRATIVE LAW  
AND PROCESS:  
CASES AND MATERIALS  
  
THIRD EDITION**

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## Chapter 1

### **The Fine Line Between Adjudication and Rulemaking (insert as Note1-8 (a), p. 9.)**

The line between rulemaking and adjudication is often a fine one. In *Neustar Inc. v. Fed. Communications Comm’n*, 857 F.3d 886 (D.C. Cir. 2017), a recent decision involving the Federal Communication Commission’s ongoing efforts to address issues of “net neutrality,” the D.C. Circuit held that the FCC’s decision to appoint a second Local Number Portability Administrator (LNPA) was not a rulemaking requiring notice and comment, but an informal adjudication. An LNPA is a neutral company designated to oversee the process by which customers retain their phone number when they change phone companies. The statute addressing the issue, 47 U.S.C. § 251(e)(1), provides that the FCC must designate at least one such company.

Complicating matters for the FCC was the fact that it had made its prior LNPA selection via notice-and-comment rulemaking. But the court held that both § 251 and the APA gave the FCC flexibility to decide whether to make an LNPA selection via rulemaking or more informal methods. As the court characterized the LNPA selection process, the FCC reasonably proceeded by informal adjudication to make a “fact-intensive determination” that “resolved interests in a specific bidding competition.” *Id.* at 895. See also §4.01 *infra*, p. 295.

## Chapter 2

### **§ 2.05, p. 79: Insert after *Board of Regents of State Colleges v. Roth*.**

#### **Note 2-23(a): *Kerry v. Din***

In *Kerry v. Din*, 135 S. Ct. 2128 (2015), a fractured Supreme Court considered whether U.S. citizens have a liberty interest in their spouse’s admission to the United States. Fauzia Din petitioned to have her husband Kanishka Berashk, a former civil servant in Afghanistan’s Taliban regime, admitted to the United States as an “immediate relative.” While Din’s petition was approved, Berashk’s visa application was denied. A consular officer informed Berashk that he was inadmissible under the Immigration and Nationality Act, 8 U.S.C. § 1182, as an alien who had engaged in “terrorist activities.” Din and Berashk received no further explanation for the denial. Din sought review district court, claiming a violation of due process of law “when, without adequate explanation of the reason for the visa denial, it deprived her of her constitutional right to live in the United States with her spouse.” *Id.* at 2131. The district court granted the Government’s motion to dismiss, but the Ninth Circuit reversed, concluding that Din had “a protected liberty interest in marriage that entitled [her] to review of the denial of [her] spouse’s visa.” *Id.* (quoting *Din v. Kerry*, 718 F.3d 856, 860 (9th Cir. 2013)).

The Supreme Court failed to produce a majority opinion, with five justices voting to reverse the Ninth Circuit and four voting to affirm. All justices agreed on the basic framework: First, the Court must determine “whether the denial of Berashk’s visa application deprived Din” of life, liberty, or property. *Id.* at 2132. If so, the Court must determine whether the Government “afforded sufficient process.” *Id.* Justice Scalia, joined by Chief Justice Roberts and Justice Thomas, concluded for the plurality that Din lacked a protected interest warranting any process.

Asserting that the “Due Process Clause has its origin in Magna Carta,” which dates back to 1215, Justice Scalia then discussed the interests protected by the English document: “The Court has recognized that at the time of the Fifth Amendment’s ratification, the words ‘due process of law’ were understood to convey the same meaning as the words ‘by the law of the land’ [from the Magna Carta].” *Id.* Justice Scalia then quoted Coke and Blackstone to establish the specific interests protected “by the law of the land,” concluding that

Din, of course, could not conceivably claim that the denial of Berashk’s visa application deprived her—or for that matter even Berashk—of life or property; and under the . . . historical understanding, a claim that it deprived her of liberty is equally absurd. The Government has not “taken or imprisoned” Din, nor has it “confine[d]” her, either by “keeping [her] against h[er] will in a private house, putting h[er] in the stocks, arresting or forcibly detaining h[er] in the street.” Indeed, not even Berashk has suffered a deprivation of liberty so understood.

*Id.* at 2133. Justice Scalia next rejected Din’s liberty argument—or, as he characterized it, the argument that, “because enforcement of the law affects her enjoyment of an implied fundamental liberty, the Government must first provide her a full battery of procedural-due-process protections.” *Id.* Justice Scalia maintained that the “asserted interest [must be] supported by this Nation’s history and practice,” *id.* at 2135, and thus surveyed the history of immigration regulation. Justice Scalia concluded from Congress’s practice of impeding “a person’s ability to bring a spouse into the United States” that Din could not make the historical showing required to establish the liberty interest. *Id.* In short, “[n]othing . . . establishes a free-floating and categorical liberty interest in marriage . . . sufficient to trigger constitutional protection whenever a regulation in any way touches upon an aspect of the marital relationship.” *Id.*

Justice Kennedy, joined by Justice Alito, concurred in the judgment on narrower grounds. Justice Kennedy concluded that there was no need to decide whether Din had a protected interest because the perfunctory explanation given by the consular official was all the process required:

Absent an affirmative showing of bad faith on the part of the consular officer who denied Berashk a visa—which Din has not plausibly alleged with sufficient particularity—[*Kleindienst v. Mandel*, 408 U.S. 753 (1972)] instructs us not to “look behind” the Government’s exclusion of Berashk for additional factual details beyond what its express reliance on [the terrorism provision]. . . .

Under *Mandel*, respect for the political branches’ broad power over the creation and administration of the immigration system extends to determinations of how much information the Government is obliged to disclose about a consular officer’s denial of a visa to an alien abroad.

*Id.* at 2141 (Kennedy, J., concurring in the judgment).

In dissent, Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, concluded that Din possessed a protected interest and that the government failed to provide her with due process:

[T]his Court has already recognized that the Due Process Clause guarantees that the government will not, without fair procedure, deprive individuals of a host of rights,

freedoms, and liberties that are no more important, and for which the state has created no greater expectation of continued benefit, than the liberty interest at issue here. [Here, Justice Breyer cited the myriad cases recognizing protected liberty interests, including reputation.] How could a Constitution that protects individuals against the arbitrary deprivation of so diverse a set of interests not also offer some form of procedural protection to a citizen threatened with governmental deprivation of her freedom to live together with her spouse in America? As compared to reputational harm, for example, how is Ms. Din's liberty interest any less worthy of due process protections?

*Id.* at 2143. (Breyer, J., dissenting).

Justice Scalia responded to the dissent at the end of his opinion: “[The Government] might, indeed, deprive Din of something ‘important,’ but if that is the criterion for Justice Breyer’s new pairing of substantive and procedural due process, we are in for quite a ride.” *Id.* at 2138 (plurality opinion) (quoting *id.* at 2142 (Breyer, J., dissenting)).

**NOTE: *Ms. L. v. U.S. Immigration & Customs Enf’t***

In *Ms. L. v. U.S. Immigration & Customs Enf’t*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018), two migrant parents bringing due process claims on behalf of themselves and all others similarly situated succeeded in obtaining a preliminary injunction requiring the government to reunify all separated minor children with their parents. This conclusion rested primarily on two factors: that the practice of family separation had expanded beyond its lawful reach, and that the government had implemented the practice with no effective procedure for managing the separated families

The court first acknowledged the power of the executive branch “to detain individuals lawfully entering the United States and to apprehend individuals illegally entering the country,” but observed that “the right to family integrity still applies” – the context of an international border “does not render the practice constitutional, nor does it shield the practice from judicial review.” Asylum seekers who are fleeing persecution “are entitled to careful consideration by government officials.” The Government’s conduct was inconsistent with the statutory scheme which was designed “to treat refugees with an ordered process[] and benevolence.”

Second, the court concluded that family had been separated without any procedures for tracking the children separated from their parents, for permitting parents to contact their children, or for reuniting the children with their parents following the completion of the parents’ immigration or criminal proceedings. The court observed that even a detainee’s personal property receives greater protections in terms of tracking and safeguarding, and that affording substantial less process and protections for a migrant’s child could not possibly satisfy due process.

The court enjoined the government’s routine practice of separating migrants from their children and ordered the government to reunite class members with their children when the parent is returned to immigration custody after their criminal proceedings conclude, subject to exceptions where the a parent is determined to be unfit or otherwise dangerous to the child. The government has failed, however, to comply with the court’s reunification deadlines, and while reunification has proceeded, Health and Human Services officials have expressed recalcitrance in complying with the court’s



orders. *E.g.*, Caitlin Dickerson, *Judge Criticizes Trump Administration for Response to Family Reunification Order*, N.Y. TIMES, (July 14, 2018), <https://www.nytimes.com/2018/07/14/us/family-reunification-migrant.html>.

The *Ms. L.* court’s preliminary injunction rested not on an APA challenge, but on the Constitution’s Due Process Clause. But, as relevant to administrative law, the court was deeply troubled by that haphazard nature of the parent-child separations and the complete absence of organized recordkeeping, reunification, or even ability for parents to check on the status of their children. President Trump’s Executive Order suggesting that it was “the Administration’s policy ‘to maintain family unity, including by detaining alien families together where appropriate and consistent with law and available resources,’” could not remedy these due process violations largely because it provided nothing more than general platitudes. As the court observed, the Executive Order “is subject to various [subjective] qualifications” and still fails to implement “plans or procedures . . . to reunify the parent with the child.”

**§ 2.05, p. 98. Insert after note 2.36(a).**

**Note 2-36(a): *City of Los Angeles v. Patel***

In *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015), the Court held that citizens who will be subject to a deprivation of due process by a deficient state statute may lodge a facial challenge to the statute under the Fourth Amendment. *Patel* applied this principle to a lawsuit challenging a Los Angeles ordinance requiring hotels to keep detailed records of their guests, particularly to track those staying for a short period of time. Law enforcement were directed to perform spot checks of the records at any time the hotel was open, and failure to comply with a record check could subject the hotel operator to immediate arrest. An arrestee would be provided with no pre-arrest opportunity to challenge the officer’s actions.

Justice Sotomayor, writing for the five-justice majority, held that the due process protections given to those searched pursuant to an administrative subpoena also applied to this case, such that hotel operators must have some “opportunity to have a neutral decisionmaker review an officer’s demand to search [a hotel’s records] before he or she faces penalties for failing to comply.” *Id.* at 2452. Justice Sotomayor rejected the argument that imposing an equivalent to a “warrant” requirement would provide hotel operators an opportunity to falsify records, explaining that “nothing . . . precludes an officer from conducting a surprise inspection by obtaining an *ex parte* warrant or, where an officer reasonably suspects the registry would be altered, from guarding the registry pending a hearing . . .” *Id.* at 2456.

**§2.07, p. 123: Insert after *Mathews v. Eldridge***

**Note 2-47(a) *Simpson v. Brown* - Pre and post deprivation due process law**

In *Simpson v. Brown County*, 860 F.3d 1001 (2017), the Seventh Circuit addressed what it described as a “classic test of procedural due process”—whether a county board could revoke a septic contractor’s professional license without notice or a pre-deprivation opportunity to be heard.

*Id.* at 1003. Plaintiff John Simpson owned a septic installation company in Brown County, Indiana, which was a rather lucrative business in a rural area of the county. Septic contractors were required to hold licenses issued by the health board. Simpson alleged that, on May 31, 2013, he received a letter from a County Health Officer, Paul Page, demanding that Simpson immediately fix Page's mother's septic system. Page threatened to petition to have Simpson's license revoked if the demands were not met. On June 14, 2013, Simpson received a second letter showing that Page had followed through on his threat, and Simpson's septic license was revoked. The letter did not identify any law Simpson had violated nor did it identify any opportunity for Simpson to challenge the decision. The district court dismissed Simpson's complaint for failure to state a claim upon which relief could be granted.

Brown County argued that Simpson's due process rights were not violated because the revocation of his license was "random and unauthorized," such that the County had neither the ability nor the duty to provide pre-deprivation process. The Seventh Circuit rejected the argument that the County could avoid liability by passing decision making responsibilities to one Health Officer, concluding that "Brown County cannot give its Health Officer unfettered discretion to decide when, how, and why he revokes licenses, and then claim that he was acting so unpredictably that it would be impossible to provide pre-revocation notice."

Applying *Mathews v. Eldridge*, the Seventh Circuit first emphasized the importance of Simpson's private interest in his ability to earn a livelihood. Second, the Seventh Circuit determined that "there is a high risk that someone like Simpson could have his license revoked without so much as a warning, to say nothing of a fair opportunity to be heard" and basic pre-deprivation procedures, such as meaningful notice or an informal hearing, to curb this risk would not be unduly burdensome. Finally, the court determined the government interest was rather high in this situation because of the public health and safety concerns presented by proper septic management. However, there was nothing in the record "suggests that [the] septic problems associated with Simpson were both so serious and so urgent as to justify summary action by the County, without an opportunity for Simpson to be heard."

Finally, the court could find no adequate post deprivation remedy for Simpson to pursue. Of the remedies available to him, none other than § 1983 allowed him to seek compensation for the income he lost when his license was revoked. The court thus reversed the district judge's decision and remanded the claim for further proceedings, concluding that "that even if the evidence ultimately shows the County had some basis for summary action, the County has not shown there is an adequate post-deprivation remedy under state law, whether in the form of common-law judicial review or anything other."

## Chapter 3

### § 3.06, p. 262: Insert after Note 3-38.

#### **Note 3-38(a): *North Carolina State Board of Dental Examiners v. FTC***

The Supreme Court has acknowledged the potential for structural bias in the antitrust context, citing the ability of agencies to sanction anticompetitive behavior. In *North Carolina State Board of*

*Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015), the Court considered whether an agency board, comprised of a majority of active market participants, was entitled to state-action immunity from the Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2015). The North Carolina State Board of Dental Examiners argued that the Board fit the exception carved out in *Parker v. Brown* for “anticompetitive conduct by the States when acting in their sovereign capacity.” 317 U.S. 341 (1943). In *Parker*, the Court reasoned that Congress did not intend to infringe upon the ability of states to make policy decisions under its police power. In *Board of Dental Examiners*, however, the Court limited *Parker* and held that agency boards that are “controlled by market participants” are not automatically entitled to state-action immunity. 135 S. Ct. at 1114. Instead, these boards must show that “the actions in question are an exercise of the State’s sovereign power” to benefit from the immunity. *Id.* at 1111.

The North Carolina State Board of Dental Examiners was responsible for creating, administering, and enforcing a licensing system for dentists. As required by statute, the eight-member Board included six practicing dentists, elected by other dentists in the state; one practicing dental hygienist, elected by other hygienists; and one “consumer,” appointed by the governor. Each member served three-year terms with a maximum of two consecutive terms, and the Act did not establish a mechanism for any public official to remove a board member.

In the 1990s, dentists began providing teeth-whitening services. By 2003, nondentists provided the same services at lower prices. Dentists complained to the Board about the competition from nondentists, citing their lower prices. In 2006, the Board issued cease-and-desist letters warning nondentists that teeth whitening constituted the “practice of dentistry” and thus required a license. As a result, nondentists stopped offering teeth whitening services.

In 2010, the Federal Trade Commission filed an administrative complaint alleging that the Board’s “concerted action to exclude nondentists from the market for teeth whitening services in North Carolina constituted an anticompetitive and unfair method of competition.” *Id.* at 1109. In response, the Board asserted state-action immunity under *Parker*. The Administrative Law Judge decided that the Board could not assert the immunity without active supervision from the state, which it could not show. On the merits, the ALJ “determined that the Board had unreasonably restrained trade in violation of antitrust law.” *Id.* The FTC sustained the ALJ and was affirmed by the Fourth Circuit.

The Supreme Court affirmed, reasoning that “while the Sherman Act confers immunity on the States’ own anticompetitive policies out of respect for federalism, it does not always confer immunity where, as here, a State delegates control over a market to a nonsovereign actor.” *Id.* at 1110. The Court noted that while *Parker* immunity protected the states’ right to make policy choices that involved anticompetitive behavior, the rationale did not extend to cases where a state delegates its decision making power to a nonsovereign board and abdicates its supervisory responsibilities. Nor could the determination of whether an agency requires supervision to turn “on the formal designation given by States to regulators.” *Id.* at 1114. Rather, the determination requires as “an assessment of the structural risk of market participants’ confusing their own interests with the State’s policy goals.” *Id.*

The Court rejected the argument that its holding would “discourage dedicated citizens from serving on state agencies that regulate their own occupation.” *Id.* at 1115. While this was not a case that presented the question whether agency officials were immune from damages liability, the Court

noted that such immunity could be available and that, in any event, the states could provide for defense and indemnification in the event of litigation. Even simpler, the Court suggested, the states could comply with the requirement of active supervision for agencies controlled by active market participants.

In dissent, Justice Alito, joined by Justices Scalia and Thomas, argued that the majority ignored the history of the Sherman Act, disrespected state sovereignty, and created an unworkable standard to determine when an actor is “nonsovereign.” *Id.* at 1117–23 (Alito, J., dissenting).

**§ 3.07, p. 274: Insert after note 3-43.**

**Note 3-43(a): *Association of Administrative Law Judges v. Colvin***

The workload ALJs face could also pose a threat to ALJ independence, though the Seventh Circuit held that it was a threat without a remedy. In *Association of Administrative Law Judges v. Colvin*, 777 F.3d 402 (7th Cir. 2015), the union representing ALJs in the Social Security Administration filed suit, claiming that the requirement that ALJs render 500 decisions per year jeopardized the ALJs’ decisional independence, in violation of the APA. The APA “provides that when conducting a hearing an administrative law judge is not subject to direction or supervision by other employees of the agency that he is employed by and may not be assigned duties inconsistent with his duties and responsibilities as an administrative law judge.” *Id.* (citing 5 U.S.C. §§ 554(d)(2), 3105 (2015)).

Judge Posner, writing for the Seventh Circuit, characterized the ALJs’ allegations in the following way:

The plaintiffs argue that because it takes less time for an administrative law judge to award social security disability benefits than to deny benefits, because an award is not judicially appealable and therefore the administrative law judge doesn't have to be as careful in his analysis of the disability claim (doesn't, in short, have to try to make his decision appeal proof), the effect of the quota (as we'll call the “goal,” thus giving the plaintiffs the benefit of the doubt) is to induce administrative law judges to award more benefits: were it not for the quota, they would deny benefits whenever they thought the applicant wasn't entitled to them under the law, even if making that determination took a lot of time. The argument is thus that the quota alters the administrative law judges’ preferred ratio of grants to denials of benefits and by doing so infringes their decision-making independence.

*Id.* at 404. The ALJs did not contend that the SSA imposed the quota “because it wanted a higher rate of benefits awards;” in fact, the SSA was under pressure to reduce disability benefits because its available trust fund was nearing exhaustion. *Id.* Rather, Judge Posner wrote, “[t]he aim of the quota is to speed up decision-making . . .” *Id.*

The Seventh Circuit held that the ALJs lacked a remedy under the APA. The ALJs alleged a “significant change in duties, responsibilities, or working conditions,” an area over which the Civil Service Reform Act provided an exclusive remedy. *Id.* at 403. “But the plaintiffs have no remedy under [the Civil Service Reform Act] either, because the Act does not prohibit an increase in a production quota,” except where the increase violates a provision that was inapplicable in this case.

*Id.* at 404.

Leaving open the possibility that the APA could provide a remedy for some intentional interference with an ALJ's decisional independence—despite the strong language in the Civil Service Reform Act—Judge Posner observed:

Of course, any change in work duties, responsibilities, or working conditions might affect an administrative law judge's decision-making. Beyond some point, increasing a worker's quota is going to induce him to spend less time on each task. If he is a worker on a poultry processing assembly line and the conveyor belt that carries the chickens to his work station for deboning is speeded up, he will spend less time deboning each chicken than he might think desirable to make sure no bits of bone are left in the chicken when it leaves his work station on the conveyor belt. In other words, the quality of his output would decline. Yet he would not be heard to claim that his decisional independence was being compromised. His situation would parallel that of the administrative law judges. The time pressure on him would result in a reduction in the quality of his work. Similarly, the plaintiffs allege that because of the quota, the quality of the administrative law judges' work decreases because they grant benefits in cases in which, had they more time, they would have denied benefits; the quota thus affected their decision-making.

Suppose the Social Security Administration hired more administrative law judges, thus reducing the workload of each one. With less pressure to grant benefits in order to make the quota, the administrative law judges might, because they were spending more time on each case, increase the fraction of benefit denials. But who would argue that increasing a work force is an actionable interference with the workers' decisional independence?

*Id.* at 405. The court concluded: "An incidental and unintentional effect of a change in working conditions is not actionable under the Administrative Procedure Act." *Id.*

**§ 3.09, p. 294: *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (insert after Note 3-54)**

Late in its 2017-18 term, the Supreme Court faced a case in *Masterpiece Cakeshop* that, in its words, "present[ed] difficult questions as to the proper reconciliation" of the "authority of a State . . . to protect the rights and dignities of gay persons" and "the right of all persons to exercise fundamental freedoms [of speech and religion] under the First Amendment." A same-sex couple asked Masterpiece Cakeshop, a Colorado bakery, to make them a wedding cake. The bakery's owner, Jack Phillips, refused because of his religious opposition to same-sex marriage. At the time, Colorado did not recognize same-sex marriage. The couple filed a discrimination charge with Colorado's Civil Rights Commission, which ruled in favor of the couple. The state courts upheld the Commission's decision.

But rather than resolve the "delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power," the Court resolved the case on far narrower grounds, holding that the Colorado Civil Rights Commission (the agency responsible for enforcing the

state's Anti-Discrimination Act) failed to act as a neutral decision maker in ruling against the bakery.

The Court began with the unremarkable premise that the baker “was entitled to the neutral and respectful consideration of his claims in all the circumstances of the case.” Instead, according to the Court, the Commission acted with hostility toward Phillips:

At several points during [one] meeting, commissioners endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community. One commissioner suggested that Phillips can believe “what he wants to believe,” but cannot act on his religious beliefs “if he decides to do business in the state.” A few moments later, the commissioner restated the same position: “[I]f a businessman wants to do business in the state and he's got an issue with the—the law's impacting his personal belief system, he needs to look at being able to compromise.

...

[The Commission later held another meeting.] On this occasion another commissioner made specific reference to the previous meeting's discussion but said far more to disparage Phillips' beliefs. The commissioner stated:

“I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.”

To describe a man's faith as “one of the most despicable pieces of rhetoric that people can use” is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere. The commissioner even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation.

Because these comments were made “by an adjudicatory body deciding a particular case,” the Court could not “avoid the conclusion that these statements cast doubt on the fairness and impartiality of the Commission's adjudication” of the Phillips' case. More specifically, the Commission “violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.”

The Court reached this conclusion after considering

“the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or

administrative history, including contemporaneous statements made by members of the decisionmaking body.” *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 540 (1993). In view of these factors the record here demonstrates that the Commission's consideration of Phillips’ case was neither tolerant nor respectful of Phillips’ religious beliefs. The Commission gave “every appearance,” *id.*, at 545, of adjudicating Phillips’ religious objection based on a negative normative “evaluation of the particular justification” for his objection and the religious grounds for it. *Id.* at 537. It hardly requires restating that government has no role in deciding or even suggesting whether the religious ground for Phillips’ conscience-based objection is legitimate or illegitimate. On these facts, the Court must draw the inference that Phillips’ religious objection was not considered with the neutrality that the Free Exercise Clause requires.

The Court closed by again emphasizing the narrow scope of its holding, explaining that “Phillips was entitled to a neutral decisionmaker” while “[t]he outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.”

#### **Note 3-55: A new strain of bias doctrine?**

Where does this case fall when compared to the other cases discussed in this chapter? Despite the lack of discussion of disqualification, influence, or intrusion, does the Supreme Court’s rationale reflect some of the concerns of the *Cinderella* prejudgment case, or the due process issues discussed in *Pillsbury Co v. FTC*, excerpted *infra* at page 504 of the casebook? Compare the treatment of bias in *Masterpiece Cakeshop* with the Court’s opinion in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), excerpted below in the Supplement to Chapter 7.

*Masterpiece Cakeshop* was a 7-2 decision, with six justices signing on to Justice Kennedy’s majority opinion. Do you think the result would have changed if the baker had an idiosyncratic (but firmly held—supported by a religious text and confirmed by testimony) religious belief that adults should not celebrate birthdays, and had relied upon that belief to deny a birthday cake to a 30 year old? Assume that this action violated the state’s statute prohibiting age discrimination, and further assume that the Commission’s reaction to these hypothetical religious beliefs had been identical, replete with harsh statements as to the illegitimacy of any religion that holds such a belief. If you believe that the Court would come out differently under this alternative scenario, then to what do you attribute the result in *Masterpiece*?

## **Chapter 4**

### **§ 4.02, p. 305: Insert after note 4-7.**

#### **Note 4-7(a): *United States v. Clarke***

In *United States v. Clarke*, 134 S. Ct. 2361 (2014), a unanimous Supreme Court recognized the potential for the Internal Revenue Service to abuse its broad summons power under the Internal

Revenue Code, 26 U.S.C. § 6201(a), and held that “probing the mental processes” of IRS agents may be appropriate at times. For failure to comply with a summons, the IRS may bring an enforcement action in district court in which it must demonstrate good faith. This requires establishing that the summons has a “legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the [IRS’s] possession, and that the administrative steps required” by statute have been followed. *Id.* at 2365. These enforcement proceedings, while “summary in nature,” are adversarial: “The summoned party must receive notice, and may present argument and evidence on all matters bearing on a summons's validity.” *Id.* at 2367.

In *Clarke*, a taxpayer sought to question IRS agents about their decision to issue a summons, specifically challenging the summons for improper purpose. The IRS issued its usual affidavit, attesting to the above requirements. The taxpayer, in response, first alleged that the IRS issued the summonses to “punish [the taxpayer] for refusing to agree to a further extension of the applicable statute of limitations.” *Id.* at 2366. In support, the taxpayer “stated in sworn declarations that immediately after Dynamo declined to grant a third extension of time, the IRS, despite having not asked for additional information for some time, suddenly issued the summonses.” *Id.* Second, the taxpayer alleged that the IRS decided to enforce the summonses after the taxpayer sued to challenge tax adjustments in order to evade the Tax Court’s limitations on discovery. “In support of that charge, the respondents submitted an affidavit from [an attorney who] reported that only the IRS attorneys handling the Tax Court case, and not the original investigating agents, were present at the interview of his client.” *Id.*

The district court determined that the taxpayer “ha[d] made no meaningful allegations of improper purpose” warranting examination of IRS agents and denied the taxpayer’s request. *Id.* The Eleventh Circuit reversed, “holding that a simple allegation of improper purpose, even if lacking any factual support, entitles a taxpayer to question IRS officials concerning the Service’s reasons for issuing the summons.” *Id.*

The Supreme Court held that a taxpayer must “make a showing of facts that give rise to a plausible inference of improper motive” to question IRS officials, rejecting the Eleventh Circuit’s rule permitting questioning of IRS officials upon a mere allegation. *Id.* at 2368. The Court believed that this standard struck the correct balance between the rights of taxpayers and the need avoid the possibility of “turning every summons dispute into a fishing expedition for official wrongdoing.” *Id.*

The Court elaborated on how a taxpayer may make such a plausible showing:

[T]he taxpayer is entitled to examine an IRS agent when he can point to specific facts or circumstances plausibly raising an inference of bad faith. Naked allegations of improper purpose are not enough: The taxpayer must offer some credible evidence supporting his charge. But circumstantial evidence can suffice to meet that burden; after all, direct evidence of another person's bad faith, at this threshold stage, will rarely if ever be available. And although bare assertion or conjecture is not enough, neither is a fleshed out case demanded . . . .

*Id.* at 2367–68. The Court remanded the case to the Eleventh Circuit to apply the correct standard in the first instance.



## Chapter 5

### § 5.02, p. 398: Insert after note 5-15.

#### Note 5-15(a): Ex Parte Communications in Informal Rulemaking

Think back to the discussion of the *PATCO* case in chapter 3 and the problem of ex parte communications in formal adjudication. Should the APA's ban on ex parte communications in formal adjudication carry over to informal rulemaking? Aren't such communications part and parcel of a holistic rulemaking process in which agencies seek input from experts, policy makers, and parties who will be impacted by regulatory changes? Does the benefit of robust participation in informal rulemaking outweigh the risks associated with backdoor access?

Agencies might resolve the tensions of ex parte communications in rulemaking by developing straightforward procedures that govern how such communications should be treated. In June 2014, the Administrative Conference of the United States adopted a set of recommendations outlining best practices which agencies may employ in the informal rulemaking context. Recognizing that informal communications between agency personnel and members of the public “have traditionally been an important and valuable aspect of informal rulemaking proceedings,” the recommendations also acknowledged that “[t]he mere possibility of non-public information affecting rulemaking creates problems of perception and undermines confidence in the rulemaking process.” To mitigate this risk, the Administrative Conference made the following recommendations:

- Agencies that conduct informal rulemaking should maintain written ex parte policies.
  - Such policies should provide guidance for a proper agency response at each stage in the rulemaking process.
  - Such policies should result from a careful balancing of the benefits and harms of ex parte communications.
- Agencies should not impose ex parte restrictions *prior* to issuance of a notice of proposed rulemaking (NPR).
- Agencies should disclose the content of ex parte communications *after* a NPR is issued.
- Agencies should carefully consider the propriety of ex parte communications *after* a period for comment has closed.
- Agencies should promulgate specific rules for quasi-adjudicatory rulemakings, and they should consider how digital technologies may aid the management or disclosure of ex parte communications.

To review the full set of recommendations, see ADMIN. CONFERENCE OF THE U.S., EX PARTE COMMUNICATIONS IN INFORMAL RULEMAKING (2014), *available at* [http://www.acus.gov/sites/default/files/documents/Recommendation%202014-4%20\(Ex%20Parte\)\\_0.pdf](http://www.acus.gov/sites/default/files/documents/Recommendation%202014-4%20(Ex%20Parte)_0.pdf). Do these guidelines strike an acceptable balance between the need for informed decision making and the importance of agency candor? Can you think of other recommendations that might be helpful?

### § 5.02, p. 404: Note: e-RuleFaking—The Double-Edged Sword of e-Regulation (Insert after Problem 5-1)

As Problem 5-1 shows, the Internet has revolutionized public political participation, bringing the

once-lofty administrative process to the laptops and smartphones of the masses. But so too has the digitization of notice-and-comment procedures opened the door to more insidious activity.

To wit: the recent public kerfuffle over the FCC’s net neutrality repeal attracted nearly 24 million comments, nearly all of which were submitted online.<sup>1</sup> According to several analysts who conducted sample analyses, some 90 percent of all comments were autogenerated “form” letters.<sup>2</sup> Approximately 9 million of the submissions came from fake email addresses generated using the website FakeEmailGenerator.com.<sup>3</sup> 2 million comments evince stolen identities—signed with the names of real persons who did not create or consent to the submissions.<sup>4</sup> And 50 thousand comments are simply missing from the record.<sup>5</sup>

Some of the more complex mass submissions take the form of a “Mad Libs” game. The submitting citizen (or automated bot) selects from an assortment of similar or synonymous terms to form substantively similar, but facially distinct, sentences in support of one position or another.<sup>6</sup> For example, one analyst identified the following “Mad Lib” submission:

“I (urge) / (advocate) / (encourage) you to (overturn) / (rescind) (the previous administration’s) / (president obama’s) / (tom wheelers’s) / (obama/wheelers’s) (order) / (plan) / (decision) / (policy) / (scheme) to (takeover) / (control) / (regulate) (broadband) / (the web) / (the internet) / (internet access).”<sup>7</sup>

Some of these submissions were “legitimate”; that is, actually submitted by an interested person. Others were submitted fraudulently. One analysis concluded that over 95 percent of the FakeEmailGenerator comments opposed the repeal order.<sup>8</sup> But over 99 percent of “truly unique comments” opposed the repeal order,<sup>9</sup> suggesting that while more fake comments were submitted in support of retaining net neutrality, the vast majority of the actual substantive comments likewise supported net neutrality.

Of course, even in the days when the post was the sole mechanism for participating in the administrative process, it was still possible to submit duplicate or form comments, many of which may perhaps be uninformed, uninformative, or otherwise unhelpful. But the rise of e-regulation has, without a doubt, made it much easier for outside influencers to “stuff the box,” so to speak, and to do so with greater sophistication.

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<sup>1</sup> *In re Restoring Internet Freedom*, FCC No. 17-108 (Jan. 4, 2018) (slip op at 538) (Rosenworcel, Comm’r, dissenting).

<sup>2</sup> Sarah Oh et al., *Public Comments in the World of Massively Multiplayer Regulatory Proceedings*, TECH. POL’Y INST (Dec. 5 2017), <https://techpolicyinstitute.org/2017/12/05/public-comments-in-the-world-of-massive-multiplayer-regulatory-proceedings/>.

<sup>3</sup> *Id.*

<sup>4</sup> Rosenworcel Dissent; Brian Fung, *FCC Net Neutrality Process ‘Corrupted’ by Fake Comments and Vanishing Consumer Complaints, Officials Say*, WASH. POST (Nov. 24, 2017), [https://www.washingtonpost.com/news/the-switch/wp/2017/11/24/fcc-net-neutrality-process-corrupted-by-fake-comments-and-vanishing-consumer-complaints-officials-say/?utm\\_term=.8924e509b714](https://www.washingtonpost.com/news/the-switch/wp/2017/11/24/fcc-net-neutrality-process-corrupted-by-fake-comments-and-vanishing-consumer-complaints-officials-say/?utm_term=.8924e509b714).

<sup>5</sup> Rosenworcel Dissent

<sup>6</sup> Sarah Oh et al., *supra*.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Jeff Kao, *More than a Million Pro-Repeal Net Neutrality Comments were Likely Faked*, HACKERNOON (Nov. 23, 2017), <https://hackernoon.com/more-than-a-million-pro-repeal-net-neutrality-comments-were-likely-faked-e9f0e3ed36a6>; accord Oh et al., *supra*.

Adding to the controversy in the net neutrality repeal effort was the FCC's refusal to hold public hearings, where perhaps the agency could have more meaningfully engaged with the public. Especially where the public comment process was overburdened and hijacked by ne'er-do-wells, dissenting Commissioner Rosenworcel criticized the decision not to take the opportunity to engage in a face-to-face dialogue.<sup>10</sup>

Setting aside the merits of net neutrality as a policy, opponents of its repeal may well have plausible grounds for a procedural challenge. 5 U.S.C. § 553(c) requires agencies to consider "written data, views, or arguments." As dissenting Commissioner Clyburn pointed out, the repeal order failed to cite a single consumer comment.<sup>11</sup> For its part, the majority wrote that it "focused its review of the record on the submitted comments that bear substantively on the legal and public policy consequences" and "did not rely on comments devoid of substance, or the thousands of identical or nearly-identical non-substantive comments that simply convey support or opposition."<sup>12</sup>

What does it mean for an agency to consider data, views, and arguments? Should it matter that, as pointed out by Commissioner Clyburn, the FCC failed to cite a single consumer comment? What of the missing comments—does it matter if it is highly likely that most of those missing comments were either fake or mass submissions? Should mass submissions warrant any consideration at all?

What would you emphasize in a procedural challenge to the FCC's net neutrality repeal order? What would you emphasize in defending the order?

## **§ 5.02, p 417, Insert after Note 5-28**

### **Note 5-28(a): *State of New York v. Nuclear Regulatory Commission***

The controversy and litigation involving what to do with nuclear byproducts has lingered long past the height of the nuclear power movement. In *New York v. Nuclear Regulatory Commission*, 824 F.3d 1012 (D.C. Cir. 2016), the D.C. Circuit rejected a petition from four states to overturn a Nuclear Regulatory Commission regulation that allows spent fuel rods to be stored indefinitely at nuclear power plants.

The court discussed the NRC's plans for spent nuclear fuel processing and storage. A planned repository built into Yucca Mountain has long been part of a plan to store nuclear waste, but local concerns have successfully held up construction of this repository for decades. The NRC sought to determine the overall rules for long term spent fuel storage with a General Environmental Impact statement. The Commission established a procedure allowing for future licensing decisions to go forward if spent fuel would cool in pools for no more than sixty years and then be moved into dry casks to be replaced every hundred years. Petitioners challenged this rule as arbitrary and capricious, but the court rejected this argument, instead deferring to the agency's decision.

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<sup>10</sup> Rosenworcel Dissent at slip op page 538

<sup>11</sup> Clyburn dissent at 223.

<sup>12</sup> Slip op. at 194.

**§ 5.02, p. 471: Delete Note 5-59. Replace with the following:**

**Note 5-59: The “One-Bite Rule”**

In a line of cases beginning with the D.C. Circuit’s decision in *Paralyzed Veterans of America v. D.C. Arena L.P.*, the court of appeals imposed what became known as the “one-bite rule” to interpretive rulemaking: while an agency may initially adopt an interpretation of a regulation without public discussion, any “new interpretation of a regulation that deviates significantly from one the agency has previously adopted” requires full compliance with the APA’s notice-and-comment procedures. *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1203 (2015) (citing *Paralyzed Veterans of Am.*, 117 F.3d 579 (D.C. Cir. 1997)).

In *Perez v. Mortgage Bankers Ass’n*, the Supreme Court rejected the one-bite rule as inconsistent with the text of the APA. The Department of Labor had issued several interpretive opinion letters between 1999 and 2010 on whether mortgage-loan officers are covered by the minimum wage and overtime compensation requirements of the Fair Labor Standards Act of 1938. The letters were issued without notice and comment and changed interpretations several times before finally determining in 2010 that mortgage-loan officers were exempted from FLSA requirements. The Mortgage Bankers Association challenged the interpretation in district court as, *inter alia*, “procedurally invalid” under *Paralyzed Veterans*. The D.C. Circuit agreed with the petitioner that the interpretive rule was invalid for lack of notice and comment. The Supreme court, however, noted that “Section 4(b)(A) of the APA provides that . . . the notice-and-comment requirement ‘does not apply’ to ‘interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.’” *Id.* at 1203–04 (citing 5 U.S.C. § 553(b)(A)). While the case did not present an opportunity for the Court to determine the “precise meaning” of an “interpretive rule,” it stated that “the critical feature of interpretive rules is that they are issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.” *Id.* at 1204. “The absence of a notice-and-comment obligation makes the process of issuing interpretive rules comparatively easier for agencies than issuing legislative rules,” while such rules “do not have the force and effect of law and are not accorded that weight in the adjudicatory process.” *Id.*

The “categorical” nature of the exemption of interpretive rules from the APA’s notice and comment requirement was “fatal” to the inconsistent rule in *Paralyzed Veterans*. The Court concluded:

Rather than examining the exemption for interpretive rules contained in § 4(b)(A) of the APA, the D.C. Circuit in *Paralyzed Veterans* focused its attention on § 1 of the Act. That section defines “rule making” to include not only the initial issuance of new rules, but also “repeal[s]” or “amend[ments]” of existing rules. . . .

[The D.C. Circuit] conflates the differing purposes of §§ 1 and 4 of the Act. Section 1 defines what a rulemaking is. It does not, however, say what procedures an agency must use when it engages in rulemaking. That is the purpose of § 4. And § 4 specifically exempts interpretive rules from the notice-and-comment requirements that apply to legislative rules. So, the D.C. Circuit correctly read § 1 of the APA to mandate that agencies use the same procedures when they amend or repeal a rule as

they used to issue the rule in the first instance. Where the court went wrong was in failing to apply that accurate understanding of § 1 to the exemption for interpretive rules contained in § 4: Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule.

*Id.* at 1206. Under *Vermont Yankee*, *infra* § 5.02[C], the courts lacked “authority to impose upon [an] agency its own notion of what procedures are best”:

The *Paralyzed Veterans* doctrine creates just such a judge-made procedural right: the right to notice and an opportunity to comment when an agency changes its interpretation of one of the regulations it enforces. That requirement may be wise policy. Or it may not. Regardless, imposing such an obligation is the responsibility of Congress or the administrative agencies, not the courts.

*Id.* at 1207. The Court reversed the D.C. Circuit and overruled *Paralyzed Veterans* and its progeny.

#### **§ 5.02, p. 428: Insert after note 5-34**

##### **Note 5-34(a): *Hughes v. Talen Energy Marketing*, 136 S. Ct. 1288 (2016)**

On April 19, 2016, the Supreme Court handed down *Hughes v. Talen Energy Marketing*, 136 S. Ct. 1288 (2016), a watershed case concerning the scope of the states’ powers to subsidize new generation facilities consistent with the Federal Power Act. The Supreme Court unanimously affirmed the Fourth Circuit’s decision invalidating a Maryland program that had required the state’s utilities to guarantee a generation developer a fixed revenue stream for its electricity sales to PJM Interconnection, the region’s wholesale market operator.

Maryland was concerned about in-state power generation, particularly because its location at the cornerstone of the Mid-Atlantic meant buying electricity from outside the state would be significantly more expensive. FERC’s existing program allowed new energy plants a three-year period to adjust to the market price. However, that system of relying upon the auction to set a fair market did not satisfy Maryland’s public service commission, because not enough capacity generation was built in-state under the auction rules. Maryland instead created a system that would give a 20-year guaranteed contract price to new generators who would still bid through the FERC auction system but would be paid the difference if the price dropped. This defeated the purpose of the auction and resulted in no downward cost pressure on utilities and increased costs passed on to ratepayers. FERC said they could not approve of this system and the other generators sued to stop it. The Supreme Court agreed with FERC.

Although the majority opinion left open the possibility for other state systems to be upheld, it invalidated this particular scheme because it was preempted by federal law and based on the FERC price without giving the agency a chance to review the reasonableness of the decision.

**§ 5.02[F], p. 463: Insert after Note 5-48**

**Note 5-48(a):**

Recently, scholars have conducted quantitative analyses and meta-analyses of data and have concluded that exempt rulemaking is pervasive among U.S. agencies. For two such interesting analyses, see Graziella Romero & Nausica Palazzo, *Who Fears the Big Government? A Coordinated Attempt[t] to Downsize Federal Agencies' Power in the United States*, 18 GLOB. JURIST 2(2018) (analyzing “unorthodoxies” in administrative procedure, including the use of interpretive rules and guidance, the triggering of the good cause exception, and delegation to State and private actors), and Wendy Wagner, William West, Thomas McGarity & Lisa Peters, *Dynamic Rulemaking*, 92 N.Y.U.L. REV. 183 (2017) (“In contrast to the prevailing view that agencies rarely revise rules, our findings reveal that, at least in some quarters of the administrative state, revisions are the rule rather than the exception.”).

**§ 5.02, p. 473: Insert after Problem 5-5.**

**[G] Reliance on Private Standard-Setting Through Incorporation by Reference**

Aside from the enumerated exceptions to section 553, agencies may avoid notice-and-comment rulemaking by adopting, or incorporating by reference, codes or standards promulgated by private organizations.

Congress delegated partial incorporation authority to federal agencies in the National Technology Transfer and Advancement Act (NTTAA), providing that—with certain exceptions—all “[f]ederal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a means to carry out policy objectives or activities determined by the agencies and departments.” Pub. L. No. 104-113, § 12(d)(1), 110 Stat. 775 (1995). The Office of Management and Budget promulgates guidelines to assist agencies with their incorporation of private standards, while the National Institute of Standards and Technology—an arm of the Department of Commerce—coordinates the incorporation effort. OMB Circular A-119 is the go-to guide for incorporation: it defines voluntary, consensus standards; establishes a policy framework; and clarifies agency management and reporting requirements. You can review Circular A-119 at <https://standards.gov/nttaa/agency/index.cfm?fuseaction=documents.A119>.

What potential problems emerge when agencies rely on privately promulgated standards rather than notice-and-comment rulemaking? Nearly 10,000 private standards have been incorporated by reference into federal regulations. And while the NTTAA specifically authorizes incorporation of technical standards, standards designed to assure interoperability may have broader regulatory implications, such as in the arenas of health and safety.

In a recent article, Professor Peter Strauss highlighted a critical problem with incorporation as it relates to transparency and accessibility: standard developers’ “copyright claims on standards do not lapse with their abandonment as voluntary consensus standards, so if a standard has been incorporated by reference its ostensible copyright endures for the life of the rule incorporating it.” Peter L. Strauss, *Private Standards Organizations and Public Law*, 22 WM. & MARY BILL RTS. J.

497, 507 (2013). As a result, agencies—which are obligated not only under general copyright law but under Circular A-119 itself to respect industry copyrights—simply refer readers to external standards rather than reproducing them. “[T]he only practical course for someone in Minnesota, California, or Alabama who is affected by and wishes to learn the resulting law will usually be to purchase the standard . . . at whatever price [the copyright owner] chooses to set.” *Id.*; see also Nina A. Mendelson, *Private Control over Access to Public Law: The Perplexing Federal Regulatory Use of Private Standards*, 112 MICH. L. REV. 737 (2014).

Furthermore, commentators warn that because agencies are required to reference the specific version of each standard they incorporate, regulations may fall out-of-date as private organizations respond more fluidly to emerging technologies. See Emily S. Bremer, *Incorporation by Reference in an Open-Government Age*, 36 HARV. J.L. & PUB. POL’Y 131 (2013); Strauss, *supra*, at 506.

Professor Bremer proposes a collaborative solution whereby agencies partner with standard developers to make standards publicly available while restricting access, e.g., to read-only functionality. Do such public-private partnerships seem likely to resolve the problems inherent in private standard setting? Will these partnerships work?

#### **§ 5.03[C], p. 498: Insert after Note 5-71**

##### **Note 5-72: Transparency in Regulatory Science**

A rule proposed by the EPA with the stated goal of improving regulatory would limit EPA scientists to considering publicly-available data. See Strengthening Transparency in Regulatory Science, 83 Fed. Reg. 18768 (proposed Apr. 30, 2018) (to be codified at 40 C.F.R. 30). Critics say the rule will limit the number of studies available for consideration because many significant studies rely on the confidential health data of study subjects. Lisa Friedman, *E.P.A. Announces a New Rule. One Likely Effect: Less Science in Policymaking.*, N.Y. TIMES (Apr. 24, 2018), <https://www.nytimes.com/2018/04/24/climate/epa-science-transparency-pruitt.html>.

Consider the discussion throughout this chapter regarding the different types of formal and informal regulatory actions. The somewhat unusual aspect of this proposed rulemaking is that it “does not directly regulate any entity outside the federal government.” 83 Fed. Reg. at 18769. Do you think that the EPA could have accomplished this result via something other than notice-and-comment rulemaking? Why do you think that the EPA elected to take this route?

## **Chapter 6**

#### **§ 6.02: p. 508, Insert after Note 6-1**

##### **Note 6-1(a)**

In a recent article, *Congress in the Administrative State*, Professor Brian D. Feinstein analyzes Congress’s ability “to exert a degree of ex post control over the administrative state following legislative enactments” through oversight hearings. 95 WASH. U. L. REV. 1187, 1191 (2018).

Professor Feinstein reaches two key conclusions on congressional oversight:

First, the finding that committees strategically decline to hold hearings based on the preference alignment of Congress, the committee, and the relevant agency shows a subtle majoritarian dynamic at work in Congress's internal organization. . . . Second, the finding that oversight can substantially alter agency behavior indicates that Congress's position vis-a-vis the White House is not as diminished as some suggest.

*Id.* at 1191-93. These findings, he suggests, undermine the notion that judicial deference to agencies leaves them unchecked. Instead, he argues that Congress can leverage its ability to convene oversight hearings and to restructure internal institutions to exert significant influence over agency behavior.

**§6.04, p.526, Insert after Note 6-8:**

**Note 6-8(a): New Developments in the Congressional Review Act (CRA).**

As stated in the text of the Act, Congress has a rather short window to pass a disapproval resolution of the rules in question—only 60 legislative days (meaning days that Congress is actually in session). 5 U.S.C. § 802(a). After a resolution has been passed by Congress disapproving of the rule, the president must then sign the bill. If he does not, then Congress can still disapprove of the rule by a two-thirds majority. 5 U.S.C. § 801(a)(3)(B). That final disapproval by two-thirds is analogous to the regular legislative process for bills and resolution with legislative power. Congress recently considered a flurry of CRA repeal bills focused on regulations passed under the closing year of the Obama Administration.

Overall, fifteen Obama era regulations were repealed in 2017 pursuant to the CRA:

- Requiring disclosure of energy company payments to foreign governments in order to receive mining, drilling, or other exploration rights, House Joint Resolution 41, Pub. L. 115-4, 131 Stat. 9 (Feb. 14, 2017), repealing 81 Fed. Reg. 49359 (July 27, 2016);
- Protecting streams adjacent to coal mines and prohibiting certain dumping of waste from mining operations in order to protect streams, House Joint Resolution 38, Pub. L. 115-5, 131 Stat. 10 (Feb. 16, 2017), repealing 81 Fed. Reg. 93066 (Dec. 20, 2016);
- Sharing information from the Social Security Administration of those receiving benefits for “disabling mental illnesses” to the Department of Justice so that those recipients could be excluded from purchasing firearms, House Joint Resolution 40, Pub. L. 115-8, 131 Stat. 15 (Feb. 28, 2017), repealing 81 Fed. Reg. 91702 (Dec. 19, 2016);
- Requiring federal contractors to disclose violation of labor standards, House Joint Resolution 37, Pub. L. 115-11, 131 Stat. 75 (Mar. 27, 2017), repealing 81 Fed. Reg. 58562 (Aug. 25, 2016);
- Changing government land use standards on Bureau of Land Management (BLM) owned land, House Joint Resolution 44, Pub. L. 115-12, 131 Stat. 76 (Mar. 27, 2017), repealing 81 Fed. Reg. 89580 (Dec. 12, 2016);
- Establishing school rating standards and requiring districts to comply with these standards, House Joint Resolution 57, Pub. L. 115-13, 131 Stat. 77 (Mar. 27, 2017), repealing 81 Fed. Reg. 86076 (Nov. 29, 2016);



- Requiring data collection on teacher preparation programs, House Joint Resolution 58, Pub. L. 115-14, 131 Stat. 78 (Mar. 27, 2017), repealing 81 Fed. Reg. 75494 (Oct. 31, 2016);
- Restricting state based limits on drug testing for social welfare beneficiaries, House Joint Resolution 42, Pub. L. 115-17, 131 Stat. 89 (Mar. 31, 2017), repealing 81 Fed. Reg. 50298 (Aug. 1, 2016);
- Restricting state officials' ability to authorize certain hunting of grizzly bears and other mammals in Alaskan wildlife refuges, House Joint Resolution 69, Pub. L. 115-20, 131 Stat. 86 (Apr. 3, 2017), repealing 81 Fed. Reg. 52247 (Aug. 5, 2016);
- Requiring employers to maintain an accurate registry of workplace injuries for at least five years, House Joint Resolution 83, Pub. L. 115-21, 131 Stat. 87 (Apr. 3, 2017), repealing 81 Fed. Reg. 91792 (Dec. 19, 2016);
- Protecting consumer privacy in data collected by broadband providers, Senate Joint Resolution 34, Pub. L. 115-22, 131 Stat. 88 (Apr. 3, 2017), repealing 81 Fed. Reg. 87274 (Dec. 2, 2016);
- Stopping states from withholding family planning money from Planned Parenthood under title IX. House Joint Resolution 43, Pub. L. 115-23, 131 Stat. 89 (Apr. 13, 2017), repealing 81 Fed. Reg. 91852 (Dec. 19, 2016);
- Department of Labor rule relating to savings arrangements established by qualified State political subdivisions for non-governmental employees, House Joint Resolution 67, Pub. L. 115-24, 131 Stat. 90 (Apr. 13, 2017), repealing 81 Fed. Reg. 92639 (Dec. 20, 2016); and,
- Savings Arrangements Established by States for Non-Governmental Employees, House Joint Resolution 66, Pub. L. 115-35, 131 Stat. 848 (May 17, 2017), repealing 81 Fed. Reg. 59464 (August 30, 2016).
- Arbitration Agreements, House Joint Resolution 111, Pub. L. 115-74, 131 Stat. 1243 (Nov. 1, 2017), repealing 82 Fed. Reg. 33210 (July 19, 2017).

The House of Representatives passed a repeal bill for a BLM action designed to reduce waste from leaking oil and gas wells. *See*, 81 Fed. Reg. 83008 (Nov. 18, 2016). While it passed the House 221-191, the measure failed in the senate 49-51. *See*, Actions, H.J. Res. 36, available at <https://www.congress.gov/bill/115th-congress/house-joint-resolution/36/actions>

#### **§ 6.04, p.527, insert after note 6-10**

##### **6.10(a): *New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Dept. of Health & Mental Hygiene***

In *New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Dept. of Health & Mental Hygiene*, 16 N.E. 3d 538 (N.Y. 2014), the Court of Appeals of New York found that the health board's ban on sugary drinks impermissibly went beyond its statutory authority to infringe upon the legislative sphere.

In 2012, the New York City Board of Health amended the City Health Code to restrict the size of cups and containers used by food service establishments for the provision of sugary drinks. This provision was designed to combat rising obesity amongst the residents of New York City. The proposed rule, referred to as the "Portion Cap Rule" was scheduled to go into effect in 2013. After

petitioners sued for injunctive relief, the trial court enjoined the Board from implementing the rule, finding that the Board of Health exceeded its regulatory authority and engaged in law making, effectively usurping the role of the Legislature.

On appeal, the respondents argued that both the Board of Public Health and the City Council had co-equal legislative authority. The court rejected this argument, finding that the Board possessed only regulatory authority delegated by statute, not the ability to create new laws. Noting the ongoing discussion between the City authorities over how to handle the obesity crisis, the Court found that the Board had made an impermissible legislative policy decision instead of simply passing an administrative rule. The court thus permanently enjoined the Board from enforcing the rule.

**§ 6.06, p. 537: *Gundy v. United States* - Resolving the (Lack of a) Circuit Split on Nondelegation (Insert after Note 6-22)**

Despite the unanimous view of the circuit courts,<sup>13</sup> the Supreme Court has granted certiorari in *Gundy v. United States* to determine whether SORNA – the Sex Offender Registry Notification Act, 34 U.S.C. § 20913 – unconstitutionally empowers the Attorney General to determine the retroactive effect of the statute.<sup>14</sup> Specifically, SORNA imposes a registration requirement on sex offenders.<sup>15</sup> Subsection (d) sets forth the role of the Attorney General:

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) [regarding initial registration].<sup>16</sup>

As the Petition for Writ of Certiorari argues, “[I]n SORNA Congress failed to articulate any policy to guide the Attorney General in determining the law's applicability to pre-Act offenders. Congress gave no guidance as to how the Attorney General should exercise this delegated authority.”<sup>17</sup>

The Supreme Court has welcomed this challenge, notwithstanding the unanimous viewpoints of the courts of appeals on SORNA and the 80-plus years of jurisprudence declining to invoke the antidelegation doctrine as the *ratio decidendi*. The Petition for the Writ of Certiorari contains a strong clue as to how this case has wound its way for a merits argument before the high court—a citation to a concurrence written by the newest Supreme Court Justice from his 2008 Tenth Circuit opinion in *United States v. Hinckley*. *Hinckley* held that the initial registration requirement automatically applied retroactively to sex offenders who were able to comply with initial registration requirements at the time SORNA was enacted. Rather than giving the Attorney General

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<sup>13</sup> Brief for the United States in Opposition, *Gundy v. United States*, No. 17-6086, 2017 US 8132119, at \*21 (U.S. Dec. 18, 2017) (“Every court of appeals to decide such a nondelegation to SORNA has rejected it—ten of them in published decisions and one in multiple unpublished decisions.”) (collecting cases).

<sup>14</sup> *Gundy*, No. 17-6086, 2018 WL 1143828 (U.S. Mar. 5, 2018).

<sup>15</sup> 34 U.S.C. § 20913(a)–(b).

<sup>16</sup> *Id.* § 20913(d).

<sup>17</sup> Petition for a Writ of Certiorari, *Gundy*, No. 17-6086, 2017 WL 8132120, at \*18 (Sept. 20, 2017).

*carte blanche* to determine whether the registration requirement applied, the court held that the Attorney General was empowered to make exceptions to the otherwise applicable requirement. We have chronicled in this section several decisions discussing the doctrine and multiple nonmajority opinions strongly suggesting that the nondelegation doctrine should be more stringently applied. Then-Circuit Judge Gorsuch's concurrence in *Hinckley*, which he used for additional justification for his view on the automatic retroactivity of SORNA, fits this mold:

Article I of the Constitution vests legislative authority in Congress and “permits no delegation of those powers.” *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 472 (2001). That is why, when Congress delegates authority to the executive branch, the Supreme Court requires it to provide “an intelligible principle to which the person or body authorized to [act] is directed to conform.” *Id.* (quoting *J.W. Hampton Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). Under Mr. Hinckley's reading, however, the Attorney General has, as the Eleventh Circuit conceded, “*unfettered discretion* to determine both *how* and *whether* SORNA [is] to be retroactively applied.” *Madera*, 528 F.3d at 858 (first emphasis added). Without any discernible principle to guide him or her in the statute, the Attorney General could, willy nilly, a) require every single one of the estimated half million sex offenders in the nation to register under SORNA, b) through inaction, leave each of those half million offenders exempt from SORNA, c) do anything in between those two extremes, or d) change his or her mind on this question, making the statute variously prospective and retroactive, as administrative agencies are normally entitled to do when Congress delegates interpretive questions to them, *see Nat'l Cable & Tel. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1001 (2005).<sup>18</sup>

The Tenth Circuit's automatic retroactivity holding would ultimately be abrogated by the Supreme Court, which held that retroactivity must be determined by the Attorney General. Judge Gorsuch's delegation concerns were echoed four years later by the odd couple of Justice Scalia joined by Justice Ginsburg, who suggested in dissent that the majority's interpretation of 34 U.S.C. § 20913(d) left it “to the Attorney General to decide—with no statutory standard whatever governing his discretion—whether a criminal statute will or will not apply to certain individuals. That seems to me sailing close to the wind with regard to the principle that legislative powers are nondelegable . . . .”<sup>19</sup>

Justices Gorsuch, Ginsburg, and company will determine just how close to the antidelegation wind SORNA sails will likely be determined at the start of October Term 2018, as *Gundy* is not scheduled to be fully briefed until September 2018.<sup>20</sup> Is the antidelegation doctrine on the verge of a revival? Can you identify a guiding principle in SORNA? Do you think a decision invalidating SORNA's initial registration provision could provide any guidance going forward, or is SORNA so plainly unconstitutional that it will still leave *Schechter Poultry* and *Panama Refining* as the perennial guideposts going forward?

<sup>18</sup> *United States v. Hinckley*, 550 F.3d 926, 948 (10th Cir. 2008) (Gorsuch, J., concurring), *abrogated in part on other grounds by Reynolds v. United States*, 565 U.S. 432 (2012).

<sup>19</sup> *Reynolds*, 565 U.S. at 450 (Scalia, J., dissenting).

<sup>20</sup> <http://www.scotusblog.com/case-files/cases/gundy-v-united-states/>.

**§ 6.07, p. 569: Insert after note 6-30.**

**Note 6-30(b):**

Consider the following passage from Hannah J. Wiseman, *Delegation and Dysfunction*, 35 YALE J. ON REG. 233 (2018) (exploring the concept of delegation within a cooperative federalist regime and its attendant principal-agent challenges, the author argues for improving consistent oversight by strengthening the tools available to federal principals and their subfederal agents in holding each other accountable).

But as recent political changes demonstrate, federal agencies might lack the resources or political will to uphold their duties under federal acts or to adequately oversee entities exercising delegated federal power. Here, the statutorily-enabled abilities of citizens, local governments, and states to encourage or force federal agency action are important tools. . . . [C]itizens, including states and local governments, can petition agencies and argue that they have violated a nondiscretionary duty by, for example, failing to reconsider a previous decision to abdicate federal responsibility. The agency need not substantively change its behavior based on this petition, but it at least must adequately respond. For example, the Natural Resources Defense Council and other environmental groups petitioned the EPA arguing that conditions had changed so dramatically since its 1988 determination of state control that the EPA should now regulate these wastes under the hazardous waste portion of RCRA. Although this was unsuccessful, it did cause the EPA to review the adequacy of state programs. . . .

. . . There are, however, substantial limitations to the petition and citizen-suit process. In some cases, citizens may not petition or sue states to force them to carry out nondiscretionary duties. . . .

. . . Despite some early citizen suits that resulted in dramatic changes such as stringent Clean Air Act regulations, citizen suits have not recently had as much success, in part due to narrow judicial interpretations and a general reluctance of courts to force agencies' hands. This is in part due to the narrow wording of citizen-suit provisions themselves, which tend to only allow suits for nondiscretionary duties and a failure to enforce individual violations of a statute after an agency has received notice of this problematic failure to enforce. . . .

*Id.* at 288-9.

**§ 6.07, p. 570: Replace the D.C. Circuit's opinion in *Association of American Railroads v. United States Department of Transportation* with the Supreme Court's opinion overruling the D.C. Circuit.**

**§ 6.07: *Department of Transportation v. Association of American Railroads***

In *Association of American Railroads v. DOT*, 721 F.3d 666 (D.C. Cir. 2013), in your casebook at p. 570, the D.C. Circuit held that the congressionally created National Railroad Passenger Corporation—Amtrak—was a private entity and that it therefore could not lawfully participate in

creating regulations for the private freight railroad lines whose tracks it necessarily used. The Supreme Court reversed in the case below.

135 S. Ct. 1225  
SUPREME COURT OF THE UNITED STATES  
**DEPARTMENT OF TRANSPORTATION, et al., Petitioners**  
v.  
**ASSOCIATION OF AMERICAN RAILROADS, Respondent**  
No. 13–1080 | Argued December 8, 2014 | Decided March 9, 2015

JUSTICE KENNEDY delivered the opinion of the Court.

[In 1970 Congress created the National Railroad Passenger Corporation, most often known as Amtrak, for the purpose of preserving passenger services and routes on the country’s railroads. Congress recognized that, of necessity, Amtrak must rely for most of its operations on track systems owned by the freight railroads. So, as a condition of relief from their common carrier duties, Congress required freight railroads to allow Amtrak to use their tracks and facilities at rates agreed to by the parties—or, in the event of disagreement, to be set by the Surface Transportation Board (STB). Amtrak has enjoyed a statutory preference over freight transportation in using rail lines, junctions, and crossings since 1973.

The present controversy results from a more recent congressional action. In 2008, concerned by poor service, unreliability, and delays resulting from freight traffic congestion, Congress enacted the Passenger Rail Investment and Improvement Act (PRIIA). Section 207(a) of the PRIIA provides for the creation of “metrics and standards” that address the performance and scheduling of passenger railroad services; and under section §213(a) these metrics and standards may play a role in prompting STB investigations and subsequent enforcement actions.

Section 207(a) further provides that Amtrak shall have joint authority, together with the Federal Railroad Administration (FRA), to issue the metrics and standards. In accordance with this authority, and after inviting comments on a draft version, Amtrak and the FRA jointly issued their metrics and standards in May 2010. Among other matters, the metrics and standards address Amtrak’s on-time performance and train delays caused by host railroads. With respect to “host responsible delays”—that is, delays attributed to the railroads along which Amtrak trains travel—the metrics and standards provide that “[d]elays must not be more than 900 minutes per 10,000 Train-Miles.” Amtrak conducts determine responsibility for particular delays.

Alleging that the metrics and standards have substantial and adverse effects upon its members’ freight services, respondent, the Association of American Railroads, filed suit against the Department of Transportation (DOT), the FRA, and two individuals in their official capacities. Respondent claimed that §207 “violates the nondelegation doctrine and the separation of powers principle by placing legislative and rulemaking authority in the hands of a private entity [Amtrak] that participates in the very industry it is supposed to regulate.” Respondent also claimed that §207 violates the Fifth Amendment Due Process Clause by “[v]esting the coercive power of the government” in Amtrak, an “interested private party.” In its prayer for relief respondent sought, among other remedies, a declaration of §207’s unconstitutionality and invalidation of the metrics and standards.

The District Court for the District of Columbia granted summary judgment to petitioners on both claims. The Court of Appeals for the District of Columbia Circuit reversed as to the nondelegation and separation of powers claim, however, reasoning in central part that because “Amtrak is a private corporation with respect to Congress’s power to delegate . . . authority,” it cannot constitutionally be granted the “regulatory power prescribed in §207.” The Court of Appeals did not reach respondent’s due process claim.]

Having granted the petition for writ of certiorari, this Court now holds that, for purposes of determining the validity of the metrics and standards, Amtrak is a governmental entity. Although Amtrak’s actions here were governmental, substantial questions respecting the lawfulness of the metrics and standards—including questions implicating the Constitution’s structural separation of powers and the Appointments Clause, U. S. Const., Art. II, §2, cl. 2—may still remain in the case. As those matters have not yet been passed upon by the Court of Appeals, this case is remanded.

## I

...

## II

In holding that Congress may not delegate to Amtrak the joint authority to issue the metrics and standards—authority it described as “regulatory power”—the Court of Appeals concluded Amtrak is a private entity for purposes of determining its status when considering the constitutionality of its actions in the instant dispute. That court’s analysis treated as controlling Congress’ statutory command that Amtrak “is not a department, agency, or instrumentality of the United States Government.” [*Ass’n of Am. R.R. v. U.S. Dep’t of Transp.*, 721 F.3d 666, 675 (2013) (quoting 49 U. S. C. §24301(a)(3)).] The Court of Appeals also relied on Congress’ pronouncement that Amtrak “shall be operated and managed as a for-profit corporation.” [*id.*, at 675 (quoting §24301(a)(2))]. Proceeding from this premise, the Court of Appeals concluded it was impermissible for Congress to “delegate regulatory authority to a private entity.” *Id.*, at 670; see also *ibid.* (holding *Carter v. Carter Coal Co.*, 298 U. S. 238 (1936), prohibits any such delegation of authority).

That premise, however, was erroneous. Congressional pronouncements, though instructive as to matters within Congress’ authority to address, see, e.g., *United States ex rel. Totten v. Bombardier Corp.*, 380 F. 3d 488, 491–492 (CA DC 2004) (Roberts, J.), are not dispositive of Amtrak’s status as a governmental entity for purposes of separation of powers analysis under the Constitution. And an independent inquiry into Amtrak’s status under the Constitution reveals the Court of Appeals’ premise was flawed.

It is appropriate to begin the analysis with Amtrak’s ownership and corporate structure. The Secretary of Transportation holds all of Amtrak’s preferred stock and most of its common stock. Amtrak’s Board of Directors is composed of nine members, one of whom is the Secretary of Transportation. Seven other Board members are appointed by the President and confirmed by the Senate. 49 U. S. C. §24302(a)(1). These eight Board members, in turn, select Amtrak’s president. §24302(a)(1)(B); §24303(a). Amtrak’s Board members are subject to salary limits set by Congress, §24303(b); and the Executive Branch has concluded that all appointed Board members are removable by the President without cause.

Under further statutory provisions, Amtrak's Board members must possess certain qualifications. Congress has directed that the President make appointments based on an individual's prior experience in the transportation industry, §24302(a)(1)(C), and has provided that not more than five of the seven appointed Board members be from the same political party, §24302(a)(3). In selecting Amtrak's Board members, moreover, the President must consult with leaders of both parties in both Houses of Congress in order to "provide adequate and balanced representation of the major geographic regions of the United States served by Amtrak." §24302(a)(2).

In addition to controlling Amtrak's stock and Board of Directors the political branches exercise substantial, statutorily mandated supervision over Amtrak's priorities and operations. Amtrak must submit numerous annual reports to Congress and the President, detailing such information as route specific ridership and on time performance. §24315. The Freedom of Information Act applies to Amtrak in any year in which it receives a federal subsidy, 5 U. S. C. §552, which thus far has been every year of its existence. Pursuant to its status under the Inspector General Act of 1978 as a "designated Federal entity," 5 U. S. C. App. §8G(a)(2), p. 521, Amtrak must maintain an inspector general, much like governmental agencies such as the Federal Communications Commission and the Securities and Exchange Commission. Furthermore, Congress conducts frequent oversight hearings into Amtrak's budget, routes, and prices.

It is significant that, rather than advancing its own private economic interests, Amtrak is required to pursue numerous, additional goals defined by statute. To take a few examples: Amtrak must "provide efficient and effective intercity passenger rail mobility," 49 U. S. C. §24101(b); "minimize Government subsidies," §24101(d); provide reduced fares to the disabled and elderly; and ensure mobility in times of national disaster, §24101(c)(9).

Finally, Amtrak is also dependent on federal financial support. In its first 43 years of operation, Amtrak has received more than \$41 billion in federal subsidies. In recent years these subsidies have exceeded \$1 billion annually.

Given the combination of these unique features and its significant ties to the Government, Amtrak is not an autonomous private enterprise. Among other important considerations, its priorities, operations, and decisions are extensively supervised and substantially funded by the political branches. A majority of its Board is appointed by the President and confirmed by the Senate and is understood by the Executive to be removable by the President at will. Amtrak was created by the Government, is controlled by the Government, and operates for the Government's benefit. Thus, in its joint issuance of the metrics and standards with the FRA, Amtrak acted as a governmental entity for purposes of the Constitution's separation of powers provisions. And that exercise of governmental power must be consistent with the design and requirements of the Constitution, including those provisions relating to the separation of powers.

Respondent urges that Amtrak cannot be deemed a governmental entity in this respect. Like the Court of Appeals, it relies principally on the statutory directives that Amtrak "shall be operated and managed as a for profit corporation" and "is not a department, agency, or instrumentality of the United States Government." §§24301(a)(2)–(3). In light of that statutory language, respondent asserts, Amtrak cannot exercise the joint authority entrusted to it and the FRA by §207(a).

On that point this Court's decision in *Lebron v. National Railroad Passenger Corp.*, 513 U. S. 374 (1995), provides necessary instruction. In *Lebron*, Amtrak prohibited an artist from installing a politically controversial display in New York City's Penn Station. The artist sued Amtrak, alleging

a violation of his First Amendment rights. In response Amtrak asserted that it was not a governmental entity, explaining that “its charter’s disclaimer of agency status prevent[ed] it from being considered a Government entity.” The Court rejected this contention, holding “it is not for Congress to make the final determination of Amtrak’s status as a Government entity for purposes of determining the constitutional rights of citizens affected by its actions.” To hold otherwise would allow the Government “to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form.” Noting that Amtrak “is established and organized under federal law for the very purpose of pursuing federal governmental objectives, under the direction and control of federal governmental appointees,” and that the Government exerts its control over Amtrak “not as a creditor but as a policymaker,” the Court held Amtrak “is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution.”

*Lebron* teaches that, for purposes of Amtrak’s status as a federal actor or instrumentality under the Constitution, the practical reality of federal control and supervision prevails over Congress’ disclaimer of Amtrak’s governmental status. . . . Treating Amtrak as governmental for these purposes, moreover, is not an unbridled grant of authority to an unaccountable actor. The political branches created Amtrak, control its Board, define its mission, specify many of its day-to-day operations, have imposed substantial transparency and accountability mechanisms, and, for all practical purposes, set and supervise its annual budget. Accordingly, the Court holds that Amtrak is a governmental entity, not a private one, for purposes of determining the constitutional issues presented in this case.

### III

[On remand, JUSTICE KENNEDY directed the D.C. Circuit to consider the constitutionality of the metrics and standards in light of this decision. He indicated that, at that time, the Court of Appeals should consider in the first instance three arguments raised by the Association: that “the selection of Amtrak’s president, who is not appointed by the President . . . but by the other Board Members, calls into question Amtrak’s structure under the Appointments Clause;” that § 207(d)’s provision investing the STB with arbitration power “is a plain violation of the nondelegation principle and the Appointments Clause;” and that “Congress violated the Due Process Clause by giving a federally chartered, nominally private, for-profit corporation regulatory authority over its own industry[.]”]

The judgment of the Court of Appeals for the District of Columbia Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE ALITO, concurring.

I entirely agree with the Court that Amtrak is “a federal actor or instrumentality,” as far as the Constitution is concerned. . . . The District of Columbia Circuit understandably heeded 49 U. S. C. §24301(a)(3), which proclaims that Amtrak “is *not* a department, agency, or instrumentality of the United States Government,” but this statutory label cannot control for constitutional purposes. (Emphasis added). I therefore join the Court’s opinion in full. I write separately to discuss what follows from our judgment.



This case, on its face, may seem to involve technical issues, but in discussing trains, tracks, metrics, and standards, a vital constitutional principle must not be forgotten: Liberty requires accountability.

When citizens cannot readily identify the source of legislation or regulation that affects their lives, Government officials can wield power without owning up to the consequences. One way the Government can regulate without accountability is by passing off a Government operation as an independent private concern. Given this incentive to regulate without saying so, everyone should pay close attention when Congress “sponsor[s] corporations that it specifically designate[s] *not* to be agencies or establishments of the United States Government.” [*Lebron*, 513 U. S., at 390].

Recognition that Amtrak is part of the Federal Government raises a host of constitutional questions.

## II

I begin with something that may seem mundane on its face but that has a significant relationship to the principle of accountability. Under the Constitution, all officers of the United States must take an oath or affirmation to support the Constitution and must receive a commission. See Art. VI, cl. 3; Art. II, §3, cl. 6. There is good reason to think that those who have not sworn an oath cannot exercise significant authority of the United States.\* And this Court certainly has never treated a commission from the President as a mere wall ornament. See, *e.g.*, *Marbury v. Madison*, 1 Cranch 137, 156 (1803); *see also id.*, at 179 (noting the importance of an oath).

Both the Oath and Commission Clauses confirm an important point: Those who exercise the power of Government are set apart from ordinary citizens. Because they exercise greater power, they are subject to special restraints. There should never be a question whether someone is an officer of the United States because, to be an officer, the person should have sworn an oath and possess a commission.

Here, respondent tells the Court that “Amtrak’s board members do not take an oath of office to uphold the Constitution, as do Article II officers vested with rulemaking authority.” . . .

## III

I turn next to the [PRIIA’s] arbitration provision. . . .

This scheme is obviously regulatory. Section 207 provides that Amtrak and the FRA “shall jointly” create new standards, cf. *e.g.*, 12 U. S. C. §1831m(g)(4)(B) (The appropriate Federal banking agencies shall jointly issue rules of practice to implement this paragraph”), and that Amtrak and *private rail carriers* “shall incorporate” those standards into their agreements whenever “practicable,” cf. *e.g.*, *BP America Production Co. v. Burton*, 549 U. S. 84, 88 (2006) (characterizing a command to “audit and reconcile, to the extent practicable, all current and past lease accounts” as creating “duties” for the Secretary of the Interior (quoting 30 U. S. C. §1711(c)(1))). The fact that private rail carriers sometimes may be required by federal law to include the metrics and standards in their contracts by itself makes this a regulatory scheme.

[The D.C. Circuit observed that,] “[a]s is often the case in administrative law,” . . . “the metrics and

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\* It is noteworthy that the first statute enacted by Congress was “An Act to regulate the Time and Manner of administering certain Oaths.” Act of June 1, 1789, ch. 1, §1, 1 Stat. 23.

standards lend definite regulatory force to an otherwise broad statutory mandate.” Here, though the nexus between regulation, statutory mandate, and penalty is not direct (for, as the Government explains, there is a pre-existing requirement that railroads give preference to Amtrak, the metrics and standards inherently have a “coercive effect,” *Bennett v. Spear*, 520 U. S. 154, 169 (1997), on private conduct. Even the United States concedes, with understatement, that there is “perhaps some incentivizing effect associated with the metrics and standards.” Because obedience to the metrics and standards materially reduces the risk of liability, railroads face powerful incentives to obey. That is regulatory power.

The language from §207 quoted thus far should raise red flags. In one statute, Congress says Amtrak is not an “agency.” But then Congress commands Amtrak to act like an agency, with effects on private rail carriers. No wonder the D. C. Circuit ruled as it did.

The oddity continues, however. Section 207(d) of the PRIIA also provides that if the FRA and Amtrak cannot agree about what the regulatory standards should say, then “any party involved in the development of those standards may petition the [STB] to appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration.” The statute says nothing more about this “binding arbitration,” including who the arbitrator should be.

Looking to Congress’ use of the word “arbitrator,” respondent argues that because the arbitrator can be a private person, this provision by itself violates the private nondelegation doctrine. The United States, for its part, urges the Court to read the term “arbitrator” to mean “public arbitrator” in the interests of constitutional avoidance.

No one disputes, however, that the arbitration provision is fair game for challenge, even though no arbitration occurred. The obvious purpose of the arbitration provision was to force Amtrak and the FRA to compromise, or else a third party would make the decision for them. The D. C. Circuit is correct that when Congress enacts a compromise-forcing mechanism, it is no good to say that the mechanism cannot be challenged because the parties compromised. “[S]tack[ing] the deck in favor of compromise” was the whole point. Unsurprisingly, this Court has upheld standing to bring a separation-of-powers challenge in comparable circumstances. See *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U. S. 252, 264–265 (1991).

...

As to the merits of this arbitration provision, I agree with the parties: If the arbitrator can be a private person, this law is unconstitutional. Even the United States accepts that Congress “cannot delegate regulatory authority to a private entity.” Indeed, Congress, vested with enumerated “legislative Powers,” Art. I, §1, cannot delegate its “exclusively legislative” authority at all. *Wayman v. Southard*, 10 Wheat. 1, 42–43 (1825) (Marshall, C. J.). The Court has invalidated statutes for that very reason. See *A. L. A. Schechter Poultry Corp. v. United States*; 295 U. S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U. S. 388 (1935); see also *Mistretta v. United States*, 488 U. S. 361, 373, n. 7 (1989) (citing, *inter alia*, *Industrial Union Dept., AFL–CIO v. American Petroleum Institute*, 448 U. S. 607, 646 (1980)).

The principle that Congress cannot delegate away its vested powers exists to protect liberty. Our Constitution, by careful design, prescribes a process for making law, and within that process there are many accountability checkpoints. See *INS v. Chadha*, 462 U. S. 919, 959 (1983). It would dash the whole scheme if Congress could give its power away to an entity that is not constrained by those checkpoints. The Constitution’s deliberative process was viewed by the Framers as a valuable

feature, not something to be lamented and evaded.

Of course, this Court has “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.” *Whitman v. American Trucking Assns., Inc.*, 531 U. S. 457, 474–475 (2001) (quoting *Mistretta, supra*, at 416 (SCALIA, J. dissenting)). But the inherent difficulty of line-drawing is no excuse for not enforcing the Constitution. Rather, the formal reason why the Court does not enforce the nondelegation doctrine with more vigilance is that the other branches of Government have vested powers of their own that can be used in ways that resemble lawmaking. See, e.g., [*Arlington v. FCC*, 133 S. Ct. 1863, 1873 n. 4 (2013)] . . . . Even so, “the citizen confronting thousands of pages of regulations—promulgated by an agency directed by Congress to regulate, say, ‘in the public interest’—can perhaps be excused for thinking that it is the agency really doing the legislating.” [*Arlington*, 133 S. Ct., 1879 (ROBERTS, C.J., dissenting).]

When it comes to private entities, however, there is not even a fig leaf of constitutional justification. Private entities are not vested with “legislative Powers.” Art. I, §1. Nor are they vested with the “executive Power,” Art. II, §1, cl. 1, which belongs to the President. Indeed, it raises “[d]ifficult and fundamental questions” about “the delegation of Executive power” when Congress authorizes citizen suits. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 197 (2000) (KENNEDY, J., concurring). A citizen suit to enforce existing law, however, is nothing compared to delegated power to create new law. By any measure, handing off regulatory power to a private entity is “legislative delegation in its most obnoxious form.” *Carter v. Carter Coal Co.*, 298 U. S. 238, 311 (1936).

For these reasons, it is hard to imagine how delegating “binding” tie-breaking authority to a private arbitrator to resolve a dispute between Amtrak and the FRA could be constitutional. No private arbitrator can promulgate binding metrics and standards for the railroad industry. Thus, if the term “arbitrator” refers to a private arbitrator, or even the *possibility* of a private arbitrator, the Constitution is violated.

. . .

Here, even under the Government’s public-arbitrator theory, it looks like the arbitrator would be making law without supervision—again, it is “binding arbitration.” Nothing suggests that those words mean anything other than what they say. This means that an arbitrator could set the metrics and standards that “shall” become part of a private railroad’s contracts with Amtrak whenever “practicable.” As to that “binding” decision, who is the supervisor? Inferior officers can do many things, but nothing final should appear in the Federal Register unless a Presidential appointee has at least signed off on it. . . .

#### IV

Finally, the Board of Amtrak, and, in particular, Amtrak’s president, also poses difficult constitutional problems. As the Court observes, “Amtrak’s Board of Directors is composed of nine members, one of whom is the Secretary of Transportation. Seven other Board members are appointed by the President and confirmed by the Senate. These eight Board members, in turn, select Amtrak’s president.” In other words, unlike everyone else on the Board, Amtrak’s president has not been appointed by the President and confirmed by the Senate.

As explained above, accountability demands that principal officers be appointed by the President. See Art. II, §2, cl. 2. The President, after all, must have “the general administrative control of those executing the laws,” *Myers v. United States*, 272 U. S. 52, 164 (1926), and this principle applies with special force to those who can “exercis[e] significant authority” without direct supervision, *Buckley, supra*, at 126. Unsurprisingly then, the United States defends the non-Presidential appointment of Amtrak’s president on the ground that the Amtrak president is merely an inferior officer. Given Article II, for the Government to argue anything else would be surrender.

This argument, however, is problematic. Granted, a multimember body may head an agency. See *Free Enterprise Fund, supra*, at 512–513. But those who head agencies must be principal officers. See *Edmond, supra*, at 663. It would seem to follow that because agency heads must be principal officers, every member of a multimember body heading an agency must also be a principal officer. After all, every member of a multimember body could cast the deciding vote with respect to a particular decision. One would think that anyone who has the unilateral authority to tip a final decision one way or the other cannot be an inferior officer.

...

\* \* \*

In sum, while I entirely agree with the Court that Amtrak must be regarded as a federal actor for constitutional purposes, it does not by any means necessarily follow that the present structure of Amtrak is consistent with the Constitution. The constitutional issues that I have outlined (and perhaps others) all flow from the fact that no matter what Congress may call Amtrak, the Constitution cannot be disregarded.

JUSTICE THOMAS, concurring in the judgment.

We have come to a strange place in our separation-of-powers jurisprudence. Confronted with a statute that authorizes a putatively private market participant to work hand-in-hand with an executive agency to craft rules that have the force and effect of law, our primary question—indeed, the primary question the parties ask us to answer—is whether that market participant is subject to an adequate measure of control by the Federal Government. We never even glance at the Constitution to see what it says about how this authority must be exercised and by whom.

I agree with the Court that the proper disposition in this case is to vacate the decision below and to remand for further consideration of respondent’s constitutional challenge to the metrics and standards. I cannot join the majority’s analysis, however, because it fails to fully correct the errors that require us to vacate the Court of Appeals’ decision. I write separately to describe the framework that I believe should guide our resolution of delegation challenges and to highlight serious constitutional defects in the [PRIIA] that are properly presented for the lower courts’ review on remand.

## I

The Constitution does not vest the Federal Government with an undifferentiated “governmental power.” Instead, the Constitution identifies three types of governmental power and, in the Vesting Clauses, commits them to three branches of Government. . . .

These grants are exclusive. See *Whitman v. American Trucking Assns., Inc.*, 531 U. S. 457, 472 (2001) (legislative power); *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U. S. 477, 496–497 (2010) (executive power); [*Stern v. Marshall*, 131 S. Ct. 2594, 2608–2609 (2011) (judicial power)]. When the Government is called upon to perform a function that requires an exercise of legislative, executive, or judicial power, only the vested recipient of that power can perform it.

In addition to allocating power among the different branches, the Constitution identifies certain restrictions on the *manner* in which those powers are to be exercised. Article I requires, among other things, that “[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it . . . .” Art. I, §7, cl.2. And although the Constitution is less specific about how the President shall exercise power, it is clear that he may carry out his duty to take care that the laws be faithfully executed with the aid of subordinates. *Myers v. United States*, 272 U. S. 52, 117 (1926), overruled in part on unrelated grounds in *Humphrey’s Executor v. United States*, 295 U. S. 602 (1935).

When the Court speaks of Congress improperly delegating power, what it means is Congress’ authorizing an entity to exercise power in a manner inconsistent with the Constitution. For example, Congress improperly “delegates” legislative power when it authorizes an entity other than itself to make a determination that requires an exercise of legislative power. See *Whitman, supra*, at 472. It also improperly “delegates” legislative power to itself when it authorizes itself to act without bicameralism and presentment. See, e.g., *INS v. Chadha*, 462 U. S. 919 (1983). And Congress improperly “delegates”—or, more precisely, authorizes the exercise of—executive power when it authorizes individuals or groups outside of the President’s control to perform a function that requires the exercise of that power. See, e.g., *Free Enterprise Fund, supra*.

In order to be able to adhere to the provisions of the Constitution that allocate and constrain the exercise of these powers, we must first understand their boundaries. Here, I do not purport to offer a comprehensive description of these powers. My purpose is to identify principles relevant to today’s dispute, with an eye to offering guidance to the lower courts on remand. At issue in this case is the proper division between legislative and executive powers. An examination of the history of those powers reveals how far our modern separation-of-powers jurisprudence has departed from the original meaning of the Constitution.

## II

The allocation of powers in the Constitution is absolute, but it does not follow that there is no overlap between the three categories of governmental power. Certain functions may be performed by two or more branches without either exceeding its enumerated powers under the Constitution. . . . The question is whether the particular function requires the exercise of a certain type of power; if it does, then only the branch in which that power is vested can perform it. . . .

The function at issue here is the formulation of generally applicable rules of private conduct. Under the original understanding of the Constitution, that function requires the exercise of legislative power. By corollary, the discretion inherent in executive power does *not* comprehend the discretion to formulate generally applicable rules of private conduct.

[After analyzing some of the historical roots of the separation-of-powers concept, JUSTICE THOMAS

proceeded to discuss the Framers' dedication to it, which he says is "well documented, if only half-heartedly honored.""]

### III

Even with these sound historical principles in mind, classifying governmental power is an elusive venture. [*Wayman v. Southard*, 10 Wheat. 1, 43 (1825)]; The Federalist No. 37, at 228 (J. Madison). But it is no less important for its difficulty. The "check" the judiciary provides to maintain our separation of powers is enforcement of the rule of law through judicial review. We may not—without imperiling the delicate balance of our constitutional system—forgo our judicial duty to ascertain the meaning of the Vesting Clauses and to adhere to that meaning as the law.

We have been willing to check the improper allocation of executive power, see, e.g., *Free Enterprise Fund*, 561 U. S. 477; *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U. S. 252 (1991), although probably not as often as we should, see, e.g., *Morrison v. Olson*, 487 U. S. 654 (1988). Our record with regard to legislative power has been far worse.

We have held that the Constitution categorically forbids Congress to delegate its legislative power to any other body, *Whitman*, 531 U. S., at 472, but it has become increasingly clear to me that the test we have applied to distinguish legislative from executive power largely abdicates our duty to enforce that prohibition. Implicitly recognizing that the power to fashion legally binding rules is legislative, we have nevertheless classified rulemaking as executive (or judicial) power when the authorizing statute sets out "an intelligible principle" to guide the rulemaker's discretion. *Ibid.* Although the Court may never have intended the boundless standard the "intelligible principle" test has become, it is evident that it does not adequately reinforce the Constitution's allocation of legislative power. I would return to the original understanding of the federal legislative power and require that the Federal Government create generally applicable rules of private conduct only through the constitutionally prescribed legislative process.

[JUSTICE THOMAS chronicled the Court's "intelligible principle" jurisprudence and concluded that, "[t]o the extent that the 'intelligible principle' test was ever an adequate means of enforcing [the distinction between legislative and executive power], it has been decoupled from the historical understanding of the legislative and executive powers and thus does not keep executive 'lawmaking' within the bounds of inherent executive discretion.""]

We should return to the original meaning of the Constitution: The Government may create generally applicable rules of private conduct only through the proper exercise of legislative power. I accept that this would inhibit the Government from acting with the speed and efficiency Congress has sometimes found desirable. In anticipating that result and accepting it, I am in good company. John Locke, for example, acknowledged that a legislative body "is usually too numerous, and so too slow for the dispatch requisite to execution." [J. Locke, *Second Treatise of Civil Government* §160, p. 80 (J. Gough ed. 1947).] But he saw that as a benefit for legislation, for he believed that the creation of rules of private conduct should be an irregular and infrequent occurrence. See *id.*, §143, at 72. The Framers, it appears, were inclined to agree. . . .

### IV

Although the majority corrects an undoubted error in the framing of the delegation dispute below, it

does so without placing that error in the context of the constitutional provisions that govern respondent's challenge to §207 of the PRIIA.

A

...

Although no provision of the Constitution expressly forbids the exercise of governmental power by a private entity, our so-called “private nondelegation doctrine” flows logically from the three Vesting Clauses. Because a private entity is neither Congress, nor the President or one of his agents, nor the Supreme Court or an inferior court established by Congress, the Vesting Clauses would categorically preclude it from exercising the legislative, executive, or judicial powers of the Federal Government. In short, the “private nondelegation doctrine” is merely one application of the provisions of the Constitution that forbid Congress to allocate power to an ineligible entity, whether governmental or private.

For this reason, a conclusion that Amtrak is private—that is, not part of the Government at all—would necessarily mean that it cannot exercise these three categories of governmental power. But the converse is not true: A determination that Amtrak acts as a governmental entity in crafting the metrics and standards says nothing about whether it properly exercises governmental power when it does so. . . . To its credit, the majority does not hold otherwise. It merely refutes the Court of Appeals' premise that Amtrak is private. But this answer could be read to suggest, wrongly, that our conclusion about Amtrak's status has some constitutional significance for “delegation” purposes.

B

The first step in the Court of Appeals' analysis on remand should be to classify the power that §207 purports to authorize Amtrak to exercise. The second step should be to determine whether the Constitution's requirements for the exercise of that power have been satisfied.

[The remainder of JUSTICE THOMAS's opinion is omitted.]

## NOTES AND QUESTIONS

**6-35(a).** Amtrak is certainly not the only example of an entity that exists on the boundary separating public actors from private actors. As one commentator notes, however, administrative law scholarship often tends to focus on the components of the American bureaucratic architecture that are directly under the President or independent regulatory commissions and boards. There is, however, a considerable bureaucracy outside of these structures. For instance, since the Postal Reorganization Act of 1971, Pub. L. No. 91-375, § 201, 84 Stat. 719, 720, the United States Postal Service has exhibited both public and private sector characteristics. *See* Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 PA. L. REV. 841 (2014).

**6-35(b).-2.** *American Railroads* was, in fact, one of two decisions announced on March 9, 2015, in which the Supreme Court unanimously reversed decisions of the D.C. Circuit Court of Appeals. The other, *Perez v. Mortgage Banker's Ass'n*, 135 S. Ct. 1199 (2015), discussed *supra*, at Note 5-59, dealt with the procedures an agency must observe when revising its interpretation of an existing

regulation.

In an article published before the Supreme Court had handed down both these cases, Cass R. Sunstein and Adrian Vermeule argued that “in recent years, several judges on the nation’s most important regulatory court—the United States Court of Appeals for the District of Columbia Circuit—have given birth to libertarian administrative law in the form of a series of judge-made doctrines that are designed to protect private ordering from national regulatory intrusion. . . . Taken as a whole, libertarian administrative law parallels the kind of progressive administrative law that the same court created in the 1970s and that the Supreme Court unanimously rejected in *Vermont Yankee*. It should meet a similar fate.” *Id.* at 393.

**6-35(c).** Although the Supreme Court unanimously refused to uphold the D.C. Circuit’s potentially disruptive decision, *American Railroads* itself is not without its own portents of change for the landscape of administrative law.

As an initial matter, it should be noted that the Court did not dispose of all the potential nondelegation issues in the case. Although it is now resolved that Amtrak is a public company for purposes of the nondelegation analysis, the question remains open with respect to the STB. Should Amtrak and the FRA be unable to reach an agreement regarding the metrics and standards that coercively influence Amtrak’s relations with the freight lines whose tracks it uses, under current law the STB may be called upon to appoint an arbitrator. If that arbitrator were held to be a private person, would there be an illegal delegation of public power? Note also that Justice Kennedy instructed the D.C. Circuit on remand to address the Respondent’s due process claim, which challenged the constitutionality under the Fifth Amendment of Amtrak’s self-interested participation in the metrics and standards at issue in the case. On that issue, see generally Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL’Y 931 (2014).

Strong concurrences from Justices Alito and Thomas suggest that “accountability” issues may ultimately prove to be more disruptive of contemporary practices than nondelegation issues. The aspects of Amtrak’s corporate structure implicating potential constitutional infirmities under the Appointments Clause seemed particularly troubling to Justice Alito. Although eight of the nine members on Amtrak’s Board of Directors are appointed according to the procedures of Article II, Amtrak’s president is not appointed but rather is elected by the other eight members. Does this arrangement pass constitutional muster? See generally Gillian E. Metzger, *Appointments, Innovation, and the Judicial-Political Divide*, 64 DUKE L.J. 1607 (2015) (examining the differing approaches to innovation taken by the political branches and the judiciary in recent years with respect to the appointments process).

## **§ 6.07, p. 579**

### **§ 6.07, *Ass’n. of American Railroads v. U.S. Dept. of Transp.***

In *Ass’n. of American Railroads v. U.S. Dept. of Transp.*, 821 F.3d 19, 27 (D.C. Cir. 2016), the D.C. Circuit followed up on *Department of Transportation v. Association of American Railroads* by examining whether a law violated due process if it granted an entity power to regulate its competitors. Relying on the Supreme Court’s decision in *Carter v. Carter Coal Co.*, 298 U.S. 238



(1936), the D.C. Circuit determined that this delegation to a private entity was, in fact, unconstitutional. The court concluded, “as did the Supreme Court in 1936, that the due process of law is violated when a self-interested entity is ‘intrusted with the power to regulate the business . . . of a competitor.’ ‘[A] statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property’ and transgresses ‘the very nature of [governmental function].’”

The court then considered whether indeed Amtrak was (1) a self-interested entity (2) with regulatory authority over its competitors. Notwithstanding the fact that Amtrak might be an agency of government for constitutional purposes, the court found that it was an economically self-interested entity because Amtrak is statutorily obligated to be operated and managed as a for-profit corporation. The court also found that it had regulatory authority over its competitors, because the freight operators are competitors with Amtrak for use of the rails, a scarce commodity, and Amtrak participates in the development of “metrics and standards” which these freight operators are required to incorporate into their agreements with Amtrak “to the extent practicable.” The court held that this arrangement violated the Due Process Clause.

#### **§ 6.07, p. 569: Insert after note 6-30.**

##### **Note 6-30(a): Delegation, Discretion, and Agency Choices**

*Whitman* reminds us that Congress can delegate substantial interpretive and rulemaking authority to agencies. As you will see in chapter 8, courts generally defer to reasonable agency interpretations of their own enabling statutes when acting within their delegated powers.

Can an agency’s wide discretion potentially *hamstring* its response to changing circumstances?

In *Verizon v. F.C.C.*, 740 F.3d 623 (D.C. Cir. 2014), the D.C. Circuit evaluated the FCC’s “Open Internet Order,” an attempt by the agency to compel broadband providers to maintain net neutrality (i.e., refrain from apportioning bandwidth based on content or source). The D.C. Circuit agreed that the FCC had statutory authority to adopt measures “encouraging the deployment of broadband infrastructure.” *Id.* at 628. Moreover, the agency reasonably interpreted the Telecommunications Act of 1996 to authorize regulation against discriminatory practices, and the agency’s justification for the Open Internet Order was “reasonable and supported by substantial evidence.” *Id.*

Yet the D.C. Circuit vacated the core provisions of the Order. What was the problem?

The Telecommunications Act of 1996 divides communications services into two categories: telecommunications carriers, which are prohibited as common carriers from engaging in unreasonable price or service discrimination; and information-service providers, which are not so confined. The FCC exercised its delegated authority to classify DSL services as telecommunications carriers. Yet it classified cable broadband providers as information-service providers, exempt from the common carrier regulations. In the *Brand X* case, reproduced in your casebook on page 859, the Supreme Court upheld the FCC’s classification of cable broadband providers as a reasonable interpretation of ambiguous language in the 1996 Act.

Having exercised its discretion to shield the broadband industry from common carrier regulations,

and having survived judicial review, the agency could not now impose its Open Internet Order on these information-service providers. “Given that the Commission has chosen to classify broadband providers in a manner that exempts them from treatment as common carriers, the Communications Act expressly prohibits the Commission from nonetheless regulating them as such.” *Id.* at 628.

Although the agency initially contemplated seeking Supreme Court review, it ultimately decided not to appeal the *Verizon* ruling. Instead, it plans to issue new rules that are compatible with the court’s analysis; it also intends to evaluate Internet service providers on a case-by-case basis, and it will consider reclassifying cable broadband providers as telecommunications carriers if circumstances warrant. *See Statement by FCC Chairman Tom Wheeler on the FCC’s Open Internet Rules*, FCC.GOV (Feb. 19, 2014), <https://www.fcc.gov/document/statement-fcc-chairman-tom-wheeler-fccs-open-internet-rules>.

**§ 6.07, p. 594: Insert after Note 6-45**

**Note 6-45(a): *United States v. California*, 2018 WL 3301414, \_\_\_ F. Supp. 3d \_\_\_ (E.D. Cal. 2018).**

The Federal Government sued to enjoin enforcement of three laws enacted by the State of California under theories of preemption and intergovernmental immunity.

Assembly Bill 103 (AB 103) established review and reporting requirements for the California Attorney General’s inspection of civil immigration detention facilities. The court could not find any indication of Congressional intent for States to have no oversight of detention facilities within their borders, and found no conflict between AB 103 and 8 C.F.R. § 236.6 because it did not envision public disclosure. Nor did AB 103 impede detention determinations or impose on the facilities, apart from requiring access. The court concluded that the law did not violate the Supremacy Clause or intergovernmental immunity. *U.S. v. California*, 2018 U.S. Dist. LEXIS 112055, at \*19-28.

Assembly Bill 450 (AB 450) prohibited employers from providing voluntary consent for immigration officials to enter nonpublic work areas and access, review, or obtain employee records, as well as reverifying the employment eligibility of current employees when not required by federal law. Additionally, it requires employers to notify employees of any impending inspections of I-9 or other employment records within 72 hours. With respect to the first two provisions, the court found plaintiff likely to succeed on its Supremacy Clause claim. First, prior law permitted immigration officials to gain access to nonpublic areas of a worksite, thus the provision could reasonably be interpreted as impeding the enforcement of federal immigration law. Second, employers were held liable under 8 U.S.C.S. § 1324(a)(2) for continuing to employ a noncitizen without work authorization, as a result the provision prohibiting reverification conflicted with federal law. *Id.* at \*40-43.

The court viewed the notice requirement of AB 450 as an extension of the courtesy afforded to employers by federal law, rather than an attempt to thwart immigration law. Plaintiff argued that it impeded the enforcement of immigration law because informing the targets of the investigation ahead of time would render the investigations less effective. The court reminded plaintiffs that the notice requirement of AB 450 activates only when the employer knows of an investigation, and

since 8 U.S.C.S. § 1324(a) imposes obligations and liabilities primarily on employers, “[t]he “targets” of the investigation have [] already been ‘warned.’” The court found no indication of congressional intention to keep employees from learning they were under investigation. Since the provision only punished employers for not communicating with their employees, there was no violation of intergovernmental immunity.

Senate Bill 54 (SB 54) restricts California law enforcement agencies from sharing individuals’ release date or personal information with immigration officials. It also restricts transferring individuals to the custody of immigration officials. The court found no conflict between SB 54 and 8 U.S.C.S. § 1373(a) because “information regarding citizenship or immigration status” does not include release dates or home addresses. Plaintiff’s obstacle preemption argument was unavailing because “[s]tanding aside does not equate to standing in the way.” The court also was “not convinced that the intergovernmental immunity doctrine extends to the State’s regulation over the activities of its own law enforcement and decision to restrict assistance with some federal endeavors.”

The court granted plaintiff’s motion to enjoin the consent, access, and reverification provisions of AB 450.

A few days later, the court granted California’s motion to dismiss the United States’ Supremacy Clause claims as to AB 103, SB 54, and the notice requirement of AB. *United States v. California*, No. 2:18-cv-490-JAM-KJN, 2018 U.S. Dist. LEXIS 113759 (E.D. Cal. July 9, 2018).

#### **§ 6.11, p. 471: Insert after Note 6-71:**

##### **Note 6-72: Limiting *Stern* – *Arkison & Sharif***

The Supreme Court has subsequently limited *Stern* in two recent decisions. In *Executive Benefits Insurance Agency v. Arkison*, the Court held that bankruptcy judges could issue reports and recommendations on *Stern* issues to be reviewed de novo by the district court. 134 S. Ct. 2165 (2014). In *Wellness International Network, Ltd. v. Sharif*, the Court held that parties could consent to bankruptcy court adjudication of *Stern* claims. 135 S. Ct. 1932 (2015).

##### ***Executive Benefits Insurance Agency v. Arkison***

In *Arkison*, a bankruptcy trustee filed a motion for summary judgment against the Executive Benefits Insurance Agency (EBIA), which had filed a voluntary Chapter 7 bankruptcy petition. 134 S. Ct. 2165 (2014). The bankruptcy granted summary judgment for the trustee on all claims, including a fraudulent conveyance claim under Washington law. The district court conducted de novo review, affirming the bankruptcy court and entering judgment for the trustee. On appeal, EBIA contended that “Article III did not permit Congress to vest authority in a bankruptcy court to finally decide the trustee’s fraudulent conveyance claims.” *Id.* at 1269.

Justice Thomas, for a unanimous Court, held that the statutory report-and-recommendation procedure applicable to “non-core” proceedings under 28 U.S.C. § 157(c) is also applicable to *Stern* claims. The Court’s analysis centered on the “severability provision” of the Bankruptcy Amendments and Federal Judgeship Act of 1984:

[The Court first quoted the provision:] “If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of this Act, or the application of that provision to persons or circumstances other than those as to which it is held invalid, is not affected thereby.” 98 Stat. 344, note following 28 U.S.C. § 151.

The plain text of this severability provision closes the so-called “gap” created by *Stern* claims. When a court identifies a claim as a *Stern* claim, it has necessarily “held invalid” the “application” of § 157(b) [the “core proceedings” statute]. In that circumstance, the statute instructs that “the remainder of th[e] Act . . . is not affected thereby.” That remainder includes § 157(c), which governs non-core proceedings. With the “core” category no longer available for the *Stern* claim at issue, we look to § 157(c)(1) to determine whether the claim may be adjudicated as a non-core claim—specifically, whether it . . . is “otherwise related to a case under title 11.” If the claim satisfies the criteria of § 157(c)(1), the bankruptcy court simply treats the claims as non-core: The bankruptcy court should hear the proceeding and submit proposed findings of fact and conclusions of law to the district court for *de novo* review and entry of judgment.

The conclusion that the remainder of the statute may continue to apply to *Stern* claims accords with our general approach to severability. We ordinarily give effect to the valid portion of a partially unconstitutional statute so long as it remains fully operative as a law and so long as it is not evident from the statutory text and context that Congress would have preferred no statute at all. Neither of those concerns applies here.

*Id.* at 2173. The Court next held that the fraudulent conveyance claim at issue came within the scope of § 157(c)(1) as a claim “related to a case under title 11” because, “[a]t bottom, a fraudulent conveyance claim asserts that property that should have been part of the bankruptcy estate and therefore available for distribution to creditors pursuant to Title 11 was improperly removed.” *Id.* at 2174.

Finally, while the bankruptcy court did not properly follow the procedures of submitting a report and recommendation because it actually ruled on the summary judgment motion, “the District Court’s *de novo* review and entry of its own valid final judgment cured any error.” *Id.* at 2175. Because of this holding, the Court declined to address other issues raised by the parties, including “whether Article III permits a bankruptcy court, with the consent of the parties, to enter final judgment on a *Stern* claim. We reserve that question for another day.” *Id.* at 2170 n.4.

### ***Wellness International Network, Ltd. v. Sharif***

This question was not reserved for long, however, as the Court considered the ability of parties’ consent to bankruptcy court jurisdiction over *Stern* claims in *Sharif*, less than one year later. 135 S. Ct. 1932 (2015).

*Sharif* arose out of a bankruptcy court’s default judgment against Sharif in an adversary proceeding, imposed as a sanction for repeated violation of the court’s discovery order. The default judgment included a declaration, requested by a creditor, that the assets held by a trust Sharif administered were “in fact property of Sharif’s bankruptcy estate.” *Id.* at 1941. While the creditor

alleged that Sharif failed to timely challenge the bankruptcy court's order as violating *Stern*, the Seventh Circuit concluded that, in any event, separation-of-powers concerns precluded forfeiture. The Seventh Circuit held that the declaration that trust assets were Sharif's property constituted a *Stern* claim, over which the bankruptcy court lacked constitutional authority.

Citing *Schor*, *supra* § 6.11, Justice Sotomayor, writing for the Court, concluded that "litigants may validly consent to adjudication by bankruptcy courts." First, the Court observed that "the entitlement to an Article III adjudicator is a personal right and thus ordinarily subject to waiver." *Id.* at 1942. As examples, the Court cited the ability of litigants to waive the right to have an Article III judge preside at trial and the ability of criminal defendants to waive the right to have an Article III judge supervise voir dire.

Second, the Court concluded that "allowing bankruptcy courts to decide *Stern* claims by consent" would not "impermissibly threaten the institutional integrity of the Judicial Branch." *Id.* at 1944. Bankruptcy courts "hear matters solely on a district court's reference, which the district court may withdraw *sua sponte*," and their powers are "limited to a narrow class of common law claims as an incident to [their] . . . unchallenged, adjudicative function," the Court said. *Id.* at 1945. There was no "danger" that Congress was attempting "to aggrandize itself or humble the Judiciary." *Id.*

Finally, the Court concluded that consent must be knowing and voluntary but need not be express under both the Constitution and the statute. The statute "states only that a bankruptcy court must obtain 'the consent'—consent *simpliciter*—'of all parties to the proceeding' before hearing and determining a non-core claim." *Id.* at 1947. The Court noted that a requirement of express consent would conflict with the Court's holding to the contrary in the context of magistrate judges. Thus, "the key inquiry is whether the litigant or counsel was made aware of the need for consent to refuse it, and still voluntarily appeared to try the case." *Id.* at 1948.

The Court reversed and remanded the proceeding to the Seventh Circuit "to decide on remand whether Sharif's actions evinced the requisite knowing and voluntary consent, and also whether . . . Sharif forfeited his *Stern* argument below." *Id.* at 1949.

In dissent, Chief Justice Roberts, joined by Justice Scalia and, in part, Justice Thomas, accused the majority of "yield[ing] . . . to functionalism." *Id.* at 1950 (Roberts, C.J., dissenting). The dissent disparaged *Schor*'s conclusion that Article III merely implicates waivable, personal rights, and warned that

the Court's acceptance of an Article III violation is not likely to go unnoticed. The next time Congress takes judicial power from Article III courts, the encroachment may not be so modest—and we will no longer hold the high ground of principle. The majority's acquiescence in the erosion of our constitutional power sets a precedent that I fear we will regret.

*Id.* The majority rejoined: "To hear the principal dissent tell it, the world will end not in fire, or ice, but in a bankruptcy court." *Id.* at 1947 (majority opinion). The majority then quoted Justice Brennan's dissent from *Schor* to affirm that the Court would not tolerate a "phalanx of non-Article III tribunals equipped to handle the entire business of the Article III courts." *Id.* The majority remarked: "Adjudication based on litigant consent has been a consistent feature of the federal court system since its inception. Reaffirming that unremarkable fact, we are confident, poses no great threat to anyone's birthrights, constitutional or otherwise." *Id.*

**§ 6.07, Outsourcing, p.594: Insert after Note 6-45**

**Note 6-45(a)**

For a comprehensive analysis of the “outsourcing revolution”, see Alfred C. Aman, Jr. and Joseph C. Dugan, *The Human Side of Public-Private Partnerships: From New Deal Regulation to Administrative Law Management*, 102 IOWA L. REV. 883 (2017).

## **Chapter 7**

**§ 7.03, p. 680: Insert after note 7-15.**

**Note 7-15(a): *Ass’n. of American Railroads v. U.S. Dept. of Transp.***

In *Ass’n. of American Railroads v. U.S. Dept. of Transportation*, 821 F.3d 19 (D.C. Cir. 2016), also discussed *supra*, the D.C. Circuit examined whether the Appointments Clause was violated by Congress vesting appointment power of a principal officer in the Surface Transportation Board.

The Court scrutinized the ambiguity in the statute which failed to state whether the individual appointed to the board should be a public or private individual. But ultimately, the D.C. Circuit determined that the provision was unconstitutional in either case. If the statute required a private individual, then the appointment would be unconstitutional because private individuals cannot wield the coercive power of government. If the appointment was of a public individual, then it would be unconstitutional because the arbitrator would be a principal officer who could only be appointed by the President with the advice and consent of the Senate since he wielded “significant authority pursuant to the statutes of the United States” and must be an “officer of the United States.”

The real question then is whether the arbitrator is a principal officer or an inferior officer. If it was the latter, the appointment method would be valid, because the Surface Transportation Board should be considered a “department” within the meaning of the Appointments Clause. *See Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 511 (2010) (defining a department as “a freestanding component of the Executive Branch, not subordinate to or contained within any other such component”). In answering this question, the court relied on the Supreme Court’s test in *Edmond v. United States*, 520 U.S. 651 (1997), which the D.C. Circuit said “identified the dispositive feature as whether an officer is ‘directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.’” Here, the arbitrator would not be directed or supervised by anyone, nor would his or her decisions be reviewable by anyone. Consequently, the arbitrator would have to be a principal officer appointed by the President with the advice and consent of the Senate. As such, the Court determined the statute violated the Appointments Clause under either scenario.

**§ 7.03, p. 681: Insert after note 7-16.**

**Note 7-16(a): *National Labor Relations Board v. Noel Canning***

In the opinion that follows, the United States Supreme Court undertook to interpret the recess appointments clause for the first time. The Court affirmed the judgment of the D.C. Circuit, but on narrower grounds.

134 S. Ct. 2550  
SUPREME COURT OF THE UNITED STATES  
**NATIONAL LABOR RELATIONS BOARD, Petitioner**  
v.  
**NOEL CANNING, et al., Respondent**  
No. 12–1281 | Argued Jan. 13, 2014 | Decided June 26, 2014

JUSTICE BREYER delivered the opinion of the Court.

Ordinarily the President must obtain “the Advice and Consent of the Senate” before appointing an “Office[r] of the United States.” U.S. Const., Art. II, § 2, cl. 2. But the Recess Appointments Clause creates an exception. It gives the President alone the power “to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” Art. II, § 2, cl. 3. We here consider three questions about the application of this Clause.

The first concerns the scope of the words “recess of the Senate.” Does that phrase refer only to an inter-session recess (*i.e.*, a break between formal sessions of Congress), or does it also include an intra-session recess, such as a summer recess in the midst of a session? We conclude that the Clause applies to both kinds of recess.

The second question concerns the scope of the words “vacancies that may happen.” Does that phrase refer only to vacancies that first come into existence during a recess, or does it also include vacancies that arise prior to a recess but continue to exist during the recess? We conclude that the Clause applies to both kinds of vacancy.

The third question concerns calculation of the length of a “recess.” The President made the appointments here at issue on January 4, 2012. At that time the Senate was in recess pursuant to a December 17, 2011, resolution providing for a series of brief recesses punctuated by “*pro forma* session[s],” with “no business . . . transacted,” every Tuesday and Friday through January 20, 2012. . . . In calculating the length of a recess are we to ignore the *pro forma* sessions, thereby treating the series of brief recesses as a single, month-long recess? We conclude that we cannot ignore these *pro forma* sessions.

Our answer to the third question means that, when the appointments before us took place, the Senate was in the midst of a 3–day recess. Three days is too short a time to bring a recess within the scope of the Clause. Thus we conclude that the President lacked the power to make the recess appointments here at issue.

I

The case before us arises out of a labor dispute. The National Labor Relations Board (NLRB) found that a Pepsi–Cola distributor, Noel Canning, had unlawfully refused to reduce to writing and execute a collective-bargaining agreement with a labor union. The Board ordered the distributor to

execute the agreement and to make employees whole for any losses. . . .

The Pepsi-Cola distributor subsequently asked the Court of Appeals for the District of Columbia Circuit to set the Board's order aside. It claimed that three of the five Board members had been invalidly appointed, leaving the Board without the three lawfully appointed members necessary for it to act. . . .

In 2011 the President had nominated each of [the members in question] to the Board. . . . On January 4, 2012, the President, invoking the Recess Appointments Clause, appointed all three to the Board.

The distributor argued that the Recess Appointments Clause did not authorize those appointments. It pointed out that on December 17, 2011, the Senate, by unanimous consent, had adopted a resolution providing that it would take a series of brief recesses beginning the following day. . . . Pursuant to that resolution, the Senate held *pro forma* sessions every Tuesday and Friday until it returned for ordinary business on January 23, 2012. . . . The President's January 4 appointments were made between the January 3 and January 6 *pro forma* sessions. In the distributor's view, each *pro forma* session terminated the immediately preceding recess. Accordingly, the appointments were made during a 3-day adjournment, which is not long enough to trigger the Recess Appointments Clause.

The Court of Appeals agreed that the appointments fell outside the scope of the Clause. But the court set forth different reasons. It held that the Clause's words "the recess of the Senate" do not include recesses that occur *within* a formal session of Congress, *i.e.*, intra-session recesses. Rather those words apply only to recesses *between* those formal sessions, *i.e.*, inter-session recesses. Since the second session of the 112th Congress began on January 3, 2012, the day before the President's appointments, those appointments occurred during an intra-session recess, and the appointments consequently fell outside the scope of the Clause. . . .

The Court of Appeals added that, in any event, the phrase "vacancies that may happen during the recess" applies only to vacancies that come into existence during a recess. . . . The vacancies that [the members at issue] were appointed to fill had arisen before the beginning of the recess during which they were appointed. For this reason too the President's appointments were invalid. And, because the Board lacked a quorum of validly appointed members when it issued its order, the order was invalid. . . .

[The Court granted the Solicitor General's petition for certiorari, asking the parties to address (1) the D.C. Circuit's rationale and (2) Noel Canning's initial argument that the President may not exercise recess appointment power during *pro forma* sessions.]

We shall answer all three questions presented. . . .

## II

Before turning to the specific questions presented, we shall mention two background considerations that we find relevant to all three. First, *the Recess Appointments Clause sets forth a subsidiary, not a primary, method for appointing officers of the United States*. The immediately preceding Clause—Article II, Section 2, Clause 2—provides the primary method of appointment. It says that



the President “shall nominate, *and by and with the Advice and Consent of the Senate*, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States” (emphasis added).

...

Second, *in interpreting the Clause, we put significant weight upon historical practice*. For one thing, the interpretive questions before us concern the allocation of power between two elected branches of Government. . . . And we [have] confirmed that “[l]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions” regulating the relationship between Congress and the President. *The Pocket Veto Case*, 279 U.S. 655, 689 (1929). . . .

We recognize, of course, that the separation of powers can serve to safeguard individual liberty, *Clinton v. City of New York*, 524 U.S. 417, 449–450 (1998) (KENNEDY, J., concurring), and that it is the “duty of the judicial department”—in a separation-of-powers case as in any other—“to say what the law is,” *Marbury v. Madison*, 1 Cranch 137, 177 (1803). But it is equally true that the longstanding “practice of the government,” *McCulloch v. Maryland*, 4 Wheat. 316, 401 (1819), can inform our determination of “what the law is,” *Marbury*, *supra*, at 177.

That principle is neither new nor controversial. As James Madison wrote, it “was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms & phrases necessarily used in such a charter . . . and that it might require a regular course of practice to liquidate & settle the meaning of some of them.” . . . And our cases have continually confirmed Madison’s view. . . .

[Our] precedents show that this Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era. . . .

There is a great deal of history to consider here. Presidents have made recess appointments since the beginning of the Republic. Their frequency suggests that the Senate and President have recognized that recess appointments can be both necessary and appropriate in certain circumstances. We have not previously interpreted the Clause, and, when doing so for the first time in more than 200 years, we must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached.

### III

The first question concerns the scope of the phrase “*the recess* of the Senate.” Art. II, § 2, cl. 3 (emphasis added). The Constitution provides for congressional elections every two years. And the 2-year life of each elected Congress typically consists of two formal 1-year sessions, each separated from the next by an “inter-session recess.” . . . The Senate or the House of Representatives announces an inter-session recess by approving a resolution stating that it will “adjourn *sine die*,” *i.e.*, without specifying a date to return (in which case Congress will reconvene when the next formal session is scheduled to begin).

The Senate and the House also take breaks in the midst of a session. The Senate or the House

announces any such “intra-session recess” by adopting a resolution stating that it will “adjourn” to a fixed date, a few days or weeks or even months later. All agree that the phrase “the recess of the Senate” covers inter-session recesses. The question is whether it includes intra-session recesses as well.

In our view, the phrase “the recess” includes an intra-session recess of substantial length. Its words taken literally can refer to both types of recess. Founding-era dictionaries define the word “recess,” much as we do today, simply as “a period of cessation from usual work.” . . . The Founders themselves used the word to refer to intra-session, as well as to inter-session, breaks. . . .

We recognize that the word “the” in “*the* recess” might suggest that the phrase refers to the single break separating formal sessions of Congress. That is because the word “the” frequently (but not always) indicates “a particular thing.” . . . But the word can also refer “to a term used generically or universally.” . . . Reading “the” generically . . . there is no linguistic problem applying the Clause’s phrase to both kinds of recess. And, in fact, the phrase “the recess” was used to refer to intra-session recesses at the time of the founding. . . .

The constitutional text is thus ambiguous. And we believe the Clause’s purpose demands the broader interpretation. The Clause gives the President authority to make appointments during “the recess of the Senate” so that the President can ensure the continued functioning of the Federal Government when the Senate is away. The Senate is equally away during both an inter-session and an intra-session recess, and its capacity to participate in the appointments process has nothing to do with the words it uses to signal its departure.

History also offers strong support for the broad interpretation. We concede that pre-Civil War history is not helpful. But it shows only that Congress generally took long breaks between sessions, while taking no significant intra-session breaks at all (five times it took a break of a week or so at Christmas). . . . Obviously, if there are no significant intra-session recesses, there will be no intra-session recess appointments. In 1867 and 1868, Congress for the first time took substantial, non-holiday intra-session breaks, and President Andrew Johnson made dozens of recess appointments. The Federal Court of Claims upheld one of those specific appointments, writing “[w]e have *no doubt* that a vacancy occurring while the Senate was thus temporarily adjourned” during the “first session of the Fortieth Congress” was “legally filled by appointment of the President alone.” *Gould v. United States*, 19 Ct. Cl. 593, 595–596 (1884) (emphasis added). Attorney General Evarts also issued three opinions concerning the constitutionality of President Johnson’s appointments, and it apparently did not occur to him that the distinction between intra-session and inter-session recesses was significant. . . .

In all, between the founding and the Great Depression, Congress took substantial intra-session breaks (other than holiday breaks) in four years: 1867, 1868, 1921, and 1929. . . . And in each of those years the President made intra-session recess appointments. . . .

Since 1929, and particularly since the end of World War II, Congress has shortened its inter-session breaks as it has taken longer and more frequent intra-session breaks; Presidents have correspondingly made more intra-session recess appointments. Indeed, if we include military appointments, Presidents have made thousands of intra-session recess appointments.

[JUSTICE BREYER explained that presidential advisors have consistently affirmed the

constitutionality of intra-session recess appointments. As for the Senate, its members have expressed different views—but while the 1863 Pay Act had denied compensation to recess appointees selected to fill vacancies arising midsession, the Senate changed course in 1940 and authorized compensation for many of those appointees.]

The upshot is that restricting the Clause to inter-session recesses would frustrate its purpose. It would make the President’s recess-appointment power dependent on a formalistic distinction of Senate procedure. Moreover, the President has consistently and frequently interpreted the word “recess” to apply to intra-session recesses, and has acted on that interpretation. The Senate as a body has done nothing to deny the validity of this practice for at least three-quarters of a century. And three-quarters of a century of settled practice is long enough to entitle a practice to “great weight in a proper interpretation” of the constitutional provision. *The Pocket Veto Case*, 279 U.S., at 689.

...

[JUSTICE BREYER went on to consider how long a break must be in order to fall within the Clause.] Is a break of a week, or a day, or an hour too short to count as a “recess”? The Clause itself does not say. . . .

[T]he most likely reason the Framers did not place a textual floor underneath the word “recess” is that they did not foresee the need for one. They might have expected that the Senate would meet for a single session lasting at most half a year. . . . And they might not have anticipated that intra-session recesses would become lengthier and more significant than inter-session ones. The Framers’ lack of clairvoyance on that point is not dispositive. . . . [W]e think it most consistent with our constitutional structure to presume that the Framers would have allowed intra-session recess appointments where there was a long history of such practice.

...

[Because a brief inter-session recess is just as possible as a brief intra-session recess, even the Solicitor General, arguing for a broader interpretation, acknowledges that there is a lower limit applicable to both kinds of recess. He argues that the lower limit should be three days by analogy to the Adjournments Clause of the Constitution. . . . That Clause says: “Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days.” Art. I, § 5, cl. 4.]

We agree with the Solicitor General that a 3–day recess would be too short. . . . The Adjournments Clause reflects the fact that a 3–day break is not a significant interruption of legislative business. As the Solicitor General says, it is constitutionally *de minimis*. . . . A Senate recess that is so short that it does not require the consent of the House is not long enough to trigger the President’s recess-appointment power.

That is not to say that the President may make recess appointments during any recess that is “more than three days.” Art. I, § 5, cl. 4. The Recess Appointments Clause seeks to permit the Executive Branch to function smoothly when Congress is unavailable. And though Congress has taken short breaks for almost 200 years, and there have been many thousands of recess appointments in that time, we have not found a single example of a recess appointment made during an intra-session recess that was shorter than 10 days. . . . The lack of examples suggests that the recess-appointment

power is not needed in that context. . . .

. . . We [conclude], in light of historical practice, that a recess of more than 3 days but less than 10 days is presumptively too short to fall within the Clause. We add the word “presumptively” to leave open the possibility that some very unusual circumstance—a national catastrophe, for instance, that renders the Senate unavailable but calls for an urgent response—could demand the exercise of the recess-appointment power during a shorter break. . . .

In sum, we conclude that the phrase “the recess” applies to both intra-session and inter-session recesses. If a Senate recess is so short that it does not require the consent of the House, it is too short to trigger the Recess Appointments Clause. See Art. I, § 5, cl. 4. And a recess lasting less than 10 days is presumptively too short as well.

#### IV

The second question concerns the scope of the phrase “vacancies *that may happen* during the recess of the Senate.” Art. II, § 2, cl. 3 (emphasis added). All agree that the phrase applies to vacancies that initially occur during a recess. But does it also apply to vacancies that initially occur before a recess and continue to exist during the recess? In our view the phrase applies to both kinds of vacancy.

We believe that the Clause’s language, read literally, permits, though it does not naturally favor, our broader interpretation. We concede that the most natural meaning of “happens” as applied to a “vacancy” (at least to a modern ear) is that the vacancy “happens” when it initially occurs. . . . But that is not the only possible way to use the word.

. . .

[T]he linguistic question here is not whether the phrase can be, but whether it must be, read more narrowly. The question is whether the Clause is ambiguous. *The Pocket Veto Case*, 279 U.S., at 690. And the broader reading, we believe, is at least a permissible reading of a “doubtful” phrase. *Ibid.* We consequently go on to consider the Clause’s purpose and historical practice.

[JUSTICE BREYER explained that the purpose of the Clause is to provide for the assistance of subordinate officers during periods in which the Senate cannot confirm them. He acknowledged the risk that a President with broad recess appointment power might exercise that power to “avoid Senate confirmations as a matter of course,” but he suggested that the limited term of service for a recess appointee would counter that temptation. He also surveyed historical practice over the past two centuries and concluded that history supports a broader interpretation of “happen.” Based on data provided by the Congressional Research Service, there is good reason to believe that “many recess appointees have filled vacancies that arose before the recess began,” and while there is some evidence that the Senate disagreed with the broad interpretation early on, it “subsequently abandoned its hostility.”]

The upshot is that the President has consistently and frequently interpreted the Recess Appointments Clause to apply to vacancies that initially occur before, but continue to exist during, a recess of the Senate. The Senate as a body has not countered this practice for nearly three-quarters of a century, perhaps longer. . . . The tradition is long enough to entitle the practice “to great regard

in determining the true construction” of the constitutional provision. *The Pocket Veto Case*, 279 U.S., at 690. And we are reluctant to upset this traditional practice where doing so would seriously shrink the authority that Presidents have believed existed and have exercised for so long.

In light of some linguistic ambiguity, the basic purpose of the Clause, and the historical practice we have described, we conclude that the phrase “all vacancies” includes vacancies that come into existence while the Senate is in session.

## V

The third question concerns the calculation of the length of the Senate’s “recess.” On December 17, 2011, the Senate by unanimous consent adopted a resolution to convene “*pro forma* session[s]” only, with “no business . . . transacted,” on every Tuesday and Friday from December 20, 2011, through January 20, 2012. . . . At the end of each *pro forma* session, the Senate would “adjourn until” the following *pro forma* session. . . .

The President made the recess appointments before us on January 4, 2012, in between the January 3 and the January 6 *pro forma* sessions. We must determine the significance of these sessions—that is, whether, for purposes of the Clause, we should treat them as periods when the Senate was in session or as periods when it was in recess. If the former, the period between January 3 and January 6 was a 3-day recess, which is too short to trigger the President’s recess-appointment power . . . . If the latter, however, then the 3-day period was part of a much longer recess during which the President did have the power to make recess appointments . . . .

The Solicitor General argues that we must treat the *pro forma* sessions as periods of recess. He says that these “sessions” were sessions in name only because the Senate was in recess as a *functional* matter. The Senate, he contends, remained in a single, unbroken recess from January 3, when the second session of the 112th Congress began by operation of the Twentieth Amendment, until January 23, when the Senate reconvened to do regular business.

In our view, however, the *pro forma* sessions count as sessions, not as periods of recess. We hold that, for purposes of the Recess Appointments Clause, the Senate is in session when it says it is, provided that, under its own rules, it retains the capacity to transact Senate business. The Senate met that standard here.

The standard we apply is consistent with the Constitution’s broad delegation of authority to the Senate to determine how and when to conduct its business. The Constitution explicitly empowers the Senate to “determine the Rules of its Proceedings.” Art. I, § 5, cl. 2.

. . .

Furthermore, this Court’s precedents reflect the breadth of the power constitutionally delegated to the Senate. We generally take at face value the Senate’s own report of its actions.

. . .

[W]e find that the *pro forma* sessions were sessions for purposes of the Clause. First, the Senate said it was in session. The Journal of the Senate and the Congressional Record indicate that the

Senate convened for a series of twice-weekly “sessions” from December 20 through January 20. . . . And these reports of the Senate “must be assumed to speak the truth.” *United States v. Ballin*, 144 U.S. 1, 4 (1892).

Second, the Senate’s rules make clear that during its *pro forma* sessions, despite its resolution that it would conduct no business, the Senate retained the power to conduct business. During any *pro forma* session, the Senate could have conducted business simply by passing a unanimous consent agreement. . . . [T]he Senate has enacted legislation during *pro forma* sessions even when it has said that no business will be transacted. Indeed, the Senate passed a bill by unanimous consent during the second *pro forma* session after its December 17 adjournment. . . .

By way of contrast, we do not see how the Senate could conduct business during a recess. It could terminate the recess and then, when in session, pass a bill. But in that case, of course, the Senate would no longer be in recess. It would be in session. And that is the crucial point. Senate rules make clear that, once in session, the Senate can act even if it has earlier said that it would not.

[The Solicitor General thought the relevant inquiry was not the Senate’s *capacity* to conduct business but what the Senate actually *did* during its *pro forma* sessions. JUSTICE BREYER declined the Solicitor General’s invitation to “engage in a more realistic appraisal of what the Senate actually did,” as such an appraisal would run contrary to the court’s separation-of-powers precedent and would prove factually challenging.]

Finally, the Solicitor General warns that our holding may “disrup[t] the proper balance between the coordinate branches by preventing the Executive Branch from accomplishing its constitutionally assigned functions.” . . . We do not see, however, how our holding could significantly alter the constitutional balance. Most appointments are not controversial and do not produce friction between the branches. Where political controversy is serious, the Senate unquestionably has other methods of preventing recess appointments. As the Solicitor General concedes, the Senate could preclude the President from making recess appointments by holding a series of twice-a-week *ordinary* (not *pro forma*) sessions. And the nature of the business conducted at those ordinary sessions—whether, for example, Senators must vote on nominations, or may return to their home States to meet with their constituents—is a matter for the Senate to decide. The Constitution also gives the President (if he has enough allies in Congress) a way to force a recess. Art. II, § 3 (“[I]n Case of Disagreement between [the Houses], with Respect to the Time of Adjournment, [the President] may adjourn them to such Time as he shall think proper”). Moreover, the President and Senators engage with each other in many different ways and have a variety of methods of encouraging each other to accept their points of view.

Regardless, the Recess Appointments Clause is not designed to overcome serious institutional friction. It simply provides a subsidiary method for appointing officials when the Senate is away during a recess. Here, as in other contexts, friction between the branches is an inevitable consequence of our constitutional structure. See *Myers v. United States*, 272 U.S. 52, 293 (1926) (BRANDEIS, J., dissenting). That structure foresees resolution not only through judicial interpretation and compromise among the branches but also by the ballot box.

## VI

The Recess Appointments Clause responds to a structural difference between the Executive and

Legislative Branches: The Executive Branch is perpetually in operation, while the Legislature only acts in intervals separated by recesses. The purpose of the Clause is to allow the Executive to continue operating while the Senate is unavailable. We believe that the Clause's text, standing alone, is ambiguous. It does not resolve whether the President may make appointments during intra-session recesses, or whether he may fill pre-recess vacancies. But the broader reading better serves the Clause's structural function. Moreover, that broader reading is reinforced by centuries of history, which we are hesitant to disturb. We thus hold that the Constitution empowers the President to fill any existing vacancy during any recess—intra-session or inter-session—of sufficient length.

...

[A]s in all cases, we interpret the Constitution in light of its text, purposes, and “our whole experience” as a Nation. *Missouri v. Holland*, 252 U.S. 416, 433 (1920). And we look to the actual practice of Government to inform our interpretation.

Given our answer to the last question before us, we conclude that the Recess Appointments Clause does not give the President the constitutional authority to make the appointments here at issue. Because the Court of Appeals reached the same ultimate conclusion (though for reasons we reject), its judgment is affirmed.

*It is so ordered.*

#### **Note 7-16(a)(1)**

JUSTICE SCALIA, joined by CHIEF JUSTICE ROBERTS, JUSTICE THOMAS, and JUSTICE ALITO, concurred in the Court's judgment. However, JUSTICE SCALIA would have affirmed the D.C. Circuit's reasoning as well: that is to say, he would have held that the President may exercise his recess appointment power *only* during the formal inter-session Recess and then *only* to fill those vacancies that arise during the Recess. Chiding the majority for its “adverse-possession theory of executive authority” and accusing it of “cast[ing] aside the plain, original meaning of the constitutional text in deference to late-arising historical practices that are ambiguous at best,” JUSTICE SCALIA predicted that future Presidents may use their exceptional recess appointment power to bypass the ordinary constitutional scheme. Does this sound like aggrandizement of the executive branch at the expense of the legislature? Does the majority's “presumptively too short” framework mitigate the risk of abuse?

#### **Note 7-16(a)(2)**

From JUSTICE SCALIA's vantage point, the recess appointments clause is largely an anachronism, a relic predating modern communication and transportation technologies that keep Senators connected even when they leave the Capital.

JUSTICE BREYER rejected this notion of the recess appointments clause as anachronistic, writing that the concurrence would “basically read [the clause] out of the Constitution[, an] act of judicial excision in the name of liberty.” JUSTICE BREYER recognized the ongoing vitality of the clause: “[T]he Framers included the Recess Appointments Clause to preserve the ‘vigour of government’ at times when an important organ of Government, the United States Senate, is in recess.” What do you think? Are recess appointments necessary in this modern era of short breaks, fast jets, and teleconferencing?

**Note 7-16(a)(3)**

According to JUSTICE BREYER, while *Marbury* teaches that it is the duty of the courts to say what the law is, *McCulloch* recognizes that longstanding government practices may inform that inquiry. The Court, he writes, should “hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached.” JUSTICE SCALIA tacitly agreed that widespread and unchallenged government practices should guide the interpretation of ambiguous constitutional provisions, but he also stressed that “past practice does not, by itself, create power.” Moreover, he opined that the “historical practice of the political branches is . . . irrelevant when the Constitution is clear.”

Which side has the better of the debate? In the context of recess appointments, how much deference should the Court pay to longstanding Presidential tradition? To apparent congressional acquiescence? Do you agree with the majority that the language of the recess appointments clause is sufficiently ambiguous to warrant further historical investigation? Or did the D.C. Circuit have it right: is the language clear? Is the Court stretching beyond the plain meaning of the text to reach a result that seems more viable? Or, as Professor Shane suggested, did “pragmatism trump an overconfident textualism?” Peter Shane, *Two Cheers for Recess Appointments*, REG BLOG (June 26, 2014), <http://www.regblog.org/2014/06/26-shane-two-cheers-recess-appointments.html>.

**Note 7-16(a)(4)**

If the Court had embraced the rationale of the D.C. Circuit (or the concurring justices), what result might have obtained? How would a strict interpretation of the recess appointments clause impact federal agencies? Their past decisions? Consider JUSTICE BREYER’s observation that “JUSTICE SCALIA would render illegitimate thousands of recess appointments reaching all the way back to the founding era.” Imagine that you were on the receiving end of an adverse decision by an agency commissioner who was appointed during an intra-session recess. If the D.C. Circuit’s rationale had held, would you seek subsequent review? Clearly this is not an area of the law that can tolerate great uncertainty.

**Note 7-16(a)(5):**

Six months after the D.C. Circuit’s *Noel Canning* decision, the Senate confirmed four appointees to the NLRB, which gave the board five confirmed members for the first time since 2003. *See* Press Release, Nat’l Labor Relations Bd., The National Labor Relations Board Has Five Senate Confirmed Members (Aug. 12, 2013), *available at* <http://www.nlr.gov/news-outreach/news-releases/national-labor-relations-board-has-five-senate-confirmed-members>.

Moreover, in July 2014, the NLRB unanimously ratified all matters taken up during the period in which it lacked a quorum (January 4, 2012, to August 5, 2013). *See* Press Release, Nat’l Labor Relations Bd., NLRB Officials Ratify Agency Actions Taken During Period When Supreme Court Held Board Members Were Not Validly Appointed (Aug. 4, 2014), *available at* <http://www.nlr.gov/news-outreach/news-story/nlr-officials-ratify-agency-actions-taken-during-period-when-supreme-court>. So, while *Noel Canning* raises fascinating doctrinal questions, its *immediate* practical effect has proved modest.

**Note 7-16(a)(6)**

How might the Court’s decision impact future Presidents? If a recess of fewer than ten days is presumptively too short to activate the recess appointment power, and if the Senate continues to



employ the *pro forma* maneuver, couldn't *Noel Canning* cripple Presidents in their efforts to "take Care that the Laws be faithfully executed"?

#### **Note 7-16(b)**

On November 15, 2017, Richard Cordray announced he would resign from his position as Director of the Consumer Financial Protection Bureau (CFPB) at the end of the month. On November 24, Cordray distributed his resignation letter, explaining that he had reassigned career civil servant and CFPB veteran, Leandra English to the position of deputy director and that he would resign effective at close of business. As a result, he said, pursuant to the CFPB's founding legislation, the Dodd-Frank Act, English would become acting Director upon his departure.

Several hours later the White House named former congressman and sitting OMB Director, Mick Mulvaney to the same position. As the two appointees publicly laid claim to the same position, the strange drama that played out in the CFPB offices made its way to the court room and concluded with Mulvaney firmly, albeit temporarily, ensconced as acting Director of the CFPB and Director of the OMB.

English sought a preliminary injunction against the appointment of an acting Director other than herself, arguing that she became acting Director by operation of the Dodd-Frank Act. The district court denied her request, holding that the Dodd-Frank Act and FVRA, construed harmoniously, preserve a nonexclusive means for the president to appoint acting officers. *See English v. Trump*, 279 F. Supp. 3d 307 (D.D.C. 2018), *appeal dismissed*, 2018 U.S. App. LEXIS 19856 (D.C. Cir.); *see also* Victoria Guida & Katy O'Donnell, *Battle over CFPB leadership ends as Mulvaney challenger resigns*, POLITICO (July 6, 2018, 04:32 PM), <https://www.politico.com/story/2018/07/06/consumer-financial-protection-bureau-leadership-battle-674254> ("English said she was stepping down in light of President Donald Trump's nomination of a permanent director, Kathy Kraninger, to run the [CFPB]. . . . English's lawyer, Deepak Gupta, said his client would be filing paperwork on Monday to 'bring the litigation to a close.'").

#### **Note 7-16(c): Appointments and staffing as a deregulatory policy tool**

A clear theme in the Trump administration's approach to regulation is deregulation.<sup>21</sup> But perhaps the clearest motif in said theme is inaction. The Trump Administration has been among the slowest in history at filling key administrative posts.<sup>22</sup> His agencies have been directed to abandon ongoing litigation,<sup>23</sup> be silent to the public,<sup>24</sup> and face new legislation specifically designed to stymie regulatory processes<sup>25</sup>—in other words, to make agencies do more nothing.

<sup>21</sup> *E.g.*, <https://www.nytimes.com/2017/06/20/business/nlr-trump-labor.html>;

<https://www.nytimes.com/2017/07/01/us/politics/trump-epa-chief-pruitt-regulations-climate-change.html>.

<sup>22</sup> [https://www.washingtonpost.com/graphics/politics/trump-administration-appointee-tracker/database/?tid=a\\_inl](https://www.washingtonpost.com/graphics/politics/trump-administration-appointee-tracker/database/?tid=a_inl);  
[https://www.washingtonpost.com/news/the-fix/wp/2017/06/27/the-appointee-situation-at-the-state-department-is-bad-these-other-agencies-might-have-it-worse/?%3Ftid%3D=sm\\_pg&utm\\_term=.0013d0834612](https://www.washingtonpost.com/news/the-fix/wp/2017/06/27/the-appointee-situation-at-the-state-department-is-bad-these-other-agencies-might-have-it-worse/?%3Ftid%3D=sm_pg&utm_term=.0013d0834612);  
<http://money.cnn.com/2017/06/07/news/economy/trump-staffing-vacancies/index.html>.

<sup>23</sup> *See, e.g.*, *Gloucester Cty. Sch. Bd. v. G. G. ex rel. Grimm*, 137 S. Ct. 1239 (2017); *G. G. v. Gloucester Cty. Sch. Bd.*, 853 F.3d 729 (4th Cir. 2017); *Glob. Tel\*Link v. Fed. Comm'n's Comm'n*, No. 15-1461, 2017 WL 2540899 (D.C. Cir. June 13, 2017).

<sup>24</sup> *E.g.*, <http://www.politico.com/story/2017/01/federal-agencies-trump-information-lockdown-234122>;

But the decision to do nothing is not without material consequences, both in terms of its practical impact, for example on agencies' ability to carry out their congressional mandates, and its legal impact:

These results suggest that independent agencies may not be as shielded from presidential influence as is sometimes suggested. Conversely, perhaps presidential oversight mechanisms such as OMB review of rules are not needed to prevent or delay agencies from issuing rules disfavored by the White House. As Terry Moe and others have noted, the president's power to appoint agency leadership is formidable and likely sufficient to block or slow rulemaking at independent agencies. Of course, the harder work of issuing new rules to reduce or eliminate old rules remains.

Connor Raso, *Where and why has agency rulemaking declined under Trump?*, BROOKINGS INST. (June 29, 2018), [https://www.brookings.edu/research/where-and-why-has-agency-rulemaking-declined-under-trump/?utm\\_campaign=Brookings%20Brief&utm\\_source=hs\\_email&utm\\_medium=email&utm\\_content=64218260](https://www.brookings.edu/research/where-and-why-has-agency-rulemaking-declined-under-trump/?utm_campaign=Brookings%20Brief&utm_source=hs_email&utm_medium=email&utm_content=64218260)

APA § 553(b)(A) exempts “rules of agency organization, procedure, or practice” from its Rulemaking requirements. Executives intent on rolling back the reach of the administrative state have found that hiring the right people and leaving the administering agency chronically understaffed are both effective techniques for achieving policy goals while avoiding potentially lengthy rulemakings.

Reagan-EPA appointee, Anne Gorsuch cut staff, shrank its budget, and dissolved the Office of Enforcement – all of which resulted in a decrease of civil enforcement cases by 75% in her first year. Gorsuch was forced out and replaced when the Democrat-controlled House launched investigations that uncovered corruption and misconduct, and ultimately, charged Gorsuch with contempt after she failed to answer a congressional subpoena.

Later, the second Bush administration made more friendly appointments, but “nurtured a political climate that challenged the science undergirding EPA actions,” requiring political appointees to include language about the uncertainty of climate change in reports and prohibiting EPA employees from discussing it.

The Trump administration seems to have “combined the overt attacks pioneered by Reagan and Gorsuch to the more sophisticated Bush strategy of corroding the science driving the EPA’s activities,” under Scott Pruitt. Jennifer Liss Ohayon, Leif Fredrickson, and Christopher Sellers, *Would firing Scott Pruitt save the EPA?*, The Washington Post (May 22, 2018), [https://www.washingtonpost.com/news/made-by-history/wp/2018/05/22/would-firing-scott-pruitt-save-the-epa/?utm\\_term=.1506477821c4](https://www.washingtonpost.com/news/made-by-history/wp/2018/05/22/would-firing-scott-pruitt-save-the-epa/?utm_term=.1506477821c4).

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<http://www.cnn.com/2017/05/12/politics/epa-resignation-protest-review-board/index.html>;  
[https://www.washingtonpost.com/politics/federal-agencies-ordered-to-restrict-their-communications/2017/01/24/9daa6aa4-e26f-11e6-ba11-63c4b4fb5a63\\_story.html?utm\\_term=.c7ddeb4f182](https://www.washingtonpost.com/politics/federal-agencies-ordered-to-restrict-their-communications/2017/01/24/9daa6aa4-e26f-11e6-ba11-63c4b4fb5a63_story.html?utm_term=.c7ddeb4f182).

<sup>25</sup> E.g., [https://ag.ny.gov/sites/default/files/letter\\_006\\_2017\\_03\\_29.pdf](https://ag.ny.gov/sites/default/files/letter_006_2017_03_29.pdf);  
<https://www.thereview.org/2017/03/29/roberts-misguided-regulatory-accountability-act/>.

As former-Administrator Pruitt reduced EPA staff, with an estimated 2000 positions vulnerable and 700 employees opting to leave; reduced enforcement, filing one-third fewer civil enforcement cases than under Obama, and one-fourth fewer than under Bush; directed the manipulation of EPA science by removing climate change information from websites and dismissing academics on scientific advisory boards to replace them with lobbyists. *Id.*

The Department of State is experiencing similar self-inflicted problems due to understaffing.

The State Department will soon offer a \$25,000 buyout to diplomats and staff members who quit or take early retirements by April, officials confirmed on Friday.

The decision is part of Secretary of State Rex W. Tillerson's continuing effort to cut the ranks of diplomats and Civil Service officers despite bipartisan resistance in Congress. Mr. Tillerson's goal is to reduce a department of nearly 25,000 full-time American employees by 8 percent, which amounts to 1,982 people.

To reach that number, he has already frozen hiring, reduced promotions, asked some senior employees to perform clerical duties that are normally relegated to lower-level staff members, refused to fill many ambassadorships and senior leadership jobs, and fired top diplomats from coveted posts while offering low-level assignments in their place. Those efforts have crippled morale worldwide.

Gardiner Harris, *State Department to Offer Buyouts in Effort to Cut Staff*, N.Y. TIMES (Nov. 10, 2017), <https://www.nytimes.com/2017/11/10/us/politics/state-department-buyouts.html>. See also, Robbie Gramer & Dan de Luce, *State Department Scraps Sanctions Office*, FOREIGN POLICY (Oct. 26, 2017, 07:26 PM), <http://foreignpolicy.com/2017/10/26/state-department-scraps-sanctions-office/> (“The Trump administration was three weeks late on a Russia sanctions deadline. But it’s killed the office that coordinates them.”); Carrie Kahn, *U.S. Ambassador To Mexico Is Latest Career Diplomat To Resign*, NPR (Mar. 1, 2018, 07:31 PM), <https://www.npr.org/sections/thetwo-way/2018/03/01/590081271/u-s-ambassador-to-mexico-is-latest-career-diplomat-to-resign>; Joshua Partlow & Carol Morello, *A top U.S. diplomat in Latin America leaves in protest, swelling an exodus*, THE WASHINGTON POST (Mar. 9, 2018), [https://www.washingtonpost.com/world/the\\_americas/a-top-us-diplomat-in-latin-america-leaves-in-protest-swelling-an-exodus/2018/03/09/461ed68a-169e-11e8-930c-45838ad0d77a\\_story.html?utm\\_term=.c55688ba8f4d](https://www.washingtonpost.com/world/the_americas/a-top-us-diplomat-in-latin-america-leaves-in-protest-swelling-an-exodus/2018/03/09/461ed68a-169e-11e8-930c-45838ad0d77a_story.html?utm_term=.c55688ba8f4d).

Well over a year into U.S. President Donald Trump's tenure, the State Department is in disarray. Former Secretary of State Rex Tillerson embarked on a zealous drive to reform the department as the White House proposed steep budget cuts. But what he called a much-needed push to trim and streamline a vast bureaucracy, many critics saw as a hollowing out of the U.S. diplomatic corps. Dozens of key positions, including 38 ambassadorships, remain unfilled — leaving the delicate art of diplomacy in too few hands with too many world crises at the boiling point.

With so many empty posts, the State Department is relying on lower-level officials to pick up the slack, even in embassies of strategic importance. The State Department claims it has a cadre of talented career diplomats filling the gaps in

interim roles. But the stand-ins lack the clout of formal ambassadors, who are presidentially nominated and Senate-confirmed.

Robbie Gramer, *Mapped: 38 U.S. Ambassadorships Remain Empty*, FOREIGN POLICY (April 9, 2018), <http://foreignpolicy.com/2018/04/09/mapped-38-u-s-ambassadorships-remain-empty-diplomacy/>.

Remaining State Department employees also appear to be under observation.

A senior advisor to the State Department appointed just two months ago has been quietly vetting career diplomats and American employees of international institutions to determine whether they are loyal to President Donald Trump and his political agenda, according to nearly a dozen current and former U.S. officials.

Mari Stull, a former food and beverage lobbyist-turned-wine blogger under the name “Vino Vixen,” has reviewed the social media pages of State Department staffers for signs of ideological deviation. She has researched the names of government officials to determine whether they signed off on Obama-era policies — though signing off does not mean officials personally endorsed them but merely cleared them through the bureaucratic chain. And she has inquired about Americans employed by international agencies, including the World Health Organization and the United Nations, asking their colleagues when they were hired and by whom, according the officials.

Her probing, along with a highly secretive management style, has become so uncomfortable that at least three senior officials are poised to leave the bureau, according to the sources. Officials there have warned some Americans employed by the U.N. to sidestep traditional meet-and-greet sessions with the department’s upper management to avoid drawing attention to themselves.

Colum Lynch & Robbie Gramer, *Trump Appointee Compiles Loyalty List of U.S. Employees at U.N., State*, FOREIGN POLICY (June 13, 2018, 11:01 AM), <http://foreignpolicy.com/2018/06/13/trumps-vino-vixen-compiles-loyalty-list-of-u-s-employees-at-u-n-state-mari-stull-political-appointee-state-department-international-organization-united-nations-political-retribution-chaos-dysfunction/>.

**Note 7-16(c)(1):**

What effect might excessive vacancies have on judicial review? *See infra*, Note 9-2(b). “Both Congress and the U.S. Supreme Court designed the administrative state in reliance on the key assumption that ‘agencies will be expert in enforcement because they are expert in their statutes, their industries, and their regulatory scheme.’” Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31, 42-3 (2017) (quoting Max Minzner, *Should Agencies Enforce?*, 99 MINN. L. REV. 2113, 2119 (2015)).

One possible consequence could be the shift of decision-making authority from agencies to courts. The various doctrines requiring courts to give deference to agency decision making endow agencies with substantial discretion to make critical decisions. Thus, agencies frequently have the final say

on critical issues regarding asset distribution, professional licensing, market monitoring, and environmental protection, to name just a few. The importance of the agency role in decision making is reinforced by administrative exhaustion requirements. Someone impacted by an agency decision cannot simply complain to the courts about that decision. Instead, the aggrieved party must ordinarily first take her complaints to the agency itself to give the agency an opportunity to exercise its congressionally-mandated discretion and to get the decision correct without court intervention.

But when an agency just plain refuses to make a decision, the agency loses its opportunity to have the first (and frequently final) say.<sup>26</sup> Where exhaustion is waived for failure to act, the court is left as the adjudicatory body in a case that should have been determined at the administrative level in the first instance.

**Note 7-16(d):**

Are there constraints to agency self-harm? Internal deliberative bodies might provide an example. One EPA proposal to rescind an Obama-era rule seeking to limit pollution from “glider trucks,” was based, in part, on a non-peer reviewed study funded by a glider truck manufacturer. The study is contradicted by the findings of the EPA’s own researchers.

According to an eight-member working group of the EPA’s Science Advisory Board that questions the adequacy of the science behind the rollback:

‘[t]his proposed rule is based on claims and assumptions about glider vehicle emissions, safety and cost that could be assessed via rigorous technical analysis, but it appears that EPA has not attempted to undertake relevant analyses,’ the working group said in a memo. ‘Furthermore, there is little mention of effects on public health in the proposed rule.’

The working group also has recommended reviewing other EPA policy changes, including the agency’s move to repeal the Clean Power Plan that throttles greenhouse gas emissions from electricity and its proposed rollback of a 2016 rule requiring oil and gas companies to pare methane releases.

Jennifer A. Dlouhy, *EPA’s Own Science Advisors to Rebuke Agency Over Auto Rollback*, BLOOMBERG (May 29, 2018, 04:00 AM), <https://www.bloomberg.com/news/articles/2018-05-29/epa-s-own-science-advisers-to-rebuke-agency-over-auto-rollback>.

How would a statement like this be evaluated by Justice Scalia’s arbitrary and capricious standard in *Fox, infra*, § 8.08, at 888?

**§ 7.04, p.697: Executive Power to Fire: Insert after Note 7-28**

**Note 7-28(a)**

Recently, perhaps emboldened by successful Appointments Clause challenges, a plaintiff’s

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<sup>26</sup> *E.g.*, *Beeler v. Colvin*, No. 1:15-CV-01481-SEB-MJD, 2016 WL 7111646 (S.D. Ind. Dec. 7, 2016).

challenge to the constitutionality of for cause protection for a single head of an agency, as opposed to multi-member commissions, has drawn great attention. The plaintiff in *PHH Corp. v. Consumer Financial Protection Bureau*, 839 F.3d 1 (D.C. Cir. 2016) (order vacated and rehearing en banc granted), argued that this arrangement places too much authority in one administrator and unconstitutionally limited the president's power to fire. Specifically, the case involved the ability of the President to remove the head of the Consumer Financial Protection Bureau. In *PHH*, the D.C. Circuit panel held that the current law under which the head of the CFPB may only be removed "for cause" was unconstitutional. To avoid the issue, the court held that the power to fire an individual was inherently included with the President's power to appoint that person.

On rehearing en banc, the D.C. Circuit held that the for-cause protection provided by Congress to the CFPB's Director is consistent with Article II of the Constitution. The majority decision rested on two considerations: the first, that for cause protections, in general, do not interfere with the President's ability to execute the laws faithfully, and second, that the functions of the CFPB and its Director, like those of a number of other independent federal financial regulators, are not core executive functions, unlike what is entrusted to a cabinet officer, who we assume must answer directly to the president. *PHH Corp. v. CFPB*, 881 F.3d 75, 84 (D.C. Cir. 2018) (*en banc*). The court observed that severing the for-cause provision from the rest of the Dodd-Frank Act would have the effect of turning the CFPB "into an instrumentality of the President with a Director removable at will," *id.* at 83, while threatening the time-honored independence of financial regulators and numerous other independent agencies, *id.* at 84.

**§ 7.04, p. 712: *Lucia v. SEC* – Challenges to Administrative Law Judges (Insert after Note 7-29)**

*Lucia v. SEC* & The Modern Appointments Clause Battlegrounds: SEC Administrative Law Judges *Free Enterprise* and its predecessors did little to settle the issue of who constitutes an "Officer[] of the United States," an "inferior Officer[]," or a mere employee. As demonstrated in the cases we have already discussed, the stakes are incredibly high when a decision maker faces a credible Appointments Clause challenge. In the last two years, the Securities and Exchange Commission's practice of delegating enforcement adjudications to administrative law judges (ALJs), who lack appointment by the Commission, drew a circuit split as to its constitutionality. The Supreme Court took up the issue in *Lucia v. SEC* to resolve whether the ALJs are in fact, as the SEC has treated them, merely employees, outside the scope of the Appointments Clause. Under the scheme addressed by the Supreme Court, the SEC delegated to a "Chief ALJ" the responsibility of hiring all other ALJs. The Commission itself had no role in appointing its ALJs.

In *Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016), the Tenth Circuit described the ALJs' appointment process and duties thusly:

Under 5 U.S.C. § 3105, "Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with [the adjudication provisions of the APA]." Agencies hire ALJs through a merit-selection process administered by the Office of Personnel Management ("OPM"), which places ALJs within the civil service (i.e., the "competitive service"). ALJ applicants must be licensed attorneys with at least seven years of litigation experience. OPM administers an exam and uses the results to rank applicants. Agencies may select an ALJ from the top three ranked candidates. The SEC's

Chief ALJ hires from the top three candidates subject to “approval and processing by the [SEC’s] Office of Human Resources.” Once hired, ALJs receive career appointments, and are removable only for good cause. . . . The SEC currently employs five ALJs.

The SEC has authority to delegate “any of its functions” except rulemaking to its ALJs. And SEC regulations task ALJs with “conduct[ing] hearings” and make them “responsible for the fair and orderly conduct of the proceedings.”

The lack of well-developed Supreme Court case law led to two drastically different approaches to resolving whether SEC ALJs constitute employees or inferior officers. The D.C. Circuit took a very formalistic approach, essentially holding that any appointee who either lacks discretion or the power to enter final orders must be an employee—regardless of the deference accorded to the appointee’s decisions or the impact the appointee’s decisions have on other persons. The Tenth Circuit, for its part, did not develop criteria to apply in such cases, but instead satisfied itself with comparing the cases before it to the few Supreme Court decisions on the issue, such as *Freytag*, on a seemingly *ad hoc* basis.

In *Lucia*, the Supreme Court resolved this circuit split as to the correct result with respect to the SEC’s ALJs, even as it declined to provide meaningful guidance on how to handle potentially closer cases in the future.

138 S. Ct. 2044  
SUPREME COURT OF THE UNITED STATES  
**LUCIA, et al., Petitioners**  
v.  
**SECURITIES AND EXCHANGE COMMISSION, Respondent**  
No. 17–130 | Argued April 23, 2018 | Decided June 21, 2018

JUSTICE KAGAN delivered the opinion of the Court.

The Appointments Clause of the Constitution lays out the permissible methods of appointing “Officers of the United States,” a class of government officials distinct from mere employees. Art. II, §2, cl. 2. This case requires us to decide whether administrative law judges (ALJs) of the Securities and Exchange Commission (SEC or Commission) qualify as such “Officers.” In keeping with *Freytag v. Commissioner*, 501 U. S. 868 (1991), we hold that they do.

I

The SEC has statutory authority to enforce the nation’s securities laws. One way it can do so is by instituting an administrative proceeding against an alleged wrongdoer. By law, the Commission may itself preside over such a proceeding. But the Commission also may, and typically does, delegate that task to an ALJ. The SEC currently has five ALJs. Other staff members, rather than the Commission proper, selected them all

An ALJ assigned to hear an SEC enforcement action has extensive powers—the “authority to do all things necessary and appropriate to discharge his or her duties” and ensure a “fair and orderly” adversarial proceeding. Those powers “include, but are not limited to,” supervising discovery;



issuing, revoking, or modifying subpoenas; deciding motions; ruling on the admissibility of evidence; administering oaths; hearing and examining witnesses; generally “[r]egulating the course of” the proceeding and the “conduct of the parties and their counsel”; and imposing sanctions for “[c]ontemptuous conduct” or violations of procedural requirements. As that list suggests, an SEC ALJ exercises authority “comparable to” that of a federal district judge conducting a bench trial.

After a hearing ends, the ALJ issues an “initial decision.” The Commission can then review the ALJ’s decision, either upon request or *sua sponte*. But if it opts against review, the Commission “issue[s] an order that the [ALJ’s] decision has become final.” At that point, the initial decision is “deemed the action of the Commission.”

This case began when the SEC instituted an administrative proceeding against petitioner Raymond Lucia and his investment company. [The SEC alleged that] Lucia used misleading slideshow presentations to deceive prospective clients. [The ALJ ruled against Lucia.]

On appeal to the SEC, Lucia argued that the administrative proceeding was invalid because Judge Elliot had not been constitutionally appointed. According to Lucia, the Commission’s ALJs are “Officers of the United States” and thus subject to the Appointments Clause. Under that Clause, Lucia noted, only the President, “Courts of Law,” or “Heads of Departments” can appoint “Officers.” See Art. II, §2, cl. 2. And none of those actors had made Judge Elliot an ALJ. To be sure, the Commission itself counts as a “Head[ ] of Department[ ].” *Ibid.*; see *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 511-513 (2010). But the Commission had left the task of appointing ALJs, including Judge Elliot, to SEC staff members. As a result, Lucia contended, Judge Elliot lacked constitutional authority to do his job.

The Commission rejected Lucia’s argument. It held that the SEC’s ALJs are not “Officers of the United States.” Instead, they are “mere employees”—officials with lesser responsibilities who fall outside the Appointments Clause’s ambit. The Commission reasoned that its ALJs do not “exercise significant authority independent of [its own] supervision.”

Lucia’s claim fared no better in the Court of Appeals for the D.C. Circuit, [resulting in a circuit split with the Tenth Circuit.]

Lucia asked us to resolve the split by deciding whether the Commission’s ALJs are “Officers of the United States within the meaning of the Appointments Clause.” Up to that point, the Federal Government (as represented by the Department of Justice) had defended the Commission’s position. But in responding to Lucia’s petition, the Government switched sides. So when we granted the petition, 138 S. Ct. 1040 (2018), we also appointed an *amicus curiae* to defend the judgment below. We now reverse.

## II

The sole question here is whether the Commission’s ALJs are “Officers of the United States” or simply employees of the Federal Government. The Appointments Clause prescribes the exclusive means of appointing “Officers.” Only the President, a court of law, or a head of department can do so. See Art. II, §2, cl. 2. And as all parties agree, none of those actors appointed Judge Elliot before he heard Lucia’s case. So if the Commission’s ALJs are constitutional officers, Lucia raises a valid Appointments Clause claim. The only way to defeat his position is to show that those ALJs are not



officers at all, but instead non-officer employees—part of the broad swath of “lesser functionaries” in the Government’s workforce. *Buckley v. Valeo*, 424 U. S. 1, 126, n. 162 (1976) (*per curiam*).

Two decisions set out this Court’s basic framework for distinguishing between officers and employees. *Germaine* held that “civil surgeons” (doctors hired to perform various physical exams) were mere employees because their duties were “occasional or temporary” rather than “continuing and permanent.” *Id.*, at 511-512. Stressing “ideas of tenure [and] duration,” the Court there made clear that an individual must occupy a “continuing” position established by law to qualify as an officer. *Id.*, at 511. *Buckley* then set out another requirement, central to this case. It determined that members of a federal commission were officers only after finding that they “exercis[ed] significant authority pursuant to the laws of the United States.” 424 U.S., at 126. The inquiry thus focused on the extent of power an individual wields in carrying out his assigned functions.

Both the *amicus* and the Government urge us to elaborate on *Buckley*’s “significant authority” test, but another of our precedents makes that project unnecessary. In *Freytag v. Commissioner*, 501 U. S. 868 (1991), we applied the unadorned “significant authority” test to adjudicative officials who are near-carbon copies of the Commission’s ALJs. As we now explain, our analysis there (sans any more detailed legal criteria) necessarily decides this case.

The officials at issue in *Freytag* were the “special trial judges” (STJs) of the United States Tax Court. The authority of those judges depended on the significance of the tax dispute before them. In “comparatively narrow and minor matters,” they could both hear and definitively resolve a case for the Tax Court. *Id.*, at 873. In more major matters, they could preside over the hearing, but could not issue the final decision; instead, they were to “prepare proposed findings and an opinion” for a regular Tax Court judge to consider. *Ibid.* The proceeding challenged in *Freytag* was a major one, involving \$1.5 billion in alleged tax deficiencies. After conducting a 14-week trial, the STJ drafted a proposed decision in favor of the Government. A regular judge then adopted the STJ’s work as the opinion of the Tax Court.

[For more on the Court’s reasoning in *Freytag*, see the excerpt in the casebook at page 676.]

*Freytag* says everything necessary to decide this case. To begin, the Commission’s ALJs, like the Tax Court’s STJs, hold a continuing office established by law. Far from serving temporarily or episodically, SEC ALJs “receive[] a career appointment.” 5 CFR §930.204(a) (2018). And that appointment is to a position created by statute, down to its “duties, salary, and means of appointment.” *Freytag*, 501 U. S., at 88.

Still more, the Commission’s ALJs exercise the same “significant discretion” when carrying out the same “important functions” as STJs do. *Freytag*, 501 U. S., at 882. Both sets of officials have all the authority needed to ensure fair and orderly adversarial hearings—indeed, nearly all the tools of federal trial judges. Consider in order the four specific (if overlapping) powers *Freytag* mentioned. First, the Commission’s ALJs (like the Tax Court’s STJs) “take testimony.” 501 U. S., at 881. More precisely, they “[r]eceive[] evidence” and “[e]xamine witnesses” at hearings, and may also take pre-hearing depositions. Second, the ALJs (like STJs) “conduct trials.” As detailed earlier, they administer oaths, rule on motions, and generally “regulat[e] the course of” a hearing, as well as the conduct of parties and counsel. Third, the ALJs (like STJs) “rule on the admissibility of evidence.” They thus critically shape the administrative record (as they also do when issuing document subpoenas). And fourth, the ALJs (like STJs) “have the power to enforce compliance with

discovery orders.” In particular, they may punish all “[c]ontemptuous conduct,” including violations of those orders, by means as severe as excluding the offender from the hearing. So point for point—straight from *Freytag*’s list—the Commission’s ALJs have equivalent duties and powers as STJs in conducting adversarial inquiries.

And at the close of those proceedings, ALJs issue decisions much like that in *Freytag*—except with potentially more independent effect. In a major case like *Freytag*, a regular Tax Court judge must always review an STJ’s opinion. And that opinion counts for nothing unless the regular judge adopts it as his own. By contrast, the SEC can decide against reviewing an ALJ decision at all. And when the SEC declines review (and issues an order saying so), the ALJ’s decision itself “becomes final” and is “deemed the action of the Commission.” That last-word capacity makes this an a fortiori case: If the Tax Court’s STJs are officers, as *Freytag* held, then the Commission’s ALJs must be too.

[The Court rejected amicus’s argument that SEC ALJs could be meaningfully distinguished from *Freytag* based upon their weaker discovery sanction power and possibly less deferential review of factual findings.]

The only issue left is remedial. This Court has also held that the “appropriate” remedy for an adjudication tainted with an appointments violation is a new “hearing before a properly appointed” official. And we add today one thing more. That official cannot be Judge Elliot, even if he has by now received (or receives sometime in the future) a constitutional appointment. Judge Elliot has already both heard Lucia’s case and issued an initial decision on the merits. He cannot be expected to consider the matter as though he had not adjudicated it before. To cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing to which Lucia is entitled.

We accordingly reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

[Justice Thomas, joined by Justice Gorsuch, concurred with the majority’s application of *Freytag* to resolve the case but wrote separately to advocate for a more expansive definition of “Officers of the United States,” arguing that “[t]he Founders probably understood the term . . . to encompass all federal civil officials who perform an ongoing, statutory duty—no matter how important or significant the duty.]

[In dissent, Justice Breyer (joined in part by Justices Sotomayor and Ginsburg) agreed that the SEC did not properly appoint the ALJ’s but argued he would have resolved the case on statutory grounds under the APA to avoid the constitutional issue under the Appointments Clause because he could not answer the additional “embedded constitutional question” regarding “the constitutionality of the statutory ‘for cause’ removal protections that Congress provided for administrative law judges.”]

[Justice Sotomayor could not conclude that SEC ALJ’s were constitutional officers because they lacked final decisionmaking authority.]

### **Note 7-29(b): ALJs After *Lucia***

*Lucia* was a high-stakes case. SEC ALJs issued 170 initial decisions and held eleven hearings in 2016, “culminat[ing] in the imposition of approximately \$12.4 million in disgorgement and approximately \$14.5 million in civil penalties.”<sup>27</sup> And while the SEC employs only five ALJs, as many as 142 ALJs at agencies “ranging from the Consumer Financial Protection Bureau to the Federal Mine Safety Commission” exercise similarly significant authority over administrative enforcement proceedings.<sup>28</sup>

#### **Note 7-29(b)(1):**

Assume you were deciding *Lucia* and were tasked with evaluating the prevailing Appointments Clause approaches from the courts of appeals. At risk if an agency’s enforcement structure contravenes the Appointments Clause is substantial uncertainty as to the finality and potential unwinding of adjudications, not to mention the disruption in the agency’s operations. Given the need for predictability, does a bright-line approach such as the D.C. Circuit’s make sense? Or does it fail to adequately account for the myriad interests ostensibly accounted for by Appointments Clause, as the Tenth Circuit has suggested? If you would advocate a factors-based regime, what factors do you think should be given the most weight? On the other hand, if a bright-line approach is most appropriate, do you approve of where the D.C. Circuit has drawn the line?

Now assume you are reviewing *Lucia* just prior to its release. Are you persuaded that this was not the proper case for additional Appointments Clause guidance?

#### **Note 7-29(b)(1)(A): Selectively defending laws in court**

In case filed by Texas and several other states attacking the Affordable Care Act (ACA), the Justice Department announced it could find no basis on which to defend the law. The Justice Department brief argues that since the 2017 tax bill reduced the individual mandate’s tax to zero, the individual mandate would not generate tax revenue and could not be considered tax, making the keystone provision of the ACA unconstitutional.

If a rogue DOJ declines to defend federal law in court based on its own estimation of the constitutionality of that law, presumably it is the responsibility of the president, charged with the duty to take care that the laws are faithfully executed, to bring the agency to heel, but if the politically accountable president endorses the move, is there a separation of powers issue?

Critics fear the DOJ’s departure from a bi-partisan tradition of defending acts of Congress, except where no nonfrivolous argument can be made, will damage the agency’s credibility and have a long term impact on the rule of law. See Nicholas Bagley, *Trump’s legal attack on the ACA isn’t about health care. It’s a war on the rule of law.*, VOX (June 8, 2018, 01:30 PM), <https://www.vox.com/the-big-idea/2018/6/8/17442238/trump-aca-obamacare-texas-department-of->

<sup>27</sup> Office of Administrative Law Judges, U.S. Securities & Exchange Comm’n, (Jan. 26, 2017) <https://www.sec.gov/alj>.

<sup>28</sup> Alison Frankel, *New 5th Circuit Decision on ALJ Constitutionality Adds Urgency to Scotus Bid*, REUTERS (Sept. 12, 2017), <https://www.reuters.com/article/us-otc-alj/new-5th-circuit-decision-on-alj-constitutionality-adds-urgency-to-scotus-bid-idUSKCN1BN2P2>.

justice-rule-of-law.

**Note 7-29(b)(2): *CFPB v. RD Legal Funding, LLC***

The same day the *Lucia* decision was handed down, a district court held that the CFPB as a party to the proceeding stating that its structure was unconstitutional. *CFPB v. RD Legal Funding, LLC*, No. 17-890, 2018 U.S. WL 3094916 (S.D.N.Y. June 21, 2018).

In that case, the CFPB filed suit alleging that the defendants, companies that offer cash advances to consumers awaiting payouts for settlement agreements or judgments, violated provisions of the Consumer Financial Protection Act (CFPA). The New York Attorney General joined, independently asserting that the defendants violated New York law for the same actions and events that form the basis of the government's CFPA claims..

Defendants moved to dismiss on several grounds, first among them, though, was the constitutionality of the CFPB.

The district court acknowledged but declined to adopt the *en banc* holding of the D.C. Circuit in *PHH Corp. v. CFPB*, preferring, instead, the reasoning of Judge Kavanaugh's separate dissent, which concluded that the CFPB was unconstitutionally structured. *Id.* (citing *PHH Corp. v. CFPB*, 881 F. 3d 75, 164 (2018) (Kavanaugh, J., dissenting)). Rather than adopting Judge Kavanaugh's remedy of severing the for-cause removal provision, Judge Preska endorsed the result of Judge Henderson's dissent, invalidating the CFPB's founding statute in its entirety. *Id.* at 137 (citing *PHH Corp.*, at 137 (Henderson, J., dissenting)).

In response to the defendants' constitutional claim, the CFPB attempted to ratify the enforcement action after the appointment of acting Director Mick Mulvaney, who the president may remove at will, asserting that the defendants could not obtain dismissal on the grounds that the action was initially filed by a Director removable only for-cause. Judge Preska agreed with the defendants' argument that ratification did not properly address the constitutional issue, "which concerns the structure and authority of the CFPB itself, not the authority of an agent to make decisions on the CFPB's behalf," noting that acting Director Mulvaney's appointment is of limited duration and a new Director subject to for-cause removal, at some point, must be appointed. .

The court concluded that the New York Attorney General's action could proceed, denying the defendant's motion to dismiss, but the Clerk was directed to terminate the CFPB from the action.

**Note 7-29(b)(3): *Collins v. Mnuchin*, No. 17-20364, 2018 U.S. App. LEXIS 19510 (5th Cir., July 16, 2018) (per curiam).**

In *Collins v. Mnuchin*, aggrieved shareholders of Fannie Mae and Freddie Mac challenged the structure of the Federal Housing Finance Agency (FHFA).

The court provided two main reasons for skepticism towards independent agencies: first, overly insulated agencies prevent the executive from performing Article II oversight obligations, and second, excessive insulation allows Congress to accumulate power. *Id.* at \*34-5. Accordingly, "agencies may be independent, but they may not be isolated." *Id.*

In the court's view, the FHFA was excessively insulated to the point of isolation for five reasons. The for-cause removal restriction, a single director, a lack of statutorily mandated bi-partisan leadership, external funding, and a lack of executive control. Together, the court reasoned, the layers of insulation left the executive branch without any formal mechanisms to influence the FHFA. *Id.* at \*49.

Concluding the FHFA structure violated Article II, the court further concluded that severing the for-cause removal restriction was the appropriate remedy. *Id.* at \*58-9.

**Note 7-29(b)(4): “Excepting Administrative Law Judges From the Competitive Service”**

Following the *Lucia* decision, the Trump Administration issued Executive Order 13843.

Pursuant to my authority under section 3302(1) of title 5, United States Code, I find that conditions of good administration make necessary an exception to the competitive hiring rules and examinations for the position of ALJ. These conditions include the need to provide agency heads with additional flexibility to assess prospective appointees without the limitations imposed by competitive examination and competitive service selection procedures. Placing the position of ALJ in the excepted service will mitigate concerns about undue limitations on the selection of ALJs, reduce the likelihood of successful Appointments Clause challenges, and forestall litigation in which such concerns have been or might be raised. This action will also give agencies greater ability and discretion to assess critical qualities in ALJ candidates, such as work ethic, judgment, and ability to meet the particular needs of the agency. These are all qualities individuals should have before wielding the significant authority conferred on ALJs, and each agency should be able to assess them without proceeding through complicated and elaborate examination processes or rating procedures that do not necessarily reflect the agency's particular needs. This change will also promote confidence in, and the durability of, agency adjudications.

Exec. Order No. 13843, § 1, 83 Fed. Reg. 32755 (July 10, 2018).

While aspiring Administrative Law Judges may find their job prospects improved by this order, current ALJ and President of the Association of Administrative Law Judges had this to say about:

Until this month, federal agencies hired ALJ candidates with at least seven years of litigation experience; they are also required to take a six-part examination conducted by the Office of Personnel Management. Now, as a result of the president's executive order, an agency that wants to employ an ALJ can recruit any attorney regardless of skill or experience. Competence and impartiality apparently are no longer essential; cronyism and political interference will no longer be taboo.

Marilyn Zahm, *Do you have a Social Security card? Then take this executive order personally.*, THE WASHINGTON POST (July 18, 2018),

[https://www.washingtonpost.com/opinions/do-you-have-a-social-security-card-then-take-this-executive-order-personally/2018/07/18/4d66339c-89d6-11e8-85ae-511bc1146b0b\\_story.html?utm\\_term=.e7a392bf4b14](https://www.washingtonpost.com/opinions/do-you-have-a-social-security-card-then-take-this-executive-order-personally/2018/07/18/4d66339c-89d6-11e8-85ae-511bc1146b0b_story.html?utm_term=.e7a392bf4b14).

**Note 7-29(c): *Ortiz v. United States*, 136 S. Ct. 2165 (2018) Appointments challenges for military judges**

In *Ortiz v. U.S.*, the Court considered appointments clause concerns for military judges, as well as the reviewability of military appellate court decisions. The petitioner, Ortiz, was found guilty by court-martial of knowingly possessing and distributing child pornography in violation of the Uniform Code of Military Justice, a decision that was summarily affirmed by the Air Force Court of Criminal Appeals (AFCCA), which included Colonel Martin Mitchell. The Court of Appeals for the Armed Forces (CAAF) then granted Ortiz's petition for review to consider whether Judge Mitchell was disqualified from serving on the CCA because he had been appointed to the Court of Military Commission Review (CMCR).

Ortiz argued that because Judge Mitchell was appointed to the CMCR, he was barred from continued service on the AFCCA both by statute and the Appointments Clause of the Constitution. The CAAF rejected both grounds, and the Supreme Court granted certiorari.

After settling the jurisdictional question, finding “that the judicial character and constitutional pedigree of the court-martial system” permitted review of the CAAF's decision, the Court affirmed with one concurrence and one dissent. On the Appointments Clause issue, the majority rejected Ortiz's argument that a principal officer of one court could not simultaneously sit as an inferior officer on another because the “Court has never read the Appointments Clause to impose rules about dual service, separate and distinct from methods of appointment.”

**§ 7.05, p. 729: Insert after Note 7-35**

**Note 7-35(a): The Role of Cost-Benefit Analysis in Future Administrations**

For a discussion of potential applications of cost benefit analysis in future administrations, see John D. Graham & Paul R. Noe, *A Paradigm Shift in the Cost-Benefit State*, REGBLOG (April 26, 2016) <https://www.regblog.org/2016/04/26/graham-noe-shift-in-the-cost-benefit-state/>.

**Note 7-35(b): The Independent Agency Regulatory Analysis Act (S. 1607)**

The Independent Agency Regulatory Analysis Act (S.1607) was introduced into the Senate Committee on Homeland Security and Governmental Affairs by Senator Rob Portman (R-OH). It is expected to come to committee vote during this Congress. The Act would require independent agencies like the Federal Depository Insurance Corporation and others, which are currently not bound by OMB requirements, to submit their proposed rulemakings to the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA). OMB would provide comments on the agency's cost-benefit analysis calculations, as it does currently with other executive agency's proposed rules. While the independence of the agency will not be changed, and the agency would not be required to comply with OIRA's recommendations, the Act requires that the agency include, as a part of its final rulemaking, OIRA's commentary and why it did not follow OIRA's advice if it did not.

**§7.05 ,p.730: Insert after Note 7-39**

**Note 7-39(a): Executive Order 13771-Executive Power and the 2-for-1 rule**

EXECUTIVE ORDER 13771

REDUCING REGULATION AND CONTROLLING REGULATORY COSTS

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Budget and Accounting Act of 1921, as amended (31 U.S.C. 1101 *et seq.*), section 1105 of title 31, United States Code, and section 301 of title 3, United States Code, it is hereby ordered as follows:

Section 1. Purpose. It is the policy of the executive branch to be prudent and financially responsible in the expenditure of funds, from both public and private sources. In addition to the management of the direct expenditure of taxpayer dollars through the budgeting process, it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations. Toward that end, it is important that for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.

Sec. 2. Regulatory Cap for Fiscal Year 2017. (a) Unless prohibited by law, whenever an executive department or agency (agency) publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed.

(b) For fiscal year 2017, which is in progress, the heads of all agencies are directed that the total incremental cost of all new regulations, including repealed regulations, to be finalized this year shall be no greater than zero, unless otherwise required by law or consistent with advice provided in writing by the Director of the Office of Management and Budget (Director).

(c) In furtherance of the requirement of subsection (a) of this section, any new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations. Any agency eliminating existing costs associated with prior regulations under this subsection shall do so in accordance with the Administrative Procedure Act and other applicable law.

(d) The Director shall provide the heads of agencies with guidance on the implementation of this section. Such guidance shall address, among other things, processes for standardizing the measurement and estimation of regulatory costs; standards for determining what qualifies as new and offsetting regulations; standards for determining the costs of existing regulations that are considered for elimination; processes for accounting for costs in different fiscal years; methods to oversee the issuance of rules with costs offset by savings at different times or different agencies; and emergencies and other circumstances that might justify individual waivers of the requirements of this section. The Director shall consider phasing in and updating these requirements.

Sec. 3. Annual Regulatory Cost Submissions to the Office of Management and Budget. (a) Beginning with the Regulatory Plans (required under Executive Order 12866 of September 30, 1993, as amended, or any successor order) for fiscal year 2018, and for each fiscal year thereafter,

the head of each agency shall identify, for each regulation that increases incremental cost, the offsetting regulations described in section 2(c) of this order, and provide the agency's best approximation of the total costs or savings associated with each new regulation or repealed regulation.

(b) Each regulation approved by the Director during the Presidential budget process shall be included in the Unified Regulatory Agenda required under Executive Order 12866, as amended, or any successor order.

(c) Unless otherwise required by law, no regulation shall be issued by an agency if it was not included on the most recent version or update of the published Unified Regulatory Agenda as required under Executive Order 12866, as amended, or any successor order, unless the issuance of such regulation was approved in advance in writing by the Director.

(d) During the Presidential budget process, the Director shall identify to agencies a total amount of incremental costs that will be allowed for each agency in issuing new regulations and repealing regulations for the next fiscal year. No regulations exceeding the agency's total incremental cost allowance will be permitted in that fiscal year, unless required by law or approved in writing by the Director. The total incremental cost allowance may allow an increase or require a reduction in total regulatory cost.

(e) The Director shall provide the heads of agencies with guidance on the implementation of the requirements in this section.

Sec. 4. Definition. For purposes of this order the term "regulation" or "rule" means an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency, but does not include:

- (a) regulations issued with respect to a military, national security, or foreign affairs function of the United States;
- (b) regulations related to agency organization, management, or personnel; or
- (c) any other category of regulations exempted by the Director.

Sec. 5. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

- (i) the authority granted by law to an executive department or agency, or the head thereof; or
- (ii) the functions of the Director relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



**Note 7-39(b):**

E.O. 13771 differs from E.O. 12291, 12498, and 12866 in significant ways: agencies are instructed to consider the cost of any proposed regulation rather than the traditional balance of cost against benefit.

E.O. 13771 also attempts to simplify the process by administering what has become known as the “2 for 1” requirement. For every one new administrative rule or regulation proposed, the issuing agency must identify two rules or regulations to be repealed. Again, this is an attempt to address administrative costs but does not necessarily require consideration of benefits.

As of the publication of this supplement, Public Citizen, the Natural Resources Defense Council, and the Communications Workers of America have a lawsuit pending against the Trump Administration challenging E.O. 13771. The complaint alleges E.O. 13771 exceeds presidential constitutional authority, violates the “Take Care” clause of the Constitution, and compels some agencies to violate their enabling acts. For more information, see *Public Citizen, Inc. v. Trump*, No. 1:17-CV-00253 (D.D.C filed Feb. 8, 2017).

**Note 7-39(b)(1):**

*Pub. Citizen, Inc. v. Trump*, 297 F. Supp. 3d 6 (D.D.C. 2018) (granting the government’s motion to dismiss on standing grounds). The court found that the plaintiff organization had plausibly shown the relevant agency intended to issue the regulation in question with respect to five of eight putative regulatory actions, and also plausibly alleged that the Executive Order has delayed, or is likely to delay, the regulatory action. They failed, however, to allege that at least one of their members faces a substantial risk of a concrete harm due to the delay in finalizing any of the identified regulatory actions, and thus lacked standing to bring the action.

**Note 7-39(c): Deregulation by Executive Order in the Trump Administration**

The Trump Administration has issued many executive orders seeking to control or influence the administrative process in ways that emphasize cost, diminish consideration of nonfinancial benefits, and generally promote a deregulatory agenda. Among them:

- Enforcing the Regulatory Reform Agenda, Exec. Order No. 13777, 82 Fed. Reg. 12285 (Feb. 24, 2017), requires agency heads to designate a “Regulatory Reform Officer” to oversee cost-cutting initiatives, such as the offsetting of new regulations by eliminating old regulations, and establish “Regulatory Reform Task Forces” to identify regulations that “eliminate jobs, or inhibit job creation; are outdated, unnecessary, or ineffective; [or] impose costs that exceed benefits . . . .”
- Comprehensive Plan for Reorganizing the Executive Branch, Exec. Order No. 13781, 82 Fed. Reg. 13959 (Mar. 13, 2017), requires the Director of the Office of Management and Budget (OMB) to devise a “plan to reorganize governmental functions and eliminate unnecessary agencies.” The Order specifically mandates the Director to look for “redundant” agencies and areas which would “be better left to State or local governments or to the private sector through free enterprise,” among other things.

- Promoting Energy Independence and Economic Growth, Exec. Order No. 13783, 82 Fed. Reg. 16093 (Mar. 28, 2017), concludes that it is “in the national interest to ensure that the Nation's electricity is affordable, reliable, safe, secure, and clean, and that it can be produced from coal, natural gas, nuclear material, flowing water, and other domestic sources, including renewable sources.” Among other things, the Order directs heads of agencies to review “all existing” regulations, rules, and policies” that “potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources” and to draft a report identifying such policies that could be eliminated.
- Implementing an America-First Offshore Energy Strategy, Exec. Order No. 13795, 82 Fed. Reg. 20815 (Apr. 28, 2017), directs the Secretary of the Interior to “give full consideration to revising the schedule of proposed oil and gas lease sales” to including the “Western Gulf of Mexico, Central Gulf of Mexico, Chukchi Sea, Beaufort Sea, Cook Inlet, Mid-Atlantic, and South Atlantic.” The Order also directs the Secretary of Commerce to “refrain from designating or expanding any National Marine Sanctuary” and directs cabinet officials to review and possibly rescind certain environmental rules.
- Promoting Free Speech and Religious Liberty, Exec. Order 13798, 82 Fed. Reg. 21675 (May 4, 2017), directs the Treasury not to take adverse actions against organizations who speak on “moral or political issues” and directs other officials to “consider issuing amended regulations . . . to address conscience-based objections to the preventive-care mandate.”

### ***Trump v. Hawaii*, 138 S. Ct. 2392 (2018)**

#### **Executive Order Nos. 13769, 13780, and Proclamation No. 9645**

The highly anticipated “travel ban case” was the culmination of nearly eighteen months of court battles spread across the country. At the heart of the matter was the extent to which a national security justification should be stretched to shield a policy of dubious quality from judicial scrutiny. Plaintiffs’ Establishment Clause claim sat on roughly two years of statements made by the President and his advisers, that they argued cast doubt on the official objective of the Proclamation, beginning with then-candidate Trump’s pledge that, if elected, he would ban Muslims from entering the United States. Specifically, on December 7, 2015, he issued a formal statement “calling for a total and complete shutdown of Muslims entering the United States.” That statement, which remained on his campaign website until May 2017 (several months into his Presidency), read in full:

Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on. According to Pew Research, among others, there is great hatred towards Americans by large segments of the Muslim population. Most recently, a poll from the Center for Security Policy released data showing “25% of those polled agreed that violence against Americans here in the United States is justified as a part of the global jihad” and 51% of those polled “agreed that Muslims in America should have the choice of being governed according to Shariah.” Shariah authorizes such atrocities as murder against nonbelievers who won’t convert, beheadings and more unthinkable acts that pose great harm to Americans, especially women.

“Without looking at the various polling data, it is obvious to anybody the hatred is beyond comprehension. Where this hatred comes from and why we will have to determine. Until we are able to determine and understand this problem and the dangerous threat it poses, our country cannot be the victims of the horrendous attacks by people that believe only in Jihad, and have no sense of reason or respect of human life. If I win the election for President, we are going to Make America Great Again.”—Donald J. Trump.

On December 8, 2015, Trump justified his proposal during a television interview by noting that President Franklin D. Roosevelt “did the same thing” with respect to the internment of Japanese Americans during World War II. In January 2016, during a Republican primary debate, Trump was asked whether he wanted to “rethink [his] position” on “banning Muslims from entering the country.” He answered, “No.” A month later, at a rally in South Carolina, Trump told an apocryphal story about United States General John J. Pershing killing a large group of Muslim insurgents in the Philippines with bullets dipped in pigs’ blood in the early 1900’s. In March 2016, he expressed his belief that “Islam hates us. . . . [W]e can’t allow people coming into this country who have this hatred of the United States . . . [a]nd of people that are not Muslim.” That same month, Trump asserted that “[w]e’re having problems with the Muslims, and we’re having problems with Muslims coming into the country.” He therefore called for surveillance of mosques in the United States, blaming terrorist attacks on Muslims’ lack of “assimilation” and their commitment to “sharia law.” A day later, he opined that Muslims “do not respect us at all” and “don’t respect a lot of the things that are happening throughout not only our country, but they don’t respect other things.”

As Trump’s presidential campaign progressed, he began to describe his policy proposal in slightly different terms. In June 2016, he characterized the policy proposal as a suspension of immigration from countries “where there’s a proven history of terrorism.” He also described the proposal as rooted in the need to stop “importing radical Islamic terrorism to the West through a failed immigration system.” Asked in July 2016 whether he was “pull[ing] back from” his pledged Muslim ban, Trump responded, “I actually don’t think it’s a rollback. In fact, you could say it’s an expansion.” He then explained that he used different terminology because “[p]eople were so upset when [he] used the word Muslim.”

A month before the 2016 election, Trump reiterated that his proposed “Muslim ban” had “morphed into a[n] extreme vetting from certain areas of the world.” Then, on December 21, 2016, President-elect Trump was asked whether he would “rethink” his previous “plans to create a Muslim registry or ban Muslim immigration.” He replied: “You know my plans. All along, I’ve proven to be right.”

On January 27, 2017, he signed Executive Order No. 13769, Protecting the Nation From Foreign Terrorist Entry Into the United States. 82 Fed. Reg. 8977 (2017) (EO-1). As he signed it, President Trump read the title, and said “We all know what that means.” Speaking to the media the same day, he explained that, under EO-1, Christians would be given priority for entry as refugees into the United States, because in the past, “[i]f you were a Muslim [refugee from Syria] you could come in, but if you were a Christian, it was almost impossible.” Considering that past policy “very unfair,” President Trump explained that EO-1 was designed “to help” the Christians in Syria.

In a television interview, campaign adviser Rudy Giuliani explained that when the President “first announced it, he said, ‘Muslim ban.’ He called me up. He said, ‘Put a commission together. Show

me the right way to do it legally.” Giuliani said he assembled a group of Members of Congress and lawyers that “focused on, instead of religion, danger. . . . [The order] is based on places where there [is] substantial evidence that people are sending terrorists into our country.”

EO-1 directed the Secretary of Homeland Security to conduct a review to examine the adequacy of information provided by foreign governments about their nationals seeking to enter the United States. Pending that review, the order suspended for 90 days the entry of foreign nationals from seven countries—Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen—that had been previously identified by Congress or prior administrations as posing heightened terrorism risks. The District Court for the Western District of Washington entered a temporary restraining order blocking the entry restrictions, and the Court of Appeals for the Ninth Circuit denied the Government’s request to stay that order.

Rather than appeal the Ninth Circuit’s decision, the Government declined to continue defending EO-1 in court and instead announced that the President intended to replace it with a new executive order. On March 6, 2017, President Trump issued Executive Order 13780 (EO-2) which, like its predecessor, imposed temporary entry and refugee bans, and called for a worldwide review. 82 Fed. Reg. 13209.

White House senior policy adviser, Stephen Miller publicly explained that EO-2 would “have the same basic policy outcome” as EO-1, and that any changes would address “very technical issues that were brought up by the court.” After EO-2 was issued, the White House Press Secretary told reporters that, by issuing EO-2, President Trump “continue[d] to deliver on . . . his most significant campaign promises.” That statement was consistent with President Trump’s own declaration that “I keep my campaign promises, and our citizens will be very happy when they see the result.” Before EO-2 took effect, federal District Courts in Hawaii and Maryland entered nationwide preliminary injunctions barring enforcement of the entry suspension.

While litigation over EO-2 was ongoing, President Trump repeatedly made statements alluding to a desire to keep Muslims out of the country. He said at a March 2017 rally that EO-2 was just a “watered down version of the first one” and had been “tailor[ed]” at the behest of “the lawyers.” He further added that he would prefer “to go back to the first [executive order] and go all the way” and reiterated his belief that it was “very hard” for Muslims to assimilate into Western culture. During a rally in April 2017, the President recited the lyrics to a song called “The Snake,” about a woman who nurses a sick snake back to health but then is attacked by the snake, as a warning about accepting Syrian refugees into the country. At 3:25 AM, on June 5, the President tweeted: “People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!” And in another tweet four minutes later, the President stated that the Justice Department had submitted a “watered down, politically correct version” of the “original Travel Ban” “to S[upreme] C[ourt].” Later adding: “That’s right, we need a TRAVEL BAN for certain DANGEROUS countries, not some politically correct term that won’t help us protect our people!”

On June 26, 2017, the Supreme Court granted the Government’s petition for certiorari and issued a *per curiam* opinion partially staying the District Courts’ injunctions pending further review. In particular, the Court allowed EO-2’s travel ban to take effect except as to “foreign nationals who have a credible claim of a bona fide relationship with a person or entity in the United States.” The temporary restrictions in EO-2 expired before the Court took any action, and the lower court

decisions were then vacated as moot.

Then, on August 17, 2017, the President again tweeted about Islam, referencing the story about General Pershing's massacre of Muslims in the Philippines: "Study what General Pershing . . . did to terrorists when caught. There was no more Radical Islamic Terror for 35 years!" In September 2017, President Trump tweeted that "[t]he travel ban into the United States should be far larger, tougher and more specific—but stupidly, that would not be politically correct!" On September 15, 2017, he stated that the "travel ban . . . should be far larger, tougher, and more specific," but "stupidly that would not be politically correct."

On September 24, 2017, after completion of the worldwide review, the President issued Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats. 82 Fed. Reg. 45161. The Proclamation sought to improve vetting procedures by identifying ongoing deficiencies in the information needed to assess whether nationals of particular countries present "public safety threats," by restricting entry of certain nationals from eight foreign states whose systems for managing and sharing information about their nationals the President deemed inadequate, including six Muslim-majority countries.

On November 29, 2017, President Trump retweeted three anti-Muslim videos, entitled "Muslim Destroys a Statue of Virgin Mary!", "Islamist mob pushes teenage boy off roof and beats him to death!", and "Muslim migrant beats up Dutch boy on crutches!" The videos were initially tweeted by a British political party opposed to, among other things, immigration and Islam. When asked about these videos, the White House Deputy Press Secretary, Raj Shah, connected them to the Proclamation, responding that the "President has been talking about these security issues for years now, from the campaign trail to the White House" and "has addressed these issues with the travel order that he issued earlier this year and the companion proclamation."

Plaintiffs argued that the Proclamation contravened provisions of the Immigration and Nationality Act (INA) and violated the Establishment Clause because it was motivated animus toward Islam, not national security. The District Court granted a nationwide preliminary injunction, concluding that the Proclamation violated the INA because there were insufficient findings that the affected foreign nationals were security threats and the policy discriminates against visa applicants on the basis of nationality. The Ninth Circuit granted a partial stay of the injunction, permitting enforcement as against foreign nationals without a bona fide relationship to the United States. The Supreme Court stayed the injunction in full pending the resolution of the appeal. The Ninth Circuit affirmed, holding that the Proclamation exceeded the presidential authority under the INA. The court reasoned that the INA permitted suspension on a temporary basis under 8 U.S.C.S. § 1182(f), but only to respond to an urgent need, and further, that the Proclamation conflicted with Congress's "finely reticulated regulatory scheme." The court also agreed that the Proclamation discriminated against visa applicants on the basis of nationality in violation of 8 U.S.C.S. § 1152(a)(1)(A), but did not reach the Establishment Clause claim. The Supreme Court then granted certiorari to decide whether the President had authority under the INA to issue the Proclamation, and whether the entry policy violates the Establishment Clause of the First Amendment.

138 S. Ct. 2392  
SUPREME COURT OF THE UNITED STATES  
**DONALD J. TRUMP, et al., Petitioners**  
v.  
**HAWAII, et al., Respondent**  
No. 17–965 | Argued April 25, 2018 | Decided June 26, 2018

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Under the Immigration and Nationality Act, foreign nationals seeking entry into the United States undergo a vetting process to ensure that they satisfy the numerous requirements for admission. The Act also vests the President with authority to restrict the entry of aliens whenever he finds that their entry “would be detrimental to the interests of the United States.” 8 U. S. C. §1182(f). Relying on that delegation, the President concluded that it was necessary to impose entry restrictions on nationals of countries that do not share adequate information for an informed entry determination, or that otherwise present national security risks. The plaintiffs in this litigation, respondents here, challenged the application of those entry restrictions to certain aliens abroad. We now decide whether the President had authority under the Act to issue the Proclamation, and whether the entry policy violates the Establishment Clause of the First Amendment.

[Part I, summarizing the history of the president’s executive orders, is omitted. In parts II and III, the Court assumed without deciding that the plaintiffs’ statutory claims were reviewable and concluded that the Proclamation was within the scope of presidential authority under the INA.]

IV

[In sections A and B, the Court concluded that the plaintiffs had Article III standing to challenge the exclusion of their relatives under the Establishment Clause and summarized their claim. Plaintiffs argued that the Proclamation was motivated by religious animus and that the stated concerns about vetting protocol and national security were pretexts for discriminating against Muslims. In support, plaintiffs cited to Establishment Clause precedent and a litany of made by the Trump administration throughout the evolution of the policy that culminated in the issuance of the Proclamation. The language, they contended, violated constitutional tradition.

The Court countered that “it cannot be denied that the Federal Government and the Presidents who have carried its laws into effect have—from the Nation’s earliest days—performed unevenly in living up to those inspiring words.” *Hawaii*, at 2418. After quoting a selection of the administration’s statements, the Court explained that the issue was not whether to denounce them, but whether extrinsic statements were significant to the review of “a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility.” *Id.*

In section C, the Court explained that the authority to admit or exclude was fundamentally within the authority of the political branches and largely immune from judicial review. *Id.* at 2418 (citing

*Fiallo v. Bell*, 430 U. S. 787, 792 (1977). “Nonetheless, although foreign nationals seeking admission have no constitutional right to entry, this Court has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U. S. citizen.” *Id.* at 2419 (citing *Kleindienst v. Mandel*, 408 U. S. 753, 756-757 (1972)). The Court concluded that *Mandel* applied where immigration overlapped with national security. *Id.*

Under *Mandel*’s “circumscribed review,” the Court’s inquiry was limited to whether the policy was facially legitimate and bona fide. *Id.* at 2420. However, for this case (apparently at the Government’s suggestion), the Court assumed that extrinsic evidence could be considered in the course of a rational basis review. *Id.* Consequently, the Proclamation would be upheld “so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds.” *Id.*]

## D

Given the standard of review, it should come as no surprise that the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny. On the few occasions where we have done so, a common thread has been that the laws at issue lack any purpose other than a “bare . . . desire to harm a politically unpopular group.” In one case, we invalidated a local zoning ordinance that required a special permit for group homes for the intellectually disabled, but not for other facilities such as fraternity houses or hospitals. We did so on the ground that the city’s stated concerns about (among other things) “legal responsibility” and “crowded conditions” rested on “an irrational prejudice” against the intellectually disabled. *Cleburne v. Cleburne Living Center, Inc.*, 473 U. S. 432, 448-450 (1985) (internal quotation marks omitted). And in another case, this Court overturned a state constitutional amendment that denied gays and lesbians access to the protection of antidiscrimination laws. The amendment, we held, was “divorced from any factual context from which we could discern a relationship to legitimate state interests,” and “its sheer breadth [was] so discontinuous with the reasons offered for it” that the initiative seemed “inexplicable by anything but animus.” *Romer v. Evans*, 517 U. S. 620, 632, 635 (1996).

The Proclamation does not fit this pattern. It cannot be said that it is impossible to “discern a relationship to legitimate state interests” or that the policy is “inexplicable by anything but animus.” Indeed, the dissent can only attempt to argue otherwise by refusing to apply anything resembling rational basis review. But because there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification.

The Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices. The text says nothing about religion. Plaintiffs and the dissent nonetheless emphasize that five of the seven nations currently included in the Proclamation have Muslim-majority populations. Yet that fact alone does not support an inference of religious hostility, given that the policy covers just 8% of the world’s Muslim population and is limited to countries that were previously designated by Congress or prior administrations as posing national security risks.

The Proclamation, moreover, reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies. Plaintiffs seek to discredit the findings of the review, pointing to deviations from the review’s baseline criteria resulting in the inclusion of Somalia and

omission of Iraq. But as the Proclamation explains, in each case the determinations were justified by the distinct conditions in each country. . . . It is, in any event, difficult to see how exempting one of the largest predominantly Muslim countries in the region from coverage under the Proclamation can be cited as evidence of animus toward Muslims.

The dissent likewise doubts the thoroughness of the multi-agency review because a recent Freedom of Information Act request shows that the final DHS report “was a mere 17 pages.” Yet a simple page count offers little insight into the actual substance of the final report, much less predecisional materials underlying it. See 5 U.S.C. §552(b)(5) (exempting deliberative materials from FOIA disclosure).

More fundamentally, plaintiffs and the dissent challenge the entry suspension based on their perception of its effectiveness and wisdom. They suggest that the policy is overbroad and does little to serve national security interests. But we cannot substitute our own assessment for the Executive’s predictive judgments on such matters, all of which “are delicate, complex, and involve large elements of prophecy.” *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U. S. 103, 111 (1948). While we of course “do not defer to the Government’s reading of the First Amendment,” the Executive’s evaluation of the underlying facts is entitled to appropriate weight, particularly in the context of litigation involving “sensitive and weighty interests of national security and foreign affairs.”

[The opinion identifies three additional factors that support the conclusion that the entry policy supports a legitimate national security interest: first, Iraq, Sudan, and Chad were removed from the list, with Libya making progress to achieve a similar status; second, a variety of nonimmigrant visas remain available to nationals of the covered countries; and third, all covered foreign nationals seeking entry as immigrants or nonimmigrants may apply for a waiver based on undue hardship, public safety, and the interests of the United States.]

Finally, the dissent invokes *Korematsu v. U.S.*, 323 U. S. 214 (1944). Whatever rhetorical advantage the dissent may see in doing so, *Korematsu* has nothing to do with this case. The forcible relocation of U. S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority. But it is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission. The entry suspension is an act that is well within executive authority and could have been taken by any other President—the only question is evaluating the actions of this particular President in promulgating an otherwise valid Proclamation.

The dissent’s reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—“has no place in law under the Constitution.” 323 U. S., at 248 (Jackson, J., dissenting).

\* \* \*

Under these circumstances, the Government has set forth a sufficient national security justification to survive rational basis review. We express no view on the soundness of the policy. We simply hold today that plaintiffs have not demonstrated a likelihood of success on the merits of their constitutional claim.



[[The Court of Appeals grant of preliminary injunction was reversed as an abuse of discretion and the case was remanded.]

[Justice Kennedy concurred in full, writing separately to suggest Government officials should be more conscientious of constitutional guarantees, even if the Court would not require it.]

[Justice Thomas concurred in the Court's opinion but wrote separately questioning whether district courts have the authority to issue nationwide injunctions.]

[Justice Breyer, joined by Justice Kagan, dissented, finding the available evidence of bias a sufficient basis for setting aside the Proclamation if the Court had to decide the issue without further proceedings, but offered a procedural approach to question on remand. In his view, "the Proclamation's elaborate system of exemptions and waivers can and should help us answer . . . the question of whether or the extent to which religious animus played a significant role in the Proclamation's promulgation or content."

According to Justice Breyer, If the exemptions and waivers were applied as written, the Proclamation would resemble "President Carter's Iran order and President Reagan's Cuba proclamation, both of which contained similar categories of persons authorized to obtain case-by-case exemptions," tending to strengthen the national security defense of an already facially neutral policy.

On the other hand, if the Government was not applying the waivers as described, the national security argument would be weaker. The Proclamation would not resemble precedent and if the Government was excluding Muslims that met the Proclamation's security terms, the religious animus argument would be strengthened.

Justice Breyer believed that the evidence unearthed thus far demonstrated that the waivers were in fact not being issued as described, with no meaningful discretion left to immigration decision makers.]

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG joins, dissenting.

## I

[Justice Sotomayor saw the case principally as an Establishment Clause issue. As a result the question before Court was not whether the statements were significant to review of a facially neutral policy implemented under a broad grant of constitutional and statutory authority, but "whether a reasonable observer, presented with all 'openly available data,' the text and 'historical context' of the Proclamation, and the 'specific sequence of events' leading to it, would conclude that the primary purpose of the Proclamation is to disfavor Islam and its adherents by excluding them from the country." *Hawaii*, at 2438 (citing *McCreary County v. ACLU*, 545 U. S. 844, 862-3 (2005) (Sotomayor, J., dissenting)). After conducting a more exhaustive survey of the Proclamation's historical context, "[t]he answer [was] unquestionably yes." *Id.*

This was because “[t]aking all the relevant evidence together, a reasonable observer would conclude that the Proclamation was driven primarily by anti-Muslim animus, rather than by the Government’s asserted national-security justifications.” *Id.* Statements made by the President and his advisors during the campaign and after the election created a perception of apparent hostility toward Muslims, and by repeatedly declining opportunities to disavow past remarks, the President had not tempered that perception. The dissent was thus not surprised “that the President’s lawyers have, at every step in the lower courts, failed in their attempts to launder the Proclamation of its discriminatory taint,” but was, perhaps, dismayed at the Court’s disposition here, given its view in *Masterpiece Cakeshop*, that official expressions of hostility to religion and a failure to disavow them had constitutional significance. *Id.* at 2439 (citing *United States v. Fordice*, 505 U. S. 717, 746-747 (1992) (“[G]iven an initially tainted policy, it is eminently reasonable to make the [Government] bear the risk of nonpersuasion with respect to intent at some future time, both because the [Government] has created the dispute through its own prior unlawful conduct, and because discriminatory intent does tend to persist through time” (citation omitted)); *cf. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 584 U. S. \_\_\_, \_\_\_, (2018) (slip op., at 18) (“The official expressions of hostility to religion in some of the commissioners’ comments—comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to the affirmance of the order—were inconsistent with what the Free Exercise Clause requires”)).]

## II

Rather than defend the President’s problematic statements, the Government urges this Court to set them aside and defer to the President on issues related to immigration and national security. The majority accepts that invitation and incorrectly applies a watered-down legal standard in an effort to short circuit plaintiffs’ Establishment Clause claim.

The majority begins its constitutional analysis by noting that this Court, at times, “has engaged in a circumscribed judicial inquiry when the denial of a visa allegedly burdens the constitutional rights of a U. S. citizen.” As the majority notes, *Mandel* held that when the Executive Branch provides “a facially legitimate and bona fide reason” for denying a visa, “courts will neither look behind the exercise of that discretion, nor test it by balancing its justification.” In his controlling concurrence in *Kerry v. Din*, 135 S. Ct. 2128 (2015), Justice Kennedy applied *Mandel*’s holding and elaborated that courts can “‘look behind’ the Government’s exclusion of” a foreign national if there is “an affirmative showing of bad faith on the part of the consular officer who denied [the] visa.” The extent to which *Mandel* and *Din* apply at all to this case is unsettled, and there is good reason to think they do not. Indeed, even the Government agreed at oral argument that where the Court confronts a situation involving “all kinds of denigrating comments about” a particular religion and a subsequent policy that is designed with the purpose of disfavoring that religion but that “dot[s] all the i’s and . . . cross[es] all the t’s,” *Mandel* would not “pu[t] an end to judicial review of that set of facts.”

In light of the Government’s suggestion “that it may be appropriate here for the inquiry to extend beyond the facial neutrality of the order,” the majority rightly declines to apply *Mandel*’s “narrow standard of review” and “assume[s] that we may look behind the face of the Proclamation.” In doing so, however, the Court, without explanation or precedential support, limits its review of the Proclamation to rational-basis scrutiny. That approach is perplexing, given that in other

Establishment Clause cases, including those involving claims of religious animus or discrimination, this Court has applied a more stringent standard of review. As explained above, the Proclamation is plainly unconstitutional under that heightened standard.

But even under rational-basis review, the Proclamation must fall. That is so because the Proclamation is “‘divorced from any factual context from which we could discern a relationship to legitimate state interests,’ and ‘its sheer breadth [is] so discontinuous with the reasons offered for it’” that the policy is “‘inexplicable by anything but animus.’” The President’s statements, which the majority utterly fails to address in its legal analysis, strongly support the conclusion that the Proclamation was issued to express hostility toward Muslims and exclude them from the country. Given the overwhelming record evidence of anti-Muslim animus, it simply cannot be said that the Proclamation has a legitimate basis.

Indeed, even a cursory review of the Government’s asserted national-security rationale reveals that the Proclamation is nothing more than a “‘religious gerrymander.’”

The majority first emphasizes that the Proclamation “says nothing about religion.” Even so, the Proclamation, just like its predecessors, overwhelmingly targets Muslim-majority nations. Given the record here, including all the President’s statements linking the Proclamation to his apparent hostility toward Muslims, it is of no moment that the Proclamation also includes minor restrictions on two non-Muslim majority countries, North Korea and Venezuela, or that the Government has removed a few Muslim-majority countries from the list of covered countries since EO-1 was issued. Consideration of the entire record supports the conclusion that the inclusion of North Korea and Venezuela, and the removal of other countries, simply reflect subtle efforts to start “talking territory instead of Muslim,” precisely so the Executive Branch could evade criticism or legal consequences for the Proclamation’s otherwise clear targeting of Muslims.

The majority next contends that the Proclamation “reflects the results of a worldwide review process undertaken by multiple Cabinet officials.” At the outset, there is some evidence that at least one of the individuals involved in that process may have exhibited bias against Muslims. As noted by one group of *amici*, the Trump administration appointed Frank Wuco to help enforce the President’s travel bans and lead the multiagency review process. According to *amici*, Wuco has purportedly made several suspect public statements about Islam: He has “‘publicly declared that it was a ‘great idea’ to ‘stop the visa application process into this country from Muslim nations in a blanket type of policy,’” “that Muslim populations ‘living under other-than-Muslim rule’ will ‘necessarily’ turn to violence, that Islam prescribes ‘violence and warfare against unbelievers,’ and that Muslims ‘by-and-large . . . resist assimilation.’”

But, even setting aside those comments, the worldwide review does little to break the clear connection between the Proclamation and the President’s anti-Muslim statements. For “[n]o matter how many officials affix their names to it, the Proclamation rests on a rotten foundation.” The President campaigned on a promise to implement a “total and complete shutdown of Muslims” entering the country, translated that campaign promise into a concrete policy, and made several statements linking that policy (in its various forms) to anti-Muslim animus.

Ignoring all this, the majority empowers the President to hide behind an administrative review process that the Government refuses to disclose to the public. Furthermore, evidence of which we can take judicial notice indicates that the multiagency review process could not have been very

thorough. Ongoing litigation under the Freedom of Information Act shows that the September 2017 report the Government produced after its review process was a mere 17 pages.. That the Government’s analysis of the vetting practices of hundreds of countries boiled down to such a short document raises serious questions about the legitimacy of the President’s proclaimed national-security rationale.

Beyond that, Congress has already addressed the national-security concerns supposedly undergirding the Proclamation through an “extensive and complex” framework governing “immigration and alien status.” The Immigration and Nationality Act sets forth, in painstaking detail, a reticulated scheme regulating the admission of individuals to the United States. [Justice Sotomayor summarizes the immigration scheme.]

Put simply, Congress has already erected a statutory scheme that fulfills the putative national-security interests the Government now puts forth to justify the Proclamation. Tellingly, the Government remains wholly unable to articulate any credible national-security interest that would go unaddressed by the current statutory scheme absent the Proclamation. The Government also offers no evidence that this current vetting scheme . . . is inadequate to achieve the Proclamation’s proclaimed objectives of “preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their [vetting and information-sharing] practices.” . . .

For many of these reasons, several former national-security officials from both political parties—including former Secretary of State Madeleine Albright, former State Department Legal Adviser John Bellinger III, former Central Intelligence Agency Director John Brennan, and former Director of National Intelligence James Clapper—have advised that the Proclamation and its predecessor orders “do not advance the national-security or foreign policy interests of the United States, and in fact do serious harm to those interests.”

Moreover, the Proclamation purports to mitigate national-security risks by excluding nationals of countries that provide insufficient information to vet their nationals. Yet, as plaintiffs explain, the Proclamation broadly denies immigrant visas to all nationals of those countries, including those whose admission would likely not implicate these information deficiencies (*e.g.*, infants, or nationals of countries included in the Proclamation who are long-term residents of and traveling from a country not covered by the Proclamation). . . . In addition, the Proclamation permits certain nationals from the countries named in the Proclamation to obtain nonimmigrant visas, which undermines the Government’s assertion that it does not already have the capacity and sufficient information to vet these individuals adequately.

Equally unavailing is the majority’s reliance on the Proclamation’s waiver program. As several *amici* thoroughly explain, there is reason to suspect that the Proclamation’s waiver program is nothing more than a sham. The remote possibility of obtaining a waiver pursuant to an ad hoc, discretionary, and seemingly arbitrary process scarcely demonstrates that the Proclamation is rooted in a genuine concern for national security.

In sum, none of the features of the Proclamation highlighted by the majority supports the Government’s claim that the Proclamation is genuinely and primarily rooted in a legitimate national-security interest. What the un rebutted evidence actually shows is that a reasonable observer would conclude, quite easily, that the primary purpose and function of the Proclamation is to disfavor Islam by banning Muslims from entering our country.

### III

[Justice Sotomayor next concludes that the plaintiffs meet the other requirements for a preliminary injunction.]

### IV

Unlike in [*Masterpiece Cakeshop*, discussed *supra*], where the majority considered the state commissioners' statements about religion to be persuasive evidence of unconstitutional government action, the majority here completely sets aside the President's charged statements about Muslims as irrelevant. That holding erodes the foundational principles of religious tolerance that the Court elsewhere has so emphatically protected, and it tells members of minority religions in our country "that they are outsiders, not full members of the political community."

Today's holding is all the more troubling given the stark parallels between the reasoning of this case and that of *Korematsu v. United States*, 323 U. S. 214 (1944). In *Korematsu*, the Court gave "a pass [to] an odious, gravely injurious racial classification" authorized by an executive order. As here, the Government invoked an ill-defined national-security threat to justify an exclusionary policy of sweeping proportion. As here, the exclusion order was rooted in dangerous stereotypes about, *inter alia*, a particular group's supposed inability to assimilate and desire to harm the United States. As here, the Government was unwilling to reveal its own intelligence agencies' views of the alleged security concerns to the very citizens it purported to protect. And as here, there was strong evidence that impermissible hostility and animus motivated the Government's policy.

Although a majority of the Court in *Korematsu* was willing to uphold the Government's actions based on a barren invocation of national security, dissenting Justices warned of that decision's harm to our constitutional fabric. Justice Murphy recognized that there is a need for great deference to the Executive Branch in the context of national security, but cautioned that "it is essential that there be definite limits to [the government's] discretion," as "[i]ndividuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support." Justice Jackson lamented that the Court's decision upholding the Government's policy would prove to be "a far more subtle blow to liberty than the promulgation of the order itself," for although the executive order was not likely to be long lasting, the Court's willingness to tolerate it would endure.

In the intervening years since *Korematsu*, our Nation has done much to leave its sordid legacy behind. . . . Today, the Court takes the important step of finally overruling *Korematsu*, denouncing it as "gravely wrong the day it was decided." This formal repudiation of a shameful precedent is laudable and long overdue. But it does not make the majority's decision here acceptable or right. By blindly accepting the Government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one "gravely wrong" decision with another.

Our Constitution demands, and our country deserves, a Judiciary willing to hold the coordinate

branches to account when they defy our most sacred legal commitments. Because the Court's decision today has failed in that respect, with profound regret, I dissent.

#### **Note 7-39(h)(1): Animus in National Security?**

In *Masterpiece Cakeshop*, the Court seized on comments made by some of the commissioners in finding that “[t]he Civil Rights Commission’s treatment of [the petitioner’s] case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.” Would the Court in *Trump v. Hawaii* have arrived at a different conclusion if the controversial statements about Islam were made by the agency officials responsible for implementing the policy instead of the president?

#### **Note 7-39(h)(2): Citizenship and Immigration**

The Court gives considerable deference to the executive branch when it comes to immigration and national security, but does the decision in *Trump v. Hawaii* draw the line at citizenship? Writing for the majority, Chief Justice Roberts distinguishes away Justice Sotomayor’s invocation of *Korematsu*, asserting that “[t]he forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority.” “[T]hat morally repugnant order, the Chief Justice says, should not be compared to “a facially neutral policy denying certain foreign nationals the privilege of admission.”

If the proclamation being challenged in *Trump v. Hawaii* directed officials to more aggressively pursue denaturalization, would it affect the distinction between citizenship and the privilege of admission? See Dara Lind, *Denaturalization explained: how Trump can strip immigrants of their citizenship*, Vox (July 18, 2018, 11:20 AM), <https://www.vox.com/2018/7/18/17561538/denaturalization-citizenship-task-force-janus>; *Maslenjak v. U.S.*, 137 S. Ct. 1918 (2017) (9-0 decision) (holding that a naturalized citizen was improperly convicted of knowingly procuring naturalization contrary to law based on prior false statements made in applying for admission as a refugee since there was no finding the false statements were causally connected to the decision to grant naturalization).

#### **Note 7-39(i): The Unitary Executive**

In 2001, then-professor Elena Kagan argued “that in comparison with other forms of control, the new presidentialization of administration renders the bureaucratic sphere more transparent and responsive to the public, while also better promoting important kinds of regulatory competence and dynamism.” *Presidential Administration*, 114 HARV. L. REV. 2245, 2252. The “notable features of contemporary American government” providing the context for her argument then —namely, “the emergent relationship between the President and public, the rise of divided government, and the increased ossification of federal bureaucracies”— are conspicuously present today. *Id.* Some argue her assessment has not aged well:

Professor Kagan's overly sanguine view of presidential administration - bolstered by unrealistic expectations of accountability and nonexistent paths of judicial review - is worthy of reconsideration. A careful accounting of presidential reversal, discovery, nonenforcement, and intrusion weakens the general foundation of judicial deference to administrative agencies. Courts should hesitate before

rewarding maladministration with obeisance. Indeed, deference encourages further abuses of the administrative process. This nudging - in the most extreme cases - should be discouraged with heightened scrutiny.

Josh Blackman, *Presidential Maladministration*, 2018 U. ILL. L. REV. 397, 401 (2018). It has, however, been a good year for executives with unitary inclinations. The decision in *Lucia v. SEC*, brought the appointment of SEC ALJ's under the authority of the president's political appointees, *supra*, note 7-29(b). Following that decision, the White House saw fit to issue Executive Order 13843, reducing the examination and qualification requirements for ALJ's, *supra*, note 7-29(b)(3). The decision in *Trump v. Hawaii*, strengthened the president's authority to set policy on matters related to immigration and national security even where the motivations behind the policy are potentially suspect, *supra*, note 7-39(b)(1). And with Justice Kennedy's retirement announced at the end of the October 2017 term, the opportunity to fill a second judge with a deferential streak to the Supreme Court. *See*, Carrie Johnson, *Brett Kavanaugh Supported Broad Leeway For Presidents Under Investigation*, NPR (July 10, 2018, 05:20 AM), <https://www.npr.org/2018/07/10/627504728/brett-kavanaugh-supported-broad-leeway-for-presidents-under-investigation>; Leah Litman, *On Key Issues, Judge Gorsuch Is Pro-Presidential Power*, TAKE CARE BLOG (Mar. 20, 2017), <https://takecareblog.com/blog/on-key-issues-judge-gorsuch-is-pro-presidential-power>.

#### **Note 7-39(j):**

In May 2017, Deputy Attorney General Rod Rosenstein appointed Special Counsel Robert Mueller to oversee the investigation of possible collusion between the Trump campaign and the Russian government, among other issues.. The Trump administration has been vocal about its disapproval of the extant investigation and has developed increasingly extreme theories of presidential authority.

“The appointment of the Special Counsel is totally UNCONSTITUTIONAL! Despite that, we play the game because I, unlike the Democrats, have done nothing wrong!”  
Donald Trump (@realDonaldTrump), Twitter (June 4, 2018, 10:01 AM), <https://twitter.com/realDonaldTrump/status/1003637916919320577>. *But see* Steve Vladeck, *The Confusing and Confused New Attack on the Constitutionality of the Special Counsel's Investigation*, JUSTSECURITY (May 24, 2018), <https://www.justsecurity.org/56979/confusing-confused-attack-constitutionality-special-counsels-investigation/>.

As has been stated by numerous legal scholars, I have the absolute right to PARDON myself, but why would I do that when I have done nothing wrong? In the meantime, the never ending Witch Hunt, led by 13 very Angry and Conflicted Democrats (& others) continues into the mid-terms!

Donald Trump (@realDonaldTrump), Twitter (June 4, 2018, 05:35 AM), <https://twitter.com/realDonaldTrump/status/1003616210922147841>.

A confidential memo to Special Counsel Mueller from the Trump legal team, that was allegedly leaked, asserts the following:

President's actions here, by virtue of his position as the chief law enforcement

officer, could neither constitutionally nor legally constitute obstruction because that would amount to him obstructing himself, and that he could, if he wished, terminate the inquiry, or even exercise his power to pardon if he so desired.

*The Trump Lawyers' Confidential Memo to Mueller, Explained*, New York Times (June 2, 2018), (quoting Letter from Marc E. Kasowitz, Counsel to the President, to Robert Mueller, Special Counsel for U.S. Dep't of Justice, *Re: Request for Testimony on Alleged Obstruction of Justice* (marked delivered by hand and confidential) (Jan. 29, 2018)), <https://www.nytimes.com/interactive/2018/06/02/us/politics/trump-legal-documents.html>.

On April 11, a bill was introduced to the Senate that would enhance the Special Counsel's protections from arbitrary dismissal. Special Counsel Independence and Integrity Act, S. 2644, 115th Cong. (2018). Professors Eric Posner and Steve Vladeck delivered a letter to the Senate Judiciary Committee arguing that the bill would likely survive constitutional challenges. Letter from Eric Posner, Kirkland & Ellis Distinguished Serv. Prof'r of L, Univ. of Chi. L Sch. & Stephen I. Vladeck, A. Dalton Cross Prof'r in L, Univ. of Tex. Sch. of L, to Sen. Charles Grassley, Chairman & Sen. Dianne Feinstein, Ranking Member, U.S. Senate Judiciary Committee (April 24, 2018) (on file with author), available at <https://www.justsecurity.org/wp-content/uploads/2018/04/Posner-Vladeck-Letter-on-S2644.pdf>.

With respect to the Appointments Clause, they argued the Special Counsel satisfies the four-factor test applied in *Morrison v. Olson*, 487 U.S. 654 (1988), *supra*, § 7.04, as well as Justice Scalia's more restrictive standard in *Edmond v. U.S.*, 520 U.S. 651 (1997), and is therefore, comfortably, an inferior officer. *Id.* "Perhaps the central argument," they say, "is that *Morrison v. Olson* is wrongly decided. . . that all "good cause" restrictions on the removal of (even inferior) Executive Branch Officers are unconstitutional." *Id.* To this, they argue that *Morrison* is still good law, that Justice Kennedy would likely provide a crucial vote, and that the authority of the Special Counsel intrudes less into executive power than the authority of the Independent Counsel in *Morrison*. *Id.* Where the Independent Counsel statute in *Morrison* provided several points of intrusion, the S. 2644 provides for one: for-cause removal. *Id.* Ultimately, they explain, a constitutional objection to S. 2644 is only viable if one "fully accepts the "unitary executive" theory of executive power—that all for cause removal restrictions within the executive branch are unconstitutional." *Id.*

How will S. 2644 fair after *Lucia*? How will it fair after Justice Kennedy's retirement?

On August 1, the president appeared to call for the Special Counsel's removal via tweet:

..This is a terrible situation and Attorney General Jeff Sessions should stop this Rigged Witch Hunt right now, before it continues to stain our country any further. Bob Mueller is totally conflicted, and his 17 Angry Democrats that are doing his dirty work are a disgrace to USA!

Donald Trump (@realDonaldTrump), Twitter (Aug. 1, 2018, 06:24 AM), <https://twitter.com/realDonaldTrump/status/1024646945640525826>.

#### **Note 7-39(k):**

With midterm elections approaching and no hope of passing a second tax cut bill, the New York Times reported, the Trump administration was considering a tax cut by regulation.



Steven Mnuchin, the Treasury secretary, said in an interview on the sidelines of the Group of 20 summit meeting in Argentina this month that his department was studying whether it could use its regulatory powers to allow Americans to account for inflation in determining capital gains tax liabilities. The Treasury Department could change the definition of “cost” for calculating capital gains, allowing taxpayers to adjust the initial value of an asset, such as a home or a share of stock, for inflation when it sells.

“If it can’t get done through a legislation process, we will look at what tools at Treasury we have to do it on our own and we’ll consider that,” Mr. Mnuchin said, emphasizing that he had not concluded whether the Treasury Department had the authority to act alone. “We are studying that internally, and we are also studying the economic costs and the impact on growth.”

Alan Rappeport & Tim Tankersley, *Trump Administration Mulls Unilateral Tax Cut for the Rich*, N.Y. TIMES (July 30, 2018), <https://www.nytimes.com/2018/07/30/us/politics/trump-tax-cuts-rich.html>. Although the Bush administration considered and rejected the same move because of the lack of legal foundation, advocates appear to be unconcerned about what might happen in the courts, claiming the main economic benefit would be realized before it could get in front of a judge. Critics see little benefit beyond a tax break for the already wealthy.

#### **Note 7-39(k)(1): Treasury Memorandum on Taxes**

##### MEMORANDUM OPINION FOR THE GENERAL COUNSEL DEPARTMENT OF THE TREASURY

. . . We have carefully reviewed the arguments set forth in the Treasury Memorandum [Tr. Mem.] and the NCF Memorandum. As a result of that review, and of our own research and analysis, we are compelled to agree with Treasury’s legal conclusion that Treasury does not have legal authority to index capital gains for inflation by means of regulation.

#### I.

. . . Although the term “cost” is not further defined in the Code, since the inception of the federal income tax system following ratification of the Sixteenth Amendment in 1913, Treasury has consistently interpreted the statutory term “cost” to mean price paid. . . .

The sole issue presented by your request is whether Treasury may, by amending its regulations, reinterpret the statutory term “cost” to mean the price paid as adjusted for inflation. The NCF Memorandum argues that Treasury may do so. In making that argument, the Memorandum relies heavily on analysis of the Supreme Court’s decision in *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984). . . . As the Court noted in *Chevron*, “[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.” *Id.* (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)). But any such “gap” must be created by Congress: “assertions of ambiguity do not transform a clear statute into an ambiguous

provision.” *United States v. James*, 478 U.S. 597, 605 (1986). The NCF Memorandum’s central argument rests on the proposition that “cost” is an ambiguous term. In essence, the Memorandum argues that Congress, in using that word, left a “gap” in the statutory scheme to be filled by Treasury in the exercise of its rulemaking power under the Code. Specifically, the NCF Memorandum asserts that the “meaning of ‘cost’ is sufficiently ambiguous to permit the exercise of administrative discretion” to interpret cost in a manner that takes account of inflation, *id.* at 23, and consequently that in light of *Chevron*, “a regulation indexing capital gains for inflation should and would be upheld judicially as a valid exercise of the Treasury’s interpretative discretion under the [Code],” *id.* at 1.4

*Chevron* is a profound expression of principles that flow from the doctrine of separation of powers. The decision recognizes the appropriate roles of each of the three branches of government. Congress writes laws; the executive branch interprets and enforces them. Congress may, however, leave greater or lesser scope for Executive action. Thus, Congress often leaves to the executive branch the task of filling in the gaps in the statutory scheme through interpretation, and courts must then defer to the Executive’s reasonable interpretations. As the *Chevron* Court explained:

While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices — resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

467 U.S. at 865-66.

*Chevron* is thus a powerful analytical tool for the smooth administration of complex statutes and for the defense of agency actions under such statutes. It is not, however, unlimited. *Chevron* also teaches that when Congress writes legislation in specific terms, if it does not leave policy choices to be resolved by an administrative agency, then Congress’s decision binds both the executive branch and the judiciary. To repeat: “If the intent of Congress is clear, that is the end of the matter.” *Id.* at 842. In particular, *Chevron* does not furnish blanket authority for the regulatory rewriting of statutes whenever a dictionary gives more than a single definition for a statutory term or whenever some arguably relevant discipline assigns a specialized, technical meaning to such a term. Such a reading of *Chevron* would eviscerate the well-established rule of construction that statutes must be accorded their plain and commonly understood meaning. Indeed, it would lead to a legal regime in which many statutory terms with widely understood meanings would be deemed “ambiguous.” In this regard, we fully concur in your conclusion that “[i]f the plain meaning doctrine could be applied only to words that have only one conceivable meaning, it would have precious little utility as a principle to resolve conflicting interpretations of statutes.” [Tr. Mem. at 7-8.]

*Chevron* teaches that the inquiry into the meaning of a statutory term—including whether that meaning is ambiguous—is to be conducted by “employing traditional tools of statutory construction.” 467 U.S. at 843 n.9. *See also INS v. Cardoza-Fonseca*, 480 U.S. at 449 (using “ordinary canons of statutory construction” to ascertain the meaning of statutory terms). These tools and canons include examination of “the plain language of the Act, its symmetry with [other relevant legal materials], and its legislative history.” *Id.* Additionally, “[i]n ascertaining the plain meaning of the statute, the court must look to . . . the language and design of the statute as a whole.” [*K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).]

In reaching its ultimate conclusion that Treasury lacks the legal authority to index capital gains for inflation, your opinion considers and rejects the NCF Memorandum's arguments that the term "cost" is ambiguous. It concludes that "[t]he statute itself has a plain meaning which is clear and unambiguous: cost means the 'actual price paid' or 'purchase price.'" [Tr. Mem. at 1.] *See also, e.g., id.* at 4-8. As set forth below, we also conclude that "cost" is not ambiguous in the context of determining gain or loss from the disposition of property.

...

Legal Auth. of the Dep't of the Treasury to Issue Regs Indexing Capital Gains for Inflation, 16 Op. O.L.C. 136, 136-140 (1992).

### **Note 7-39(I): Interagency conflict as a control mechanism**

Look[ing] at the myriad ways that agency battles are structured, with attention to normatively and legally relevant attributes[,] . . . focus[ing] on situations where agencies have different institutional cultures, political allies, or policy priorities that lead to clashes," the authors argue that "[c]onflict among and within agencies can provide substantial political, social welfare, and legitimacy benefits.

Daniel A. Farber & Anne Joseph O'Connell, *Agencies as Adversaries*, 105 CALIF. L. REV. 1375, 1384-5 (2017).

The authors categorize the relationships between agencies "in terms of the imbalance of the power relationship, with formal authority of one actor over the other becoming more attenuated as we move down the list," ordering them as follows:

1. the hard hierarchy, where one actor can veto another's actions or substitute its own binding decision;
2. the soft hierarchy, where a substantive power relationship still exists, but the dominant actor's control has limits;
3. the monitoring or advisory relationship, where one actor makes the decision, but another is authorized to monitor, demand information, or offer formal advice - sometimes creating legal or political obstacles; and
4. the symmetrical relationship, where the actors operate in parallel.

*Id.* at 1389.

The authors note that although conflicts between political officials and career civil servants fall under the first category because at least, "[i]n principle, political officials control civil servants," there are formal and informal constraints to this dynamic, including for-cause protections, in the former sense, and "levers" such as whistleblowing and work slowdowns, in the latter sense. "Careerists outlast, on average, political appointees, and often have an informational or expertise advantage." *Id.* at 1393.

**§ 7.06:, p.738: Insert after Note 7-46**

**Note 7-46(a): Anti-administrativism: CRA, RAA, and REINS**

**A. The Political Attack**

The political attack on the national administrative state is hard to miss. Even separate from the Trump Administration's promise to "deconstruct[] the administrative state" or its identification of a dangerous "deep state" opposed to the President, the Administration's initial actions have been aggressively antiregulatory. These actions include specific area rollbacks, such as instructions that agencies repeal, waive, or delay implementation of major Obama Administration regulatory initiatives in the environmental, financial regulation, and health care arenas. But they also encompass dramatic transsubstantive measures, in particular requirements that agencies establish task forces focused on regulatory repeal, repeal two regulations for each new regulation they propose, and keep additional regulatory costs at zero. President Trump's cabinet is composed of individuals who have long opposed the agencies and programs they now lead and his budget proposes to dramatically slash funding for a large swath of nonmilitary agencies. Business interests are enjoying a regulatory retraction of unprecedented proportions, with the combination of executive branch actions and Congress's disapproval of late Obama Administration rules under the CRA. By the time the window for disapproval closed, Congress had overturned fourteen Obama regulations -- which was thirteen more regulatory disapprovals than had previously occurred in the CRA's twenty-one year life. Agency teams -- often with business ties -- have sought to delay numerous rules immediately, although such efforts have already faced resistance from courts. Importantly, the Trump Administration has also proposed some measures that would expand the administrative state -- for example, by adding over 15,000 more immigration employees. And some ostensibly deregulatory measures, such as congressional Republicans' efforts to repeal the Affordable Care Act, may well entail substantial grants of new administrative authority. But the overall thrust since the Trump Administration came into office has been in a strongly deregulatory direction.

Even more significant for the administrative state would be enactment of congressional measures like the proposed RAA. The Senate's version of the RAA would require agencies, upon request, to hold oral evidentiary hearings on any "specific scientific, technical, economic, or other complex factual issues that are genuinely disputed" in high-impact rulemakings (those with an expected annual economic impact of \$ 1 billion or more) and in some major rulemakings (those with an expected annual economic impact of \$ 100 million or more). It would also limit the use of interim final rulemaking, require high-impact rules to meet a higher evidentiary standard, and limit judicial deference to an agency's interpretations of its own rules. The House version is more extreme, requiring an agency to hold formal trial-like hearings when proposing a high-impact rule and, for all

rulemakings, often to hold an initial hearing at which interested parties can challenge the information on which the agency plans to rely. Both bills would also impose additional evaluation requirements on agencies and expand the availability of judicial review of agency actions; and the House version forbids agencies from implementing rules until all legal challenges to them are resolved. Additionally, the House incorporated the proposed Separation of Powers Restoration Act in its version, which would require courts to "decide de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions, and rules made by agencies." Although some question how burdensome the Senate version would be, past experience with oral hearing and trial-type procedures under the APA's formal rulemaking provisions and other statutes strongly suggests that both measures would be significantly onerous and resource consuming for agencies. A separate proposed measure, the Regulations from the Executive in Need of Scrutiny (REINS) Act, would not impose additional procedures on agencies but instead require Congress enact a joint resolution of approval before any major rule could go into effect. Given the notorious difficulty Congress has had recently in passing legislation, the REINS Act would even more clearly stop regulation in its tracks.

Gillian E. Metzger, *The Supreme Court, 2016 Term – Foreword: 1930's Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 9-13 (2017).

## Chapter 8

### § 8.04, p. 763: Insert after note 8-13.

#### **Note 8-13(a): *T-Mobile South, LLC v. City of Roswell***

When Congress provides that a decision must be “in writing and supported by substantial evidence contained in a written record,” borrowing the administrative law “term of art,” must the decision maker provide reasons for its decisions? If so, is a specific form of presentation required?

In *T-Mobile South, LLC v. City of Roswell*, 135 S. Ct. 808 (2015), the Supreme Court considered the effect of this “term of art” in the Telecommunications Act of 1996, 7 U.S.C. § 332, which requires substantial evidence in a written record whenever a state or local government denies “a request to place, construct, or modify personal wireless service facilities.” T-Mobile applied to build a 108-foot-tall cell tower on vacant residential property in Roswell, Georgia. The city’s Planning and Zoning Division determined that T-Mobile’s application complied with all city ordinances. The city council held a public hearing on the application, during which residents expressed their opposition due to “aesthetic compatibility” and outdated technology. *Id.* at 812. City council members also expressed their reservations on the record, stating variously that other carriers provided sufficient coverage; that residential properties should not have cell towers; that a lack of a backup generator was concerning; and that the tower was incompatible with the natural setting.

Two days after the hearing, the city sent a letter to T-Mobile, stating: “Please be advised the City of Roswell Mayor and City Council denied the request from T-Mobile for a . . . tower structure during their April 12, 2010 hearing. The minutes from the aforementioned hearing may be obtained from

the city clerk.” *Id.* at 813. While the statute allowed T-Mobile to seek judicial review within 30 days of the city’s decision, the “detailed written minutes of the hearing . . . were not approved and published by the City until 26 days” after issuing the decision. *Id.* Three days after the minutes were published, and one day before the 30 days would have elapsed, T-Mobile sued.

The Supreme Court first determined that “the statute requires localities to provide reasons when they deny applications to build cell phone towers. . . . In order to determine whether a locality’s denial was supported by substantial evidence, courts must be able to identify . . . why the locality denied the application.” *Id.* at 814. This, the Court said, “flows directly from Congress’ use of the term ‘substantial evidence.’ The statutory phrase ‘substantial evidence’ is a term of art in administrative law that describes how an administrative record is to be judged by a reviewing court.” *Id.* at 815.

The Court next considered whether the act mandated any particular form for a decision. Aware that Congress sought to strike a balance between local zoning power and the need to promote telecommunications services, the Court determined that Congress intended to allow localities flexibility in their decision making. Accordingly, “[o]ther than providing that a locality’s reasons must be given in writing, nothing in [the statutory] text imposes any requirement that the reasons be given in any particular form.” *Id.* at 815–16. While the reasons need not be stated in the denial letter, they must be “stated clearly enough to enable judicial review.” *Id.* at 816.

Recognizing that “a locality may rely on detailed meeting minutes as it did here,” the Court nonetheless advised that “the locality can likely avoid prolonging the litigation—and adding expense to the taxpayers, the companies, and the legal system” by providing a short statement of reasons. *Id.* “Moreover, in that circumstance, the locality need not worry that, upon review of the record, a court will either find that it could not ascertain the locality’s reasons or mistakenly ascribe to the locality a rationale that was not in fact the reason for the locality’s denial.” *Id.* However, the Court declined to impose this requirement: “Congress could adopt such a rule if it were so inclined, but it did not do so in this statute. It is not our place to legislate another approach.” *Id.* at 818.

Looking beyond the statutory text, the Court “hasten[ed] to add that a locality cannot stymie or burden the judicial review contemplated by the statute by delaying the release of its reasons for a substantial time after it conveys its written denial.” Accordingly, the Court imposed what it considered to be a logical outgrowth of the time limitation on judicial review:

Because an entity may not be able to make a considered decision whether to seek judicial review without knowing the reasons for the denial of its application, and because a court cannot review the denial without knowing the locality’s reasons, the locality must provide or make available its written reasons at essentially the same time as it communicates its denial.

*Id.* at 816. The Court dismissed the concern that its timing rule would “unduly burden localities.” *Id.* at 817. First, the Court noted, a denial “needs only to be issued . . . ‘within a reasonable period of time’” under the statute. *Id.* Second,

[i]f a locality is not in a position to provide its reasons promptly, the locality can delay the issuance of its denial . . . and instead release it along with its reasons once

those reasons are ready to be provided. Only once the denial is issued would the 30-day commencement-of-suit clock begin.

*Id.* Leaving open questions of harmless error and remedy for consideration on remand, the Court held that the city amply described its reasoning but failed to comply with the (new) timing requirement.<sup>29</sup>

In dissent, Chief Justice Roberts, joined by Justice Ginsburg, accused the majority of “add[ing] a requirement [of simultaneously providing reasons] that Congress has included expressly in many other statutes, but not in this one.” *Id.* at 823 (Roberts, C.J., dissenting). The dissent maintained that

a reviewing court does not need to be able to discern the town's reasons within mere days of the decision. At that point no one has even asked the court to review the denial. The fact that a court cannot conduct review without knowing the reasons simply means that if the town has not already made the record available, it must do so by whatever deadline the court sets.

*Id.* at 822. In response, the majority stated that the dissent’s approach would “turn[] judicial review on its head.” *Id.* at 816 n.3. Without published reasons, the majority stated that a company “would thus be left to guess at what the locality's written reasons will be, write a complaint that contains those hypotheses, and risk being sandbagged by the written reasons that the locality subsequently provides in litigation after the challenging entity has shown its cards.” *Id.*

The dissent also believed that the timing error should ultimately be found harmless. Justice Alito, in concurrence, echoed this sentiment: “I have trouble believing that T-Mobile South, LLC—which actively participated in the decisionmaking process, including going so far as to transcribe the public hearing—was prejudiced by the city of Roswell's delay in providing a copy of the minutes.” *Id.* at 819 (Alito, J., concurring).

## **§ 8.05 p. 795: Insert after note 8-29.**

### **Note 8-29(a): Continued Evolution of *Chevron***

The debate over the merits of the *Chevron* doctrine continues, seemingly more intensely than ever. In *Chevron is Dead: Long Live Chevron*, Michael Herz argues that the current formulation of *Chevron* is a good formulation and should be preserved. 115 COLUM. L. REV. 1867 (2015). Conversely, members of Congress continue to discuss attempting to limit the *Chevron* doctrine through prohibitive legislation. See Christopher Walker, *Courts Regulating the Regulators*, REG BLOG (April 25, 2016) <https://www.regblog.org/2016/04/25/walker-courts-regulating-the-regulators/>. For an interesting and helpful approach that examines *Chevron* outcomes, by comparing judicial deference doctrines with contract law, see Chabot, Christine Kexel, *Selling Chevron* (September 9, 2015). 67 Administrative Law Review 481 (2015). Available at SSRN: <https://ssrn.com/abstract=2573236> or <http://dx.doi.org/10.2139/ssrn.2573236>

### **Note 8-29(a): *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018)**

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<sup>29</sup> Whether the decision was in fact supported by substantial evidence was not before the Court.

In *Epic Systems*, the Supreme Court was tasked with reconciling the Federal Arbitration Act, which heavily favors enforcement of arbitration agreements, and the National Labor Relations Act, which “secures to employees rights to organize unions and bargain collectively.” Several circuits, in part relying upon the interpretation of the National Labor Relations Board, had held that the NLRA protected the right to class and collective actions, meaning that employees could not be required to waive those rights as part of a binding employment arbitration agreement.

The Supreme Court reversed, with Justice Gorsuch first concluding that NLRA did not conflict with or alter the FAA’s presumption of enforcement. Justice Gorsuch then held that the NLRB’s interpretation did not warrant deference:

No party to these cases has asked us to reconsider *Chevron* deference. Cf. *SAS*. But even under *Chevron*’s terms, no deference is due. To show why, it suffices to outline just a few of the most obvious reasons.

The *Chevron* Court justified deference on the premise that a statutory ambiguity represents an “implicit” delegation to an agency to interpret a “statute which it administers.” Here, though, the Board hasn’t just sought to interpret its statute, the NLRA, in isolation; it has sought to interpret this statute in a way that limits the work of a second statute, the Arbitration Act. And on no account might we agree that Congress implicitly delegated to an agency authority to address the meaning of a second statute it does not administer. One of *Chevron*’s essential premises is simply missing here.

It’s easy, too, to see why the “reconciliation” of distinct statutory regimes “is a matter for the courts,” not agencies. An agency eager to advance its statutory mission, but without any particular interest in or expertise with a second statute, might (as here) seek to diminish the second statute’s scope in favor of a more expansive interpretation of its own—effectively “‘bootstrap[ing] itself into an area in which it has no jurisdiction.’” All of which threatens to undo rather than honor legislative intentions. To preserve the balance Congress struck in its statutes, courts must exercise independent interpretive judgment.

Another justification the *Chevron* Court offered for deference is that “policy choices” should be left to Executive Branch officials “directly accountable to the people.” But here the Executive seems of two minds, for we have received competing briefs from the Board and from the United States (through the Solicitor General) disputing the meaning of the NLRA. And whatever argument might be mustered for deferring to the Executive on grounds of political accountability, surely it becomes a garble when the Executive speaks from both sides of its mouth, articulating no single position on which it might be held accountable. In these circumstances, we will not defer.

Finally, the *Chevron* Court explained that deference is not due unless a “court, employing traditional tools of statutory construction,” is left with an unresolved ambiguity. 467 U.S., at 843, n.9. And that too is missing: the canon against reading conflicts into statutes is a traditional tool of statutory construction and it, along with the other traditional canons we have discussed, is more than up to the



job of solving today's interpretive puzzle. Where, as here, the canons supply an answer, “*Chevron* leaves the stage.” *Alternative Entertainment*, 858 F.3d, at 417 (opinion of Sutton, J.).

Among administrative law practitioners and scholars, Justice Gorsuch’s explanation that “deference is not due unless a ‘court, employing traditional tools of statutory construction,’ is left with an unresolved ambiguity” has drawn significant attention. Taking Justice Gorsuch at his word, in what situations will *Chevron* deference apply? Don’t the “traditional tools of statutory construction” purport to definitively interpret most if not all statutory texts? The late-Justice Scalia once wrote that the canons of statutory interpretation “Will not relieve judges of all doubts and misgivings about their interpretations. . . . But textualism will provide greater certainty in the law . . . .” ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* (2012) (setting forth 57 canons of statutory interpretation). Could *Chevron* step in when the canons still yield “doubts and misgivings?” How much doubt would be required? Is this a workable standard, again taking Justice Gorsuch’s statement at face value?

Commentators have also been keen to point out that Justice Gorsuch’s quotation from footnote 9 of *Chevron* lack important context. The complete quotation, citations omitted, provides as follows: “The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that *Congress had an intention on the precise question* at issue, that intention is the law and must be given effect.” 467 U.S. at 843 n.9 (emphasis added). *Chrevorn* held that the tools of statutory construction must prevail if they revealed a “clear congressional *intent*” on the “*precise question* at issue.” Justice Gorsuch’s quotation says something different: that deference is not due as long as the statute at issue could be interpreted with the tools of statutory interpretation. How do you think these inquiries differ? What does this matter for administrative law practitioners?

**Note 8-29(a)(1): *Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067 (2018)**

*Wisconsin Central*, decided just a month after *Epic Systems*, provided another window into Justice Gorsuch’s views on administrative deference. Congress enacted the Railroad Retirement Tax Act of 1937 to address the precarious state of railroad pension funds during the Great Depression. Recently-retired Seventh Circuit Judge Richard Posner had held that the statute’s definition of “compensation” as “any form of money remuneration” included stock option plans. Among other things, Judge Posner observed that stock options were not even an available form of compensation at the time the RRTA was passed. The IRS shared Judge Posner’s view, and the Government asked the Supreme Court to defer to this interpretation under *Chevron*. “But in light of all the textual and structural clues before [the Court],” Justice Gorsuch thought it “clear enough that the term ‘money’ excludes ‘stock,’ leaving no ambiguity for the agency to fill.” Again, Justice Gorsuch cited to the footnote 9 from *Chevron* from which he quoted in *Epic Systems*.

*Wisconsin Central*, as in *Epic Systems*, drew a four-justice dissent. Justice Breyer found “a degree of ambiguity” with respect to stock options, and thus found deference appropriate, particularly since “Congress has never suggested it held a contrary view, despite making other statutory changes.”

Justice Gorsuch again dismissed a *Chevron* argument as inapplicable where the tools of statutory interpretation left no ambiguity for the IRS:

Finally, the government seeks *Chevron* deference for a more recent IRS interpretation treating “compensation” under the Act as having “the same meaning as the term wages in” FICA “except as specifically limited by the Railroad Retirement Tax Act.” . . . But in light of all the textual and structural clues before us, we think it’s clear enough that the term “money” excludes “stock,” leaving no ambiguity for the agency to fill. . . . Nor does the regulation help the government even on its own terms. FICA’s definition of wages—“all remuneration”—is “specifically limited by the Railroad Retirement Tax Act,” which applies only to “money remuneration.” So in the end all the regulation winds up saying is that everyone should look carefully at the relevant statutory texts. We agree, and that is what we have done.

138 S. Ct. 2067, 2074 (2018) (citing *Chevron*, 467 U.S. at 843, n. 9). Note nearly every question at oral argument concerned the definition of “money” or “money remuneration.” Transcript of Oral Argument, *Wis. Cent., Ltd. v. U.S.*, 2018 U.S. Trans. LEXIS 28 (No. 17-530).

Justice Gorsuch’s position on *Chevron* goes beyond that of the petitioners, who argue, first, that the government’s reading would fail step one because the regulation conflicts with the statute, and second, that the regulation also fails step two because it contravenes Congress’s intention to maintain a railroad retirement system distinct from FICA. Reply Brief of Petitioner-Appellant, *Wisconsin Central v. U.S.*, 2018 U.S. S. Ct. Briefs LEXIS 1375, at 36.

The majority opinion seems to be in agreement with the Fifth Circuit in *Union Pac. R.R. v. U.S.*, 865 F.3d 1045, 1048-53 (8th Cir. 2017). Brief for Ass’n of Am. R.R. as Amicus Curiae in Support of Petitioner, *Wisconsin Central v. U.S.*, 2018 U.S. LEXIS 3837. 2018 U.S. S. Ct. Briefs LEXIS 703 at n. 2. That footnote is the only mention of *Chevron* by the *amici* supporting the petitioner.

#### **Note 8-29(b):**

Like Justice Gorsuch, the Trump administration’s nominee to replace Justice Kennedy, Judge Kavanaugh, is an outspoken critic of *Chevron*.

See, William A. Galston, *Under the radar: The Supreme Court decision Brett Kavanaugh is most likely to overrule*, Brookings: FIXGOV BLOG (July 10, 2018), <https://www.brookings.edu/blog/fixgov/2018/07/10/under-the-radar-the-supreme-court-decision-brett-kavanaugh-is-most-likely-to-overrule/>.

According to Judge Kavanaugh, courts should look with skepticism on the expansion of agency discretion by determining a statute to be ambiguous because the very notion of ambiguity itself is ambiguous. *Id.* Instead, he would adopt a new presumption: “when there is a high probability that a certain interpretation of the statute represents the best reading, the court should adopt this reading, even if the matter is not entirely free from doubt.” *Id.*

#### **Note 8-29(c):**

See, Daniel J. Hemel & Aaron L. Nielson, *Chevron Step One-and-a-Half*, 84 U. CHI. L. REV. 757 (2017) (discussing the potential boons and boondoggles of courts asking whether the agency itself

recognized that the statute was ambiguous after Chevron step one, rather than moving on to step two).

**Note 8-29(d):**

See Catherine M. Sharkey, *Cutting in on the Chevron Two-Step*, 86 FORDHAM L. REV. 2359 (2018) (urging the incorporation of State Farm “reasoned decisionmaking” into the Chevron framework).

**§ 8.06, p. 811: Insert the following after note 8-32.**

**Note 8-32(a): *Husted v. A. Philip Randolph Institute* - State voter registration procedures**

In *Husted v. A. Philip Randolph Institute*, the Supreme Court upheld a state procedure which removed voters from the rolls after failing to return a postage prepaid card and failing to vote for a total of six years. The plaintiffs argued that the procedure violated the National Voter Registration Act because the NVRA prohibits removal of voters on the basis of the failure to vote. The Court held based upon a plain-text reading of the NVRA that states could remove voters who both failed to respond to a notice and failed to vote, and it was not for the Court to “second-guess Congress or to decide whether Ohio’s [removal procedure] is the ideal method for keeping its voting rolls up to date.”

The principle dissent, authored by Justice Breyer for four justices, maintained that the Ohio procedure violated the NVRA because of its focus on removing voters who had not voted.

**Note 8-32(b): *Utility Air Regulatory Group v. E.P.A.***

In Chapter 9, we examine *Massachusetts v. E.P.A.*, widely regarded as a significant judicial precedent for the regulation of greenhouse gasses. *Massachusetts* was also an important administrative law case: it clarified the Court’s standing doctrine, finding that states have a special stake in protecting their quasi-sovereign interests and are entitled to “special solicitude” in judicial standing analysis. See, *infra*, at page 958.

On the merits, *Massachusetts* rejected the EPA’s conclusion that it lacked authority under the Clean Air Act to issue mandatory regulations in response to global climate change. The Court held that the EPA could permissibly regulate automobile emissions because “greenhouse gases fit well within the Clean Air Act’s capacious definition of ‘air pollutant.’” 549 U.S. 497, 532 (2007).

After *Massachusetts*, the EPA promulgated new greenhouse gas emissions standards for motor vehicles. It also made stationary sources of greenhouse gas emissions subject to the Clean Air Act’s permitting requirements, *with the caveat* that these sources would not become newly subject to permitting if they emitted less than 100,000 tons of greenhouse gases per year. Additionally, the agency required sources that were already subject to permitting—i.e., sources that exceeded statutory thresholds for conventional pollutants—to employ best available control technologies for greenhouse gases.

A consortium of states and industry groups challenged the EPA’s actions. The D.C. Circuit dismissed the suit, and the consortium sought Supreme Court review.

134 S. Ct. 2427  
SUPREME COURT OF THE UNITED STATES  
**UTILITY AIR REGULATORY GROUP, Petitioner**  
v.  
**ENVIRONMENTAL PROTECTION AGENCY, et al., Respondent**  
No. 12–1146 | Argued Feb. 24, 2014 | Decided June 23, 2014

JUSTICE SCALIA announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II.

Acting pursuant to the Clean Air Act . . . the Environmental Protection Agency recently set standards for emissions of “greenhouse gases” (substances it believes contribute to “global climate change”) from new motor vehicles. We must decide whether it was permissible for EPA to determine that its motor-vehicle greenhouse-gas regulations automatically triggered permitting requirements under the Act for stationary sources that emit greenhouse gases.

I. Background

A. Stationary-Source Permitting

The Clean Air Act regulates pollution-generating emissions from both stationary sources, such as factories and powerplants, and moving sources, such as cars, trucks, and aircraft. This litigation concerns permitting obligations imposed on stationary sources under Titles I and V of the Act.

Title I charges EPA with formulating national ambient air quality standards (NAAQS) for air pollutants. . . . States have primary responsibility for implementing the NAAQS by developing “State implementation plans.” . . . A State must designate every area within its borders as “attainment,” “nonattainment,” or “unclassifiable” with respect to each NAAQS . . . and the State’s implementation plan must include permitting programs for stationary sources that vary according to the classification of the area where the source is or is proposed to be located. . . .

Stationary sources in areas designated attainment or unclassifiable are subject to the Act’s provisions relating to “Prevention of Significant Deterioration” (PSD). . . . Since the inception of the PSD program, every area of the country has been designated attainment or unclassifiable for at least one NAAQS pollutant; thus, on EPA’s view, all stationary sources are potentially subject to PSD review.

[In areas where the PSD program applies, it is unlawful to construct a major emitting facility—a stationary source that may emit 250 tons per year of any pollutant or 100 tons per year for certain types of sources—without first obtaining a permit. Permit applicants must not violate air-quality standards and must implement “best available control technology” (BACT) for each pollutant subject to regulation.]

In addition to the PSD permitting requirements for construction and modification, Title V of the Act makes it unlawful to operate any “major source,” wherever located, without a comprehensive

operating permit. . . . Title V defines a “major source” by reference to the Act-wide definition of “major stationary source,” which in turn means any stationary source with the potential to emit 100 tons per year of “any air pollutant.” . . .

## B. EPA’s Greenhouse-Gas Regulations

In 2007, the Court held that Title II of the Act “authorize[d] EPA to regulate greenhouse gas emissions from new motor vehicles” if the Agency “form[ed] a ‘judgment’ that such emissions contribute to climate change.” *Massachusetts v. EPA*, 549 U.S. 497. In response to that decision, EPA embarked on a course of regulation resulting in “the single largest expansion in the scope of the [Act] in its history.”

[In a notice of proposed rulemaking, EPA expressed its view that once greenhouse gases are regulated under any portion of the Clean Air Act, the PSD and Title V permitting requirements would extend to all stationary sources with the potential to emit greenhouse gases in excess of the 250/100-ton thresholds, sweeping many new sources under these programs. In spite of its concern, EPA proceeded to issue a “Tailpipe Rule” for motor vehicle emissions.]

EPA then announced steps it was taking to “tailor” the PSD program and Title V to greenhouse gases. . . . Those steps were necessary, it said, because the PSD program and Title V were designed to regulate “a relatively small number of large industrial sources,” and requiring permits for all sources with greenhouse-gas emissions above the statutory thresholds would radically expand those programs, making them both unadministrable and “unrecognizable to the Congress that designed” them. . . . EPA adopted a “phase-in approach” that it said would “appl[y] PSD and title V at threshold levels that are as close to the statutory levels as possible, and do so as quickly as possible, at least to a certain point.” . . .

[The phase-in approach consisted of three steps. During the first six months (step one), no source would become newly subject to the PSD/Title V requirements solely on the basis of greenhouse gas emissions, though sources already required to obtain permits based on conventional pollutants would need to comply with BACT for greenhouse gases if they emitted 75,000 tons per year. Then, for a one-year period (step two), sources with the potential to emit 100,000 tons of greenhouse gases per year would be subject to PSD/Title V. After that one-year period (step three), the agency hinted that it might reduce permitting thresholds to 50,000 tons with appropriate exemptions.]

## C. Decision Below

Numerous parties, including several States, filed petitions for review in the D.C. Circuit under 42 U.S.C. § 7607(b), challenging EPA’s greenhouse-gas-related actions. The Court of Appeals dismissed some of the petitions for lack of jurisdiction and denied the remainder. . . . First, it upheld the Endangerment Finding and Tailpipe Rule. . . . Next, it held that EPA’s interpretation of the PSD permitting requirement as applying to “any regulated air pollutant,” including greenhouse gases, was “compelled by the statute.” . . . The court also found it “crystal clear that PSD permittees must install BACT for greenhouse gases.” . . . Because it deemed petitioners’ arguments about the PSD program insufficiently applicable to Title V, it held they had “forfeited any challenges to EPA’s greenhouse gas-inclusive interpretation of Title V.” . . . Finally, it held that

petitioners were without Article III standing to challenge EPA’s efforts to limit the reach of the PSD program and Title V through the Triggering and Tailoring Rules. . . .

We granted six petitions for certiorari but agreed to decide only one question: “Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases.”

## II. Analysis

. . .

### A. The PSD and Title V Triggers.

We first decide whether EPA permissibly interpreted the statute to provide that a source may be required to obtain a PSD or Title V permit on the sole basis of its potential greenhouse-gas emissions.

#### 1.

EPA thought its conclusion that a source’s greenhouse-gas emissions may necessitate a PSD or Title V permit followed from the Act’s unambiguous language. The Court of Appeals agreed and held that the statute “compelled” EPA’s interpretation. . . . We disagree. The statute compelled EPA’s greenhouse-gas-inclusive interpretation with respect to neither the PSD program nor Title V.

The Court of Appeals reasoned by way of a flawed syllogism: Under *Massachusetts*, the general, Act-wide definition of “air pollutant” includes greenhouse gases; the Act requires permits for major emitters of “any air pollutant;” therefore, the Act requires permits for major emitters of greenhouse gases. The conclusion follows from the premises only if the air pollutants referred to in the permit-requiring provisions (the minor premise) are the same air pollutants encompassed by the Act-wide definition as interpreted in *Massachusetts* (the major premise). Yet no one—least of all EPA—endorses that proposition, and it is obviously untenable.

The Act-wide definition says that an air pollutant is “any air pollution agent or combination of such agents, including any physical, chemical, biological, [or] radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air.” In *Massachusetts*, the Court held that the Act-wide definition includes greenhouse gases because it is all-encompassing; it “embraces all airborne compounds of whatever stripe.” . . . But where the term “air pollutant” appears in the Act’s operative provisions, EPA has routinely given it a narrower, context-appropriate meaning.

That is certainly true of the provisions that require PSD and Title V permitting for major emitters of “any air pollutant.” Since 1978, EPA’s regulations have interpreted “air pollutant” in the PSD permitting trigger as limited to regulated air pollutants . . . a class much narrower than *Massachusetts*’ “all airborne compounds of whatever stripe” . . . and since 1993 EPA has informally taken the same position with regard to the Title V permitting trigger, a position the Agency ultimately incorporated into some of the regulations at issue here. . . . Those interpretations were appropriate: It is plain as day that the Act does not envision an elaborate, burdensome permitting process for major emitters of steam, oxygen, or other harmless airborne substances. It takes some cheek for EPA to insist that it cannot possibly give “air pollutant” a reasonable, context-

appropriate meaning in the PSD and Title V contexts when it has been doing precisely that for decades.

...

*Massachusetts* does not strip EPA of authority to exclude greenhouse gases from the class of regulable air pollutants under . . . parts of the Act where their inclusion would be inconsistent with the statutory scheme. . . . *Massachusetts* does not foreclose the Agency's use of statutory context to infer that certain of the Act's provisions use "air pollutant" to denote not every conceivable airborne substance, but only those that may sensibly be encompassed within the particular regulatory program. . . .

[JUSTICE SCALIA chided Congress's "profligate use of 'air pollutant' where what is meant is obviously narrower than the Act-wide definition," but he pointed out EPA and the courts must do their best to read the words of the statute with a view to their place in the overall statutory scheme.]

In sum, there is no insuperable textual barrier to EPA's interpreting "any air pollutant" in the permitting triggers of PSD and Title V to encompass only pollutants emitted in quantities that enable them to be sensibly regulated at the statutory thresholds, and to exclude those atypical pollutants that, like greenhouse gases, are emitted in such vast quantities that their inclusion would radically transform those programs and render them unworkable as written.

## 2.

Having determined that EPA was mistaken in thinking the Act compelled a greenhouse-gas-inclusive interpretation of the PSD and Title V triggers, we next consider the Agency's alternative position that its interpretation was justified as an exercise of its "discretion" to adopt "a reasonable construction of the statute." . . . We conclude that EPA's interpretation is not permissible.

[Even under the deferential *Chevron* framework, agencies must operate within the bounds of reasonable interpretation, accounting for the specific context in which language is used and the structure and design of the statute as a whole.]

EPA itself has repeatedly acknowledged that applying the PSD and Title V permitting requirements to greenhouse gases would be inconsistent with—in fact, would overthrow—the Act's structure and design. . . .

Like EPA, we think it beyond reasonable debate that requiring permits for sources based solely on their emission of greenhouse gases at the 100– and 250–tons–per–year levels set forth in the statute would be "incompatible" with "the substance of Congress' regulatory scheme."

...

The fact that EPA's greenhouse-gas-inclusive interpretation of the PSD and Title V triggers would place plainly excessive demands on limited governmental resources is alone a good reason for rejecting it; but that is not the only reason. EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization. . . . The power to require permits for the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide falls

comfortably within the class of authorizations that we have been reluctant to read into ambiguous statutory text. Moreover, in EPA's assertion of that authority, we confront a singular situation: an agency laying claim to extravagant statutory power over the national economy while at the same time strenuously asserting that the authority claimed would render the statute "unrecognizable to the Congress that designed" it. . . . Since, as we hold above, the statute does not compel EPA's interpretation, it would be patently unreasonable—not to say outrageous—for EPA to insist on seizing expansive power that it admits the statute is not designed to grant.

3.

EPA thought that despite the foregoing problems, it could make its interpretation reasonable by adjusting the levels at which a source's greenhouse-gas emissions would oblige it to undergo PSD and Title V permitting. Although the Act, in no uncertain terms, requires permits for sources with the potential to emit more than 100 or 250 tons per year of a relevant pollutant, EPA in its Tailoring Rule wrote a new threshold of 100,000 tons per year for greenhouse gases. Since the Court of Appeals thought the statute unambiguously made greenhouse gases capable of triggering PSD and Title V, it held that petitioners lacked Article III standing to challenge the Tailoring Rule because that rule did not injure petitioners but merely relaxed the pre-existing statutory requirements. Because we, however, hold that EPA's greenhouse-gas-inclusive interpretation of the triggers was not compelled, and because EPA has essentially admitted that its interpretation would be unreasonable without "tailoring," we consider the validity of the Tailoring Rule.

We conclude that EPA's rewriting of the statutory thresholds was impermissible and therefore could not validate the Agency's interpretation of the triggering provisions. An agency has no power to "tailor" legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. Agencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always "give effect to the unambiguously expressed intent of Congress." . . . It is hard to imagine a statutory term less ambiguous than the precise numerical thresholds at which the Act requires PSD and Title V permitting. When EPA replaced those numbers with others of its own choosing, it went well beyond the "bounds of its statutory authority."

. . .

Were we to recognize the authority claimed by EPA in the Tailoring Rule, we would deal a severe blow to the Constitution's separation of powers. Under our system of government, Congress makes laws and the President, acting at times through agencies like EPA, "faithfully execute[s]" them. . . . The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice. . . .

In the Tailoring Rule, EPA asserts newfound authority to regulate millions of small sources—including retail stores, offices, apartment buildings, shopping centers, schools, and churches—and to decide, on an ongoing basis and without regard for the thresholds prescribed by Congress, how many of those sources to regulate. We are not willing to stand on the dock and wave goodbye as EPA embarks on this multiyear voyage of discovery. We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate. EPA therefore lacked authority to "tailor" the Act's unambiguous numerical thresholds to accommodate its greenhouse-gas-inclusive interpretation of the permitting triggers.



Instead, the need to rewrite clear provisions of the statute should have alerted EPA that it had taken a wrong interpretive turn. Agencies are not free to “adopt . . . unreasonable interpretations of statutory provisions and then edit other statutory provisions to mitigate the unreasonableness.” . . . Because the Tailoring Rule cannot save EPA’s interpretation of the triggers, that interpretation was impermissible under *Chevron*.

[Although the court invalidated EPA’s Tailoring Rule, it agreed with the agency that sources which already required permits on the basis of conventional pollutants could be required to comply with BACT for greenhouse gas emissions. The text of the BACT provision in the Clean Air Act is more specific than the ambiguous text of the PSD and Title V permitting triggers: it provides that BACT is required for *each* pollutant subject to Clean Air Act regulation. Moreover, the wider statutory context does not call for a narrower construction. And, as JUSTICE SCALIA pointed out, even if the text were ambiguous, EPA’s extension of BACT to greenhouse gases emitted by sources already subject to permitting regulation “is not so disastrously unworkable . . . as to convince [the Court] that EPA’s interpretation is unreasonable.”]

To sum up: We hold that EPA exceeded its statutory authority when it interpreted the Clean Air Act to require PSD and Title V permitting for stationary sources based on their greenhouse-gas emissions. Specifically, the Agency may not treat greenhouse gases as a pollutant for purposes of defining a “major emitting facility” (or a “modification” thereof) in the PSD context or a “major source” in the Title V context. To the extent its regulations purport to do so, they are invalid. EPA may, however, continue to treat greenhouse gases as a “pollutant subject to regulation under this chapter” for purposes of requiring BACT for [sources already subject to permitting regulation]. The judgment of the Court of Appeals is affirmed in part and reversed in part.

#### **Note 8-32(a)(1)**

Justice Scalia’s analysis in *Utility Air Regulatory Group* follows classic *Chevron* lines. He begins by rejecting the D.C. Circuit’s conclusion that Congress unambiguously required PSD and Title V permits for stationary sources of greenhouse gas emissions—that’s Step One. Since Congress did not speak clearly, the question becomes whether the agency’s interpretation was permissible/reasonable. At Step Two, Justice Scalia points out that the EPA itself recognized the danger of a literal extension of the 250/100-ton thresholds: such a rule would drastically expand the agency’s regulatory reach to small entities Congress never contemplated when it drafted the licensing provisions. Justice Scalia rejects the EPA’s regulatory “fix,” finding that the agency cannot replace Congress’s quantitative threshold with its own: instead, it must go back to the regulatory drawing board and craft a rule that complies with the framework and intent of the statutory scheme.

#### **Note 8-32(a)(1)(A)**

Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, dissented from the Court’s holding that the EPA could not interpret the statute to cover stationary sources based on greenhouse-gas emissions. As a starting point, Justice Breyer “agree[d] with the Court that the word ‘any,’ when used in a statute, does not normally mean ‘any in the universe.’” 134 S. Ct. 2427, 2451 (Breyer, J., dissenting in part). Justice Breyer “also agree[d] with the Court’s point that ‘a generic reference to air pollutants’ in the Clean Air Act need not ‘encompass every substance falling within the Act-wide definition.’” *Id.* at 2452.

But, unlike the majority, the dissenters believed the Tailoring Rule could easily have been saved,

and they criticized the majority for what they saw as judicial overreach:

I do not agree with the Court that the only way to avoid an absurd or otherwise impermissible result in these cases is to create an atextual greenhouse gas exception to the phrase “any air pollutant.” After all, the word “any” makes an earlier appearance in the definitional provision, which defines “major emitting facility” to mean “any . . . source with the potential to emit two hundred and fifty tons per year or more of any air pollutant.” As a linguistic matter, one can just as easily read an implicit exception for small-scale greenhouse gas emissions into the phrase “any source” as into the phrase “any air pollutant.” And given the purposes of the PSD program and the Act as a whole, as well as the specific roles of the different parts of the statutory definition, finding flexibility in “any source” is far more sensible than the Court’s route of finding it in “any air pollutant.”

The implicit exception I propose reads almost word for word the same as the Court’s, except that the location of the exception has shifted. To repeat, the Court reads the definition of “major emitting facility” as if it referred to “any source with the potential to emit two hundred fifty tons per year or more of any air pollutant *except for those air pollutants, such as carbon dioxide, with respect to which regulation at that threshold would be impractical or absurd or would sweep in smaller sources that Congress did not mean to cover.*” I would simply move the implicit exception, which I’ve italicized, so that it applies to “source” rather than “air pollutant:” “any *source* with the potential to emit two hundred fifty tons per year or more of any air pollutant *except for those sources, such as those emitting unmanageably small amounts of greenhouse gases, with respect to which regulation at that threshold would be impractical or absurd or would sweep in smaller sources that Congress did not mean to cover.*”

*Id.* at 2452–53. Justice Breyer argued that this interpretation would better serve the threshold’s purpose (“to limit the PSD program’s obligations to larger sources while exempting the many small sources”); maintain the Act’s flexibility; and remain faithful to *Massachusetts*:

What sense does it make to read the Act as generally granting the EPA the authority to regulate greenhouse gas emissions and then to read it as denying that power with respect to the programs for large stationary sources at issue here? It is anomalous to read the Act to require the EPA to regulate air pollutants that pose previously unforeseen threats to human health and welfare where “250 tons per year” is a sensible regulatory line but not where, by chemical or regulatory happenstance, a higher line must be drawn.

*Id.* at 2454. Justice Scalia rejoined in a footnote:

Justice Breyer, however, claims to perceive no difference between (a) reading the statute to exclude greenhouse gases from the term “any air pollutant” in the permitting triggers, and (b) reading the statute to exclude sources emitting less than 100,000 tons per year from the statutory phrase “any . . . source with the potential to emit two hundred and fifty tons per year or more.” The two could scarcely be further

apart. As we have explained (and as EPA agrees), statutory context makes plain that the Act's operative provisions use “air pollutant” to denote less than the full range of pollutants covered by the Act-wide definition. It is therefore incumbent on EPA to specify the pollutants encompassed by that term in the context of a particular program, and to do so reasonably in light of that program's overall regulatory scheme.

*Id.* at 2446 n.8 (majority opinion).

**Note 8-32(a)(2)**

The D.C. Circuit in *Coalition for Responsible Regulation, Inc. v. E.P.A.*, 684 F.3d 102, 118–19 (2012), chose not to address the argument that “EPA should have considered at least the ‘absurd’ consequences that would follow from an endangerment finding for greenhouse gases.” Why do you suppose the D.C. Circuit shied away from such an inquiry? It certainly factored into JUSTICE SCALIA’s analysis. If a court believes that the plain language of a statute does not leave room for an agency to consider further regulatory consequences, is the court estopped from considering such consequences itself? Can “absurdity” factor into the analysis at Step One, or—where a court finds an unambiguous textual command—would such analysis constitute judicial overreach?

What *are* the tools of statutory interpretation available at Step One? Might avoidance of an absurd result constitute one such tool? Or is that analysis better left for Step Two?

**Note 8-32(b): *Pereira v. Sessions*, 138 S. Ct. 2105 (2018).**

In *Pereira v. Sessions*, the Court was asked to consider whether receipt of a notice labeled “notice to appear” that did not indicate when or where to appear could trigger the “stop-time rule” of 8 U.S.C.S. § 1229b(d)(1)(A). 138 S. Ct. 2105 (2018). The majority held that, as a matter of unambiguous congressional intent, it did not.

Under 8 U.S.C.S. § 1229b, nonpermanent residents who find themselves in removal proceedings and have ten years of continuous physical presence within the United States may be eligible for a form of discretionary relief called cancellation of removal. Continuous physical presence stops accruing when the government serves a “notice to appear.” § 1229b(d)(1). § 1229(a) specifies a number of pieces of information that the notice to appear will specify, including “[t]he time and place at which the proceedings will be held.” § 1229(a)(1)(G)(i). In 1997, the Attorney General promulgated a regulation that required the notice to appear to include the date, time, and place of the initial removal hearing only where practicable. *Pereira*, 138 S. Ct. at 2111. The Department of Homeland Security (DHS) now regularly serves notices that omit the date, time, and place of the initial removal hearing. *Id.* In *Matter of Camarillo*, 25 I. & N. Dec. 644 (2011), the Board of Immigration Appeals (BIA) considered the question now before the Court, concluding that the reference to § 1229(a) in the § 1229b(d)(1) stop-time rule served only to specify the document DHS must serve, but did not impose “‘substantive requirements’ as to what information that document must include to trigger the stop-time rule.” *Pereira*, at 2111-2 (quoting *Matter of Camarillo*, at 647).

*Pereira* was admitted into the United States in 2000 but overstayed his visa and was issued a notice to appear in 2006. *Id.* at 2112. The notice ordered him to appear before an Immigration Judge in Boston but did not specify a date or a time. *Id.* The Immigration Court attempted to mail *Pereira* an

updated notice when it scheduled his hearing, but DHS provided the wrong mailing address, and the notice was returned as undeliverable. *Id.* Unaware a hearing was scheduled, Pereira did not appear, and the Immigration Court ordered his removal in absentia. *Id.* In 2013, he was detained, and removal proceedings were initiated. *Id.* He applied for cancellation of removal arguing that the stop-time rule was not triggered because the 2006 notice lacked information about the date and time of his hearing. *Id.* The Immigration Court disagreed, finding him ineligible for cancellation and ordering his removal. *Id.* The BIA dismissed Pereira’s appeal, citing *Camarillo*. *Id.* The First Circuit Court of Appeals applied *Chevron*, and finding the stop-rule in § 1229b(d)(1) ambiguous, it held the BIA’s interpretation was permissible. *Id.* at 2112-3.

The Court declined to afford *Chevron* deference to the BIA’s interpretation reasoning that the text provided Congress’s unambiguous intent. “Thus, based on the plain text of the statute, it is clear that to trigger the stop-time rule, the Government must serve a notice to appear that, at the very least, ‘specif[ies]’ the ‘time and place’ of the removal proceedings.” *Id.* at 2114. § 1229b(d)(1) specifically references § 1229(a), which provides “written notice (in this section referred to as a “notice to appear”) . . . specifying . . . [t]he time and place at which the proceedings will be held.” 8 U.S.C.S. § 1229(a)(1)(G)(i). Paragraph 2 supports the Court’s reading because notice of a change in the time or place of proceedings would be unnecessary if a time and place was not already given. *Pereira*, at 2114. The Court found similar support in § 1229(b)(1). In the Court’s view, the government could not reasonably expect noncitizens to appear if the notice they received did specify a time and place. “Common sense compels the conclusion that a notice that does not specify when and where to appear for a removal proceeding is not a ‘notice to appear’ that triggers the stop-time rule.” *Pereira*, at 2115.

Concurring in the Court’s opinion in full, Justice Kennedy wrote separately to lament the use of *Chevron* to provide cover for the Courts of Appeals’ “cursory analysis.” *Id.* at 2120 (Kennedy, J., concurring). “Reflexive deference . . . is troubling,” especially when applied to “an agency’s interpretation of the statutory provisions that concern the scope of its own authority.” *Id.* “Given the concerns raised by some Members of this Court, see, e.g., [Chief Justice Roberts, Justice Thomas, Justice Gorsuch], it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision.” *Id.* at 2121.

**Note 8-32(c): *NRDC v. EPA*, No. 16-1413, 2018 U.S. App. LEXIS 20208 (D.C. Cir. July 20, 2018).**

Considering a petition for review of an EPA rule defining “natural event” in the context of the exceptional-event provision of Clean Air Act (CAA), the court found that Congress had left a gap it intended the EPA to fill, and that the EPA’s interpretation was reasonable.

Under 42 U.S.C.S. § 7619(b)(1)(A), regulated areas will not be punished for impermissible pollutant levels caused by an “exceptional event.” One feature of an exceptional event is that it is unlikely to recur. *Id.* However, even a recurring event could be exceptional if it is a “natural event.” § (b)(1)(A)(iii). Since the CAA does not define “natural event,” the EPA undertook to define it:

Natural event means an event and its resulting emissions, which may recur at the same location, in which human activity plays little or no direct causal role. For purposes of the definition of a natural event, anthropogenic sources that are reasonably controlled shall be considered to not play a direct role in causing

emissions.

81 Fed. Reg. at 68,277 (codified at 40 C.F.R. § 50.1(k)). As a result, any event caused by reasonably controlled human activity is a natural event if there is at least some natural activity.

The petitioners argued the definition stretched the meaning of “natural event” too far and that the EPA should distinguish between different categories of human activity for the purpose of characterizing events as natural. The court evaluated the rule under *Chevron*.

The meaning of “natural event” was ambiguous. “By pairing ‘natural event’ alongside ‘an event caused by human activity,’ the Act uses the phrase as a tool to separate events into the two categories, requiring it to carry a special meaning.” *NRDC*, at \*9 (quoting 42 U.S.C.S. § 7619(b)(1)(A)(iii)). Considering that many events may be caused by both natural and human activities, the court concluded that the line across which a human contribution to a natural event became a human event was the EPA’s line to draw. *Id.*

Citing *Brand X*, the court considered whether the rule fills the statutory gap in a reasonable way. *Id.* at \*10. The court indulged hypotheticals with the petitioners but ultimately concluded that, although “extreme and unforeseen applications of the rule might have problematic results, the 2016 Rule still passes muster under *Chevron* step two.” *Id.* at \*13.

**§ 8.06, p. 820: Insert after *Chemical Manufacturers Ass’n*.**

**Note 8-36(a): *E.P.A. v. EME Homer City Generation, L.P.***

In *E.P.A. v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014), the Supreme Court considered congressional and regulatory efforts to cope with transient air pollution that spreads from its state of origin to neighboring states. The Clean Air Act features a “Good Neighbor” provision that requires states to prohibit local emissions that will significantly interfere with downwind air quality. Responding to this provision, the EPA adopted a cross-state air pollution rule (the “Transport Rule”), a two-step approach whereby the agency (1) screens out states with a de minimis contribution to cross-state air pollution and (2) determines the quantity of transient emissions that the remaining states could eliminate at different price points. EPA then uses this information to develop annual emissions budgets for the regulated upwind states.

A consortium of state and local governments, industry representatives, and labor groups sought review. The D.C. Circuit invalidated the Transport Rule, holding that the “Good Neighbor” provision requires the EPA to consider *only* the proportionate responsibility of each upwind state—not the cost of preventing emissions in one place or another. The court also opined that the Transport Rule might result in overregulation, requiring states to reduce their transient pollution beyond the requirements of the “Good Neighbor” provision.

The Supreme Court reversed. Writing for the court, JUSTICE GINSBURG observed that “[w]e routinely accord dispositive effect to an agency’s reasonable interpretation of ambiguous statutory language.” *Id.* at 1603. She explained that the “Good Neighbor” provision delegates authority to the EPA in much the same way as the Clean Air Act provisions at issue in *Chevron*: the EPA is statutorily required to reduce upwind pollution, but it falls to the agency to determine how best to

allocate responsibility across multiple polluter-states. Where the statute is silent as to the division of such responsibility, the Court must “read Congress’ silence as a delegation of authority to EPA to select from among reasonable options.” *Id.* at 1604. The agency’s decision to consider cost as part of its metric was consistent with the “Good Neighbor” provision, and it was logical as well— “[e]liminating those amounts that can cost-effectively be reduced is an efficient and equitable solution to the allocation problem.” *Id.* at 1607.

In short, JUSTICE GINSBURG concluded that the “Good Neighbor” provision does not require the EPA to disregard costs and consider *only* proportionate responsibility for downwind emissions: the Transport Rule is a “permissible, workable, and equitable interpretation” of the statute. *Id.* at 1610.

**§ 8.07, p. 837: Insert after note 8-42.**

**Note 8-42(a): *Perez v. Mortgage Bankers Ass’n* and *Auer* deference**

In separate opinions concurring in the judgment in *Perez v. Mortgage Bankers Ass’n*, discussed *supra* in Note 5-59, Justices Scalia and Thomas agreed that the One-Bite Rule of *Paralyzed Veterans* was incompatible with the APA. However, as in *Decker*, the concurrences raised serious concerns about the *Auer* doctrine.

Justice Scalia opined:

By giving . . . . interpretive rules *Auer* deference, we do more than allow the agency to make binding regulations without notice and comment. Because the agency (not Congress) drafts the substantive rules that are the object of those interpretations, giving them deference allows the agency to control the extent of its notice-and-comment-free domain. To expand this domain, the agency need only write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment. The APA does not remotely contemplate this regime.

*Id.* at 1212 (Scalia, J., concurring in judgment). Justice Thomas raised separations-of-powers concerns in his concurrence: “Because this doctrine effects a transfer of the judicial power to an executive agency, it raises constitutional concerns. This line of precedents undermines our obligation to provide a judicial check on the other branches, and it subjects regulated parties to precisely the abuses that the Framers sought to prevent.” *Id.* at 1213 (Thomas, J., concurring in judgment).

**§ 8.07, p. 853: Insert after note 8-48.**

**Note 8-48(a): *King v. Burwell***

135 S. Ct. 2480 (2015).  
SUPREME COURT OF THE UNITED STATES  
**KING v. BURWELL**  
No. 14-114 | Argued March 4, 2015 | Decided June 25, 2015

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Patient Protection and Affordable Care Act adopts a series of interlocking reforms designed to expand coverage in the individual health insurance market. First, the Act bars insurers from taking a person’s health into account when deciding whether to sell health insurance or how much to charge. Second, the Act generally requires each person to maintain insurance coverage or make a payment to the Internal Revenue Service. And third, the Act gives tax credits to certain people to make insurance more affordable.

In addition to those reforms, the Act requires the creation of an “Exchange” in each State—basically, a marketplace that allows people to compare and purchase insurance plans. The Act gives each State the opportunity to establish its own Exchange, but provides that the Federal Government will establish the Exchange if the State does not.

This case is about whether the Act’s interlocking reforms apply equally in each State no matter who establishes the State’s Exchange. Specifically, the question presented is whether the Act’s tax credits are available in States that have a Federal Exchange.

II

The Affordable Care Act addresses tax credits in what is now Section 36B of the Internal Revenue Code. That section provides: “In the case of an applicable taxpayer, there shall be allowed as a credit against the tax imposed by this subtitle ... an amount equal to the premium assistance credit amount.” 26 U.S.C. § 36B(a). Section 36B then defines the term “premium assistance credit amount” as “the sum of the *premium assistance amounts* determined under paragraph (2) with respect to all *coverage months* of the taxpayer occurring during the taxable year.” § 36B(b)(1) (emphasis added). Section 36B goes on to define the two italicized terms—“premium assistance amount” and “coverage month”—in part by referring to an insurance plan that is enrolled in through “an Exchange established by the State under [42 U.S.C. § 18031].” 26 U.S.C. §§ 36B(b)(2)(A), (c)(2)(A)(i).

The parties dispute whether Section 36B authorizes tax credits for individuals who enroll in an insurance plan through a Federal Exchange. Petitioners argue that a Federal Exchange is not “an Exchange established by the State under [42 U.S.C. § 18031],” and that the IRS Rule therefore contradicts Section 36B. Brief for Petitioners 18–20. The Government responds that the IRS Rule is lawful because the phrase “an Exchange established by the State under [42 U.S.C. § 18031]” should be read to include Federal Exchanges. Brief for Respondents 20–25.

When analyzing an agency’s interpretation of a statute, we often apply the two-step framework announced in *Chevron*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694. Under that framework, we ask whether the statute is ambiguous and, if so, whether the agency’s interpretation is reasonable. *Id.*, at 842–843, 104 S.Ct. 2778. This approach “is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000). “In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.” *Ibid.*

This is one of those cases. The tax credits are among the Act’s key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep “economic and political significance” that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly. *Utility Air Regulatory Group v. EPA*, 573 U.S. —, —, 134 S.Ct. 2427, 2444, 189 L.Ed.2d 372 (2014) (quoting *Brown & Williamson*, 529 U.S., at 160, 120 S. Ct. 1291). It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort. See *Gonzales v. Oregon*, 546 U.S. 243, 266–267, 126 S.Ct. 904, 163 L.Ed.2d 748 (2006). This is not a case for the IRS.

It is instead our task to determine the correct reading of Section 36B. If the statutory language is plain, we must enforce it according to its terms. *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251, 130 S.Ct. 2149, 176 L.Ed.2d 998 (2010). But oftentimes the “meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.” *Brown & Williamson*, 529 U.S., at 132, 120 S.Ct. 1291. So when deciding whether the language is plain, we must read the words “in their context and with a view to their place in the overall statutory scheme.” *Id.*, at 133, 120 S.Ct. 1291 (internal quotation marks omitted). Our duty, after all, is “to construe statutes, not isolated provisions.” *Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290, 130 S.Ct. 1396, 176 L.Ed.2d 225 (2010) (internal quotation marks omitted).

## A

...

First, all parties agree that a Federal Exchange qualifies as “an Exchange” for purposes of Section 36B. See Brief for Petitioners 22; Brief for Respondents 22. Section 18031 provides that “[e]ach State shall ... establish an American Health Benefit Exchange ... for the State.” § 18031(b)(1). Although phrased as a requirement, the Act gives the States “flexibility” by allowing them to “elect” whether they want to establish an Exchange. § 18041(b). If the State chooses not to do so, Section 18041 provides that the Secretary “shall ... establish and operate such Exchange within the State.” § 18041(c)(1) (emphasis added).

Second, we must determine whether a Federal Exchange is “established by the State” for purposes of Section 36B. At the outset, it might seem that a Federal Exchange cannot fulfill this requirement. After all, the Act defines “State” to mean “each of the 50 States and the District of Columbia”—a definition that does not include the Federal Government. 42 U.S.C. § 18024(d). But when read in context, “with a view to [its] place in the overall statutory scheme,” the meaning of the phrase



“established by the State” is not so clear. *Brown & Williamson*, 529 U.S., at 133, 120 S.Ct. 1291 (internal quotation marks omitted). . . .

Third, we must determine whether a Federal Exchange is established “under [42 U.S.C. § 18031].” This too might seem a requirement that a Federal Exchange cannot fulfill, because it is Section 18041 that tells the Secretary when to “establish and operate such Exchange.” But here again, the way different provisions in the statute interact suggests otherwise.

The Act defines the term “Exchange” to mean “an American Health Benefit Exchange established under section 18031.” § 300gg–91(d)(21). If we import that definition into Section 18041, the Act tells the Secretary to “establish and operate such ‘American Health Benefit Exchange established under section 18031.’” That suggests that Section 18041 authorizes the Secretary to establish an Exchange under Section 18031, not (or not only) under Section 18041. Otherwise, the Federal Exchange, by definition, would not be an “Exchange” at all. See *Halbig*, 758 F.3d, at 399–400 (acknowledging that the Secretary establishes Federal Exchanges under Section 18031). . . .

The upshot of all this is that the phrase “an Exchange established by the State under [42 U.S.C. § 18031]” is properly viewed as ambiguous. The phrase may be limited in its reach to State Exchanges. But it is also possible that the phrase refers to all Exchanges—both State and Federal—at least for purposes of the tax credits. If a State chooses not to follow the directive in Section 18031 that it establish an Exchange, the Act tells the Secretary to establish “such Exchange.” § 18041. And by using the words “such Exchange,” the Act indicates that State and Federal Exchanges should be the same. But State and Federal Exchanges would differ in a fundamental way if tax credits were available only on State Exchanges—one type of Exchange would help make insurance more affordable by providing billions of dollars to the States' citizens; the other type of Exchange would not. . . .

[W]e “must do our best, bearing in mind the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *Utility Air Regulatory Group*, 573 U.S., at —, 134 S.Ct., at 2441 (internal quotation marks omitted). After reading Section 36B along with other related provisions in the Act, we cannot conclude that the phrase “an Exchange established by the State under [Section 18031]” is unambiguous.

## B

Given that the text is ambiguous, we must turn to the broader structure of the Act to determine the meaning of Section 36B. “A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme. . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.” . . .

Under petitioners’ reading, however, the Act would operate quite differently in a State with a Federal Exchange. As they see it, one of the Act's three major reforms—the tax credits—would not apply. And a second major reform—the coverage requirement—would not apply in a meaningful way. As explained earlier, the coverage requirement applies only when the cost of buying health insurance (minus the amount of the tax credits) is less than eight percent of an individual’s income. 26 U.S.C. §§ 5000A(e)(1)(A), (e)(1)(B)(ii). So without the tax credits, the coverage requirement would apply to fewer individuals. And it would be a lot fewer. In 2014, approximately 87 percent

of people who bought insurance on a Federal Exchange did so with tax credits, and virtually all of those people would become exempt. HHS, A. Burke, A. Misra, & S. Sheingold, *Premium Affordability, Competition, and Choice in the Health Insurance Marketplace* 5 (2014); Brief for Bipartisan Economic Scholars as *Amici Curiae* 19–20. If petitioners are right, therefore, only one of the Act’s three major reforms would apply in States with a Federal Exchange.

The combination of no tax credits and an ineffective coverage requirement could well push a State’s individual insurance market into a death spiral. One study predicts that premiums would increase by 47 percent and enrollment would decrease by 70 percent. E. Saltzman & C. Eibner, *The Effect of Eliminating the Affordable Care Act’s Tax Credits in Federally Facilitated Marketplaces* (2015). Another study predicts that premiums would increase by 35 percent and enrollment would decrease by 69 percent. L. Blumberg, M. Buettgens, & J. Holahan, *The Implications of a Supreme Court Finding for the Plaintiff in King vs. Burwell: 8.2 Million More Uninsured and 35% Higher Premiums* (2015). And those effects would not be limited to individuals who purchase insurance on the Exchanges. Because the Act requires insurers to treat the entire individual market as a single risk pool, 42 U.S.C. § 18032(c)(1), premiums outside the Exchange would rise along with those inside the Exchange. Brief for Bipartisan Economic Scholars as *Amici Curiae* 11–12.

It is implausible that Congress meant the Act to operate in this manner. See *National Federation of Independent Business v. Sebelius*, 567 U.S. —, —, 132 S.Ct. 2566, 2674, 183 L.Ed.2d 450 (2012) (SCALIA, KENNEDY, THOMAS, and ALITO, JJ., dissenting) (“Without the federal subsidies ... the exchanges would not operate as Congress intended and may not operate at all.”). Congress made the guaranteed issue and community rating requirements applicable in every State in the Nation. But those requirements only work when combined with the coverage requirement and the tax credits. So it stands to reason that Congress meant for those provisions to apply in every State as well. . . .

...

## D

Petitioners’ arguments about the plain meaning of Section 36B are strong. But while the meaning of the phrase “an Exchange established by the State under [42 U.S.C. § 18031]” may seem plain “when viewed in isolation,” such a reading turns out to be “untenable in light of [the statute] as a whole.” *Department of Revenue of Ore. v. ACF Industries, Inc.*, 510 U.S. 332, 343, 114 S.Ct. 843, 127 L.Ed.2d 165 (1994). In this instance, the context and structure of the Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase.

Reliance on context and structure in statutory interpretation is a “subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself.” *Palmer v. Massachusetts*, 308 U.S. 79, 83, 60 S.Ct. 34, 84 L.Ed. 93 (1939). For the reasons we have given, however, such reliance is appropriate in this case, and leads us to conclude that Section 36B allows tax credits for insurance purchased on any Exchange created under the Act. Those credits are necessary for the Federal Exchanges to function like their State Exchange counterparts, and to avoid the type of calamitous result that Congress plainly meant to avoid.

...

In a democracy, the power to make the law rests with those chosen by the people. Our role is more confined—“to say what the law is.” *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803). That is easier in some cases than in others. But in every case we must respect the role of the Legislature, and take care not to undo what it has done. A fair reading of legislation demands a fair understanding of the legislative plan.

Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter. Section 36B can fairly be read consistent with what we see as Congress’s plan, and that is the reading we adopt.

The judgment of the United States Court of Appeals for the Fourth Circuit is

*Affirmed.*

JUSTICE SCALIA, with whom JUSTICE THOMAS and JUSTICE ALITO join, dissenting.

...

This case requires us to decide whether someone who buys insurance on an Exchange established by the Secretary gets tax credits. You would think the answer would be obvious—so obvious there would hardly be a need for the Supreme Court to hear a case about it. In order to receive any money under § 36B, an individual must enroll in an insurance plan through an “Exchange established by the State.” The Secretary of Health and Human Services is not a State. So an Exchange established by the Secretary is not an Exchange established by the State—which means people who buy health insurance through such an Exchange get no money under § 36B.

Words no longer have meaning if an Exchange that is not established by a State is “established by the State.” It is hard to come up with a clearer way to limit tax credits to state Exchanges than to use the words “established by the State.” And it is hard to come up with a reason to include the words “by the State” other than the purpose of limiting credits to state Exchanges. “[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.” *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370, 45 S.Ct. 274, 69 L.Ed. 660 (1925) (internal quotation marks omitted). Under all the usual rules of interpretation, in short, the Government should lose this case. But normal rules of interpretation seem always to yield to the overriding principle of the present Court: The Affordable Care Act must be saved.

## II

... I wholeheartedly agree with the Court that sound interpretation requires paying attention to the whole law, not homing in on isolated words or even isolated sections. Context always matters. Let us not forget, however, why context matters: It is a tool for understanding the terms of the law, not an excuse for rewriting them.

Any effort to understand rather than to rewrite a law must accept and apply the presumption that

lawmakers use words in “their natural and ordinary signification.” *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U.S. 1, 12, 24 L.Ed. 708 (1878). Ordinary connotation does not always prevail, but the more unnatural the proposed interpretation of a law, the more compelling the contextual evidence must be to show that it is correct. Today’s interpretation is not merely unnatural; it is unheard of. Who would ever have dreamt that “Exchange established by the State” means “Exchange established by the State or the Federal Government”? Little short of an express statutory definition could justify adopting this singular reading. Yet the only pertinent definition here provides that “State” means “each of the 50 States and the District of Columbia.” 42 U.S.C. § 18024(d). Because the Secretary is neither one of the 50 States nor the District of Columbia, that definition positively contradicts the eccentric theory that an Exchange established by the Secretary has been established by the State. . . .

Equating establishment “by the State” with establishment by the Federal Government makes nonsense of other parts of the Act. The Act requires States to ensure (on pain of losing Medicaid funding) that any “Exchange established by the State” uses a “secure electronic interface” to determine an individual’s eligibility for various benefits (including tax credits). 42 U.S.C. § 1396w–3(b)(1)(D). How could a State control the type of electronic interface used by a federal Exchange? The Act allows a State to control contracting decisions made by “an Exchange established by the State.” § 18031(f)(3). Why would a State get to control the contracting decisions of a federal Exchange? The Act also provides “Assistance to States to establish American Health Benefit Exchanges” and directs the Secretary to renew this funding “if the State ... is making progress ... toward ... establishing an Exchange.” § 18031(a). Does a State that refuses to set up an Exchange still receive this funding, on the premise that Exchanges established by the Federal Government are really established by States? It is presumably in order to avoid these questions that the Court concludes that federal Exchanges count as state Exchanges only “for purposes of the tax credits.” *Ante*, at 2491. (Contrivance, thy name is an opinion on the Affordable Care Act!) . . .

Faced with overwhelming confirmation that “Exchange established by the State” means what it looks like it means, the Court comes up with argument after feeble argument to support its contrary interpretation. None of its tries comes close to establishing the implausible conclusion that Congress used “by the State” to mean “by the State or not by the State.” . . .

The Court persists that [key] provisions “would make little sense” if no tax credits were available on federal Exchanges. *Ante*, at 2492. Even if that observation were true, it would show only oddity, not ambiguity. Laws often include unusual or mismatched provisions. The Affordable Care Act spans 900 pages; it would be amazing if its provisions all lined up perfectly with each other. This Court “does not revise legislation ... just because the text as written creates an apparent anomaly.” *Michigan v. Bay Mills Indian Community*, 572 U.S. —, —, 134 S.Ct. 2024, 2033, 188 L.Ed.2d 1071 (2014). At any rate, the provisions cited by the Court are not particularly unusual. Each requires an Exchange to perform a standardized series of tasks, some aspects of which relate in some way to tax credits. It is entirely natural for slight mismatches to occur when, as here, lawmakers draft “a single statutory provision” to cover “different kinds” of situations. *Roberts v. United States*, 572 U.S. —, —, 134 S.Ct. 1854, 1858, 188 L.Ed.2d 885 (2014). Lawmakers need not, and often do not, “write extra language specifically exempting, phrase by phrase, applications in respect to which a portion of a phrase is not needed.” *Ibid.* . . .

### III

For its next defense of the indefensible, the Court turns to the Affordable Care Act's design and purposes. As relevant here, the Act makes three major reforms. The guaranteed-issue and community-rating requirements prohibit insurers from considering a customer's health when deciding whether to sell insurance and how much to charge, 42 U.S.C. §§ 300gg, 300gg-1; its famous individual mandate requires everyone to maintain insurance coverage or to pay what the Act calls a "penalty," 26 U.S.C. § 5000A(b)(1), and what we have nonetheless called a tax, see *National Federation of Independent Business v. Sebelius*, 567 U.S. —, —, 132 S.Ct. 2566, 2597–2598, 183 L.Ed.2d 450 (2012); and its tax credits help make insurance more affordable. The Court reasons that Congress intended these three reforms to "work together to expand insurance coverage"; and because the first two apply in every State, so must the third. *Ante*, at 2493. . . .

The Court protests that without the tax credits, the number of people covered by the individual mandate shrinks, and without a broadly applicable individual mandate the guaranteed-issue and community-rating requirements "would destabilize the individual insurance market." *Ante*, at 2493. If true, these projections would show only that the statutory scheme contains a flaw; they would not show that the statute means the opposite of what it says. Moreover, it is a flaw that appeared as well in other parts of the Act. A different title established a long-term-care insurance program with guaranteed-issue and community-rating requirements, but without an individual mandate or subsidies. §§ 8001–8002, 124 Stat. 828–847 (2010). This program never came into effect "only because Congress, in response to actuarial analyses predicting that the [program] would be fiscally unsustainable, repealed the provision in 2013." *Halbig*, 758 F.3d, at 410. How could the Court say that Congress would never dream of combining guaranteed-issue and community-rating requirements with a narrow individual mandate, when it combined those requirements with no individual mandate in the context of long-term-care insurance?

Worst of all for the repute of today's decision, the Court's reasoning is largely self-defeating. The Court predicts that making tax credits unavailable in States that do not set up their own Exchanges would cause disastrous economic consequences there. If that is so, however, wouldn't one expect States to react by setting up their own Exchanges? And wouldn't that outcome satisfy two of the Act's goals rather than just one: enabling the Act's reforms to work and promoting state involvement in the Act's implementation? The Court protests that the very existence of a federal fallback shows that Congress expected that some States might fail to set up their own Exchanges. *Ante*, at 2495. So it does. It does not show, however, that Congress expected the number of recalcitrant States to be particularly large. The more accurate the Court's dire economic predictions, the smaller that number is likely to be. That reality destroys the Court's pretense that applying the law as written would imperil "the viability of the entire Affordable Care Act." *Ante*, at 2495. All in all, the Court's arguments about the law's purpose and design are no more convincing than its arguments about context.

#### IV

Perhaps sensing the dismal failure of its efforts to show that "established by the State" means "established by the State or the Federal Government," the Court tries to palm off the pertinent statutory phrase as "inartful drafting." *Ante*, at 2495. This Court, however, has no free-floating power "to rescue Congress from its drafting errors." *Lamie v. United States Trustee*, 540 U.S. 526, 542, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004) (internal quotation marks omitted). Only when it is patently obvious to a reasonable reader that a drafting mistake has occurred may a court correct the mistake. The occurrence of a misprint may be apparent from the face of the law, as it is where the

Affordable Care Act “creates three separate Section 1563s.” *Ante*, at 2492. But the Court does not pretend that there is any such indication of a drafting error on the face of § 36B. The occurrence of a misprint may also be apparent because a provision decrees an absurd result—a consequence “so monstrous, that all mankind would, without hesitation, unite in rejecting the application.” *Sturges*, 4 Wheat., at 203. But § 36B does not come remotely close to satisfying that demanding standard. It is entirely plausible that tax credits were restricted to state Exchanges deliberately—for example, in order to encourage States to establish their own Exchanges. We therefore have no authority to dismiss the terms of the law as a drafting fumble.

## V

The Court’s decision reflects the philosophy that judges should endure whatever interpretive distortions it takes in order to correct a supposed flaw in the statutory machinery. That philosophy ignores the American people’s decision to give Congress “[a]ll legislative Powers” enumerated in the Constitution. Art. I, § 1. They made Congress, not this Court, responsible for both making laws and mending them. This Court holds only the judicial power—the power to pronounce the law as Congress has enacted it. We lack the prerogative to repair laws that do not work out in practice, just as the people lack the ability to throw us out of office if they dislike the solutions we concoct. We must always remember, therefore, that “[o]ur task is to apply the text, not to improve upon it.” *Pavelic & LeFlore v. Marvel Entertainment Group, Div. of Cadence Industries Corp.*, 493 U.S. 120, 126, 110 S.Ct. 456, 107 L.Ed.2d 438 (1989).

\* \* \*

Today’s opinion changes the usual rules of statutory interpretation for the sake of the Affordable Care Act. That, alas, is not a novelty. In *National Federation of Independent Business v. Sebelius*, 567 U.S. —, 132 S.Ct. 2566, 183 L.Ed.2d 450 this Court revised major components of the statute in order to save them from unconstitutionality. The Act that Congress passed provides that every individual “shall” maintain insurance or else pay a “penalty.” 26 U.S.C. § 5000A. This Court, however, saw that the Commerce Clause does not authorize a federal mandate to buy health insurance. So it rewrote the mandate-cum-penalty as a tax. 567 U.S., at — — —, 132 S.Ct., at 2583–2601 (principal opinion). The Act that Congress passed also requires every State to accept an expansion of its Medicaid program, or else risk losing all Medicaid funding. 42 U.S.C. § 1396c. This Court, however, saw that the Spending Clause does not authorize this coercive condition. So it rewrote the law to withhold only the incremental funds associated with the Medicaid expansion. 567 U.S., at — — —, 132 S.Ct., at 2601–2608 (principal opinion). Having transformed two major parts of the law, the Court today has turned its attention to a third. The Act that Congress passed makes tax credits available only on an “Exchange established by the State.” This Court, however, concludes that this limitation would prevent the rest of the Act from working as well as hoped. So it rewrites the law to make tax credits available everywhere. We should start calling this law SCOTUScare.

I dissent.

### **Note 8-43(a)**

Note that the Court in *Burwell* declined to categorize this as a case invoking *Chevron* deference. Why? How does this case compare to *FDA v. Brown & Williamson Tobacco Co.* and *Gonzales v. Oregon*? What makes a case an extraordinary case?

**Note 8-43(b)**

According to the majority, Congress could not possibly have meant to delegate this interpretive power to the IRS – an entity that does not deal with health insurance. But isn't this case also about tax credits generally and isn't that fair game for the IRS to administer? Isn't that part of their expertise? Or is what is at issue in this delegation discussion something akin to delegating to a federal agency the power to effectively declare an Act of Congress unconstitutional? This, of course, was not the outcome, given the way the IRS interpreted the statute in this case, but if petitioners' statutory interpretation were to be accepted, it would have substantially undermined the effectiveness of the Act and do so in a way that was very much at odds with what Congress appears to have intended. Is that why the Court did not invoke *Chevron*?

**Note 8-43(c)**

After establishing that this case did not present a *Chevron* concern, the Court looks at the overall structure and purpose of the Act to determine that the petitioners' argument would render the act meaningless and have a lasting economic impact. What impact does this portion of the opinion have on future administrations and IRS commissioners? Could a future IRS Commissioner in a new administration change the outcome here by choosing to re-interpret the Act so as to limit its implementation to the "plain meaning" of the law? Or would the holdings in *Burwell* and *National Cable & Telecommunications Ass'n v. Brand X Internet Services* preclude this possibility?

**§ 8.07, p. 859: Insert after note 8-51.**

**Note 8-51(a)**

Is the Court's opinion in *King v. Burwell* consistent with the holding in *City of Arlington*? How would you reconcile these two cases? Is this the beginning or perhaps the middle of the end of *Chevron* deference as we have known it?

**Insert after § 8.08[A]**

**§ 8.08, p. 869: *Wyoming v. Bureau of Land Management***

On March 26, 2015, the BLM published its final rule regarding hydraulic fracking. Soon after, several states challenged the rule, arguing that "it was arbitrary, not in accordance with law, and in excess of BLM's statutory jurisdiction and authority." In *Wyoming v. Bureau of Land Management (BLM)*, Nos. 2:15-cv-043-SWS, 2:15-CV-041-SES, 2016 WL 3509415 (June 21, 2016) (appeal pending), the district court found that Congress had not delegated to BLM the authority to make the rule, and it was thus invalid.

**§ 8.08, p.885: Insert after note 8-58**

**Note 8-58(a)**

Under the proposed Regulatory Accountability Act (RAA), regulations that would potentially have either a billion-dollar annual economic effect (high-impact rule) or an annual effect of over \$100 million (major rules) have extra steps in their approval processes. See S. 951 -115 congress (2017-2018), Regulatory Accountability Act of 2017, available at <https://www.congress.gov/bill/115th-congress/senate-bill/951> (there is a similarly titled bill that passed the House in January that is more expansive. See. H.R. 5 -115 Congress (2017-2018),

Regulatory Accountability Act, available at: <https://www.congress.gov/bill/115th-congress/house-bill/5>. We will refer to the Senate version unless otherwise noted since it may be more likely to pass in this form.) The RAA would require higher scrutiny from OIRA for both high-impact and major rules. In addition to the standard OIRA submission, for any major rule or high-impact rule, an agency would have to submit a discussion of alternatives and a preliminary explanation of how the rule meets statutory objectives and how benefits justify costs. When OIRA allows the rule to progress, the agency would have to publish responses to comments and criticisms of both the rule and the cost benefit analysis required by the RAA. S. 951 § (3)(f)(2). The RAA's section four makes several substantial changes to the role of judicial review. Attorneys General from New York, California, Delaware, Iowa, Maine, Maryland, Massachusetts, Oregon, Rhode Island, Vermont, Washington, and the District of Columbia wrote to express their opposition to the RAA claiming:

“Under the guise of “modernizing” the federal regulatory process, this legislation promises to bring it to a grinding halt and shows a cynical indifference to the protection, health, and safety of the American people. Nor does the RAA advance the laudable goal of promoting effective regulation. Instead, it surrenders agency authority to deep-pocketed special interests, adds needless, unworkable, and costly steps to an already extensive regulatory process, and opens up multiple new doors to endless litigation. Those changes are deeply troubling and would waylay regulations that protect Americans from toxic exposure, predatory market practices, dangerous labor conditions, unsafe food and drugs, and other harmful conditions.”

Letter from state Attorneys General to Hon. Mitchell McConnell, (June 26, 2017), available at [https://ag.ny.gov/sites/default/files/letter\\_raa\\_6\\_26\\_17\\_final\\_0.pdf](https://ag.ny.gov/sites/default/files/letter_raa_6_26_17_final_0.pdf).

## **§ 8.08[B], p. 895. Insert after note 8-59**

### **Note 8.59(a): *Encino Motorcars LLC v. Navarro***

A case about overtime wage exemptions strengthened the protections against agencies amending past rules without sufficient explanation. In *Encino Motorcars*, the dealership classified their service advisors—employees who attempt to sell vehicle repair and enhancement services—as exempt employees under the Fair Labor Standards Act (FLSA). The Department of Labor (Labor) issued a rule in 1970 exempting salesmen from overtime coverage in accordance with FLSA 9 U.S.C. §213(b)(10)(A), but still held service advisors as subject to overtime pay protections. Courts disagreed with that interpretation of the statute and in 1978, Labor clarified their 1970 rule by stating service advisors were similar to automobile salesmen and thus not entitled to overtime protection. Agency practice held to that understanding until 2011 when the agency issued a final rule stating that salesmen were only those engaged in the buying and selling of automobiles. The employees in question thought they were owed back overtime pay and sued, losing the motion to dismiss at the district court level. The Ninth Circuit Court of Appeals reversed in favor of the employees by citing Chevron deference to Labor’s 2011 rulemaking procedure.

Justice Kennedy disagreed with the 9th Circuit’s reasoning primarily because of deficiencies in the 2011 rulemaking opinion. Labor’s biggest mistake, he maintained, was not enumerating the “good reasons” that might exist for the policy change. All eight justices (decided after Justice Scalia’s



passing) agreed with the core outcome that Labor’s 2011 rule was defective and not deserving of *Chevron* deference, but Justices Thomas and Alito would have decided the merits of the underlying claim, finding for the employees. Instead, the 6-2 majority remanded the case to the 9th Circuit for resolution without *Chevron* deference.

**§ 8.08, p. 896: Insert after note 8-70.**

**Note 8-71: *Michigan v. EPA***

In *Michigan v. EPA*, a sharply divided Supreme Court considered whether and how the EPA was required to consider cost in finding that regulating pollutant emissions was “appropriate and necessary” under the Clean Air Act. 135 S. Ct. 2699 (2015). The National Emissions Standards for Hazardous Air Pollutants Program, established by the act, requires the EPA to regulate stationary sources of air pollutants that meet a threshold emission level. Power plants, however, are excluded from that program. Rather, the EPA was directed to “perform a study of the hazards to public health reasonably anticipated to occur as a result of emissions by [power plants]” and, if the EPA found regulation “appropriate and necessary,” the EPA was required to regulate the power plants. *Id.* at 2705 (quoting 42 U.S.C. § 7412(n)(1)(A)). As a result of the study,

The Agency found regulation “appropriate” because (1) power plants’ emissions . . . posed risks to human health and the environment and (2) controls were available to reduce these emissions. It found regulation “necessary” because the imposition of the Act’s other requirements did not eliminate these risks. EPA concluded that “costs should not be considered” when deciding whether power plants should be regulated . . . .

*Id.* The EPA issued a regulatory impact analysis along with its regulation, estimating that the regulation would cost power plants 9.6 billion dollars per year:

The Agency could not fully quantify the benefits of reducing power plants’ emissions of hazardous air pollutants; to the extent it could, it estimated that these benefits were worth \$4 to \$6 million per year. The costs to power plants were thus between 1,600 and 2,400 times as great as the quantifiable benefits from reduced emissions . . . . The Agency continued that its regulations would have ancillary benefits—including cutting power plants’ emissions of . . . substances that are not covered by the hazardous-air-pollutants program. . . . Although the Agency’s appropriate-and-necessary finding did not rest on these ancillary effects, the regulatory impact analysis took them into account, increasing the Agency’s estimate of the quantifiable benefits of its regulation to \$37 to \$90 billion per year. EPA concedes that the regulatory impact analysis “played no role” in its appropriate-and-necessary finding.

*Id.* at 2706. The five-member majority, led by Justice Scalia, characterized the inquiry in this way:

“We must decide whether it was reasonable for EPA to refuse to consider cost when making this finding [that regulation was appropriate and necessary].” *Id.* at 2704. The Court acknowledged the deference due to “an agency’s reasonable resolution of

an ambiguity in a statute” under *Chevron*, *infra*, but iterated that “agencies must operate within the bounds of reasonable interpretation.” *Id.* at 2707.

The Court determined that “appropriate and necessary” was a capacious term that certainly included cost:

EPA’s interpretation precludes the Agency from considering *any* type of cost—including, for instance, harms that regulation might do to human health or the environment. The Government concedes that if the Agency were to find that emissions from power plants do damage to human health, but that the technologies needed to eliminate these emissions do even more damage to human health, it would *still* deem regulation appropriate. No regulation is “appropriate” if it does significantly more harm than good.

*Id.* at 2708. The EPA argued that the statute did not require consideration of cost because, while other parts of the Clean Air Act expressly mention cost considerations, the provision at issue did not. The Court was not persuaded:

It is unreasonable to infer that, by expressly making cost relevant to other decisions, the Act implicitly makes cost irrelevant to the appropriateness of regulating power plants. . . . Other parts of the Clean Air Act also expressly mention environmental effects, while [the power plant provision] does not. Yet that did not stop EPA from deeming environmental effects relevant to the appropriateness of regulating power plants.

*Id.* at 2709. The EPA also could not rely upon the Court’s decision in *Whitman v. American Trucking*, discussed *supra* at page 561, which interpreted the phrase “requisite to protect the public health” elsewhere in the Clean Air Act to preclude consideration of cost. As the Court observed, “[a]ppropriate and necessary’ is a far more comprehensive criterion than ‘requisite to protect the public health;’ read fairly and in context, . . . the term plainly subsumes consideration of cost.” *Id.* Accordingly, the Court concluded that the “EPA strayed far beyond [the] bounds [of reasonable interpretation] when it read [the statute] to mean that it could ignore cost when deciding whether to regulate power plants.” *Id.* at 2707.

In the main, Justice Kagan and her fellow dissenters agreed with the majority on the law: “I agree with the majority—let there be no doubt about this—that EPA’s power plant regulation would be unreasonable if ‘[t]he Agency gave cost no thought at all.’” *Id.* at 2714 (Kagan, J., dissenting). However, the dissent characterized the EPA’s actions very differently. While Justice Scalia considered it fatal to not expressly consider cost at step one of the process (in deciding whether to regulate), to the dissent, it was a reasonable, preliminary decision. As Justice Kagan noted,

EPA could not have accurately assessed costs at the time of its ‘appropriate and necessary’ finding. Under the statutory scheme, that finding comes before—years before—the Agency designs emissions standards. And until EPA knows what standards it will establish, it cannot know what costs they will impose.

*Id.* at 2723. Justice Kagan also considered the numerous ways in which the regulatory scheme actually included cost, including by creating “floor standards” that “intrinsically account[] for costs” by using existing power plants as a benchmark, and by categorizing power plants with

“different standards for plants with different cost structures.” *Id.* at 2718. The categorization process ensured that more polluting types of power plants (for example, coal) would not have to match the standards of cleaner types of power plants (for example, natural gas).

In response, the majority disputed the dissent’s factual assertions: “When it deemed regulation of power plants appropriate, EPA said that cost was irrelevant to that determination—not that cost-benefit analysis would be deferred until later.” *Id.* at 2710 (majority opinion). Furthermore, the majority concluded that it was irrelevant what the EPA said about cost considerations at the present because it was, at best, a post hoc rationalization prohibited by *SEC v. Chenery, infra*: “EPA did not say that the parts of the regulatory program mentioned by the dissent prevent the imposition of costs far in excess of benefits. [EPA’s] action must be measured by what [it] did, not by what it might have done.” *Id.* at 2711 (internal quotation omitted) (alterations in original).

The dissent rejected this factual conclusion as well: “[A] court may not strike down agency action without considering the reasons the agency gave. And that is what the majority does. . . . It denies that ‘EPA said . . . that cost-benefit analysis would be deferred until later.’ But EPA said exactly that . . . .” *Id.* at 2725 (Kagan, J., dissenting)

#### **§ 8.08, p. 901: Insert after note 8-70.**

##### **Note 8-71: *Lindeen v. Securities and Exchange Commission***

In *Lindeen v. Securities and Exchange Commission*, two states petitioned for review of a final rule of the Securities and Exchange Commission (SEC) known as Regulation A-Plus, preempting all state registration and qualification requirements for a new class of securities offerings freed from federal-registration requirements so long as issuers complied with certain investor safeguards. 825 F.3d 646 (D.C. Cir. 2016).

The petitioners argued that, because the SEC declined to adopt a qualified-purchaser definition limited to investors with sufficient wealth, revenue or financial sophistication to protect their interests without state protection, Regulation A-Plus failed both parts of *Chevron*. They also argued that the rule should be vacated as arbitrary and capricious because the Commission failed to explain adequately how it protects investors.

In the petitioners’ view, the SEC’s qualified-purchaser definition, which does not restrict Tier-2 sales to wealthy and/or sophisticated investors, contravened the plain meaning of the Securities Act. The court, however, found that the Securities Act did not unambiguously foreclose the SEC’s qualified-purchaser definition. Here, the Act did not define qualified purchaser at all but instead explicitly authorized the SEC to define it. Thus, the petitioners’ invocation of legislative history and long-standing securities law practice were insufficient to overturn the SEC’s definition at step one of *Chevron*. At step two, the court said, where “there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,” we give the regulation “controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.” The petitioners insist that the SEC’s qualified-purchaser definition “is actually ‘manifestly contrary to the statute’ ‘because it imposes no restrictions based on investor wealth, income or sophistication. However, the court noted that Congress explicitly granted the SEC discretion to determine how

best to protect the public and investors, and the SEC, in exercising its discretion, concluded that Tier-2 investors were sufficiently protected by Tier-2's purchase cap and reporting requirements. The court found that the SEC had "cogently explain[ed] why it ha[d] exercised its discretion in a given manner" and its "explanation [was] . . . sufficient to enable us to conclude that [its action] was the product of reasoned decisionmaking."

#### **Note 8-72: Agency Rule Reconsideration**

"The Trump administration says people would drive more and be exposed to increased risk if their cars get better gas mileage, an argument intended to justify freezing Obama-era toughening of fuel standards." The Associated Press, *US Says Driving Would Be Riskier if Fuel Standards Tougher*, N. Y. TIMES (July 31, 2018), <https://www.nytimes.com/aponline/2018/07/31/us/politics/ap-us-trump-mileage-standards.html>.

The draft proposal obtained by the Associated Press is the latest iteration of the Trump administration's ongoing effort to unmake emissions-related regulations. On April 1, then-EPA Administrator, Scott Pruitt announced "the completion of the Midterm Evaluation (MTE) process for the greenhouse gas (GHG) emissions standards for cars and light trucks for model years 2022-2025, and his final determination that, in light of recent data, the current standards are not appropriate and should be revised." News Release, Office of the Administrator, EPA Administrator Pruitt: GHG Emissions Standards for Cars and Light Trucks Should Be Revised (April 2, 2018) (available at <https://www.epa.gov/newsreleases/epa-administrator-pruitt-ghg-emissions-standards-cars-and-light-trucks-should-be>). The announcement also unveiled the start of a "joint process with the National Highway Traffic Safety Administration (NHTSA) to develop a notice and comment rulemaking to set more appropriate GHG emissions standards and Corporate Average Fuel Economy (CAFE) standards." *Id.*

Following the announcement, the EPA published a notice explaining its intention reevaluate GHG emissions. Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022-2025 Light-Duty Vehicles, 83 Fed. Reg. 16077-87 (Apr. 13, 2018). In response, several parties filed suit. *See*, Environmental Law at Harvard, Corporate Average Fuel Economy Standards / Greenhouse Gas Standards, Regulatory Rollback Tracker, <http://environment.law.harvard.edu/2017/09/corporate-average-fuel-economy-standards/> (last visited Aug. 1, 2018).

Also following the announcement, the NHTSA published a proposed rule reconsidering the civil penalty for manufacturers failing to meet corporate average fuel economy (CAFE) standards. Civil Penalties, 83 FR 13904 (proposed Apr. 2, 2018). This coincided with a particularly fraught, separate rulemaking intended to delay the implementation of the previous administration's final rule regarding civil penalties

#### **Note 8-72(a): *NRDC v. NHTSA*, 2018 U.S. App. LEXIS 17881 (2d Cir. 2018).**

The Energy Policy and Conservation Act (EPCA) was enacted to avoid another severe energy crisis by encouraging the creation of programs, among other things, designed to improve the energy efficiency of motor vehicles and other consumer products. 42 U.S.C.S. § 6201(5). The EPCA statutory scheme includes civil penalties for manufacturers that violate CAFE standards established

by law. 49 U.S.C.S. § 32912(b). In 2016, the NHTSA published an interim final rule raising the penalty from \$5.50 per tenth of a mile-per-gallon in excess of the standard to \$14.00 pursuant to the formula required by the Improvement Act. 28 U.S.C.S. § 2461. When industry representatives took exception, the NHTSA issued a compromise final rule, effective January 27, 2017, that delayed implementation of the new penalty until the model year 2019 to give manufacturers time to adjust.

Under the new administration, the NHTSA published final rules delaying the effective date of the civil penalties final rule on four occasions between January 30 and June 27, 2017. On July 12, the NHTSA issued a final rule indefinitely suspending the effective date of the civil penalties rule. Environmental petitioners sought review on July 7, 2017, followed by State petitioners the next day.

NHTSA announced the Suspension Rule without first having undertaken notice and comment, opting instead to invoke the APA's "good cause" exception. *Id.* at 34. The good cause exception applies where the agency has reason to believe notice and comment would be impracticable, unnecessary, or contrary to the public interest. 5 U.S.C.S. § 553(b)(B). According to the court:

Impracticability is fact and context specific, but is generally confined to emergency situations in which a rule would respond to an immediate threat to safety, such as to air travel, or when immediate implementation of a rule might directly impact public safety. [*Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 93 (D.C. Cir. 2012)] (collecting cases). The exception may also be invoked when notice and comment are "unnecessary." This prong "is confined to those situations in which the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry to and to the public." *Id.* at 94 []. And, finally, an agency may invoke the good cause exception if notice and comment would be "contrary to the public interest." Of course, since notice and comment are regarded as beneficial to the public interest, for the exception to apply, the use of notice and comment must actually harm the public interest. *Id.* at 94-5.

Unable to find that the good cause exception applied, the court concluded that the NHTSA exceeded its statutory authority and failed to observe the procedure required by APA § 706(2). The court granted review, vacated the suspension of the civil penalties rule.

**Note 8-72(b):**

For an example of a court ordering an agency to abide by its own regulations, *see*, Press Release, American Immigration Council, Judge Rules USCIS Must Adjudicate Employment Authorization for Asylum Seekers Within 30-Days (Aug. 2, 2018), <https://americanimmigrationcouncil.org/news/judge-rules-uscis-must-adjudicate-employment-authorization-asylum-seekers-within-30-days>.

The INA requires the Attorney General to provide employment authorization to asylees. 8 U.S.C.S. § 1158(c)(1)(B). Applicants for asylum are not entitled to employment authorization, but the Attorney General may provide it to eligible applicants by regulation. § 1158(d)(2). Current regulations allow eligible applicants to request employment authorization 150 days after submitting their asylum application, or if their case has been recommended for approval, when they receive

notice of that recommendation. 8 C.F.R. § 208.7(a)(1). If the asylum application has not been denied before a decision on the employment authorization application has been reached, USCIS must grant or deny employment authorization within 30 days of receiving the request.

Where USCIS regularly delayed the adjudication of work authorization applications beyond the 30 day deadline, a Federal district judge granted the plaintiff's motion for summary judgment and enjoined the defendant, U.S. Citizenship and Immigration Services, from ignoring the adjudication guidelines established in 8 C.F.R. § 208.7(a)(1). *Rosario v. USCIS*, No. C15-0813JLR (W.D. Wash. July 26, 2018).

**Note 8-72(c): *Damus v. Nielsen*, No. 18-578 (JEB), 2018 U.S. Dist. LEXIS 109843 (D.D.C. 2018).**

Plaintiffs made up a class of asylum-seekers that had received a credible fear determination but were denied the opportunity for parole and remained in detention pending a further consideration of their asylum application. They alleged that since 2009, the detention of similarly situated asylum-seekers was governed by the principles and procedures set forth in ICE's "Parole Directive," but with respect to certain ICE Field Offices, the established procedures were ignored in favor of a policy of systematic detention. They supported their claim with evidence of near universal parole denials, where in the past, nearly 90 percent of the asylum-seekers who had passed a credible fear interview were released. Plaintiffs claimed that by ignoring the directive, the defendants had violated the APA, the INA, and the Fifth Amendment Due Process Clause. Defendants filed a motion to dismiss on multiple grounds. Plaintiffs requested a preliminary injunction.

Plaintiffs based their APA claim on the *Accardi* doctrine, which arose from a 1954 Supreme Court case, *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, in which the Court vacated a deportation order issued without procedures conforming to the relevant regulations. *Damus v. Nielsen*, 2018 U.S. Dist. LEXIS 109843, at \*38. Citing a number of cases from the D.C. Circuit and two immigration-specific Second Circuit decisions, the court suggested that *Accardi* required federal agencies to follow their own rules, including burdensome procedural rules that may limit discretionary actions, and that judicial review would be available where rules are ignored to the detriment of the party protected by the rule, even if the rule is a product of internal guidance and not formal regulation. *Id.* at \*39-40. The court concluded that an *Accardi* claim could give rise to a cause of action under APA § 706(2)(A).

Defendants argued that the ICE Directive was not implicated by *Accardi* doctrine because it was not binding on DHS, relying in part, on language in the Directive disclaiming the conferral of any substantive right. The court disagreed. Because "the policies and procedures contained within the Directive establish a set of minimum protections for those seeking asylum, including an opportunity to submit documentation, the availability of an individualized parole interview, and an explanation of the reasons for a parole denial," *id.* at \*43, the Directive fell "squarely within the ambit of those agency actions to which the doctrine may attach," *id.* With respect to the disclaimer, the court pointed to the government's statement at oral argument that the Directive was binding but explained that even without such concession, disclaimer language could not bar application of the *Accardi* doctrine from procedures intended to benefit individuals. *Id.* at \*44-6.

Concluding that the *Accardi* doctrine could apply to the Directive, the court next considered the merits of plaintiffs' claim. Plaintiffs' supplied evidence that the five ICE Field Offices at issue were

denying 92 to 100 percent of the parole applications they received. *Id.* at \*47. This, they noted, was a marked departure from a few years prior when parole applications were granted in 90 percent of cases. *Id.* at \*48. Plaintiffs' also submitted declarations from asylum-seekers and immigration attorneys demonstrating that similarly situated applicants routinely granted parole in the past were being denied in the present. *Id.* at \*52. Defendants offered no statistics of their own and offered no explanation for how implementation of the same Directive could produce such conflicting results. *Id.* at \*50-1. Defendants' own declarations did little to refute the substantial evidence that the Directive was not followed and, in some cases, tended to support plaintiffs' position. *Id.* at 52-3 (noting that a denial based on recent entry cuts contrary to the concept of individualized determinations). The court found plaintiffs had demonstrated a likelihood of success on the merits of their *Accardi* claim that defendants were no longer abiding by their own procedures.

\* \* \*

Did the plaintiffs overcome the presumption of regularity? What is the court's irregularity threshold, and what are the consequences of crossing it?

#### **Note 8-73:**

In *Ms. L. v. ICE*, the court ordered the defendants to reunite the class members with their children within fourteen days for children under five and thirty days for children five and older, No. 18-428, 2018 U.S. Dist. LEXIS 107365, at \*38 (S.D. Cal., June 26).

If the defendants chose not to comply, how should the court respond?

*See*, Nicholas R. Parillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685 (2018).

Professor Parillo observes that the efficacy of judicial review is backed by the threat of contempt for noncompliance. Judges must be selective about their use of the contempt power, lest they diminish the gravity of the threat.

The pressure that agencies feel arises from the shaming power of a contempt finding, regardless of sanctions. The concept of shaming is little discussed in the realm of public law, but it fits this subject quite well. Federal agency officials live in a community with a strong norm of compliance with court orders. This is evident from political science professor Robert Hume's interviews with officials, and also from my own assembly of suits, in which agencies always genuflect by acknowledging their normative obligation to comply and profess to be making good-faith efforts to do so, even if they simultaneously argue that courts cannot lawfully sanction them. Contempt findings (even without sanctions) are the lower courts' means of weaponizing the compliance norm by imposing shame -- that is, stigmatizing publicity and reputational harm -- on the officials and agencies who violate it. . . . That most agencies must get their legal representation from DOJ, an agency monopolized by lawyers with a unique stake in their reputation before the courts, does much to bolster the shame-based power of contempt.

However, [] contempt's shaming power --and with it, the very efficacy of

administrative law -- is subject to certain limitations. First, contempt's shamefulness depends in large part on the widespread perception that official disobedience is rare and therefore deviant. If the judiciary were to issue more contempt findings or impose (publicity-attracting) sanctions, it would raise the salience of violations and could thereby risk undermining the perception of universal compliance and, with it, the compliance norm itself. It is likely that judges, in order to avoid this, sometimes pull their punches, which helps explain why findings are rare and sanctions virtually absent. Second, contempt's shaming power depends on how deeply the defendant-official is immersed in the community that holds the pro-compliance norm. It has always been the case that bureaucrats must operate within multiple communities (for example, the legal world versus the scientific professions) and make tradeoffs between their efforts to satisfy the expectations of them all. On occasion, officials have been willing to endure the shame of contempt to preserve their credibility in a scientific field. Relatedly, the rise of partisan polarization could potentially fracture the pro-compliance community so badly that members of one party would refuse to acknowledge the shame of a contempt finding against a member of their own camp.

*Id.* at 700-1. Judges must carefully consider the effects their sanctions might have. In many cases, it's the agency's budget that's being punished, not the officials responsible.

In just the last decade, DOJ criminal prosecutions for official misconduct have resulted in large fines or prison terms for at least three high-ranking federal agency officials. And as to contempt fines against agencies (effectively docking their budgets), the conventional view in the rarefied field of appropriations law is that an agency's appropriations for a program are generally available to pay penalties incurred in implementing the program. Plus, the general notion of holding an agency accountable by docking its budget is hardly unfamiliar. Several statutes aim to discourage bad bureaucratic behavior by docking agency appropriations for judicially determined contract damages, employment discrimination damages, whistleblower retaliation damages, and awards of attorneys' fees when agencies litigate unjustifiably. . . .

Against federal agencies, federal judges have tried to use contempt fines more frequently than they have tried to use other sanctions (like imprisonment or individual fines against officials). But such fines are of uncertain legal availability, due to federal sovereign immunity, which DOJ has repeatedly invoked in response to judicial attempts to impose them. Some plaintiffs have argued that federal sovereign immunity to contempt fines is overridden by the constitutional imperative that courts be able to enforce their judgments, or that such immunity is negated by Congress's general waiver of immunity to non-damages suits against agencies (in 5 U.S.C. § 702); however, the question is uncertain. . . .

The sanction of imprisonment is common against private contemnors, and while the sanction is rarely used against state and local officials, it has been used against them in a clear and well-publicized way, confirming that it is a real threat for them. Against federal agency officials, the story is different. Although DOJ has backtracked from the broad argument it made in the 1950s that federal officials are absolutely immune to imprisonment for contempt, the doctrine on corporate officers'



contempt liability for a corporation's disobedience suggests there are prudential limits on personally sanctioning the officials of a noncompliant organization whose behavior the official may not fully control, and DOJ has accordingly made such prudential arguments to keep the heads of federal agencies out of jail. . . .

Courts can bar officials from seeking indemnification for [contempt fines personally targeted at agency officials responsible for noncompliance], but if that happens, the fines raise many of the same prudential worries as imprisonment, about sanctioning officials of an organization whose behavior they may not fully control. In any event, indemnification is the near-universal customary practice for all liabilities that officials -- federal, state, or local -- incur in the scope of their employment, and there is no reason to think contempt fines would be different. Thus, these fines normally would come from the public fisc.

*Id.* at 697-9.

If imprisonment is rare and contempt fines levied against an agency or its disobedient officials will almost always come from the agency's resources, and therefore, be borne by the public, how should a court treat agency officials who are determined to reduce the agency's resources?

"A fine against the agency itself could perversely diminish the resources available to comply with the injunction (though, to be fair, the court could take the money from the fine and use it to fund compliance-related agency tasks, which might be a means to effectively force the agency to reallocate its funding)." *Id.* at 702. Footnote 43 provides an example of a federal court taking this approach against a state defendant, but Professor Parillo seems to doubt whether this could work against a federal agency.

## Chapter 9

### **p. 912: Insert after Note 9-2:**

#### **Note 9-2(a): Agency Underenforcement**

*See New York v. Pruitt*, No. 18-406, 2018 U.S. Dist. LEXIS 99240 (S.D.N.Y. 2018).

In 2008, the EPA promulgated revised National Ambient Air Quality Standards ("NAAQS") for ozone. On July 13, 2015, the EPA published a notice in the Federal Register that 24 states had failed to submit State Implementation Plans ("SIP's") to meet the 2008 NAAQS as required by the "Good Neighbor Provision" of the Clean Air Act. 42 U.S.C.S. § 7410(a)(2). This finding triggered Section 110(c)(1) of the Clean Air Act, 42 U.S.C.S. § 7410(c)(1), requiring the EPA to issue Federal Implementation Plans ("FIP's") fully addressing the defaulting states' obligations under the Good Neighbor Provision with regard to the 2008 NAAQS by July 12, 2017. The EPA took no action to issue the FIPS. New York and Connecticut filed suit.

The EPA conceded that the failure to issue the FIPs by the deadline was a failure to perform a nondiscretionary duty under the Clean Air Act and that it would be feasible to sign and disseminate a notice of proposed action by June 29, 2018 and to promulgate a final action by December 6,

2018. However, in a response to the plaintiffs' motion for summary judgment, the EPA offered a proposed order instead requiring the EPA to sign a notice of proposed action by June 29 and to sign a final action by December 6, with no requirement to disseminate or promulgate by those deadlines, noting that it was not legally required to disseminate a proposed action.

Noting that "dissemination" is completed by merely posting the notice online and that the EPA gave no compelling reasons why it could not promulgate a final action by the December deadline, the court granted the plaintiffs' motion for summary judgment, exercising its "equitable powers to require the EPA to do the minimal tasks it has agreed to it can do to remedy its past violation of the statute." *Id.* at \*10.

For an argument in favor of review in cases of severe underenforcement, see Jentry Lanza, Note, *Agency Underenforcement as Reviewable Abdication*, 112 NW. U.L. REV. 1171 (2018).

The EPA is aware of dozens of chemicals used in the process of fracking that are hazardous to humans, but still allows oil and gas companies to keep the identities of the chemicals hidden from the public despite authority to require disclosure of trade secrets that create unreasonable risk to health or the environment. See, Tasha Stoiber, *Fracking Chemicals Remain Secret Despite EPA Knowledge of Health Hazards*, Environmental Working Group, ECOWATCH (Nov. 20, 2017, 12:44 PM), <https://www.ecowatch.com/fracking-chemicals-secret-2511076831.html>.

In an effort to repeal Obama-era rules protecting drinking water, Pruitt wants the EPA to study the oil and gas industry's wastewater, but since the harmful chemicals used in the process are shielded from the public, the EPA may not know what to test for. See, Sharon Kelly, *How Trump's EPA is Moving to Undo Fracking Wastewater Protections*, DESMOG (May 11, 2018, 12:17 PM), <https://www.desmogblog.com/2018/05/11/trump-epa-undo-fracking-oil-gas-wastewater-protections>.

In 2016, the EPA published rules intended to protect drinking water from the oil and gas industry's waste after it concluded a study that lasted five years. Although the EPA did produce some protections, this study was criticized for last-minute changes to the final report that downplayed the harmful effects of fracking on sources of drinking. Supporters of Congress's request for the study in 2009 relied in part on a 2004 EPA study concluding that fracking was safe. The 2004 study was later found to be scientifically unsupportable. See, Scott Tong and Tom Scheck, *EPA's late changes to fracking study downplay risk of drinking water pollution*, Marketplace.org (Nov. 30, 2016, 08:00 AM), <https://www.marketplace.org/2016/11/29/world/epa-s-late-changes-fracking-study-portray-lower-pollution-risk>

#### **Note 9-2(b): Agency vacancies and judicial review**

"Both Congress and the U.S. Supreme Court designed the administrative state in reliance on the key assumption that 'agencies will be expert in enforcement because they are expert in their statutes, their industries, and their regulatory scheme.'" Mila Sohoni, *Crackdowns*, 103 Va. L. Rev. 31, 42-3 (2017) (quoting Max Minzner, *Should Agencies Enforce?*, 99 MINN. L. REV. 2113, 2119 (2015)).

Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, S. CAL. L. REV. 913 (2009).

First, agency vacancies have consequences for the unitary theory of the executive and for separation of powers doctrine more generally. Typically, commentators on those subjects in the context of agency appointments examine the legitimacy of restrictions on the president's removal power. But the front end of the appointments process also is relevant to those discussions. Second, gaps in agency leadership constrain how delegated authority can be carried out. Vacancies may therefore operate to enforce nondelegation principles. *Third, agency staffing decisions have potential repercussions for judicial review of agency action and inaction. Specifically, agency vacancies might reshape judicial reluctance to probe the mental processes of an agency decisionmaker, judicial deference to agency interpretations of ambiguous statutes and other actions, and the general unavailability of judicial review for agency inaction.* Fourth, although the incorporation of agency vacancies into legal doctrine might improve staffing of executive agencies, litigation over vacancies faces numerous obstacles.

*Id.* at 974 (emphasis added).

**§ 9.02, p. 922: Insert after Note 9-8:**

**Note 9-8(a): *Mach Mining, LLC v. E.E.O.C.***

In *Mach Mining, LLC v. E.E.O.C.*, a unanimous Supreme Court held that the Equal Employment Opportunity Commission is not insulated from a judicial determination of “whether the EEOC satisfied its statutory obligation to attempt conciliation before filing suit” upon an allegation of unlawful employment practice. 135 S. Ct. 1645 (2015). The statute at issue, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e,

sets out a detailed, multi-step procedure through which the Commission enforces the statute’s prohibition on employment discrimination. The process generally starts when “a person claiming to be aggrieved” files a charge of an unlawful workplace practice with the EEOC. . . .

If . . . the Commission finds reasonable cause, it must first “endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.” To ensure candor in those discussions . . . : “Nothing said or done during and as a part of such informal endeavors” may be publicized . . . or “used as evidence in a subsequent proceeding . . . .” The statute leaves to the EEOC the ultimate decision whether to accept a settlement or instead to bring a lawsuit.

*Id.* at 1649. The Court determined that judicial review was available. First, the Court recited the “strong presumption favoring judicial review of administrative action.” *Id.* at 1651. Second, the Court concluded that the “conciliation requirement” is “mandatory, not precatory,” and “serves as a necessary precondition to filing a lawsuit.” *Id.* Third, while acknowledging the substantial discretion accorded to the EEOC in deciding how to deal with employers, the Court rejected the

contention that “Congress . . . left *everything* to the Commission.” *Id.* at 1652. Instead, the statute contains “concrete standards pertaining to what” conciliation efforts are required. *Id.* The statutory obliges the EEOC to “tell the employer about the claim . . . and . . . provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance.” *Id.* These requirements provide the court with a “manageable standard.” *Id.* As the Court explained:

Absent such review, the Commission's compliance with the law would rest in the Commission's hands alone. We need not doubt the EEOC's trustworthiness, or its fidelity to law, to shy away from that result. We need only know—and know that Congress knows—that legal lapses and violations occur, and especially so when they have no consequence.

*Id.* at 1652–53. Next, the Court determined the scope of judicial review:

The appropriate scope of review enforces the statute's requirements as just described—in brief, that the EEOC afford the employer a chance to discuss and rectify a specified discriminatory practice—but goes no further. Such limited review respects the expansive discretion that Title VII gives to the EEOC over the conciliation process, while still ensuring that the Commission follows the law.

*Id.* at 1653. The Court rejected the government's proposed narrower review (for example, a showing of a letter stating that conciliation was attempted) as merely “accept[ing] the EEOC's say-so . . . . And as earlier explained, the point of judicial review is instead to *verify* the EEOC's say-so.” *Id.* The Court rejected the petitioner's request for comprehensive review as “conflict[ing] with the latitude Title VII gives the Commission to pursue voluntary compliance . . . . Every aspect of Title VII's conciliation provision smacks of flexibility.” *Id.* at 1654. The Court also noted that broad judicial review would “flout Title VII's protection of the confidentiality of conciliation efforts,” designed to promote candor during negotiations. *Id.* at 1655.

In practice, the Court stated that lower courts should determine whether the EEOC “tr[ie]d to engage the employer in some form of discussion (whether written or oral), so as to give the employer an opportunity to remedy the allegedly discriminatory practice.” *Id.* at 1656. The Court noted that a sworn affidavit to this effect “will usually suffice,” except where “the employer provides credible evidence of its own, in the form of an affidavit or otherwise, indicating that the EEOC did not provide the requisite information about the charge or attempt to engage in a discussion about conciliating the claim.” *Id.* In such cases, “a court must conduct the factfinding necessary to decide that limited dispute.” *Id.*

Finally, the Court concluded that, where a lower court finds in favor of the employer, “the appropriate remedy is to order the EEOC to undertake the mandated efforts to obtain voluntary compliance.” *Id.*

**Note 9-8(b): *Armstrong v. Exceptional Child Center, Inc.***

In *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015), the Supreme Court determined that healthcare providers were precluded from suing a state to enforce § 30(A) of the Medicaid Act, a reimbursement provision. The provision requires states receiving Medicaid funding to “assure that payments are consistent with efficiency, economy, and quality of care and

are sufficient to enlist enough providers so that care and services are available under the plan.” *Id.* at 1382 (quoting 42 U.S.C. § 1396a(a)(30)(A)). Habilitation services providers covered by Idaho’s Medicaid plan sued two Idaho Department of Health and Welfare officials, claiming that Idaho violated the provision “by reimbursing providers of habilitation services at rates lower than § 30(A) permits. They asked the court to enjoin petitioners to increase these rates.” *Id.*

The Court considered and rejected three potential bases for suit: the Supremacy Clause, equitable relief, and an implied right of action under the Medicaid Act.

First, all nine justices agreed that the Supremacy Clause did not provide “an implied right of action” under which the providers could seek relief, reversing the Ninth Circuit’s decision to the contrary. The majority said that the Supremacy Clause “creates a rule of decision . . . . It instructs courts what to do when state and federal law clash,” but it creates no rights. *Id.* at 1383. Rather, “[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action.” *Id.* at 1384. It does not rest on the Supremacy Clause.

Second, the Court held that Congress intended to foreclose equitable relief for two reasons: “First, the sole remedy Congress provided for a State’s failure to comply with Medicaid’s requirements—for the State’s ‘breach’ of the Spending Clause contract [agreed to under the statute]—is the withholding of Medicaid funds by the Secretary of Health and Human Services.” *Id.* at 1385. Second, the Court described the provision as “judicially unadministrable,” citing the broad and unspecific nature of the statute. *Id.*

Finally, the Court determined that the Medicaid Act did not imply a private right of action. Four justices concluded that the statute “lacks the sort of rights-creating language needed to imply a private right of action.” *Id.* at 1387 (plurality opinion). Justice Breyer agreed that there was no private right of action, but refused to accept that the answer “follow[ed] from the application of a simple, fixed legal formula separating federal statutes that may underlie this kind of injunctive action from those that may not.” *Id.* at 1388 (Breyer, J., concurring in part & concurring in judgment).

The care providers, the Court said, were not left helpless: “Their relief must be sought initially through the Secretary [of Health and Human Services] rather than through the courts.” *Id.* at 1387.

### **§9.03 (p.923), insert after Note 9-12**

#### **Note 9-12(a): *B & B Hardware Inc. v. Hargis Industries, Inc.***

In *B & B Hardware, Inc. v. Hargis Industries, Inc.*, 135 S.Ct. 1293 (2015), the Supreme Court held that district courts can dismiss cases subject to issue preclusion (*res judicata*) when the administrative agency deciding the case used thorough procedures.

In *B&B Hardware*, two companies disputed the similarity of a trademark (SEALTIGHT vs. SEALTITE). The dispute was first decided by the Trademark Trial and Appeal Board (TTAB) that conducts its hearings by written evidence and testimony as opposed to live witnesses and trials. The TTAB decided in favor of B&B and SEALTIGHT, meanwhile Hargis sued for patent infringement

at the district level where it argued that its right to a jury trial must be preserved. B&B argued that issue preclusion barred the claim (as infringement touches upon the core issues debated in registration disputes) from being re-litigated absent a defect in the TTAB's process, but the district court disagreed and its jury approved the trademark registration, finding that agencies were not entitled to issue preclusion. The Eighth Circuit split in favor of Hargis and ruled against issue preclusion, but because the procedures used by the TTAB differed from patent standards adopted by the Eighth Circuit.

Justice Alito writing for the Court agreed that a jury trial is a right in infringement damages cases, but in trademark registration disputes, the TTAB's ruling should be respected and issue preclusion apply as long as the TTAB's procedures were not "fundamentally poor, cursory, or unfair." *Id.* at 1309. Recalling this history, the Court noted how old courts of law still respected decisions of courts of equity even when procedures differed. It also heavily relied upon the Restatement (Second) of Judgments and its prior case law to adhere to the belief that Congress presumes administrative agency decisions deserve issue preclusion absent a contrary statement in the law. See *Astoria Federal Sav. and Loan Ass'n v. Solimino*, 501 U.S. 104, 110 (1991); *United States v. Utah Const. & Min. Co.*, 384 U.S. 394, 421 (1966). However, the concern of eroding the separation of powers caused Justices Thomas and Scalia to dissent. In their view, this decision greatly expanded Article II powers and weakened the basic structure of judicial review of administrative agency decisions.

#### **Note 9-12(b): Executive Authority to Grant Security Clearance**

On July 23, 2018, the White House Press Secretary announced the president was "exploring the mechanisms to remove security clearances" of six former intelligence and law enforcement officials "because they politicized, and in some cases monetized, their public service and security clearances." The officials named include: John O. Brennan, former C.I.A. director; Susan E. Rice, former national security adviser; James R. Clapper Jr., former director of national intelligence; and Michael V. Hayden, former head of the C.I.A. and National Security Agency; in addition to James B. Comey, controversial ex-F.B.I. director, and Andrew G. McCabe, former deputy director of the F.B.I., both of whom no longer have security clearances.

Julie Hirschfield Davis & Julian E. Barnes, *Trump Weighs Stripping Security Clearances From Officials Who Criticized Him*, N.Y. TIMES (July 23, 2018), <https://www.nytimes.com/2018/07/23/us/politics/trump-security-clearances.html>.

In *Dep't of the Navy v. Egan*, the Supreme Court found it lacked the jurisdictional authority to review substantive merits of a security clearance determination, 484 U.S. 518 (1988). However a few months later, the Court's ruling in *Webster v. Doe* left open the possibility that courts could review procedural constitutional claims in national security personnel determinations, 486 U.S. 592 (1988).

The standard process for revoking security clearance as established by Executive Order 12968, titled "Access to Classified Information," requires a written explanation detailing the factual allegations supporting the decision and two levels of administrative appeals before a final determination can be made. Exec. Order No. 12968, § 5.2, 60 Fed. Reg. 40245, 40252 (Aug. 2, 1995). However, other avenues remain for the motivated executive. For the complete explanation of the options available for making such a move, see Bradley P. Moss, *Can the President Revoke*

*Former Officials' Security Clearances?*, LAWFARE BLOG (July 23, 2018, 10:12 PM), <https://www.lawfareblog.com/can-president-revoke-former-officials-security-clearances>.

**Note 9-12(b)(1):**

Would these cases be litigated the same way as *Trump v. Hawaii*? As Brad Moss explains, this administration's motives for "exploring the mechanisms" are not secret.

**Note 9-12(b)(2):**

See Paul Rosenzweig, *Revoking Security Clearance – A Short Update*, LAWFARE BLOG (July 24, 2018, 12:24 PM), <https://www.lawfareblog.com/revoking-security-clearances-short-update> (suggesting the officials named by the White House might have a viable claim if their clearance revocations were based on constitutionally protected free speech).

Not long after the announcement from the White House, the D.C. Circuit issued a decision in a security clearance case, *Palmieri v. U.S.*, No. 16–5347, slip op. at 1-2 (D.C. Cir., July 24, 2018). In a short concurrence, Judge Katsas noted that "the [c]ourt avoid[ed] deciding whether *Egan* bars non-frivolous constitutional challenges to the denial or revocation of a security clearance [as to] . . . investigatory or even adjudicatory processes." *Id.* at 1. This question was difficult, Judge Katsas said, because "judicial review bumps up against the President's enumerated and exclusive power as Commander in Chief." *Id.* at 1-2.

**§ 9. 03[A], p. 958: insert after 9.32**

**Note 9-32(a): *Sierra Club v. Federal Energy Regulatory Commission***

In *Sierra Club v. FERC*, 827 F.3d 36 (D.C. Cir. 2016), FERC authorized the redesign of a liquefied natural gas terminal in Texas to support export operations. The environmental plaintiffs challenged that decision, arguing that FERC's Environmental Impact Statement did not sufficiently address certain indirect effects associated with the decision and did not consider the appropriate cumulative effects of the decision.

Under the Natural Gas Act, the Department of Energy is responsible for permitting the export of natural gas, but it has delegated to FERC the authority to permit the construction of facilities for the export of natural gas. Thus, a person who wishes to export natural gas needs the permission of both FERC and DOE. This case only involved a challenge to FERC's decision.

The government objected to the plaintiffs' standing. There was a member of one of the plaintiff organizations who lived in the vicinity of where the facility would be built and therefore would be esthetically injured by the noise and disturbance caused by the construction. The government argued, however, that the plaintiffs' claim as to the inadequacy of the EIS did not relate to the noise and disturbance of the construction, so that injury could not be the basis for standing. The D.C. Circuit rejected this argument, saying it "sliced the salami too thin." Citing to its earlier decision in *WildEarth Guardians v. Jewell*, 738 F.3d 298, 305 (D.C. Cir. 2013), the court held, "[I]t is sufficient for standing purposes that the 'aesthetic injury follows from an inadequate [Environmental Impact Statement] whether or not the inadequacy concerns the same environmental

issue that causes their injury.’’ Here, if a court were to overturn the agency decision because of an inadequate EIS, the facility would not be built, thereby avoiding the plaintiff’s injury.

**§ 9.03[A] p. 958 insert after 9-35:**

**Note 9-36: *Spokeo Inc. v. Robbins***

The Supreme Court recently reemphasized the concept of concreteness of injury. In *Spokeo Inc. v. Robbins*, 136 S.Ct. 1540 (2016) a class action against an internet reputation company failed because the lead plaintiff could not name any concrete actual injury. Robbins claimed that the Fair Credit Reporting Act entitled him to damages when inaccurate information was posted about him. His Spokeo profile contained many errors, but Justice Alito reversed the Ninth Circuit and rejected that as enough harm to meet standing doctrine by writing: “It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm.”

**Insert after problem 9-3, p.982**

**Note 9-45(a): *United States Army Corps of Engineers v. Hawkes Co.***

Recent cases involving what constitutes final agency action include *United States Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016). In the continuing litigation over the “Waters of the United States” (WOTUS) rule, the peat mining Hawkes company appealed a jurisdictional determination by the Army Corps of Engineers that stated that Hawkes’s land contained protected waters. The district court ruled against the peat mining company, but the 8th circuit reversed and was affirmed by the Supreme Court. Through restating *Bennett v. Spear*, 520 U. S. 154, 177–178 (1997), Chief Justice Roberts confirmed that jurisdictional determinations of the Army Corps mark 1) the consummation of the agency’s decision-making process, and 2) the determinations are ones by which rights or obligations have been determined, or from which legal consequences will flow.

**§9.04, p.986: Insert after Note 9-46**

**Note 9-46(a): *Fry v. Napoleon Community Schools* 137 S. Ct. 743**

The Supreme Court unanimously reversed the Sixth Circuit in a case brought by by a student (Fry) with disabilities. The student’s public school denied Fry’s use of a service dog named Wonder. While the family won the right to compel the school to permit Wonder to help their daughter, the family chose to avoid administrative backlash by enrolling Fry in another school instead. The family sued claiming disability discrimination, but the State and the Sixth Circuit Court of Appeals ruled that they had to exhaust administrative remedies under the Individuals with Disabilities Education Act (IDEA). See Pub. L. 101-476. Specifically, the IDEA both protects the rights to access other vehicles for redress but also requires claimants to exhaust remedies under the IDEA before filing in civil court “seeking relief that is also available under [the IDEA]” 20 U.S.C. §1415(l).

The Supreme Court unanimously reversed, saying that claims of students with disabilities that had nothing to do with the quality of education (Free and Public Education, or FAPE) did not need to go through the dispute procedures outlined under IDEA. The court appeared very concerned with the IDEA limiting redressability rights granted in other statutes, notably the Americans with Disabilities Act (ADA). As a result, the Supreme Court proposed the following test to analyze the



gravamen of the claim:

One clue to whether the gravamen of a complaint against a school concerns the denial of a FAPE, or instead addresses disability-based discrimination, can come from asking a pair of hypothetical questions. First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school—say, a public theater or library? And second, could an adult at the school—say, an employee or visitor—have pressed essentially the same grievance? When the answer to those questions is yes, a complaint that does not expressly allege the denial of a FAPE is also unlikely to be truly about that subject; after all, in those other situations there is no FAPE obligation and yet the same basic suit could go forward. But when the answer is no, then the complaint probably does concern a FAPE, even if it does not explicitly say so; for the FAPE requirement is all that explains why only a child in the school setting (not an adult in that setting or a child in some other) has a viable claim.

*Fry*, Slip op. 15-16 available at: [https://www.supremecourt.gov/opinions/16pdf/15-497\\_p8k0.pdf](https://www.supremecourt.gov/opinions/16pdf/15-497_p8k0.pdf)

The Supreme Court did not have enough of a record to rule on the outcome on its own and remanded the case to the Sixth Circuit to use hypotheticals and determine if the cause of action was truthfully a FAPE claim or an ADA claim.

**§ 9.04[D], p. 1004: Insert after *Nader v. Allegheny Airlines, Inc.*:**

**Note 9-48(a): Primary Jurisdiction**

The dissent in *Armstrong v. Exceptional Child Center, Inc.*, discussed *supra* at Note 9-8(b), suggested that the majority too easily concluded that “Congress believed the Judiciary to be completely incapable of enforcing § 30(A).” *Id.* at 1395 (Sotomayor, J., dissenting). The dissent agreed with the Court that the broad scope of the statute “is not irrelevant.” *Id.*

But rather than compelling the conclusion that the provision is wholly unenforceable by private parties, its breadth counsels in favor of interpreting § 30(A) to provide substantial leeway to States, so that only in rare and extreme circumstances could a State actually be held to violate its mandate. The provision's scope may also often require a court to rely on HHS, which is “comparatively expert in the statute's subject matter.” When the agency has made a determination with respect to what legal standard should apply, or the validity of a State's procedures for implementing its Medicaid plan, that determination should be accorded the appropriate deference. And if faced with a question that presents a special demand for agency expertise, a court might call for the views of the agency, or refer the question to the agency under the doctrine of primary jurisdiction. Finally, because the authority invoked for enforcing § 30(A) is equitable in nature, a plaintiff is not entitled to relief as of right, but only in the sound discretion of the court.

*Id.* Because the remedy sought was equitable, the dissent urges that doctrines such as primary jurisdiction provide ample room for courts to defer when appropriate, but provide

relief when necessary. The majority's categorical rule, the dissent suggested, was unnecessarily inflexible.

Does the dissent's invocation of primary jurisdiction doctrine comport with that doctrine's articulation in *Nader*?

**§ 9.03, p. 928: Insert after note 9-18.**

**Note 9-18(a): *Lexmark International, Inc. v. Static Control Components, Inc.***

The United States Supreme Court clarified its “zone of interest” doctrine in a recent intellectual property case, *Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014). Petitioner Lexmark sued Static Control for copyright infringement; Static Control counterclaimed on a Lanham Act false advertising theory. The district court found that Static Control's alleged injury was too remote and that it therefore lacked prudential standing to bring a Lanham Act claim. The Sixth Circuit reversed, adopting a “reasonable-interest test” employed by the Second Circuit in similar actions: it found that Static Control alleged a cognizable interest in its reputation and further alleged that its interest was harmed by Lexmark's purportedly false statements.

The Supreme Court granted certiorari to decide “the appropriate analytical framework for determining a party's standing to maintain an action for false advertising under the Lanham Act.” *Id.* at 1386. The Court affirmed the Sixth Circuit's judgment, though on slightly different doctrinal grounds, rejecting the district court's prudential standing analysis and finding instead that the private damages remedy under the Lanham Act extends to litigants who fall within the zone of interests protected by the Act and who suffer injury proximately caused by a violation of the Act.

The Court explained that, while it has at times discussed the zone-of-interests test in the context of prudential standing, the test is really more about statutory construction: “[w]hether a plaintiff comes within ‘the “zone of interests”’ is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim.” *Id.* at 1387. Just as courts cannot apply their own policy judgment to enforce a cause of action that Congress has declined to create, they cannot limit a congressionally sanctioned cause of action in the interest of “prudence.” *Id.* at 1388.

Turning to the zone-of-interests test as applied in Lanham Act actions, the Court noted that the statute has an explicit purpose “to protect persons engaged in . . . commerce against unfair competition.” The Court held that “to come within the zone of interests in a suit for false advertising [under the Lanham Act], a plaintiff must allege an injury to a commercial interest in reputation or sales.” *Id.* at 1390. Not every putative litigant could fit its injuries within that zone, but Static Control clearly could.

Having found the zone-of-interests test satisfied, the Court considered proximate causation. It explained that “the proximate-cause requirement generally bars suits for alleged harm that is ‘too remote’ from the defendant's unlawful conduct.” *Id.* at 1390. In Lanham Act actions, a litigant must show “economic or reputation injury flowing directly from the deception wrought by the defendant's advertising.” *Id.* at 1391. Here again, Static Control stated a claim: it alleged that false

statements by Lexmark disparaged its business and its products.

In conducting its analysis, the Court declined to adopt the “reasonable-interest” test of the Second and Sixth Circuits. The relevant question, the Court observed, is not whether “the plaintiff’s interest is ‘reasonable,’ but whether it is one the Lanham Act protects; and not whether there is a ‘reasonable basis’ for the plaintiff’s claim of harm, but whether the harm alleged is proximately tied to the defendant’s conduct.” *Id.* at 1393.

Michael Ramsey, a professor at the University of San Diego School of Law, called the *Lexmark* decision a “welcome clean-up of standing doctrine that’s exactly right on rule-of-law grounds,” adding that “[a] constitutional statute is by Article VI the supreme law of the land, binding on the courts. If such a statute authorizes a claim, the courts must apply the statute.” Michael Ramsay, *Lexmark v. Static Control: The End of Prudential Standing?*, ORIGINALISM BLOG (Mar. 27, 2014), <http://originalismblog.typepad.com/the-originalism-blog/2014/03/lexmark-v-static-control-the-end-of-prudential-standingmichael-ramsey.html>.

Another team of commentators suggested that the Court’s framework in *Lexmark* may have a broad effect, as its “focus on statutory purposes and their implication for what a statute *authorizes*, rather than a focus on how so-called ‘prudential’ considerations may *limit* standing, may shift the debate over who can sue under a wide variety of federal laws.” Andrew P. Bridges, Jennifer Lloyd Kelly & Ronnie Solomon, *Litigation Alert: Supreme Court’s Lexmark Decision Creates Uniform Federal False Advertising Standing Requirement*, FENWICK & WEST LLP (Mar. 27, 2014), <http://www.fenwick.com/publications/Pages/Litigation-Alert-Supreme-Court%E2%80%99s-Lexmark-Decision-Creates-Uniform-Federal-False-Advertising-Standing-Requirement.aspx>.

### **§ 9.03(a), p. 972. Insert the next three notes after note 9-39**

#### **Note 9-39(a): *West Virginia v. Environmental Protection Agency***

On February 9, 2016, the Supreme Court ordered a historic stay in *West Virginia v. EPA*, a case currently pending in the D.C. Circuit Court of Appeals. 577 U.S. 15A773 (Feb. 9, 2016). The stay ordered a halt to the enforcement of the EPA’s Carbon Emission Guidelines. This decision was particularly noteworthy because the guidelines were not designed to go into effect until 2020, so it was particularly surprising that the Court believed the challenge to the agency action merited a stay. Although the case was originally scheduled to be heard before a panel of the D.C. Circuit in June of 2016, oral argument has been rescheduled for a hearing *en banc* in September of 2016. *West Virginia v. EPA*, No. 15-1363 (May 16, 2016).

#### **Note 9-39(b): *United States v. Texas***

In *United States v. Texas*, the Supreme Court affirmed a Fifth Circuit decision granting a preliminary injunction against the implementation of an Executive Order regarding immigration enforcement. 579 U.S. \_\_\_ (June 23, 2016). The preliminary injunction halted the expansion of Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) and Deferred Action for Childhood Arrivals (DACA). *Texas v. United States*, 809 F.3d 134 (2015). Affirming the Fifth Circuit by a 4-4 court split, the case has little precedential value beyond the 5<sup>th</sup> Circuit but has had a significant effect on the future of President Obama’s immigration reform. Adam

Liptak & Michael D. Shear, *Supreme Court Tie Blocks Obama Immigration Plan*, N.Y. TIMES (June 23, 2016) [http://www.nytimes.com/2016/06/24/us/supreme-court-immigration-obama-dapa.html?\\_r=0](http://www.nytimes.com/2016/06/24/us/supreme-court-immigration-obama-dapa.html?_r=0). One potentially notable effect of the case is that the Supreme Court accepted that Texas had standing to sue in this case, a potentially significant expansion of the ability of a State to sue on behalf of its citizens. *Id.*

**Note 9-39(c): *West Virginia ex rel. Morrissey v. United States Department of Health and Human Services***

In *West Virginia ex rel. Morrissey v. United States Department of HHS*, West Virginia sued to challenge the President's determination not to enforce certain controversial provisions of the Affordable Care Act for a transitional period. 827 F.3d. 81 (D.C. Cir. 2016). That decision, implemented by a letter from the Secretary of the Department of Health and Human Services, left the responsibility to enforce or not to enforce these provisions to the States, and West Virginia objected to being put in that position. It argued that the Secretary's decision was contrary to law, that the letter was an unlawful rule because it did not go through notice and comment, that the decision was an unconstitutional delegation of federal enforcement authority, and that it was unconstitutional commandeering under the 10<sup>th</sup> Amendment.

The D.C. Circuit did not reach the merits, because it affirmed the dismissal of the case for lack of standing. The state argued that the letter required it to decide whether or not to enforce the ACA provisions, and the state suggested this was like the situation in *Printz v. United States*, 521 U.S. 898 (1997), where state legal officers were required to conduct background checks on gun purchases. The Court did not agree. In *Printz* the state was required to take action, but the letter here did not require the state to take any action. The fact that the state might have to decide whether or not to take action was not a concrete injury. It said "no court has ever recognized political discomfort as an injury-in-fact." Thus, the Court dismissed the case for lack of standing.

**§ 9.04[B], p.986: Insert after Note 9-46:**

**Note 9-46(b): Jurisdiction restrictions and exhaustion**

In *League of United Latin Am. Citizens v. Wheeler*, petitioners sought review of an EPA order denying a petition to revoke limited allowances, or "tolerances," for the use of the dangerous pesticide, chlorpyrifos, on food products. No. 17-71636, 2018 U.S. App. LEXIS 22152 (9th Cir., August 9, 2018). The EPA did not defend the suit on the merits, but instead, argued that the administrative process provided in the Federal Food, Drug, and Cosmetic Act (FFDCA) deprived the federal courts of jurisdiction until the EPA issued a response to the petitioners' administrative objections.

The Ninth Circuit explained that a rule is not jurisdictional unless it governs a court's subject-matter or personal jurisdiction. Jurisdictional statutes speak to the power of the court rather than the rights or obligations of the parties. *Id.* at \*16. Jurisdictional prescriptions and claim-processing rules are not the same. Claim-processing rules do not govern a court's adjudicatory capacity and can be waived by the parties or the court. *Id.* at \*16-7.

In *Sebelius v. Auburn Reg'l Med. Ctr.*, the Supreme Court stated a rule is jurisdictional only if Congress has clearly stated so, and without a clear statement, courts should treat the restriction as nonjurisdictional. 568 U.S. 145, 153 (2013). In assessing Congress's clarity, courts "consider both the language of the statute and its 'context, including . . . [past judicial] interpretation[s] of similar provisions.'" *Id.* at \*17 (quoting *Reed*

*Elsevier v. Muchnick*, 559 U.S. 154, 168 (2010)). Threshold requirements of exhaustion are typically treated as nonjurisdictional. *Id.* (citing *Reed Elsevier*, at 166).

The court considered whether the judicial review provision of the FFDCA, “clearly stated” that obtaining the EPA’s response to an objection was a jurisdictional requirement, and held that it did not. The provision at issue described a process by which parties could obtain judicial review, not the adjudicatory capacity of the courts. The provision “lack[ed] mandatory language with ‘jurisdictional import.’” *Id.* at \*20 (quoting *Auburn Reg’l Med. Ctr.*, 568 U.S. at 154). The Supreme Court found similar language in a statute providing for judicial review of Board of Veterans’ Appeals decisions “did ‘not suggest, much less provide clear evidence, that the provision was meant to carry jurisdictional consequences.’” *Id.* at \*19 (quoting *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 438 (2011)).

The Ninth Circuit also considered “what it would mean” for future review of EPA decisions if it attached a jurisdictional meaning to the provision. Citing *Auburn Reg’l Med. Ctr.* and *Henderson*, the court explained “[t]he impact of a jurisdictional finding must be considered within the context of the administrative process Congress was establishing in the relevant statute, and the values that process was meant to protect.” *Id.* at \*24. In this case, a jurisdictional finding would allow the EPA to evade judicial review by declining to respond to an objection. *Id.* at \*25.

Concluding the provision was not jurisdictional, the court then considered whether exhaustion was required by balancing the interest of the individual in prompt judicial review against the institutional interest in protecting agency authority and promoting judicial efficiency. *Id.* at \*30. The institutional interest in the challenged action was weak because it neither protected agency authority nor promoted judicial efficiency. The challenged action was not a matter of agency discretion or expertise. Rather, it was a legal question regarding compliance with statutory directives. *Id.* at \*31. Additionally, the petitioners’ timely submissions were met with delay tactics on the part of the EPA, so it was not an instance of avoiding or flouting administrative processes. *Id.* at \*32. Here, promoting exhaustion also did not promote judicial economy because the Ninth Circuit had already issued five decisions since 2012 about the EPA’s inaction over chlorpyrifos tolerances, so there were no factual questions remaining, and to the remaining legal questions on the merits, the EPA offered no defense. *Id.* at \*33-4.

On balance, the court found the individual interest to be comparatively strong and made for a sufficient basis to excuse exhaustion. The EPA’s intent to delay was unreasonable and unduly prejudiced subsequent court action because the EPA had over a year to respond and no factual questions remained for it to investigate. *Id.* at \*34. The delay was prejudicial because the EPA’s interpretation of the FFDCA’s judicial review provision would allow indefinite delay of review when the chemical in question is responsible for severe and irreparable health effects. *Id.* at \*35.

#### **§ 9.05: p. 1010: Insert after Note 9-52:**

##### **Note 9-53: “Waters of the United States”**

In 2015, the EPA and DOD issued a rule that sought to provide a definition for the term “Waters of the United States” as it is used in the Clean Water Act (CWA). The Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37054 (June 29, 2015) (2015 WOTUS rule), was challenged around the country, and a number of petitions were transferred to the Sixth Circuit for consolidation. *Murray Energy Corp. v. DOD*, 817 F.3d 261 (6th Cir. 2016).

A number of the petitioners then moved to dismiss their petitions, arguing that the Sixth Circuit lacked jurisdiction to review the 2015 WOTUS rule based on the judicial review provisions of the

Clean Water Act. The court found that it did have jurisdiction and denied all pending motions to dismiss. Petitioners then sought review.

In *Nat'l Ass'n of Mfrs. v. DOD*, the Court considered whether the 2015 WOTUS rule should be challenged in Federal District Court under the APA or in Federal Courts of Appeals under the CWA. 138 S. Ct. 617 (2018). The Court held that the rule did not meet the requirements of the judicial review provisions in the CWA, reversing the Sixth Circuit decision, and remanding with instructions to dismiss the petitions for review for lack of jurisdiction. *Id.* at 634.

After the Court granted review, the Trump administration issued Executive Order 13778, Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule, Rule, 82 Fed. Reg. 12497 (Feb. 28, 2017). Pursuant to that order, the EPA and DOD issued a proposed rule that would rescind the 2015 WOTUS rule. *See*, Definition of “Waters of the United States”–Recodification of Preexisting Rule, 83 Fed. Reg. 32227 (proposed July 12, 2018). A second proposed rule established a new effective date for the 2015 WOTUS rule, delaying it for two years. *See*, Definition of “Waters of the United States”–Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5200 (Feb. 6, 2018).

In a footnote, the Court noted that these developments have no effect on the issues presented and that for the time being, 2015 WOTUS rule is still on the books. *Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 627, n. 5. Challenges are ongoing. *See*, Pls. Compl., *Waterkeeper Alliance, Inc. v. Pruitt*, No. 3:18-cv-03521 (N.D. Cal., June 13, 2018).

## Chapter 10

### **§ 10.02: p. 1028: Insert after note 10-7.**

#### **Note 10-7(a): Open government in state agencies**

*See*, Miriam Seifter, *Further From the People? The Puzzle of State Administration*, 93 N.Y.U.L. REV. 107, 110 (2018) (arguing that state-level administration is less accountable and transparent than the federal government, and is actually not “closer to the people”).

### **§ 10.02, p. 1026: Insert after note 10-1.**

#### **Note 10-1(a): *Judicial Watch, Inc. v. U.S. Secret Service***

In *Judicial Watch, Inc. v. U.S. Secret Service*, 726 F.3d 208 (D.C. Cir. 2013), petitioner sought access to logs of every visitor to the White House during a seven-month period. The Secret Service denied petitioner’s request, but the district court ordered the Service to either (1) release the records or (2) assert specific exemptions for *each* document withheld.

The D.C. Circuit affirmed in part and reversed in part. Citing *Tax Analysts*, the court explained that agency records extend only to those documents that an agency creates/obtains *and* controls at the time of the FOIA request. The first prong was clearly satisfied here: the Secret Service obtains all visitor logs as part of its security procedures. However, the court was ambivalent about the second prong: given that the Secret Service uses visitor logs for limited purposes only, and given that the

logs are retained on White House computer servers for a brief sixty-day period, the court was not convinced that the Service exercised requisite control over the records. Moreover, where an agency creates documents in response to a request from an entity not covered by FOIA—such as the Office of the President—the agency cannot be said to control the records if the noncovered entity manifests intent to control them. Finally, separation of powers concerns counsel against treating the logs of visitors to the Office of the President as agency records within the meaning of FOIA.

The court thus reversed the district court order with respect to logs of visitors to the Office of the President: such records were not available for public review. However, logs of visitors to White House offices that are *themselves* subject to FOIA, such as the Office of Management and Budget, are properly classified as “agency records”—and they cannot be withheld unless one of the nine enumerated exemptions applies.

**§ 10.02 (B), p. 1028. Insert after note 10.7.**

**Note 10-7(a): FOIA Changes**

Long critiqued for being inefficient in ensuring open government in the age of social media, the Freedom of Information Act was recently strengthened. Congress enacted The FOIA Improvement Act of 2016, (Public Law No: 114-185 (06/30/2016)), to change the procedure for requesting federal information, ease public access to information through the creation of a central FOIA request portal, and mandate agencies keep track of FOIA rejections and report summaries to Congressional oversight committees. The datasets on FOIA requests and refusals must themselves be publicly available in a searchable format. Agencies are now required to inform requesters of their rights to appeal adverse determinations and seek guidance from FOIA officers in the agency and access FOIA dispute resolution services. Overall, the changes in the act favor transparency and efficiency and reduce the effort needed by the public to access information.

**§ 10.04, p. 1084: Insert after note 10-28.**

**Note 10-28(a): Best Practices for Government in the Sunshine**

In June 2014, the Administrative Conference of the United States adopted a new set of recommendations highlighting best practices to enhance transparency at agencies subject to the Government in the Sunshine Act. Based on empirical data gathered by Professor Bernard Bell of the Rutgers-Newark School of Law and Reeve T. Bull of the Administrative Conference, the recommendations included the following:

- Multimember agencies should promulgate concise public documents that describe how members of the public may participate in open meetings.
- Such agencies should post meeting agendas and relevant documents in advance.
- Such agencies should keep interested parties informed of their meetings and activities through listservs.
- Such agencies should consider providing webcasts of open meetings.
- Such agencies should publish descriptions of substantive business conducted at closed meetings, while preserving the confidentiality of protected information.

- Such agencies should avoid e-mail exchanges in which the entire group participates, as these exchanges can rise to the level of virtual meetings.

To read the full report, visit this link: <http://www.acus.gov/recommendation/government-sunshine-act>.