

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

**2019-2020 FALL/SPRING LETTER UPDATE**

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## Preface

The following is the final letter update to the Third Edition of Administrative Law and Process. Administrative law has evolved significantly in the five years since the Third Edition was printed. The new-look Supreme Court's October 2018 Term alone produced several significant cases which will define and shape the next era of administrative law, and things do not appear to be slowing down. The forthcoming Fourth Edition, which will be in print in time for 2020 classes in the Fall, will present updated cases and commentary, with a particular emphasis on making the doctrines accessible and practical. This letter update focuses on recent decisions, especially on Supreme Court cases decided in the last year. There will, of course, be more substantial updates and revisions in the forthcoming Fourth Edition.

## Chapter 2

### § 2.02, p. 40: Insert after Note 2-3.

#### Note 2-3(a)

Later in the course we will discuss some of the due process issues associated with immigrants seeking asylum in the U. S. Do you think there may be any parallels between the current administration's stance toward immigrants, especially in asylum situations, and the due process issues that first emerged in the McCarthy era cases set forth above? Are immigrant's persons under the due process clause or as non-citizens are they being treated differently? Is this fair? What should the role of lawyers be today given the process issues that arise in these contexts and the number of persons in need of legal assistance? What has the role of prominent national law firms been in these circumstances?

As a New York Times article explains, (*see* Annie Correal, *Why Big Law Fights Trump on Migrants* N.Y. TIMES, Nov. 24, 2018, at A1, *available at* <https://www.nytimes.com/2018/11/21/nyregion/president-trump-immigration-law-firms.html>)-lawyers from Paul Weiss, Hogan Lovells, Covington & Burling, WilmerHale, and Arnold & Porter, among others, have donated hundreds of hours to combating the Administration's immigration policies, carrying on what the New York Times described as a "well-earned reputation as cautious defenders of the establishment." Professor Stephen Gillers, quoted in the article, sees something a bit different in the "Big Law" firms' role in the immigration debates compared to their activism under recent administrations: "What's different here is that the firms are on a wholesale basis, and dramatically, challenging the behavior of the White House." These firms are not merely trying to enforce current law, but are seeking to shape and mold still-developing areas of law—just as Arnold, Fortas and Porter sought to do in *Bailey*. What does their involvement signal about the role and responsibility of the bar vis-à-vis the development of the law and individuals who would face insurmountable barriers without legal assistance? What lawyer norms and ethics should apply? The American Bar Association has made its position on the role of the bar clear. The American Bar Endowment recently announced a \$150,000 grant to assist the ABA in its

immigration *pro bono* efforts. As a past president of the ABA explained, “this doesn’t have anything to do with whether you like the wall or don’t like the wall. There are thousands and thousands of people waiting for due process.” Lorelei Laird, *\$150K ABE Grant Will Help ABA Facilitate Pro Bono Immigration Work*, A.B.A. J. (Jan. 26, 2019), <http://www.abajournal.com/news/article/former-aba-president-spearheads-effort-to-increase-pro-bono-immigration-work>.

Another possible parallel to the McCarthy era cases is that, despite significant doctrinal development in the application of the due process clause, immigration issues still frequently turn on the right/privilege distinction. To take just one example, Justice Scalia’s 2015 plurality opinion in *Kerry v. Din*, 135 S. Ct. 2128 (2015), rejected a citizen’s challenge to the denial of her spouse’s visa application. Justice Scalia framed and dispensed of the citizen’s lawsuit as follows:

[Fauzia Din] claims that the Government denied her 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. There is no such constitutional right.

What Justice BREYER’s dissent strangely describes as a “deprivation of her freedom to live together with her spouse in America” is, in any world other than the artificial world of ever-expanding constitutional rights, nothing more than a deprivation of her spouse’s freedom to immigrate into America.

**§ 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), the Supreme Court addressed—albeit without reaching a majority decision—whether U.S. citizens have a liberty interest in their spouse’s admission to the United States. Fauzia Din, who had secured her status as a naturalized citizen of the United States in 2007 after entering as a refugee seven years earlier, filed a petition to have her husband, Kanishka Berashk, classified as an “immediate relative” entitled to priority immigration status. Her petition was approved, but Berashk’s visa application was ultimately denied. The consular officer who denied the visa offered no explanation other than that Berashk was inadmissible under 8 U.S.C. §1182(a)(3)(B), which bars aliens who have engaged in “terrorist activities.” A citizen resident of Afghanistan, Berashk had formerly served as a civil servant in the Taliban regime.

Writing for the plurality, Justice Scalia deemed “absurd” Din’s claim that, by denying her husband’s visa application, the Government had deprived Din of her liberty. He reasoned:

[T]he Federal Government here has not attempted to forbid a marriage. Although Din and the dissent borrow language from those cases invoking a fundamental right to marriage, they both implicitly concede that no such right has been infringed in this case. Din relies on the “associational interests in marriage that necessarily are protected by the right to marry,” and that are “presuppose[d]” by later cases establishing a right to marital privacy.” ... The dissent supplements the fundamental right to marriage with a fundamental right to live in the United States in order to find an affected liberty interest. ...

Nothing in the cases Din cites 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. Even if our cases could be construed so broadly, the relevant question is not whether the asserted interest is “consistent with this court’s substantive-due-process line of cases,” but whether it is supported by “this nation’s history and practice.”

Citing Blackstone and the Magna Carta, Justice Scalia emphasized that, historically, the concept of liberty as it relates to due process has been associated with the protections accorded to individuals against physical restraints imposed by the government. Accordingly, since “[t]he Government has not ‘taken or imprisoned Din,’ nor has it ‘confined’ her, either by ‘keeping [her] against her will in a private house, putting h[er] in the stocks, arresting or forcibly detaining her in the street[,]” she has suffered no deprivation of liberty. Justice Scalia further pointed to “a long practice of regulating spousal immigration” in federal law, which he maintained undercut any force that an argument for “implying” a general liberty interest in marriage might otherwise have., he added that “[a]lthough Congress has tended to show a ‘continuing and kindly concern . . . for the unity and happiness of the immigrant family,’ . . . this has been a matter of legislative grace rather than fundamental right.”

Justice Kennedy wrote an opinion in which Justice Alito joined, concurring in the judgment of the plurality. In his view, it was unnecessary to reach the question whether Din had a protected liberty interest at all; for even if she did, “the notice she received regarding her husband’s visa denial satisfied due process.”

Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, dissented. He began by observing that Din “seeks *procedural*, not *substantive* protection” for the liberty interest she asserts:

Our cases make clear that the Due Process Clause entitles her to such procedural rights as long as (1) she seeks protection for a liberty interest sufficiently important for procedural protection to flow “implicit[ly]” from the design, object, and nature of the Due Process Clause, or (2) nonconstitutional law (a statute, for example) creates “an expectation” that a person will not be deprived of that kind of liberty without fair procedures.

The liberty for which Ms. Din seeks protection easily satisfies both standards. As this Court has long recognized, the institution of marriage, which encompasses the right of spouses to live together and to raise a family, is central to human life, requires and enjoys community support, and plays a central role in most individuals’ “orderly pursuit of happiness.” . . . Similarly, the Court has long recognized that a citizen’s right to live within this country, being fundamental, enjoys basic procedural due process protection. . . .

At the same time, the law, including visa law, surrounds marriage with a host of legal protections to the point that it creates a strong expectation that government will not deprive married individuals of their freedom to live together without strong reasons and (in individual cases) without fair procedure.



Justice Scalia replied by expressing discomfort with the suggestion “that procedural due process rights attach even to some nonfundamental liberty interests that have *not* been created by statute.” In his estimation, Justice Breyer was asserting that in fact “there are two categories of implied rights protected by the Due Process Clause: really fundamental rights, which cannot be taken away at all absent a compelling state interest; and not-so-fundamental rights, which can be taken away so long as due process is observed.” This, Justice Scalia maintained, “is a dangerous doctrine.” “It vastly expands the scope of our implied-rights jurisprudence by setting it free from the requirement that the liberty interest be ‘objectively, deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty.’”

Justice Breyer, in turn, responded that by extending procedural protections to “expectations” created by nonconstitutional law only when there exists an unequivocal statutory right to support them, Justice Scalia has breathed new life into the long-defunct rights/privilege distinction.

### **Note: Family Separation at the Border**

In late spring 2018, the Trump administration announced what it labelled a “zero tolerance” policy for those crossing the border illegally. Adults caught were subject to criminal prosecution and separated from any children accompanying them. The children were placed with the Department of Health and Human Services (HHS) Office of Refugee and Resettlement (ORR). And despite this policy, which began informally as early as July 1, 2017, and later became formal, the government had “no procedure in place for the reunification of these families.” 310 F. Supp. 3d 1133 (S.D. Cal. 2018). A number of lawsuits immediately followed.

The first to reach the preliminary injunction stage was *Ms. L. v. ICE* in the Southern District of California, where the plaintiffs sought “injunctive relief to prohibit separation of . . . children in the future absent a finding the parent is unfit or presents a danger to the child, and to require reunification of these families once the parent is returned to immigration custody unless the parent is determined to be unfit or presents a danger to the child.”

Judge Dana Sabraw began by recognizing that the executive branch could properly exercise its enforcement powers “to detain individuals lawfully entering the United States and to apprehend individuals illegally entering the country.” It could not, however, consistent with what the court called “substantive due process,” separate parents from their children:

[T]he practice of separating these families was implemented without any effective system or procedure for (1) tracking the children after they were separated from their parents, (2) enabling communication between the parents and their children after separation, and (3) reuniting the parents and children after the parents are returned to immigration custody following completion of their criminal sentence. This is a startling reality. The government readily keeps track of personal property of detainees in criminal and immigration proceedings. Money, important documents, and automobiles, to name a few, are routinely catalogued, stored, tracked and produced upon a detainees’ release, at all levels—state and federal, citizen and alien. Yet, the government has no system in place to keep track of, provide effective communication with, and promptly produce alien children.

The unfortunate reality is that under the present system migrant children are not accounted for with the same efficiency and accuracy as *property*. Certainly, that cannot satisfy the requirements of due process.

But while the court found that the separation policy violated these substantive rights, the bigger issue underlying these violations was the absence of any *procedure* justifying this separation after the parent's criminal proceedings had concluded:

This practice of separating class members from their minor children, and failing to reunify class members with those children, without any showing the parent is unfit or presents a danger to the child is sufficient to find Plaintiffs have a likelihood of success on their due process claim. When combined with the manner in which that practice is being implemented, *e.g.*, the lack of any effective procedures or protocols for notifying the parents about their children[']s whereabouts or ensuring communication between the parents and children, and the use of the children as tools in the parents' criminal and immigration proceedings, a finding of likelihood of success is assured. A practice of this sort implemented in this way is likely to [violate substantive due process.]

The court rejected the government's justification (the "ability to enforce the criminal and immigration laws") for its separation policies as a red herring: "[T]he injunction here—preventing the separation of parents from their children and ordering the reunification of parents and children that have been separated—would do nothing of the sort. The Government would remain free to enforce its criminal and immigration laws, and to exercise its discretion in matters of release and detention consistent with law." Absent a determination that a parent was unfit or a danger to the child, the court ordered the government to reunify parents with their minor children under 5 within 14 days, and with all other minor children within 30 days, among other steps to ensure communication between parents and children.

The government failed, however, to comply with the court's reunification deadlines, and Health and Human Services officials expressed recalcitrance in complying with the court's orders. See, *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>. Though the process dragged on, a recent order states that "2,816 children were identified as having been separated from their parents at the border, and nearly all of them have now been reunified with their parents or otherwise discharged in accordance with their parents' wishes." *Ms. L.*, No. 3:18-cv-428, \_\_\_ WL \_\_\_ (S.D. Cal. Mar. 8, 2019), ECF No. 386.

The government appealed the preliminary injunction order and, while the appeal has been stayed, reached a global settlement resolving four lawsuits, including two in the District Court for the District of Columbia and two in the Southern District of California. Two of the cases were individual suits brought by parents who were also members (by virtue of their circumstances) of the *Ms. L.* class. In the final suit, *Dora*, the plaintiffs alleged that parental separation "denied them of a meaningful opportunity to apply for the protections of asylum" because they were forced to go

through the dispositive “credible fear interview process while separated from their children.” Unopposed Motion for Preliminary Approval, *Ms. L.*, No. 3:18-cv-428 (S.D. Cal. Oct. 5, 2018), ECF No. 247. As a result of the settlement, the government agreed to provide additional process for asylum seekers who were separated from their children by “exercis[ing] its discretionary authority to sua sponte conduct a good faith, de novo review of the parent’s negative credible fear finding.”

The consolidated *Ms. L.* and *Dora* action remains pending with substantial court oversight, including regular status updates on the family reunification process. This careful oversight, coupled with a new report from the HHS Office of Inspector General, has expanded the class to “potentially ‘thousands’ more families.” *Ms. L.*, No. 3:18-cv-428, \_\_\_ WL \_\_\_ (S.D. Cal. Mar. 8, 2019), ECF No. 386. As Judge Sabraw explained, the Government “did not include in the class [discussed above] those parents whose children were released from ORR custody before June 26, 2018 [the date the class was certified.]” But a new OIG report “reveal[ed] that the Department of Justice and the Department of Homeland Security began separating migrant families as early as July 1, 2017 . . . and that pursuant to the policy, potentially ‘thousands’ more families had been separated [beyond those identified under the court’s earlier injunction.]” The problem is that “those parents—the potentially ‘thousands’ identified by OIG—were not reunified with their children pursuant to the Court’s preliminary injunction” and could be removed while their children remained in ORR custody.

The plaintiffs moved to amend the class to clarify that it extended to *all* parents separated from their children, not just those parents who were released after the injunction was put in place. The Government raised, and the court rejected, a variety of arguments as to why the class should not be amended. Among these:

Defendants suggest this information is not a new development, but rather something the parties knew about, or should have known about, when the Court issued its Orders. However, that suggestion stands in stark contrast to Defendants’ representations in this case in as late as May of 2018 that the government did not have either a policy or practice of separating families at the border. . . .

There is no dispute the parents who have been excluded from the class were also subjected to this “common practice.” Like the current members of the class, they, too, were separated from their children by DOJ and DHS, their children were placed in ORR custody, and they were not reunified with their children despite the absence of any finding they were unfit parents or presented a danger to their children. These parents, like those presently in the class, present the identical question, namely did that practice violate the parents’ rights to substantive due process . . . .

The hallmark of a civilized society is measured by how it treats its people and those within its borders. That Defendants may have to change course and undertake additional effort to address these issues does not render modification of the class definition unfair; it only serves to underscore the unquestionable importance of the effort and

why it is necessary (and worthwhile). In sum, that Plaintiffs were alerted to the existence of a handful of parents within this group, and that subsequent investigation by the OIG confirmed that there was not just a handful but potentially thousands of parents in this group, does not render modification of the class definition unfair.

As before, while the court couched the issue in terms of the plaintiffs' substantive due process rights of family unity, the real deficiency was the absence of any procedural due process to justify the separation (lack of parental fitness). The court agreed to receive further briefing on the appropriate remedy for the newly-included class members. *See also* Julie Small, *Judge: Immigration Must Identify Thousands More Migrant Kids Separated From Parents*, NPR (Mar. 9, 2019), <https://www.npr.org/2019/03/09/701935587/judge-immigration-must-identify-thousands-more-migrant-kids-separated-from-paren>.

**§ 2.05, p. 98. Insert after Note 2-36.**

**Note 2-36(a)**

The effect of *Sandin* on step one of the due process analysis has been “disastrous for prisoners” and has produced a wide range of circuit court standards. Michael Z. Goldman, Note, *Sandin v. Conner and Intraprison Confinement: Ten Years of Confusion and Harm in Prisoner Litigation*, 45 B.C. L. REV. 423, 425 (2004). The D.C. Circuit, too, has seized upon the “diverge[nce]” in circuit court authority, setting forth the following “survey [of] the current state of the law” in *Aref v. Lynch*, 833 F.3d 242 (D.C. Cir. 2016):

The Third, Sixth, and Tenth Circuits all generally look to administrative confinement as the baseline.<sup>7</sup> *See, e.g., Jones v. Baker*, 155 F.3d 810, 812–13 (6th Cir. 1998) (finding no liberty interest for inmate placed in administrative segregation for thirty months pending investigation for murder of a prison guard as segregation during investigation is not atypical and was justified).

The Fifth Circuit, on the other hand, has held disciplinary segregation can never implicate a liberty interest unless it “inevitably” lengthens a prisoner’s sentence and that administrative segregation—being an ordinary incident of prison life—is essentially incapable of creating a liberty interest.<sup>8</sup> The Seventh Circuit also has adopted a high standard, holding the baseline is not just the conditions of confinement within that particular prison, but those at the harshest facility in the state’s most restrictive prison. By contrast, the Fourth Circuit looks to the general population as the baseline. And the Second Circuit requires a fact-specific determination that compares the duration and conditions of segregation with conditions in both administrative confinement and the general population. As a result, the Second Circuit has found confinements as short as 180 and 305 days create a liberty interest under *Sandin*. In sum, divergences in the baseline often lead to divergences in outcome. We are therefore cautious about relying too heavily on out-of-circuit

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<sup>7</sup> . . . The Tenth Circuit also uniquely considers whether the prison action is “reasonably related to legitimate penological interests.”

<sup>8</sup> The Fifth Circuit has found a liberty interest in a few extraordinary cases involving solitary confinement that spans decades.

precedent in evaluating appellants' claims, except to note that courts are generally hesitant to find a liberty interest in the confinement context.

Our circuit laid out its approach to the comparative baseline in *Hatch* [where the court held that] a liberty interest arises only when the deprivation “imposes an ‘atypical and significant’ hardship on an inmate in relation to the most restrictive confinement conditions that prison officials ... *routinely* impose on inmates serving similar sentences.” Because administrative segregation is most routinely imposed, the court held it constitutes the proper baseline. . . . We must look “not only to the nature of the deprivation ... but also to its length” in evaluating atypicality and significance.

Though our circuit may be unique in considering the duration of confinement relative to similarly situated prisoners, duration itself is widely regarded as a crucial element of the *Sandin* analysis. *See, e.g., Wilkinson*, 545 U.S. at 223–24 (considering indefinite duration of confinement and infrequency of review when finding a liberty interest in placement at a particularly harsh supermax prison). Duration is significant precisely because “especially harsh conditions endured for a brief interval and somewhat harsh conditions endured for a prolonged interval might both be atypical. . . .

We conclude, then, that the proper methodology for evaluating deprivation claims under *Sandin* is to consider (i) the conditions of confinement relative to administrative segregation, (ii) the duration of that confinement generally, and (iii) the duration relative to length of administrative segregation routinely imposed on prisoners serving similar sentences. We also emphasize that a liberty interest can potentially arise under less-severe conditions when the deprivation is prolonged or indefinite.

What do you make of these various tests and characterizations of *Sandin*? Which do you think best reflects what Justice Rehnquist intended?

## **§ 2.05, p. 98. Insert after Problem 2-1.**

### **Note 2-36(b)**

Ordinarily, under the bail statutes of the several States, “courts may deny bail to persons charged with a felony, but only after an individualized determination that the defendant poses a substantial danger to another person or to the community.” David Post, *Denying Bail*, REASON: VOLOKH CONSPIRACY (Nov. 19, 2018), <https://reason.com/volokh/2018/11/19/denying-bail>. In the federal system, defendants may be held pending trial if required to reasonably assure the safety of other people or the community or to reasonably assure the defendant's appearance. If a defendant is charged with certain serious offenses, however, the defendant must overcome a rebuttable presumption that the defendant is a danger to the community. *See* 18 U.S.C. § 3142. As a general matter, however, our legal system recognizes a strong liberty interest in remaining free before trial, ensuring at least some process before a defendant may be incarcerated.

Arizona voters, via a popular referendum procedure, passed a statute “categorically prohibit bail for all persons charged with sexual assault if ‘the proof is evident or the presumption great’ that the person committed the crime, without considering other facts that may justify bail in an individual

case.” categorically prohibit bail for all persons charged with sexual assault if “the proof is evident or the presumption great” *State v. Wein*, 417 P.3d 787, 789 (2018), *cert. denied sub nom. Arizona v. Goodman*, No. 18-391, 2019 WL 177709 (U.S. Jan. 14, 2019). The Arizona Supreme Court held that this categorical bar on pretrial release, with no individualized analysis, violated what it termed “substantive due process.” But underlying its reasoning throughout was a procedural due process analysis. The liberty interest at stake triggered procedural guarantees—those who were charged with sexual assault could be detained, but only after an “individualized determination.” Arizona sought, and was denied, certiorari by the Supreme Court in January 2019.

In *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), the Supreme Court held that the nearly identical right to bail that triggered due process protections in *Wein* (and in *United States v. Salerno*, 481 U.S. 739 (1987)) likely has limited, if any, application in the immigration detention context. Justice Alito began his opinion for the Court by expressing sympathy for the task facing the immigration authorities:

Every day, immigration officials must determine whether to admit or remove the many aliens who have arrived at an official “port of entry” (e.g., an international airport or border crossing) or who have been apprehended trying to enter the country at an unauthorized location. Immigration officials must also determine on a daily basis whether there are grounds for removing any of the aliens who are already present inside the country. The vast majority of these determinations are quickly made, but in some cases deciding whether an alien should be admitted or removed is not as easy. As a result, Congress has authorized immigration officials to detain some classes of aliens during the course of certain immigration proceedings. Detention during those proceedings gives immigration officials time to determine an alien’s status without running the risk of the alien’s either absconding or engaging in criminal activity before a final decision can be made.

The Ninth Circuit, citing the doctrine of constitutional avoidance, read a bond review requirement into the Immigration and Naturalization Act. Without review every six months, at which the government would be required to justify further detention by clear and convincing evidence, the government would be required to release pre-deportation detainees. The Court rejected, in wholesale fashion, the Ninth Circuit’s statutory interpretation (the statute vested complete discretion in the Attorney General to decide who to detain and who to release) and remanded the due process claims to the Ninth Circuit for consideration in the first instance. It did so, however, with a strong parting shot. The district court had certified the matter as a class action. The Supreme Court, however, suggested that the court should reconsider whether class treatment remained appropriate despite the elimination of the statutory claims: “[The Court of Appeals should also consider on remand whether a Rule 23(b)(2) class action litigated on common facts is an appropriate way to resolve respondents’ Due Process Clause claims. ‘[D]ue process is flexible,’ we have stressed repeatedly, and it ‘calls for such procedural protections as the particular situation demands.’”

Justice Breyer, writing for a three-justice dissent (Justice Kagan did not participate in the decision), took a very different view of the due process implications of holding immigration detainees without any procedure for review:

The noncitizens at issue are asylum seekers, persons who have finished serving a sentence of confinement (for a crime), or individuals who, while lacking a clear

entitlement to enter the United States, claim to meet the criteria for admission. The Government has held all the members of the groups before us in confinement for many months, sometimes for years, while it looks into or contests their claims. But ultimately many members of these groups win their claims and the Government allows them to enter or to remain in the United States. . . .

Consider the relevant constitutional language and the values that language protects. The Fifth Amendment says that “[n]o person shall be ... deprived of life, liberty, or property without due process of law.” An alien is a “person.” See *Wong Wing v. United States*, 163 U.S. 228, 237–238 (1896). To hold him without bail is to deprive him of bodily “liberty.” See *United States v. Salerno*. And, where there is no bail proceeding, there has been no bail-related “process” at all. The Due Process Clause—itsself reflecting the language of the Magna Carta—prevents arbitrary detention. . . .

The cases before us, however, are not criminal cases. Does that fact make a difference?

If there is no reasonable basis for treating these confined noncitizens worse than ordinary defendants charged with crimes, worse than convicted criminals appealing their convictions, worse than civilly committed citizens, worse than identical noncitizens found elsewhere within the United States, and worse than noncitizens who have committed crimes, served their sentences, and been definitively ordered removed (but lack a country willing to take them), their detention without bail is arbitrary. Thus, the constitutional language, purposes, and tradition that require bail in instances of criminal confinement also very likely require bail in these instances of civil confinement. That perhaps is why Blackstone wrote that the law provides for the possibility of “bail in any case whatsoever.” . . .

The bail questions before us are technical but at heart they are simple. We need only recall the words of the Declaration of Independence, in particular its insistence that *all* men and women have “certain unalienable Rights,” and that among them is the right to “Liberty.” We need merely remember that the Constitution's Due Process Clause protects each person's liberty from arbitrary deprivation.

Even while the majority did not reach the due process issue, whose interests did it address? What would the majority's *Goldberg v. Kelley* analysis look like? How would it contrast from the dissent's analysis? What do you think accounts for the majority's distinct treatment of criminal detainees and immigration detainees? Might the logic underlying the majority's opinion track, in some way, the Court's rationale in *Cafeteria & Restaurant Workers Union v. McElroy*, *supra*?

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

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

One end furthered by procedural due process is preventing arbitrary governmental action. Requiring a degree of process serves as an initial safeguard—actions motivated by animus may be snuffed out by the types of procedures *Mathews* mandates. So it was the case in *Simpson v. Brown*

*County*, 860 F.3d 1001 (7th 2017), where 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. Underlying Plaintiff John Simpson’s claim, which was dismissed by the district court on the pleadings, were some small-town rent-seeking shenanigans. 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.

Brown County argued that Simpson’s due process rights were not violated because the revocation of his license was a “random and unauthorized” act of an employee, 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 “suggest[ing] 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, Simpson lacked an adequate post-deprivation remedy. 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.”

What does *Simpson* mandate in terms of governmental supervision of its employees as a matter of due process? Under what circumstances could the County have immediately revoked Simpson’s license, and what post-deprivation process would then be required? If you were advising the County, what record would you want to recreate, from the time of an investigation of a septic contractor, to the suspension of the license, to a final revocation? On the other side, beyond the potential for animus or improper motive on the part of the health officer, what evidence would you marshal on behalf of Simpson?



**§ 2.08, p. 151: Insert at the end of Note 2-54.**

*See also Mickelson v. Cnty. Of Ramsey*, 823 F.3d 918 (8th Cir. 2016) (holding that use of debit cards to return arrestees' money after release, including fees if the funds are converted into cash or if they remain on the card for more than 36 hours, was a "*de minimis* level of imposition with which the Constitution is not concerned").

## Chapter 3

**§ 3.03, p. 211: Insert after Note 3-4.**

**Note 3-4(a)**

The stakes involved in many deportation hearings are very high, and substantial procedural protections are appropriate. In some deportation proceedings, the end result can be a matter of life or death. *See, e.g., Gonzalez Ruano v. Barr*, 922 F.3d 346 (7th Cir. 2019) (reversing denial of asylum predicated upon refugee's membership in wife's family where a cartel leader "walked up to [him], again held a gun to him" and told him that "he would kill [him] if he did not leave" his wife"). Political enemies deported to their country of origin may face severe danger. Nevertheless, these issues are statutory in nature, controlled by the procedures provided in the Immigration Act. Alternatively, if INS (now the Department of Homeland Security) so desired, it could specifically invoke the formal proceedings of the APA, but again, to do so would deprive it perhaps of some flexibility that it might need in deportation cases in which the stakes involved may not be very high.

This debate is at the heart of many major political issues, including the closely-related right to asylum. A sizeable contingent of the electorate—led by President Trump—simply wants to "get rid of the whole asylum system" and "get rid of judges" (in the President's words) and use the limited procedures currently available to undocumented persons to restrict immigration.<sup>1</sup> And Trump's controversial "Remain in Mexico policy" has forced asylum seekers to wait in Mexico (rather being detained or paroled in the United States) until immigration officials can resolve their cases, making it even more difficult for asylum applicants to obtain lawyers and subjecting them to continued danger "from the same gangs that threatened them in Central America."<sup>2</sup> The Northern District of California preliminarily enjoined the policy, but, on May 7, 2019, a divided panel of the Ninth Circuit (drawing three separate opinions) stayed the injunction, finding that the defendants were likely to prevail on their statutory arguments. *Innovation Law Lab v. McAleenan*, \_\_\_ F.3d \_\_\_ (9th Cir. 2019). One judge in particular criticized the Department of Homeland Security's procedures for failing to even inquire of asylum seekers coming from Central America whether they additionally fear persecution in Mexico before turning them away at the border to await their asylum decision. These procedures, in Judge Watford's estimation, were arbitrary and capricious under the APA—a standard we will address at length later—and likely in violation of the United States' treaty obligations. But the "Remain in Mexico policy" highlights the breadth of what we

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<sup>1</sup> Colby Itkowitz, *Trump: Congress Needs to 'Get Rid of the Whole Asylum System,'* WASH. POST (Apr. 5, 2019), [https://www.washingtonpost.com/politics/trump-congress-needs-to-get-rid-of-the-whole-asylum-system/2019/04/05/700eac1a-57a5-11e9-8ef3-fbd41a2ce4d5\\_story.html](https://www.washingtonpost.com/politics/trump-congress-needs-to-get-rid-of-the-whole-asylum-system/2019/04/05/700eac1a-57a5-11e9-8ef3-fbd41a2ce4d5_story.html).

<sup>2</sup> Zolan Kanno-Youngs 7 Maya Averbuch, *Anxious Wait in Mexico For Migrants Who Hope U.S. Can Be Safe Haven*, N.Y. TIMES, Apr. 6, 2019, at A12.

mean when we talk about “procedures.” What access to information does an affected individual have? Is any right to an attorney meaningful when an individual cannot enter the country to find or meet with one? What about the circumstances an asylum applicant is left in while being expected to prepare a legal case?

**§ 3.05, p. 240: Insert after Note 3-25.**

**Note 3-25(a)**

A related issue is the degree to which agencies may base an adjudicatory decision on an expert’s opinion (which may rely upon hearsay in whole or part) without disclosing the underlying data to support the opinion. In *Biestek v. Berryhill*, 139 S. Ct. 1148 (2019), the Supreme Court resolved a circuit split over the Social Security Administration’s reliance upon vocational experts to support the availability of jobs in denying applications for disability benefits. In a civil case, the experts’ underlying data would be subject to full disclosure under the discovery rules. As we have seen, however, administrative adjudications frequently take place with minimal—if any—pre-hearing exchange of information. Relying heavily on *Perales* (as *Calhoun* did), the Court rejected the position that a vocational expert must provide her underlying data on demand in order for the ALJ to rely upon it as substantial evidence. The Court also rejected the argument that the underlying data was necessary for meaningful cross-examination. As Justice Kagan explained for the Court:

Where *Biestek* goes wrong, at bottom, is in pressing for a categorical rule, applying to every case in which a vocational expert refuses a request for underlying data. Sometimes an expert’s withholding of such data, when combined with other aspects of the record, will prevent her testimony from qualifying as substantial evidence. That would be so, for example, if the expert has no good reason to keep the data private and her testimony lacks other markers of reliability. But sometimes the reservation of data will have no such effect. Even though the applicant might wish for the data, the expert’s testimony still will clear (even handily so) the more-than-a-mere-scintilla threshold. The inquiry, as is usually true in determining the substantiality of evidence, is case-by-case. See, e.g., *Perales*, 402 U.S. at 399. It takes into account all features of the vocational expert’s testimony, as well as the rest of the administrative record. And in so doing, it defers to the presiding ALJ, who has seen the hearing up close.

Three justices, including Justice Gorsuch, dissented. Justice Gorsuch framed the issue thusly:

Walk for a moment in Michael Biestek’s shoes. . . . Like many cases, yours turns on whether a significant number of other jobs remain that someone of your age, education, and experience, and with your physical limitations, could perform. . . . To meet its burden in your case, the agency chooses to rest on the testimony of a vocational expert the agency hired as an independent contractor. The expert asserts there are 120,000 “sorter” and 240,000 “bench assembler” jobs nationwide that you could perform even with your disabilities.

Where did these numbers come from? The expert says she relied on data from the Bureau of Labor Statistics and her own private surveys. But it turns out the Bureau can’t be the source; its numbers aren’t that specific. The source—if there is

a source—must be the expert's private surveys. So you ask to see them. The expert refuses—she says they're part of confidential client files. You reply by pointing out that any confidential client information can be redacted. But rather than ordering the data produced, the hearing examiner, herself a Social Security Administration employee, jumps in to say that won't be necessary. Even without the data, the examiner states in her decision on your disability claim, the expert's say-so warrants “great weight” and is more than enough evidence to deny your application. Case closed.

What sort of case-by-case evaluation do you suppose Justice Kagan contemplated? Might it involve the types of factors outlined in *Calhoun*? Does the dissent have a point? What is the rationale behind *not* requiring the vocational expert (or experts in general) to disclose the underlying data? Could there be an acceptable middle ground between complete disclosure and complete nondisclosure?

### Note 3-25(b)

Consider, in the next case, how the court applies the new rule in *Biestek*. How flexible is the court's approach? When might a claimant actually be entitled to a VE's underlying data? How does that square with *Biestek*?

#### KRELL v. SAUL

\_\_\_ F.3d \_\_\_ (7th Cir. 2019)

St. Eve, Circuit Judge.

We focus here on an issue involving a well-known figure in Social Security cases: the vocational expert. Specifically, we address whether an administrative law judge (ALJ) can decline to issue a subpoena requiring a vocational expert to produce his underlying data sources. . . .

### II. Discussion

. . .

While this case was pending, the Supreme Court held in *Biestek* that a vocational expert is not categorically required to produce his supporting data. Instead, the factfinder should evaluate the vocational expert's testimony, including his failure to produce the data, and determine whether the testimony is reliable. If an ALJ, for example, finds an expert trustworthy and believes he has good reason to withhold underlying sources—the sources might include private information or take significant time to compile, for example—the failure to produce such sources “need not make a difference.” In other cases, “the refusal to disclose data, considered along with other shortcomings, will prevent a court from finding that a reasonable mind could accept the expert's testimony.” . . .

[The subpoena request stated] why Krell thought the requested documents were important and that Krell believed he needed them to “adequately cross examine” the vocational expert. But that Krell alleged that a subpoena was necessary did not automatically make it so. At the hearing, the ALJ pointed out that, despite Krell's assertion, Krell had not in fact shown why it was necessary for the expert to produce his sources, a prerequisite to obtaining a subpoena. Why, the ALJ asked, couldn't counsel just question the expert about his sources at the hearing? And if Krell wanted to challenge

the expert's reliance on those sources, why couldn't he do so post-hearing? These questions, it turns out, were spot on.

We keep in mind here that Krell's argument is that the ALJ erred in denying the subpoena request, requiring reversal. He has not argued that, putting the subpoena request aside, the vocational expert's testimony did not constitute substantial evidence. So, we analyze only the subpoena request, not the expert's eventual testimony, and ask whether Krell was entitled to require that the expert produce his underlying sources at the hearing.

What Krell sought to do, it seems, was to require the vocational expert to make his underlying sources available on demand. *Biestek*, however, rejects such a requirement; *Biestek* clearly held that vocational experts are not categorically required to provide their underlying data. The expert may decline to do so, and if he does, this failure goes to the weight the ALJ may give the testimony. Considering the totality of his testimony, the expert can be deemed credible even if he provides no underlying data. The ALJ makes such determinations on a case-by-case basis. We acknowledge that it would be *helpful* to have the expert's underlying sources at a hearing.

But, beyond arguing for a categorical rule, which, like in *Biestek*, cannot be imposed here, Krell has advanced no reason why it was *necessary* for the expert to produce his underlying sources. We therefore cannot say that the ALJ erred in denying the subpoena request.

We want to be clear that our holding today and that of *Biestek* do not give vocational experts carte blanche to testify without providing underlying sources. It is certainly best practice for vocational experts to provide underlying sources at hearings, and we encourage them to do so. We will review on a case-by-case basis situations where a vocational expert does not produce his sources and the ALJ declines to require him to do so. In some cases, the vocational expert's testimony may prove to be unreliable without underlying sources, and in those cases the testimony may neither constitute substantial evidence nor be used as the basis for an ALJ's determination.

On a final note, we have previously suggested that in cases where underlying data may not be available at the hearing, (say, for example, the vocational expert testified by phone, as was the case here), the claimant should have the opportunity to make additional argument about the data post-hearing. . . . We have never mandated that post-hearing challenges be allowed, and we decline to do so here. But nothing in *Biestek* forces us to reconsider our recommendation, and we continue to encourage ALJs to allow claimants to submit post-hearing argument about a vocational expert's testimony, especially when the underlying sources are not available during the hearing or are not provided at all.

### **Note 3-25(c)**

The social security disability system is perpetually overburdened such that many applications remain pending for years before they are resolved years later. *See, e.g., Association of Administrative Law Judges v. Colvin*, 777 F.3d 402 (7th Cir. 2015). Do you think that ALJs will be eager to entertain post-hearing briefing? If you were counsel to the SSA, would you recommend that they do so? Could the failure to do so constitute reversible error?

Relatedly, how seriously do you reckon that an ALJ might take into consideration a VE's "failure to produce the data" in "determining whether the testimony is reliable"?

**§ 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. Instead, these boards must show that “the actions in question are an exercise of the State’s sovereign power” to benefit from the immunity.

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.” 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.” 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.” Rather, the determination requires as “an assessment of the structural risk of market participants’ confusing their own interests with the State’s policy

goals.”

The Court rejected the argument that its holding would “discourage dedicated citizens from serving on state agencies that regulate their own occupation.” 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.”

**§ 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. 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 of adjudicating Phillips’ religious objection based on a negative normative evaluation of the particular justification for his objection and the religious grounds for it. 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*?

### **Note 3-56: *Trump v. Hawaii* and the “Muslim Ban”**

We will address related issues of prejudgment and bias in rulemakings and other agency actions in later chapters. But so far we have addressed situations where only the direct decision makers have engaged in behaviors leading to accusations of bias. Can entire adjudicative processes be infected with bias or designed to produce prejudged outcomes, apart from any issues with the direct decision maker?

This is a simplified description of the issue presented in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), where the Supreme Court rejected a challenge to the final version of President Trump’s so-called “Muslim ban.” The ban initially prevented nationals from six predominantly Muslim countries (Iran, Libya, Somalia, Sudan, Syria, and Yemen) from entering the United States. The latest version removed Somalia and Sudan and added Chad, Iraq, and North Korea, and Venezuela to the list.

Front and center were Trump’s campaign promises and tweets promising and threatening to exclude Muslims from the United States. As Chief Justice Roberts, writing for a five-justice majority, described:

At the heart of plaintiffs’ case is a series of statements by the President and his advisers casting doubt on the official objective of the Proclamation. For example, while a candidate on the campaign trail, the President published a “Statement on Preventing Muslim Immigration” that called for a “total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on.” That statement remained on his campaign website until May 2017. Then-candidate Trump also stated that “Islam hates us” and asserted that the United States was “having problems with Muslims coming into the



country.” Shortly after being elected, when asked whether violence in Europe had affected his plans to “ban Muslim immigration,” the President replied, “You know my plans. All along, I’ve been proven to be right.”

One week after his inauguration, the President issued EO–1 [the first version of the travel ban]. In a television interview, one of the President’s campaign advisers 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.’” The adviser 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.”

Plaintiffs also note that after issuing EO–2 to replace EO–1, the President expressed regret that his prior order had been “watered down” and called for a “much tougher version” of his “Travel Ban.” Shortly before the release of the Proclamation, he stated that the “travel ban ... should be far larger, tougher, and more specific,” but “stupidly that would not be politically correct.” More recently, on November 29, 2017, the President retweeted links to three anti-Muslim propaganda videos. In response to questions about those videos, the President’s deputy press secretary denied that the President thinks Muslims are a threat to the United States, explaining 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.”

After reassuring that the Constitution would not tolerate religious discrimination, the majority explained that the executive’s broad authority over immigration and the facial legitimacy of Trump’s latest proclamation required vacatur of the injunction:

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.

Additionally bolstering the majority’s conclusion was the Proclamation’s wavier program, “open to all covered foreign nationals seeking entry” provided that they could demonstrate that (1) denial of entry would work an undue hardship, (2) entry would not pose a public safety threat, and (3) entry would be in the interest of the United States. But for Justice Breyer, joined by Justice Kagan, the operation of this “elaborate system of exemptions and waivers” served as additional evidence of the Proclamation’s unlawfulness:

On the one hand, if the Government is applying the exemption and waiver provisions as written, then its argument for the Proclamation's lawfulness is strengthened. . . .

On the other hand, if the Government is *not* applying the system of exemptions and waivers that the Proclamation contains, then its argument for the Proclamation's lawfulness becomes significantly weaker. . . . [I]f the Government is not applying the Proclamation's exemption and waiver system, the claim that the Proclamation is a "Muslim ban," rather than a "security-based" ban, becomes much stronger. How could the Government successfully claim that the Proclamation rests on security needs if it is excluding Muslims who satisfy the Proclamation's own terms? At the same time, denying visas to Muslims who meet the Proclamation's own security terms would support the view that the Government excludes them for reasons based upon their religion.

Unfortunately there is evidence that supports the second possibility, *i.e.*, that the Government is not applying the Proclamation as written. The Proclamation provides that the Secretary of State and the Secretary of Homeland Security "shall coordinate to adopt guidance" for consular officers to follow when deciding whether to grant a waiver. Yet, to my knowledge, no guidance has issued. . . .

An examination of publicly available statistics also provides cause for concern. The State Department reported that during the Proclamation's first month, two waivers were approved out of 6,555 eligible applicants. In its reply brief, the Government claims that number increased from 2 to 430 during the first four months of implementation. That number, 430, however, when compared with the number of pre-Proclamation visitors, accounts for a miniscule percentage of those likely eligible for visas, in such categories as persons requiring medical treatment, academic visitors, students, family members, and others belonging to groups that, when considered as a group (rather than case by case), would not seem to pose security threats.

Justice Breyer then detailed several examples of individuals receiving denials without any suggestion of cause, including that of a child with cerebral palsy who could not receiving the necessary live-saving treatment in Yemen. His dissent also noted an affidavit of an official in another matter asserting that the consular officials were provided no discretion to grant waivers except in "rare cases of imminent danger," such that the "waiver process is merely window dressing."

Justice Sotomayor, joined by Justice Ginsburg, likewise dissented, expanding upon Trump's long record of anti-Muslim sentiments. *See also* Brian Klass, *A Short History of President Trump's Anti-Muslim Bigotry*, WASH. POST (Mar. 15, 2019), <https://www.washingtonpost.com/opinions/2019/03/15/short-history-president-trumps-anti-muslim-bigotry/>. Justice Sotomayor then reframed the question as not whether the Proclamation could be read to support some legitimate interest, but instead

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. The answer is unquestionably yes.

Taking 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. Even before being sworn into office, then-candidate Trump stated that "Islam hates us," warned that "[w]e're having problems with the Muslims, and we're having problems with Muslims coming into the country," promised to enact a "total and complete shutdown of Muslims entering the United States," and instructed one of his advisers to find a "legal" way to enact a Muslim ban.

Justice Sotomayor proceeded to discuss evidence which undermined the Trump Administration's security justification and so-called "worldwide review," including evidence that one Trump appointee involved in the process had publicly expressed anti-Muslim sentiments.

You will note similarities between the issues raised by the dissent with regard to the Proclamation (perhaps fairly characterized as rule-like) and the prejudgment/bias issues discussed in later chapters. But what do you make of Justice Breyer's concerns regarding prejudgment in the adjudication-like waiver process? Is the power of the executive over immigration matters the only explanation for why such a scheme is acceptable to the majority? Does Donald Trump's record sound anything like the *Cinderella* court's discussion of Chairman Dixon's background which led to his disqualification? On this record, could any Muslim whose admission is subject to the decision, review, or oversight by a cabinet-level official be assured of a fair decision? Is it possible for an entire adjudicatory system to be infected with prejudgment? For one perspective, see William D. Araiza, *Animus and Its Discontents*, 71 FLA. L. REV. 155, 169–70 (2019), who suggests that a "silver lining" of the Supreme Court's travel ban decision was the fact that even the majority (and especially now-retired Justice Kennedy, who separately concurred) appeared "willing[] to probe the government's motivations to some appreciable degree."

## Chapter 4

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

**Note 4-7(a).** Professor Walker discusses and ultimately concludes that the travel ban (discussed above) "falls under the diverse and opaque category of informal adjudication— a category of agency action where the role of courts and other procedural protections vary dramatically." Christopher J. Walker, *Administrative Law Without Courts*, 65 UCLA L. Rev. 1620, 1629–30 (2018). In light of *Overton Park*, why was even the *Trump v. Hawaii* majority willing to consider extra-record evidence?

### § 4.02, p. 305: Insert after note 4-8.

Consider the application of *Overton Park* and *Camp v. Pitts* in a dispute of national scope

and importance—the inclusion of a citizenship question on the decennial census. As the excerpts below suggest, one faction painted the issue framed the issue as simply a matter of reverting to a practice as old as 1820. To others, the effort was the product of a sham rationale, undertaken with the sole goal of disenfranchising political opponents. How does the Court navigate the adequate explanation requirement of *Overton Park*? On what basis does the Court consider, and ultimately order, an expanded record? Is a particular result foreordained? How much room is left for the district court on remand?

## **DEPARTMENT OF COMMERCE v. NEW YORK**

139 S. Ct. 2551 (2019)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Secretary of Commerce decided to reinstate a question about citizenship on the 2020 census questionnaire. A group of plaintiffs challenged that decision on constitutional and statutory grounds. We now decide whether the Secretary violated the Enumeration Clause of the Constitution, the Census Act, or otherwise abused his discretion.

### **I A**

In order to apportion Members of the House of Representatives among the States, the Constitution requires an “Enumeration” of the population every 10 years, to be made “in such Manner” as Congress “shall by Law direct.” Art. I, § 2, cl. 3; Amdt. 14, § 2. In the Census Act, Congress delegated to the Secretary of Commerce the task of conducting the decennial census “in such form and content as he may determine.” 13 U. S. C. § 141(a). The Secretary is aided in that task by the Census Bureau, a statistical agency housed within the Department of Commerce.

The population count derived from the census is used not only to apportion representatives but also to allocate federal funds to the States and to draw electoral districts. The census additionally serves as a means of collecting demographic information, which “is used for such varied purposes as computing federal grant-in-aid benefits, drafting of legislation, urban and regional planning, business planning, and academic and social studies.” Over the years, the census has asked questions about (for example) race, sex, age, health, education, occupation, housing, and military service. It has also asked about radio ownership, age at first marriage, and native tongue. The Census Act obliges everyone to answer census questions truthfully and requires the Secretary to keep individual answers confidential, including from other Government agencies.

There have been 23 decennial censuses from the first census in 1790 to the most recent in 2010. Every census between 1820 and 2000 (with the exception of 1840) asked at least some of the population about their citizenship or place of birth. Between 1820 and 1950, the question was asked of all households. Between 1960 and 2000, it was asked of about one-fourth to one-sixth of the population. That change was part of a larger effort to simplify the census by asking most people a few basic demographic questions (such as sex, age, race, and marital status) on a short-form questionnaire, while asking a sample of the population more detailed demographic questions on a long-form questionnaire. . . .

The Census Bureau and former Bureau officials have resisted occasional proposals to resume asking a citizenship question of everyone, on the ground that doing so would discourage noncitizens from responding to the census and lead to a less accurate count of the total population.

### **B**

In March 2018, Secretary of Commerce Wilbur Ross announced in a memo that he had decided to reinstate a question about citizenship on the 2020 decennial census questionnaire. The Secretary stated that he was acting at the request of the Department of Justice (DOJ), which sought improved data about citizen voting-age population for purposes of enforcing the Voting Rights Act (or VRA)—specifically the Act’s ban on diluting the influence of minority voters by depriving them of single-member districts in which they can elect their preferred candidates. DOJ explained that federal courts determine whether a minority group could constitute a majority in a particular district by looking to the citizen voting-age population of the group. According to DOJ, the existing citizenship data from the American Community Survey [a separate annual survey “sent each year to a rotating sample of about 2.6% of households”] was not ideal: It was not reported at the level of the census block, the basic component of legislative districting plans; it had substantial margins of error; and it did not align in time with the census-based population counts used to draw legislative districts. DOJ therefore formally requested reinstatement of the citizenship question on the census questionnaire.

The Secretary’s memo explained that the Census Bureau initially analyzed, and the Secretary considered, three possible courses of action. [The first was using the American Community Survey and developing a statistical model to better estimate citizenship “at the census block level.” But the Secretary rejected this as inaccurate. The second was to include a citizenship question on the census. “The Bureau predicted that doing so would discourage some noncitizens from responding to the census. That would necessitate increased ‘non-response follow up’ operations—procedures the Bureau uses to attempt to count people who have not responded to the census—and potentially lead to a less accurate count of the total population.” The third was to use data from other agencies, such as social security records. The Census Bureau recommended this approach, but the Secretary rejected it because “they were missing for more than 10% of the population.”]

The Secretary ultimately asked the Census Bureau to develop a fourth option that would combine options two and three: reinstate a citizenship question on the census questionnaire, and also use the time remaining until the 2020 census to “further enhance” the Bureau’s “administrative record data sets, protocols, and statistical models.” The memo explained that, in the Secretary’s judgment, the fourth option would provide DOJ with the “most complete and accurate” citizen voting-age population data in response to its request.

The Secretary “carefully considered” the possibility that reinstating a citizenship question would depress the response rate. But after evaluating the Bureau’s “limited empirical evidence” on the question—evidence drawn from estimated non-response rates to previous American Community Surveys and census questionnaires—the Secretary concluded that it was not possible to “determine definitively” whether inquiring about citizenship in the census would materially affect response rates. He also noted the long history of the citizenship question on the census, as well as the facts that the United Nations recommends collecting census-based citizenship information, and other major democracies such as Australia, Canada, France, Indonesia, Ireland, Germany, Mexico, Spain, and the United Kingdom inquire about citizenship in their censuses. Altogether, the Secretary determined that “the need for accurate citizenship data and the limited burden that the reinstatement of the citizenship question would impose outweigh fears about a potentially lower response rate.”

## C

. . . In June 2018, the Government submitted to the District Court the Commerce

Department’s “administrative record”: the materials that Secretary Ross considered in making his decision. That record included DOJ’s December 2017 letter requesting reinstatement of the citizenship question, as well as several memos from the Census Bureau analyzing the predicted effects of reinstating the question. Shortly thereafter, at DOJ’s urging, the Government supplemented the record with a new memo from the Secretary, “intended to provide further background and context regarding” his March 2018 memo. The supplemental memo stated that the Secretary had begun considering whether to add the citizenship question in early 2017, and had inquired whether DOJ “would support, and if so would request, inclusion of a citizenship question as consistent with and useful for enforcement of the Voting Rights Act.” According to the Secretary, DOJ “formally” requested reinstatement of the citizenship question after that inquiry.

Respondents argued that the supplemental memo indicated that the Government had submitted an incomplete record of the materials considered by the Secretary. They asked the District Court to compel the Government to complete the administrative record. The court granted that request, and the parties jointly stipulated to the inclusion of more than 12,000 pages of additional materials in the administrative record. Among those materials were emails and other records confirming that the Secretary and his staff began exploring the possibility of reinstating a citizenship question shortly after he was confirmed in early 2017, attempted to elicit requests for citizenship data from other agencies, and eventually persuaded DOJ to request reinstatement of the question for VRA enforcement purposes.

In addition, respondents asked the court to authorize discovery outside the administrative record. They claimed that such an unusual step was warranted because they had made a strong preliminary showing that the Secretary had acted in bad faith. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). The court also granted that request, authorizing expert discovery and depositions of certain DOJ and Commerce Department officials.

In August and September 2018, the District Court issued orders compelling depositions of Secretary Ross and of the Acting Assistant Attorney General for DOJ’s Civil Rights Division. We granted the Government’s request to stay the Secretary’s deposition pending further review, but we declined to stay the Acting AAG’s deposition or the other extra-record discovery that the District Court had authorized.

The District Court held a bench trial and issued findings of fact and conclusions of law on respondents’ statutory and equal protection claims. After determining that respondents had standing to sue, the District Court ruled that the Secretary’s action was arbitrary and capricious, based on a pretextual rationale, and violated certain provisions of the Census Act. On the equal protection claim, however, the District Court concluded that respondents had not met their burden of showing that the Secretary was motivated by discriminatory animus. . . .

We granted the petition [for certiorari before judgment on the basis of the government’s representation that the census questionnaire needed to be finalized by the end of June 2019.]

[In Part II, the Court concluded that the plaintiffs had standing.]

### III

The Enumeration Clause of the Constitution does not provide a basis to set aside the Secretary’s decision. The text of that clause “vests Congress with virtually unlimited discretion in conducting the decennial ‘actual Enumeration,’ ” and Congress “has delegated its broad authority over the census to the Secretary.” Given that expansive grant of authority, we have rejected challenges to the conduct of the census where the Secretary’s decisions bore a “reasonable relationship to the accomplishment of an actual enumeration.” . . .

We look instead to Congress’s broad authority over the census, as informed by long and

consistent historical practice. All three branches of Government have understood the Constitution to allow Congress, and by extension the Secretary, to use the census for more than simply counting the population. [The Court recounted the history referenced in Part I and concluded that the Enumeration Clause “permits Congress, and by extension the Secretary, to inquire about citizenship on the census questionnaire”.]

#### IV

[The Court’s discussion of reviewability is discussed later in the book. After finding the Secretary’s decision to be reviewable, the Court found his decision to be neither arbitrary nor capricious in light of the varied levels of accuracy of the different citizenship proposals described above. The Court also found that the Secretary did not violate the Census Act.]

#### V

We now consider the District Court’s determination that the Secretary’s decision must be set aside because it rested on a pretextual basis, which the Government conceded below would warrant a remand to the agency.

We start with settled propositions. First, in order to permit meaningful judicial review, an agency must “disclose the basis” of its action. See also *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943).

Second, in reviewing agency action, a court is ordinarily limited to evaluating the agency’s contemporaneous explanation in light of the existing administrative record. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 549 (1978); *Camp v. Pitts*, 411 U.S. 138 (1973). That principle reflects the recognition that further judicial inquiry into “executive motivation” represents “a substantial intrusion” into the workings of another branch of Government and should normally be avoided. See *Overton Park*, 401 U.S. at 420.

Third, a court may not reject an agency’s stated reasons for acting simply because the agency might also have had other unstated reasons. Relatedly, a court may not set aside an agency’s policymaking decision solely because it might have been influenced by political considerations or prompted by an Administration’s priorities. Agency policymaking is not a “rarified technocratic process, unaffected by political considerations or the presence of Presidential power.” *Sierra Club v. Costle*, 657 F.2d 298, 408 (D.C. Cir. 1981). . . .

Finally, we have recognized a narrow exception to the general rule against inquiring into “the mental processes of administrative decisionmakers.” *Overton Park*, 401 U.S. at 420, 91 S.Ct. 814. On a “strong showing of bad faith or improper behavior,” such an inquiry may be warranted and may justify extra-record discovery. *Ibid.*

The District Court invoked that exception in ordering extra-record discovery here. Although that order was premature, we think it was ultimately justified in light of the expanded administrative record. Recall that shortly after this litigation began, the Secretary, prodded by DOJ, filed a supplemental memo that added new, pertinent information to the administrative record. The memo disclosed that the Secretary had been considering the citizenship question for some time and that Commerce had inquired whether DOJ would formally request reinstatement of the question. That supplemental memo prompted respondents to move for both completion of the administrative record and extra-record discovery. The District Court granted both requests at the same hearing, agreeing with respondents that the Government had submitted an incomplete administrative record and that the existing evidence supported a prima facie showing that the VRA rationale was pretextual.

The Government did not challenge the court's conclusion that the administrative record was incomplete, and the parties stipulated to the inclusion of more than 12,000 pages of internal deliberative materials as part of the administrative record, materials that the court later held were sufficient on their own to demonstrate pretext. The Government did, however, challenge the District Court's order authorizing extra-record discovery, as well as the court's later orders compelling depositions of the Secretary and of the Acting Assistant Attorney General for DOJ's Civil Rights Division.

We agree with the Government that the District Court should not have ordered extra-record discovery when it did. At that time, the most that was warranted was the order to complete the administrative record. But the new material that the parties stipulated should have been part of the administrative record—which showed, among other things, that the VRA played an insignificant role in the decisionmaking process—largely justified such extra-record discovery as occurred (which did not include the deposition of the Secretary himself). We accordingly review the District Court's ruling on pretext in light of all the evidence in the record before the court, including the extra-record discovery.

That evidence showed that the Secretary was determined to reinstate a citizenship question from the time he entered office; instructed his staff to make it happen; waited while Commerce officials explored whether another agency would request census-based citizenship data; subsequently contacted the Attorney General himself to ask if DOJ would make the request; and adopted the Voting Rights Act rationale late in the process. In the District Court's view, this evidence established that the Secretary had made up his mind to reinstate a citizenship question “well before” receiving DOJ's request, and did so for reasons unknown but unrelated to the VRA.

The Government, on the other hand, contends that there was nothing objectionable or even surprising in this. And we agree—to a point. It is hardly improper for an agency head to come into office with policy preferences and ideas, discuss them with affected parties, sound out other agencies for support, and work with staff attorneys to substantiate the legal basis for a preferred policy. The record here reflects the sometimes involved nature of Executive Branch decisionmaking, but no particular step in the process stands out as inappropriate or defective.

And yet, viewing the evidence as a whole, we share the District Court's conviction that the decision to reinstate a citizenship question cannot be adequately explained in terms of DOJ's request for improved citizenship data to better enforce the VRA. Several points, considered together, reveal a significant mismatch between the decision the Secretary made and the rationale he provided.

The record shows that the Secretary began taking steps to reinstate a citizenship question about a week into his tenure, but it contains no hint that he was considering VRA enforcement in connection with that project. The Secretary's Director of Policy did not know why the Secretary wished to reinstate the question, but saw it as his task to “find the best rationale.” The Director initially attempted to elicit requests for citizenship data from the Department of Homeland Security and DOJ's Executive Office for Immigration Review, neither of which is responsible for enforcing the VRA. After those attempts failed, he asked Commerce staff to look into whether the Secretary could reinstate the question without receiving a request from another agency. The possibility that DOJ's Civil Rights Division might be willing to request citizenship data for VRA enforcement purposes was proposed by Commerce staff along the way and eventually pursued.

Even so, it was not until the Secretary contacted the Attorney General directly that DOJ's Civil Rights Division expressed interest in acquiring census-based citizenship data to better enforce the VRA. And even then, the record suggests that DOJ's interest was directed more to helping the Commerce Department than to securing the data. . . .

Altogether, the evidence tells a story that does not match the explanation the Secretary gave



for his decision. In the Secretary's telling, Commerce was simply acting on a routine data request from another agency. Yet the materials before us indicate that Commerce went to great lengths to elicit the request from DOJ (or any other willing agency). And unlike a typical case in which an agency may have both stated and unstated reasons for a decision, here the VRA enforcement rationale—the sole stated reason—seems to have been contrived.

We are presented, in other words, with an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process. It is rare to review a record as extensive as the one before us when evaluating informal agency action—and it should be. But having done so for the sufficient reasons we have explained, we cannot ignore the disconnect between the decision made and the explanation given. Our review is deferential, but we are “not required to exhibit a naiveté from which ordinary citizens are free.” *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.). The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case.

In these unusual circumstances, the District Court was warranted in remanding to the agency, and we affirm that disposition. We do not hold that the agency decision here was substantively invalid. But agencies must pursue their goals reasonably. Reasoned decisionmaking under the Administrative Procedure Act calls for an explanation for agency action. What was provided here was more of a distraction.

\* \* \*

The judgment of the United States District Court for the Southern District of New York is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE THOMAS, with whom JUSTICE GORSUCH and JUSTICE KAVANAUGH join, concurring in part and dissenting in part.

In March 2018, the Secretary of Commerce exercised his broad discretion over the administration of the decennial census to resume a nearly unbroken practice of asking a question relating to citizenship. Our only role in this case is to decide whether the Secretary complied with the law and gave a reasoned explanation for his decision. The Court correctly answers these questions in the affirmative. That ought to end our inquiry.

The Court, however, goes further. For the first time ever, the Court invalidates an agency action solely because it questions the sincerity of the agency's otherwise adequate rationale. Echoing the din of suspicion and distrust that seems to typify modern discourse, the Court declares the Secretary's memorandum “pretextual” because, “viewing the evidence as a whole,” his explanation that including a citizenship question on the census would help enforce the Voting Rights Act “seems to have been contrived.” The Court does not hold that the Secretary merely had *additional*, unstated reasons for reinstating the citizenship question. Rather, it holds that the Secretary's stated rationale did not factor *at all* into his decision.

The Court's holding reflects an unprecedented departure from our deferential review of discretionary agency decisions. And, if taken seriously as a rule of decision, this holding would transform administrative law. It is not difficult for political opponents of executive actions to generate controversy with accusations of pretext, deceit, and illicit motives. Significant policy decisions are regularly criticized as products of partisan influence, interest-group pressure,

corruption, and animus. Crediting these accusations on evidence as thin as the evidence here could lead judicial review of administrative proceedings to devolve into an endless morass of discovery and policy disputes not contemplated by the Administrative Procedure Act (APA).

Unable to identify any legal problem with the Secretary's reasoning, the Court imputes one by concluding that he must not be telling the truth. . . .

[Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, concurred in Parts I, II, IV-A, and V of the majority opinion "except as otherwise indicated" in parts of his opinion. We take up the issues raised in Justice Breyer's opinion later in this book, where we discuss the scope and nature of judicial review. Justice Alito's opinion concurring in part and dissenting in part is omitted.]

## NOTES AND QUESTIONS

**4-8(a).** Why was the district court's order directing extra-record discovery premature? How can a litigant come ascertain that a record is incomplete in an ordinary case? Why did the Court ultimately conclude that extra-record discovery was warranted in this case?

**4-8(b).** The Trump Administration initially vowed to fight on, seeking a means to delay the census to comply with the Supreme Court's mandate. Just one day later and in the eleventh hour, facing opposition from the Democrat-controlled House, Secretary Ross changed course and announced that the census would not contain a citizenship question. Ariane de Vogue & Gregory Wallace, *Trump Administration Won't Ask About Citizenship on Census*, CNN (July 2, 2019), <https://www.cnn.com/2019/07/02/politics/doj-census-citizenship-question/index.html>. But again, the next day, things changed yet again:

In the wake of tweets from President Donald Trump branding as "fake" the news that the federal government was dropping its quest to include a question about citizenship on the 2020 census, U.S. District Judge George Hazel called for a telephone conference call in the proceedings in Maryland on Wednesday, July 3. During the call, Department of Justice lawyer Joshua Gardner told Hazel that the president's tweet was the "first I had heard of the president's position on the issue," but Gardner "confirmed that the Census Bureau is continuing with the process of printing the questionnaire without a citizenship questionnaire, and that process has not stopped."

However, Jody Hunt, the assistant attorney general for the civil division, then told Hazel that attorneys "at the Department of Justice have been instructed to examine whether there is a path forward, consistent with the Supreme Court's decision, that would allow us to include the citizenship question on the census. We think there may be a legally available path under the Supreme Court's decision." If so, Hunt continued, "our current plan would be to file a motion in the Supreme Court to request instructions on remand to govern further proceedings in order to simplify and expedite the remaining litigation and provide clarity to the process going forward."

Hazel instructed the parties in the Maryland case to submit, by 2 pm on Friday, either a stipulation that the government will not make any further efforts to include a

citizenship question on the census or a scheduling order for how the parties would proceed on the plaintiffs' claim that an intent to discriminate against minorities was behind the government's decision to include the citizenship question.

Meanwhile, DOJ lawyers made similar statements in a letter to the federal district judge presiding over *New York v. Department of Commerce*, the challenge to the citizenship question in which the Supreme Court issued its ruling last week. They explained that the Department of Justice and the Department of Commerce "have now been asked to reevaluate all available options following the Supreme Court's decision and whether the Supreme Court's decision would allow for a new decision to include the citizenship question on the 2020 Decennial Census." If the Department of Commerce "adopts a new rationale for including the citizenship question on the" census, they continued, the government will "immediately notify" the district court.

Amy Howe, *2020 Census Questionnaires Go to Printer Without Citizenship Question – But Government Says it Will Continue to Look for "Path Forward" (UPDATED)*, SCOTUSBLOG (July 3, 2019), <https://www.scotusblog.com/2019/07/2020-census-questionnaires-go-to-printer-without-citizenship-question/>.

**4-8(c).** What lessons do you suppose the Trump Administration took away from this case? How would you advise a cabinet-level official tasked with achieving certain politically-oriented results in the future? What strategies would you recommend to challengers of those policies? Professor Walker discusses and ultimately concludes that the travel ban (discussed above) "falls under the diverse and opaque category of informal adjudication—a category of agency action where the role of courts and other procedural protections vary dramatically." Christopher J. Walker, *Administrative Law Without Courts*, 65 UCLA L. Rev. 1620, 1629–30 (2018). In light of *Overton Park*, why was even the *Trump v. Hawaii* majority willing to consider extra-record evidence?

## Chapter 5

### **§ 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>3</sup> According to several analysts who conducted sample analyses, some 90 percent of all comments were autogenerated "form" letters.<sup>4</sup> Approximately 9 million of the submissions came from fake email addresses generated using the

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<sup>3</sup> *In re Restoring Internet Freedom*, FCC No. 17-108 (Jan. 4, 2018) (slip op at 538) (Rosenworcel, Comm'r, dissenting).

<sup>4</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/>.

website FakeEmailGenerator.com.<sup>5</sup> 2 million comments evince stolen identities—signed with the names of real persons who did not create or consent to the submissions.<sup>6</sup> And 50 thousand comments are simply missing from the record.<sup>7</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>8</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>9</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>10</sup> But over 99 percent of “truly unique comments” opposed the repeal order,<sup>11</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.

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>12</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

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<sup>5</sup> *Id.*

<sup>6</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>7</sup> Rosenworcel Dissent

<sup>8</sup> Sarah Oh et al., *supra*.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</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*.

<sup>12</sup> Rosenworcel Dissent at slip op page 538

order failed to cite a single consumer comment.<sup>13</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>14</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. 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

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<sup>13</sup> Clyburn dissent at 223.

<sup>14</sup> Slip op. at 194.

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[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. 471: Insert after Note 5-59**

**AZAR v. ALLINA HEALTH SERVICES**  
139 S. Ct. 1804 (2019)

[*Azar* concerns Medicare, a program which “touches the lives of nearly all Americans” and stands second in size after Social Security. The Medicare statute has its own provision requiring notice and comment (after originally lacking any such requirement) in certain situations.]

Notably, Congress didn’t just adopt the APA’s notice-and-comment regime for the Medicare program. That, of course, it could have easily accomplished in just a few words. Instead, Congress chose to write a new, Medicare-specific statute. The new statute required the government to provide public notice and a 60-day comment period (twice the APA minimum of 30 days) for any “rule, requirement, or other statement of policy (other than a national coverage determination) that establishes or changes a substantive legal standard governing the scope of benefits, the payment for services, or the eligibility of individuals, entities, or organizations to furnish or receive services or benefits under [Medicare].” 42 U.S.C. § 1395hh(a)(2).

Our case involves a dispute over this language. [Under Medicare Part A, the government pays hospitals directly for services. It calculates a “Medicare fraction” to compensate hospitals which serve a “disproportionate number” of low-income persons.] The fraction’s denominator is the time the hospital spent caring for patients who were “entitled to benefits under” Medicare Part A. The numerator is the time the hospital spent caring for Part-A-entitled patients who were *also* entitled to income support payments under the Social Security Act. The bigger the fraction, the bigger the payment.

Calculating Medicare fractions got more complicated in 1997. That year, Congress created “Medicare Part C,” sometimes referred to as Medicare Advantage. [Part C allows for beneficiaries to have the government pay insurance premiums instead of hospitals. It led to a debate over whether Part C beneficiaries count for purposes of the Medicare fraction.] The question is important as a practical matter because Part C enrollees, we’re told, tend to be wealthier than patients who opt for traditional Part A coverage. So counting them makes the fraction smaller and reduces hospitals’ payments considerably—by between \$ 3 and \$ 4 billion over a 9-year period, according to the government.

The agency overseeing Medicare has gone back and forth on whether to count Part C participants in the Medicare fraction. . . .

The case before us arose in 2014. That’s when the agency got around to calculating hospitals’ Medicare fractions for fiscal year 2012. When it did so, the agency still wanted to count Part C patients. But it couldn’t rely on the 2004 rule, which had been vacated. And it couldn’t rely on the 2013 rule, which bore only prospective effect. The agency’s solution? It posted on a website

a spreadsheet announcing the 2012 Medicare fractions for 3,500 hospitals nationwide and noting that the fractions included Part C patients.

That Internet posting led to this lawsuit. A group of hospitals who provided care to low-income Medicare patients in 2012 argued (among other things) that the government had violated the Medicare Act by skipping its statutory notice-and-comment obligations. . . .

## II

This case hinges on the meaning of a single phrase in the notice-and-comment statute Congress drafted specially for Medicare in 1987. . . . [W]hether the government had an obligation to provide notice and comment winds up turning on whether its 2014 announcement established or changed a “substantive legal standard.” That phrase doesn’t seem to appear anywhere else in the entire United States Code, and the parties offer at least two ways to read it.

The hospitals suggest the statute means to distinguish a substantive from a *procedural* legal standard. On this account, a substantive standard is one that “creates duties, rights and obligations,” while a procedural standard specifies how those duties, rights, and obligations should be enforced. And everyone agrees that a policy of counting Part C patients in the Medicare fraction is substantive in this sense, because it affects a hospital’s right to payment. From this it follows that the public had a right to notice and comment before the government could adopt the policy at hand.

Very differently, the government suggests the statute means to distinguish a substantive from an *interpretive* legal standard. Under the APA, “substantive rules” are those that have the “force and effect of law,” while “interpretive rules” are those that merely “advise the public of the agency’s construction of the statutes and rules which it administers.” *Perez v. Mortgage Bankers Assn.*, 575 U.S. 92 (2015). On the government’s view, the 1987 Medicare notice-and-comment statute meant to track the APA’s usage in this respect. And the government submits that, because the policy of counting Part C patients in the Medicare fractions would be treated as interpretive rather than substantive under the APA, it had no statutory obligation to provide notice and comment before adopting its new policy.

Who has the better reading? Several statutory clues persuade us of at least one thing: The government’s interpretation can’t be right. Pretty clearly, the Medicare Act doesn’t use the word “substantive” in the same way the APA does—to identify only those legal standards that have the “force and effect of law.”

*First*, the Medicare Act contemplates that “statements of policy” like the one at issue here *can* establish or change a “*substantive* legal standard.” Yet, by definition under the APA, statements of policy are *not* substantive; instead they are grouped with and treated as interpretive rules. . . .

*Second*, the government’s reading would introduce another incoherence into the Medicare statute. Subsection (c)(1) of § 1395hh gives the government limited authority to make retroactive “substantive change[s]” in, among other things, “interpretative rules” and “statements of policy.” But this statutory authority would make no sense if the Medicare Act used the term “substantive” as the APA does. It wouldn’t because, again, interpretive rules and statements of policy—and any changes to them—are *not* substantive under the APA by definition.

. . .



*Third*, the government suggests Congress used the phrase “substantive legal standard” in the Medicare Act as a way to exempt interpretive rules and policy statements from notice and comment. But Congress had before it—and rejected—a much more direct path to that destination. In a single sentence the APA sets forth two exemptions from the government’s usual notice-and-comment obligations:

“Except when notice or hearing is required by statute, this subsection [requiring notice and comment] does not apply—

“(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

“(B) when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. § 553(b).

In the Medicare Act, Congress expressly borrowed *one* of the APA’s exemptions, the good cause exemption, by cross-referencing it in § 1395hh(b)(2)(C). If, as the government supposes, Congress had also wanted to borrow the *other* APA exemption, for interpretive rules and policy statements, it could have easily cross-referenced that exemption in exactly the same way. Congress had recently done just that, cross-referencing both of the APA’s exceptions in the Clean Air Act. Yet it didn’t do the same thing in the Medicare Act, and Congress’s choice to include a cross-reference to one but not the other of the APA’s neighboring exemptions strongly suggests it acted “‘intentionally and purposefully in the disparate’” decisions.

The government’s response asks us to favor a most unlikely reading over this obvious one. The government submits that Congress simply preferred to mimic the APA’s interpretive-rule exemption in the Medicare Act by using the novel and enigmatic phrase “substantive legal standard” instead of a simple cross-reference. But the government supplies no persuasive account why Congress would have thought it necessary or wise to proceed in this convoluted way. . . .

The dissent would have us disregard all of the textual clues we’ve found significant because the word “substantive” carried “a special meaning in the context of administrative law” in the 1980s, making it “almost a certainty” that Congress had that meaning in mind when it used the word “substantive” in § 1395hh(a)(2). But it was the phrase “substantive *rule*” that was a term of art in administrative law, and Congress chose *not* to use that term in the Medicare Act. Instead, it introduced a seemingly new phrase to the statute books when it spoke of “substantive *legal standards*.” And, for all the reasons we have already explored, the term “substantive legal standard” in the Medicare Act appears to carry a more expansive scope than that borne by the term “substantive rule” under the APA. . . .

In the end, all of the available evidence persuades us that the phrase “substantive legal standard,” which appears in § 13955hh(a)(2) and apparently nowhere else in the U.S. Code, cannot bear the same construction as the term “substantive rule” in the APA. We need not, however, go so far as to say that the hospitals’ interpretation, adopted by the court of appeals, is correct in every particular. To affirm the judgment before us, it is enough to say the government’s arguments for reversal fail to withstand scrutiny. Other questions about the statute’s meaning can await other cases. . . .

### III

Unable to muster support for its position in the statutory text or structure, the government encourages us to look elsewhere. It begins by inviting us to follow it into the legislative history

lurking behind the Medicare Act. “But legislative history is not the law.” *Epic Systems Corp. v. Lewis*, 584 U.S. — (2018). And even those of us who believe that clear legislative history can “illuminate ambiguous text” won’t allow “ambiguous legislative history to muddy clear statutory language.” Yet the text before us clearly forecloses the government’s position in this case, and the legislative history presented to us is ambiguous at best. [The Court’s discussion of the legislative history is omitted.]

That leads us to the government’s final redoubt: a policy argument. But as the government knows well, courts aren’t free to rewrite clear statutes under the banner of our own policy concerns. If the government doesn’t like Congress’s notice-and-comment policy choices, it must take its complaints there. Besides, the government’s policy arguments don’t carry much force even on their own terms. The government warns that providing the public with notice and a chance to comment on all Medicare interpretive rules, like those in its roughly 6,000-page “Provider Reimbursement Manual,” would take “ ‘many years’ ” to complete. But the dissent points to only *eight* manual provisions that courts have deemed interpretive over the last four decades, and the government hasn’t suggested that providing notice and comment for these or any other specific manual provisions would prove excessively burdensome. Nor has the government identified any court decision invalidating a manual provision under § 1395hh(a)(2) in the nearly two years since the court of appeals issued its opinion in this case. For their part, the hospitals claim that only a few dozen pages of the Provider Reimbursement Manual might even arguably require notice and comment. And they tell us that the agency regularly and without much difficulty undertakes notice-and-comment rulemaking for many other decisions affecting the Medicare program. The government hasn’t rebutted any of these points.

Not only has the government failed to document any draconian costs associated with notice and comment, it also has neglected to acknowledge the potential countervailing benefits. Notice and comment gives affected parties fair warning of potential changes in the law and an opportunity to be heard on those changes—and it affords the agency a chance to avoid errors and make a more informed decision. Surely a rational Congress could have thought those benefits especially valuable when it comes to a program where even minor changes to the agency’s approach can impact millions of people and billions of dollars in ways that are not always easy for regulators to anticipate. . . .

[Justice Kavanaugh, whose decision for the D.C. Circuit was affirmed, did not participate in the Supreme Court’s review. The dissent of Justice Breyer, writing for only himself, is omitted.]

## NOTES AND QUESTIONS

**Note 5-60.** How does the Medicare notice and comment provision differ from the APA notice and comment provision? Is it broader? What’s the issue in *Azar*?

**Note 5-61.** One lesson from *Azar* is that not all enabling acts and administrative statutes are cut from the same cloth. While our focus is on APA procedures due to their predominance, a great many statutes mandate their own standards and processes. The APA, however, provides an important point of reference even where differences persist. In *Azar*, the Medicare Act differs from the APA in terms of when notice and comment are required. There is nothing, however, to suggest that the notice and comment process itself deviates from the APA.

**Note 5-61.** After its lengthy (and heavily edited) discussion, the Court does not settle upon a definition for “substantive legal standard,” saying only that it did not necessarily need to adopt the hospitals’ definition of a substantive standard as “one that ‘creates duties, rights and obligations.’”

What do you think Congress meant by that term? Does the hospitals' definition represent an appropriate balance?

**§ 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 analysis 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)**

Even apart from “undue” political pressure which may run afoul of the APA or constitutional principles, scholars have debated the propriety of congresspersons’ ability to informally manipulate administrative proceedings by holding hearings and otherwise pressing agency decision makers. Professor Brian Feinstein observes that “[a]lthough hearings do not directly compel agencies to act, the signal they provide to both targeted agencies and the larger legislative branch concerning the prospect of future legislative sanctions following continued non-compliance may persuade agencies to conform to committee preferences.” He concludes that this is a legitimate means of retaining some congressional oversight in the face of growing executive authority. *Congress in the Administrative State*, 95 Wash. U. L. Rev. 1187, 1191 (2018).

Professor Christopher Walker cautions that the use of these “oversight tools” poses problems when they are not used to “regularly pass laws”—particularly when “members of Congress, or congressional committees, use these oversight tools to extract policy outcomes from federal agencies that are contrary to the wishes of the collective Congress.” *Restoring Congress’s Role in*

*the Modern Administrative State*, 116 Mich. L. Rev. 1101, 1120 (2018). Professor Neomi Rao likewise argues that unchecked delegations to agencies permits “lawmakers [to] become shadow administrators” by applying various forms of soft pressure to influence agency policy and actions. *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. Rev. 1463, 1525 (2015).

What do you make of this debate? Do politics matter? Rao suggests that political polarization can lead to enhanced executive power and reduced congressional checks on that power. This is because, as Professor Neal Devins has written, “[m]embers of the President's party are loyal to their party, not Congress as an institution, and therefore, will not join forces with the opposition party to assert Congress’s institutional prerogatives. Equally telling, members of Congress see little personal gain in advancing a legislative agenda that shifts power from the President to Congress.” *Presidential Unilateralism and Political Polarization: Why Today's Congress Lacks the Will and the Way to Stop Presidential Initiatives*, 45 Willamette L. Rev. 395, 413 (2009). Can judicial review of congressional interference in agency actions take account of such political realities? Should it?

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

The Congressional Review Act, Pub. L. No. 104-121, 110 Stat. 847 (1996), has taken on new significance in the Trump Administration. The Act requires agencies to submit reports for all proposed rules to each house of Congress, containing (i) a copy of the rule; (ii) a concise general statement relating to the rule, including whether it is a major rule; and (iii) the proposed effective date of the rule.” Congress may then review each federal rule and overrule them with the passing of a joint resolution. The Act provides 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. 5U.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.

From its enactment in 1996 until Trump took office in 2017 with the Republican Party in control of both Houses of Congress, the Congressional Review Act was used only once, to repeal the Occupational Safety and Health Administration (OSHA) “Ergonomics Program Standard.” Following the passage of the joint resolution, President George W. Bush signed the repeal into law.

In 2017 alone, the Trump Administration repealed, fifteen Obama-era regulations. These included regulations concerning the environment, *e.g.*, H.J. Res. 38, Pub. L. 115-5 (prohibiting dumping at coal mines near streams); welfare, H.J. Res. 42, Pub. L. 115-17 (restricting drug testing for welfare beneficiaries); labor, H.J. Res. 37, Pub. L. 115-11 (requiring federal contractors to disclose labor standards violations); and internet privacy, S.J. Res. 34, Pub. L. 115-22 (addressing data collection by broadband providers).

The House of Representatives passed a repeal bill for a Bureau of Land Management action designed to reduce waste from leaking oil and gas wells. *See*. 81 Fed. Reg. 83008 (Nov. 18, 2016). The measure failed in the Senate, however, 49 to 51.

Is the Congressional Review Act reconcilable with *Chadha*? Does it have an impact on the rulemaking scheme created by the APA? As one scholar observes:

The CRA was Congress’s attempt to devise a lawmaking procedure that would

approximate a legislative veto as closely as *Chadha* would allow. The CRA falls between the quick-acting legislative veto and the deliberative process that Congress ordinarily uses to enact legislation. Like a legislative veto, the Act enables Congress to expeditiously nullify administrative rules that it finds unauthorized, unnecessary, or unwise before they can go into effect. Unlike a legislative veto, the CRA requires both houses of Congress to pass the identical joint resolution and the President to sign it (or Congress to override his veto) for a rule to be nullified. The CRA therefore satisfies the requirements of Article I described in *Chadha* while trying to preserve at least some of the expedition that the legislative veto afforded.

Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J.L. & PUB. POL'Y 187, 197–98 (2018).

What happens when Congress rejects a rule under the CRA? The first and most obvious answer is that the rule is of no effect. The second is that § 801(b)(2) is triggered. That provision provides that a rejected rule “may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.” But when Congress issues a joint resolution of disapproval, that resolution “does not alter [an agency’s] underlying mandate in its enabling statute, which may mandate that an agency take certain actions. Michael J. Cole, *Interpreting the Congressional Review Act: Why the Courts Should Assert Judicial Review, Narrowly Construe “Substantially the Same,” and Decline to Defer to Agencies Under Chevron*, 70 ADMIN. L. REV. 53, 65 (2018). For example, the Dodd-Frank Act, 15 U.S.C. § 78m(q)(2)(A), requires the SEC to issue a rule requiring companies to disclose payments made to foreign government in exchange for mineral extraction rights. The SEC did so, and Congress passed a joint resolution of disapproval. H.J. Res. 41, Pub. L. 115-4. What is the SEC to do? Cole laments, “This imposes on the agency a Hobson’s Choice. Namely, the agency is required under the Dodd-Frank Act to issue a new rule and interest groups could sue the agency for failing to do so—but if it does, the agency runs the risk of having its new rule struck down for being substantially the same as the old rule.” *Id.*

Even apart from a specific mandate, such as the Dodd-Frank Act’s requirement discussed above, couldn’t a CRA resolution undermine an agency’s ability to carry out its intended function? Is there tension between the CRA and the APA? Is there any path for resolution of that tension?

#### **§ 6.06, p. 537, insert after Note 6-30.**

When the Supreme Court surprisingly granted certiorari to consider a nondelegation doctrine issue, many prognosticators thought it was a sign of the long-dead doctrine’s revival. What emerged was a four-one-three split decision (Justice Kavanaugh did not participate), leaving *Schechter Poultry* and *Panama Refining* as the perennial guideposts going forward. Still, are such issues likely to be in play again, even if criminal issues are not involved?

### **GUNDY v. UNITED STATES** 139 S. Ct. 2116 (2019)

Justice KAGAN announced the judgment of the Court and delivered an opinion, in which Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR join.

The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government. This case requires us to decide whether 34 U.S.C. § 20913(d), enacted as part of the Sex Offender Registration and Notification Act (SORNA), violates that doctrine. We hold it does not. Under § 20913(d), the Attorney General must apply SORNA's registration requirements as soon as feasible to offenders convicted before the statute's enactment. That delegation easily passes constitutional muster.

## I

Congress has sought, for the past quarter century, to combat sex crimes and crimes against children through sex-offender registration schemes. [Congress began by conditioning funding on adoption of registration laws. It then added requirements that states inform localities of offenders' addresses. Every state adopted a statute, but the statutes varied in many ways,] and Congress came to realize that their “loopholes and deficiencies” had allowed over 100,000 sex offenders (about 20% of the total) to escape registration. In 2006, to address those failings, Congress enacted SORNA.

SORNA makes “more uniform and effective” the prior “patchwork” of sex-offender registration systems. The Act's express “purpose” is “to protect the public from sex offenders and offenders against children” by “establish[ing] a comprehensive national system for [their] registration.” To that end, SORNA covers more sex offenders, and imposes more onerous registration requirements, than most States had before. The Act also backs up those requirements with new criminal penalties. Any person required to register under SORNA who knowingly fails to do so (and who travels in interstate commerce) may be imprisoned for up to ten years.

The basic registration scheme works as follows. A “sex offender” is defined as “an individual who was convicted of” specified criminal offenses: all offenses “involving a sexual act or sexual contact” and additional offenses “against a minor.” Such an individual must register—provide his name, address, and certain other information—in every State where he resides, works, or studies. And he must keep the registration current, and periodically report in person to a law enforcement office, for a period of between fifteen years and life (depending on the severity of his crime and his history of recidivism).

Section 20913—the disputed provision here—elaborates the “[i]nitial registration” requirements for sex offenders. Subsection (b) sets out the general rule: An offender must register “before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement” (or, if the offender is not sentenced to prison, “not later than [three] business days after being sentenced”). Two provisions down, subsection (d) addresses (in its title's words) the “[i]nitial registration of sex offenders unable to comply with subsection (b).” The provision states:

“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 ... 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).”

Subsection (d), in other words, focuses on individuals convicted of a sex offense before SORNA's enactment—a group we will call pre-Act offenders. Many of these individuals were unregistered at the time of SORNA's enactment, either because pre-existing law did not cover them or because they had successfully evaded that law (so were “lost” to the system). And of those potential new registrants, many or most could not comply with subsection (b)'s registration rule because they had

already completed their prison sentences. For the entire group of pre-Act offenders, once again, the Attorney General “shall have the authority” to “specify the applicability” of SORNA’s registration requirements and “to prescribe rules for [their] registration.”

Under that delegated authority, the Attorney General issued an interim rule in February 2007, specifying that SORNA’s registration requirements apply in full to “sex offenders convicted of the offense for which registration is required prior to the enactment of that Act.” The final rule, issued in December 2010, reiterated that SORNA applies to all pre-Act offenders. That rule has remained the same to this day.

Petitioner Herman Gundy is a pre-Act offender. The year before SORNA’s enactment, he pleaded guilty under Maryland law for sexually assaulting a minor. After his release from prison in 2012, Gundy came to live in New York. But he never registered there as a sex offender. A few years later, he was convicted for failing to register, in violation of § 2250. He argued below (among other things) that Congress unconstitutionally delegated legislative power when it authorized the Attorney General to “specify the applicability” of SORNA’s registration requirements to pre-Act offenders. The District Court and Court of Appeals for the Second Circuit rejected that claim, as had every other court (including eleven Courts of Appeals) to consider the issue. We nonetheless granted certiorari. Today, we join the consensus and affirm.

## II

Article I of the Constitution provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.” Accompanying that assignment of power to Congress is a bar on its further delegation. Congress, this Court explained early on, may not transfer to another branch “powers which are strictly and exclusively legislative.” *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–44 (1825). But the Constitution does not “deny[] to the Congress the necessary resources of flexibility and practicality [that enable it] to perform its function[s].” Congress may “obtain[] the assistance of its coordinate Branches”—and in particular, may confer substantial discretion on executive agencies to implement and enforce the laws. “[I]n our increasingly complex society, replete with ever changing and more technical problems,” this Court has understood that “Congress simply cannot do its job absent an ability to delegate power under broad general directives.” So we have held, time and again, that a statutory delegation is constitutional as long as Congress “lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.”

Given that standard, a nondelegation inquiry always begins (and often almost ends) with statutory interpretation. The constitutional question is whether Congress has supplied an intelligible principle to guide the delegatee’s use of discretion. So the answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides. . . .

. . . [Section] 20913(d) does not give the Attorney General anything like the “unguided” and “unchecked” authority that Gundy says. The provision, in Gundy’s view, “grants the Attorney General plenary power to determine SORNA’s applicability to pre-Act offenders—to require them to register, or not, as she sees fit, and to change her policy for any reason and at any time.” If that were so, we would face a nondelegation question. But it is not. This Court has already interpreted § 20913(d) to say something different—to require the Attorney General to apply SORNA to all pre-Act offenders as soon as feasible. See *Reynolds*, 565 U.S. at 442–443. And revisiting that issue yet more fully today, we reach the same conclusion. The text, considered alongside its context, purpose, and history, makes clear that the Attorney General’s discretion extends only to



considering and addressing feasibility issues. Given that statutory meaning, Gundy's constitutional claim must fail. . . .

## A

This is not the first time this Court has had to interpret § 20913(d). In *Reynolds*, the Court considered whether SORNA's registration requirements applied of their own force to pre-Act offenders or instead applied only once the Attorney General said they did. We read the statute as adopting the latter approach. But even as we did so, we made clear how far SORNA limited the Attorney General's authority. And in that way, we effectively resolved the case now before us.

Everything in *Reynolds* started from the premise that Congress meant for SORNA's registration requirements to apply to pre-Act offenders. The majority recounted SORNA's "basic statutory purpose," found in its text, as follows: "the 'establish[ment of] a comprehensive national system for the registration of [sex] offenders' that *includes* offenders who committed their offenses before the Act became law." 565 U.S. at 442 (quoting § 20901). That purpose, the majority further noted, informed SORNA's "broad[]" definition of "sex offender," which "include[s] any 'individual who *was* convicted of a sex offense.'" *Id.*, at 442 (quoting § 20911(1)). And those two provisions were at one with "[t]he Act's history." Quoting statements from both the House and the Senate about the sex offenders then "lost" to the system, *Reynolds* explained that the Act's "supporters placed considerable importance upon the registration of pre-Act offenders." In recognizing all this, the majority (temporarily) bonded with the dissenting Justices, who found it obvious that SORNA was "meant to cover pre-Act offenders." And indeed, the dissent emphasized that common ground, remarking that "the Court acknowledges" and "rightly believes" that registration of pre-Act offenders was "what the statute sought to achieve."

But if that was so, why had Congress (as the majority held) conditioned the pre-Act offenders' duty to register on a prior "ruling from the Attorney General"? The majority had a simple answer: "[I]nstantaneous registration" of pre-Act offenders "might not prove feasible," or "[a]t least Congress might well have so thought." Here, the majority explained that SORNA's requirements diverged from prior state law. Some pre-Act offenders (as defined by SORNA) had never needed to register before; others had once had to register, but had fulfilled their old obligations. And still others (the "lost" or "missing" offenders) should have registered, but had escaped the system. As a result, SORNA created a "practical problem[]": It would require "newly registering or reregistering a large number of pre-Act offenders." And attached to that broad feasibility concern was a more technical one. Recall that under SORNA "a sex offender must initially register before completing his 'sentence of imprisonment.'" But many pre-Act offenders were already out of prison, so could not comply with that requirement. That inability raised questions about "how[ ] the new registration requirements applied to them." "Congress[s] solution" to both those difficulties was the same: Congress "[a]sk[ed] the Department of Justice, charged with responsibility for implementation, to examine [the issues] and to apply the new registration requirements accordingly."

On that understanding, the Attorney General's role under § 20913(d) was important but limited: It was to apply SORNA to pre-Act offenders as soon as he thought it feasible to do so. That statutory delegation, the Court explained, would "involve[] implementation delay." But no more than that. Congress had made clear in SORNA's text that the new registration requirements would apply to pre-Act offenders. So (the Court continued) "there was no need" for Congress to worry about the "unrealistic possibility" that "the Attorney General would refuse to apply" those requirements on some excessively broad view of his authority under § 20913(d). Reasonably read,

SORNA enabled the Attorney General only to address (as appropriate) the “practical problems” involving pre-Act offenders before requiring them to register. The delegation was a stopgap, and nothing more.

Gundy dismisses *Reynolds*'s relevance, but his arguments come up short. To begin, he contends that *Reynolds* spoke “tentative[ly]”—with “might[s], may[s], or could[s]”—about Congress's reasons for enacting § 20913(d). Gundy concludes from such constructions—which are indeed present—that the Court was “not offering a definitive reading of the statute.” But the Court used those locutions to convey not its own uncertainty but Congress's. The point of the opinion was that Congress had questions about how best to phase SORNA's application to pre-Act offenders, so gave the Attorney General flexibility on timing. The “mights, mayes, and coulds” were there to describe the legislative mindset responsible for § 20913(d), and thus formed part of the Court's own—yes, “definitive”—view of that provision's meaning. Anticipating that explanation, Gundy falls back on the claim that the Court's account of Congress's motivations “cannot supply the intelligible principle Congress failed to enact into law.” But the Court in *Reynolds* did not invent a standard Congress omitted. Rather, the Court read the statute to contain a standard—again, that the Attorney General should apply SORNA to pre-Act offenders as soon as feasible. And as the next part of this opinion shows, in somewhat greater detail than *Reynolds* thought necessary, we read the statute in the same way.

## B

Recall again the delegation provision at issue. Congress gave the Attorney General authority to “specify the applicability” of SORNA's requirements to pre-Act offenders. § 20913(d). And in the second half of the same sentence, Congress gave him authority to “prescribe rules for the registration of any such sex offenders . . . who are unable to comply with” subsection (b)'s initial registration requirement. What does the delegation in § 20913(d) allow the Attorney General to do?

The different answers on offer here reflect competing views of statutory interpretation. As noted above, Gundy urges us to read § 20913(d) to empower the Attorney General to do whatever he wants as to pre-Act offenders: He may make them all register immediately or he may exempt them from registration forever (or he may do anything in between). Gundy bases that argument on the first half of § 20913(d), isolated from everything else—from the second half of the same section, from surrounding provisions in SORNA, and from any conception of the statute's history and purpose. *Reynolds* took a different approach (as does the Government here), understanding statutory interpretation as a “holistic endeavor” which determines meaning by looking not to isolated words, but to text in context, along with purpose and history.

This Court has long refused to construe words “in a vacuum,” as Gundy attempts. . . . To define the scope of delegated authority, we have looked to the text in “context” and in light of the statutory “purpose.” . . .

So begin at the beginning, with the “[d]eclaration of purpose” that is SORNA's first sentence. There, Congress announced (as *Reynolds* noted) that “to protect the public,” it was “establish[ing] a comprehensive national system for the registration” of “sex offenders and offenders against children.” The term “comprehensive” has a clear meaning—something that is all-encompassing or sweeping. That description could not fit the system SORNA created if the Attorney General could decline, for any reason or no reason at all, to apply SORNA to all pre-Act offenders. After all, for many years after SORNA's enactment, the great majority of sex offenders

in the country would be pre-Act offenders. If Gundy were right, all of those offenders could be exempt from SORNA's registration requirements. So the mismatch between SORNA's statement of purpose and Gundy's view of § 20913(d) is as stark as stark comes. Responding to that patent disparity, Gundy urges us to ignore SORNA's statement of purpose because it is “located in the Act's preface” rather than “tied” specifically to § 20913(d). But the placement of such a statement within a statute makes no difference. See A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 220 (2012). Wherever it resides, it is “an appropriate guide” to the “meaning of the [statute's] operative provisions.” *Id.*, at 218. And here it makes clear that SORNA was supposed to apply to all pre-Act offenders—which precludes Gundy's construction of § 20913(d).

The Act's definition of “sex offender” (also noted in *Reynolds*) makes the same point. Under that definition, a “sex offender” is “an individual who was convicted of a sex offense.” § 20911(1). Note the tense: “was,” not “is.” This Court has often “looked to Congress' choice of verb tense to ascertain a statute's temporal reach,” including when interpreting other SORNA provisions. Here, Congress's use of the past tense to define the term “sex offender” shows that SORNA was not merely forward-looking. The word “is” would have taken care of all future offenders. The word “was” served to bring in the hundreds of thousands of persons previously found guilty of a sex offense, and thought to pose a current threat to the public. The tense of the “sex offender” definition thus confirms that the delegation allows only temporary exclusions, as necessary to address feasibility issues. *Contra* Gundy, it does not sweep so wide as to make a laughingstock of the statute's core definition.

The Act's legislative history backs up everything said above by showing that the need to register pre-Act offenders was front and center in Congress's thinking. [The Court discussed the legislative history, emphasizing the reports which established the facts and background noted in the introduction.]

With that context and background established, we may return to § 20913(d). As we have noted, Gundy makes his stand there (and there only), insisting that the lonesome phrase “specify the applicability” ends this case. But in so doing, Gundy ignores even the rest of the section that phrase is in. Both the title and the remaining text of that section pinpoint one of the “practical problems” discussed above . . . .

And no Attorney General has used (or, apparently, thought to use) § 20913(d) in any more expansive way. To the contrary. Within a year of SORNA's enactment (217 days, to be precise), the Attorney General determined that SORNA would apply immediately to pre-Act offenders. That rule has remained in force ever since (save for a technical change to one of the rule's illustrative examples). And at oral argument here, the Solicitor General's office—rarely in a hurry to agree to limits on the Government's authority—acknowledged that § 20913(d) does not allow the Attorney General to excuse a pre-Act offender from registering, except for reasons of “feasibility.” We thus end up, on close inspection of the statutory scheme, exactly where *Reynolds* left us. The Attorney General's authority goes to transition-period implementation issues, and no further.

## C

Now that we have determined what § 20913(d) means, we can consider whether it violates the Constitution. The question becomes: Did Congress make an impermissible delegation when it instructed the Attorney General to apply SORNA's registration requirements to pre-Act offenders as soon as feasible? Under this Court's long-established law, that question is easy. Its answer is no.

As noted earlier, this Court has held that a delegation is constitutional so long as Congress has set out an “intelligible principle” to guide the delegatee’s exercise of authority. Or in a related formulation, the Court has stated that a delegation is permissible if Congress has made clear to the delegatee “the general policy” he must pursue and the “boundaries of [his] authority.” . . . Only twice in this country’s history (and that in a single year) have we found a delegation excessive—in each case because “Congress had failed to articulate *any* policy or standard” to confine discretion. Ssee *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). By contrast, we have over and over upheld even very broad delegations. Here is a sample: We have approved delegations to various agencies to regulate in the “public interest.” We have sustained authorizations for agencies to set “fair and equitable” prices and “just and reasonable” rates. We more recently affirmed a delegation to an agency to issue whatever air quality standards are “requisite to protect the public health.” And so forth.

In that context, the delegation in SORNA easily passes muster (as all eleven circuit courts to have considered the question found). The statute conveyed Congress’s policy that the Attorney General require pre-Act offenders to register as soon as feasible. Under the law, the feasibility issues he could address were administrative—and, more specifically, transitional—in nature. . . . Even for those limited matters, the Act informed the Attorney General that he did not have forever to work things out. By stating its demand for a “comprehensive” registration system and by defining the “sex offenders” required to register to include pre-Act offenders, Congress conveyed that the Attorney General had only temporary authority. Or again, in the words of *Reynolds*, that he could prevent “*instantaneous* registration” and impose some “implementation delay. That statutory authority, as compared to the delegations we have upheld in the past, is distinctly small-bore. It falls well within constitutional bounds.”<sup>415</sup>

Indeed, if SORNA’s delegation is unconstitutional, then most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs. Consider again this Court’s long-time recognition: “Congress simply cannot do its job absent an ability to delegate power under broad general directives.” *Mistretta*, 488 U.S. at 372. Or as the dissent in that case agreed: “[S]ome judgments ... must be left to the officers executing the law.” 488 U.S. at 415 (opinion of Scalia, J.). . . .

It is wisdom and humility alike that this Court has always upheld such “necessities of government.” *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting) (internal quotation marks omitted). We therefore affirm the judgment of the Court of Appeals.

It is so ordered.

Justice KAVANAUGH took no part in the consideration or decision of this case.

Justice ALITO, concurring in the judgment.

. . . If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment.

Because I cannot say that the statute lacks a discernable standard that is adequate under the approach this Court has taken for many years, I vote to affirm.

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<sup>4</sup> Even Gundy conceded at oral argument that if the statute means what we have said, it “likely would be constitutional.” Tr. of Oral Arg. 25. That is why all of his argument is devoted to showing that it means something else.

Justice GORSUCH, with whom THE CHIEF JUSTICE and Justice THOMAS join, dissenting.

The Constitution promises that only the people's elected representatives may adopt new federal laws restricting liberty. Yet the statute before us scrambles that design. It purports to endow the nation's chief prosecutor with the power to write his own criminal code governing the lives of a half-million citizens. Yes, those affected are some of the least popular among us. But if a single executive branch official can write laws restricting the liberty of this group of persons, what does that mean for the next?

Today, a plurality of an eight-member Court endorses this extraconstitutional arrangement but resolves nothing. Working from an understanding of the Constitution at war with its text and history, the plurality reimagines the terms of the statute before us and insists there is nothing wrong with Congress handing off so much power to the Attorney General. But Justice ALITO supplies the fifth vote for today's judgment and he does not join either the plurality's constitutional or statutory analysis, indicating instead that he remains willing, in a future case with a full Court, to revisit these matters. Respectfully, I would not wait.

[Parts I and II.A are omitted.]

## B

Accepting, then, that we have an obligation to decide whether Congress has unconstitutionally divested itself of its legislative responsibilities, the question follows: What's the test? Madison acknowledged that “no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary.” Chief Justice Marshall agreed that policing the separation of powers “is a subject of delicate and difficult inquiry.” Still, the framers took this responsibility seriously and offered us important guiding principles.

First, we know that as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to “fill up the details.” In *Wayman v. Southard*, this Court upheld a statute that instructed the federal courts to borrow state-court procedural rules but allowed them to make certain “alterations and additions.” Writing for the Court, Chief Justice Marshall distinguished between those “important subjects, which must be entirely regulated by the legislature itself,” and “those of less interest, in which a general provision may be made, and power given to those who are to act ... to fill up the details.” The Court upheld the statute before it because Congress had announced the controlling general policy when it ordered federal courts to follow state procedures, and the residual authority to make “alterations and additions” did no more than permit courts to fill up the details.

Later cases built on Chief Justice Marshall's understanding. . . . Through all these cases, small or large, runs the theme that Congress must set forth standards “sufficiently definite and precise to enable Congress, the courts, and the public to ascertain” whether Congress's guidance has been followed.

Second, once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding. . . .

Third, Congress may assign the executive and judicial branches certain non-legislative responsibilities. While the Constitution vests all federal legislative power in Congress alone, Congress's legislative authority sometimes overlaps with authority the Constitution separately vests in another branch. So, for example, when a congressional statute confers wide discretion to the executive, no separation-of-powers problem may arise if “the discretion is to be exercised over matters already within the scope of executive power.” . . .

## C

Before the 1930s, federal statutes granting authority to the executive were comparatively modest and usually easily upheld. But then the federal government began to grow explosively. And with the proliferation of new executive programs came new questions about the scope of congressional delegations. Twice the Court [in *Schechter Poultry* and *Panama Refining*] responded by striking down statutes for violating the separation of powers.

. . . [S]ince that time the Court hasn't held another statute to violate the separation of powers in the same way. Of course, no one thinks that the Court's quiescence can be attributed to an unwavering new tradition of more scrupulously drawn statutes. Some lament that the real cause may have to do with a mistaken “case of death by association” because *Schechter Poultry* and *Panama Refining* happened to be handed down during the same era as certain of the Court's now-discredited substantive due process decisions. But maybe the most likely explanation of all lies in the story of the evolving “intelligible principle” doctrine.

[Justice Gorsuch discussed a 1928 case which used the term “intelligible principle” and argued that “Court's reference to an ‘intelligible principle’ was just another way to describe the traditional rule that Congress may leave the executive the responsibility to find facts and fill up details.”]

Still, it's undeniable that the “intelligible principle” remark eventually began to take on a life of its own. We sometimes chide people for treating judicial opinions as if they were statutes, divorcing a passing comment from its context, ignoring all that came before and after, and treating an isolated phrase as if it were controlling. But that seems to be exactly what happened here. For two decades, no one thought to invoke the “intelligible principle” comment as a basis to uphold a statute that would have failed more traditional separation-of-powers tests. In fact, the phrase sat more or less silently entombed until the late 1940s. Only then did lawyers begin digging it up in earnest and arguing to this Court that it had somehow displaced (*sub silentio* of course) all prior teachings in this area.

This mutated version of the “intelligible principle” remark has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked. Judges and scholars representing a wide and diverse range of views have condemned it as resting on “misunderst[ood] historical foundations.” They have explained, too, that it has been abused to permit delegations of legislative power that on any other conceivable account should be held unconstitutional. Indeed, where some have claimed to see “intelligible principles” many “less discerning readers [have been able only to] find gibberish.” Even Justice Douglas, one of the fathers of the administrative state, came to criticize excessive congressional delegations in the period when the intelligible principle “test” began to take hold.

Still, the scope of the problem can be overstated. At least some of the results the Court has reached under the banner of the abused “intelligible principle” doctrine may be consistent with more traditional teachings. Some delegations have, at least arguably, implicated the president's

inherent Article II authority. The Court has held, for example, that Congress may authorize the President to prescribe aggravating factors that permit a military court-martial to impose the death penalty on a member of the Armed Forces convicted of murder—a decision that may implicate in part the President's independent commander-in-chief authority. Others of these cases may have involved laws that specified rules governing private conduct but conditioned the application of those rules on fact-finding—a practice that is, as we've seen, also long associated with the executive function.

. . . To determine whether a statute provides an intelligible principle, we must ask: Does the statute assign to the executive only the responsibility to make factual findings? Does it set forth the facts that the executive must consider and the criteria against which to measure them? And most importantly, did Congress, and not the Executive Branch, make the policy judgments? Only then can we fairly say that a statute contains the kind of intelligible principle the Constitution demands.

While it's been some time since the Court last held that a statute improperly delegated the legislative power to another branch—thanks in no small measure to the intelligible principle misadventure—the Court has hardly abandoned the business of policing improper legislative delegations. When one legal doctrine becomes unavailable to do its intended work, the hydraulic pressures of our constitutional system sometimes shift the responsibility to different doctrines. And that's exactly what's happened here. We still regularly rein in Congress's efforts to delegate legislative power; we just call what we're doing by different names.

Consider, for example, the “major questions” doctrine. Under our precedents, an agency can fill in statutory gaps where “statutory circumstances” indicate that Congress meant to grant it such powers.<sup>69</sup> But we don't follow that rule when the “statutory gap” concerns “a question of deep ‘economic and political significance’ that is central to the statutory scheme.” So we've rejected agency demands that we defer to their attempts to rewrite rules for billions of dollars in healthcare tax credits, to assume control over millions of small greenhouse gas sources, and to ban cigarettes. Although it is nominally a canon of statutory construction, we apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency.

Consider, too, this Court's cases addressing vagueness. “A vague law,” this Court has observed, “impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis.”<sup>74</sup> And we have explained that our doctrine prohibiting vague laws is an outgrowth and “corollary of the separation of powers.”<sup>75</sup> It's easy to see, too, how most any challenge to a legislative delegation can be reframed as a vagueness complaint: A statute that does not contain “sufficiently definite and precise” standards “to enable Congress, the courts, and the public to ascertain” whether Congress's guidance has been followed at once presents a delegation problem and provides impermissibly vague guidance to affected citizens.<sup>76</sup> And it seems little coincidence that our void-for-vagueness cases became much more common soon after the Court began relaxing its approach to legislative delegations. Before 1940, the Court decided only a handful of vagueness challenges to federal statutes. Since then, the phrase “void for vagueness” has appeared in our cases well over 100 times.

Nor have we abandoned enforcing other sides of the separation-of-powers triangle between the legislative, executive, and judiciary. We have not hesitated to prevent Congress from “confer[ring] the Government's ‘judicial Power’ on entities outside Article III.”<sup>77</sup> We've forbidden the executive from encroaching on legislative functions by wielding a line-item veto.<sup>78</sup> We've prevented Congress from delegating its collective legislative power to a single House.<sup>79</sup> And we've

policed legislative efforts to control executive branch officials.<sup>80</sup> These cases show that, when the separation of powers is at stake, we don't just throw up our hands. In all these areas, we recognize that abdication is “not part of the constitutional design.”<sup>81</sup> And abdication here would be no more appropriate. To leave this aspect of the constitutional structure alone undefended would serve only to accelerate the flight of power from the legislative to the executive branch, turning the latter into a vortex of authority that was constitutionally reserved for the people's representatives in order to protect their liberties.

### III

#### A

Returning to SORNA with this understanding of our charge in hand, problems quickly emerge. Start with this one: It's hard to see how SORNA leaves the Attorney General with only details to fill up. Of course, what qualifies as a detail can sometimes be difficult to discern and, as we've seen, this Court has upheld statutes that allow federal agencies to resolve even highly consequential details so long as Congress prescribes the rule governing private conduct. But it's hard to see how the statute before us could be described as leaving the Attorney General with only details to dispatch. As the government itself admitted in *Reynolds*, SORNA leaves the Attorney General free to impose on 500,000 pre-Act offenders all of the statute's requirements, some of them, or none of them. The Attorney General may choose which pre-Act offenders to subject to the Act. And he is free to change his mind at any point or over the course of different political administrations. In the end, there isn't a single policy decision concerning pre-Act offenders on which Congress even tried to speak, and not a single other case where we have upheld executive authority over matters like these on the ground they constitute mere “details.” This much appears to have been deliberate, too. Because members of Congress could not reach consensus on the treatment of pre-Act offenders, it seems this was one of those situations where they found it expedient to hand off the job to the executive and direct there the blame for any later problems that might emerge.

Nor can SORNA be described as an example of conditional legislation subject to executive fact-finding. To be sure, Congress could have easily written this law in that way. It might have required all pre-Act offenders to register, but then given the Attorney General the authority to make case-by-case exceptions for offenders who do not present an “‘imminent hazard to the public safety’” comparable to that posed by newly released post-Act offenders. It could have set criteria to inform that determination, too, asking the executive to investigate, say, whether an offender's risk of recidivism correlates with the time since his last offense, or whether multiple lesser offenses indicate higher or lower risks than a single greater offense.

But SORNA did none of this. Instead, it gave the Attorney General unfettered discretion to decide which requirements to impose on which pre-Act offenders. . . .

Finally, SORNA does not involve an area of overlapping authority with the executive. Congress may assign the President broad authority regarding the conduct of foreign affairs or other matters where he enjoys his own inherent Article II powers. But SORNA stands far afield from any of that. It gives the Attorney General the authority to “prescrib[e] the rules by which the duties and rights” of citizens are determined, a quintessentially legislative power.

Our precedents confirm these conclusions. If allowing the President to draft a “cod[e] of fair competition” for slaughterhouses was “delegation running riot,” then it's hard to see how giving the nation's chief prosecutor the power to write a criminal code rife with his own policy choices might



be permissible. And if Congress may not give the President the discretion to ban or allow the interstate transportation of petroleum, then it's hard to see how Congress may give the Attorney General the discretion to apply or not apply any or all of SORNA's requirements to pre-Act offenders, and then change his mind at any time. If the separation of powers means anything, it must mean that Congress cannot give the executive branch a blank check to write a code of conduct governing private conduct for a half-million people.

The statute here also sounds all the alarms the founders left for us. Because Congress could not achieve the consensus necessary to resolve the hard problems associated with SORNA's application to pre-Act offenders, it passed the potato to the Attorney General. And freed from the need to assemble a broad supermajority for his views, the Attorney General did not hesitate to apply the statute retroactively to a politically unpopular minority. Nor could the Attorney General afford the issue the kind of deliberative care the framers designed a representative legislature to ensure. Perhaps that's part of the reason why the executive branch found itself rapidly adopting different positions across different administrations. And because SORNA vested lawmaking power in one person rather than many, it should be no surprise that, rather than few and stable, the edicts have proved frequent and shifting, with fair notice sacrificed in the process. Then, too, there is the question of accountability. In passing this statute, Congress was able to claim credit for “comprehensively” addressing the problem of the entire existing population of sex offenders (who can object to that?), while in fact leaving the Attorney General to sort it out.

It would be easy enough to let this case go. After all, sex offenders are one of the most disfavored groups in our society. But the rule that prevents Congress from giving the executive *carte blanche* to write laws for sex offenders is the same rule that protects everyone else. Nor is it hard to imagine how the power at issue in this case—the power of a prosecutor to require a group to register with the government on pain of weighty criminal penalties—could be abused in other settings. To allow the nation's chief law enforcement officer to write the criminal laws he is charged with enforcing—to “unit[e]” the “legislative and executive powers . . . in the same person”—would be to mark the end of any meaningful enforcement of our separation of powers and invite the tyranny of the majority that follows when lawmaking and law enforcement responsibilities are united in the same hands.<sup>88</sup>

Nor would enforcing the Constitution's demands spell doom for what some call the “administrative state.” The separation of powers does not prohibit any particular policy outcome, let alone dictate any conclusion about the proper size and scope of government. Instead, it is a procedural guarantee that requires Congress to assemble a social consensus before choosing our nation's course on policy questions like those implicated by SORNA. What is more, Congress is hardly bereft of options to accomplish all it might wish to achieve. It may always authorize executive branch officials to fill in even a large number of details, to find facts that trigger the generally applicable rule of conduct specified in a statute, or to exercise non-legislative powers. Congress can also commission agencies or other experts to study and recommend legislative language. Respecting the separation of powers forecloses no substantive outcomes. It only requires us to respect along the way one of the most vital of the procedural protections of individual liberty found in our Constitution.

...

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. . . In a future case with a full panel, I remain hopeful that the Court may yet recognize that, while Congress can enlist considerable assistance from the executive branch in filling up details and finding facts, it may never hand off to the nation's chief prosecutor the power to write his own criminal code. That “is delegation running riot.”

## NOTES AND QUESTIONS

**Note 6-30(a).** Why is *Reynolds* important to both the plurality and dissenting opinions? Does the intelligible principle saving SORNA come from Congress or from *Reynolds*?

**Note 6-30(b).** Set forth what you believe to be the intelligible principle test as articulated by the majority. How does that differ from the test proposed by the dissent?

**§ 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 conductors 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.

## I

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).

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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.

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 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.

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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.” *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 393 (2015).

**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, 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>.

**§ 6.11, 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.

**NATIONAL LABOR RELATIONS BOARD v. NOEL CANNING.**

134 S. Ct. 2550

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>16</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>17</sup> His agencies have been directed to abandon ongoing litigation,<sup>18</sup> be silent to the public,<sup>19</sup> and face new legislation specifically designed to stymie regulatory processes<sup>20</sup>—in other words, to make agencies do more nothing.

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

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<sup>16</sup> E.g., <https://www.nytimes.com/2017/06/20/business/nlrb-trump-labor.html>; <https://www.nytimes.com/2017/07/01/us/politics/trump-epa-chief-pruitt-regulations-climate-change.html>.

<sup>17</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>18</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>19</sup> E.g., <http://www.politico.com/story/2017/01/federal-agencies-trump-information-lockdown-234122>; <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>20</sup> E.g., [https://ag.ny.gov/sites/default/files/letter\\_06\\_26\\_17\\_final\\_0.pdf](https://ag.ny.gov/sites/default/files/letter_06_26_17_final_0.pdf); <https://www.thereview.org/2017/03/29/roberts-misguided-regulatory-accountability-act/>.

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).

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>21</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

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<sup>21</sup> *E.g.*, *Beeler v. Colvin*, No. 1:15-CV-01481-SEB-MJD, 2016 WL 7111646 (S.D. Ind. Dec. 7, 2016).

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 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.

## **LUCIA v. SECURITIES AND EXCHANGE COMMISSION**

138 S. Ct. 2044

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>22</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>23</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)(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

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<sup>22</sup> *Office of Administrative Law Judges*, U.S. Securities & Exchange Comm’n, (Jan. 26, 2017) <https://www.sec.gov/alj>.

<sup>23</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>.

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*, 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.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(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—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 unrebutted 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>.

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

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

The frequently-introduced Regulations from the Executive in Need of Scrutiny (REINS) Act had its best window of opportunity when the Republican Party held both houses of Congress plus the presidency. The Act, which has passed the House several times but has never gained sufficient support in the Senate, would require affirmative congressional adoption and presidential



approval for any “major rule” (i.e. a rule with a large economic impact) to take effect. In all likelihood, “[g]iven 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, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 12–13 (2017). And Professor Ronald Levin, in addition to his criticisms for how the REINS Act would undermine administrative functionality, has further raised concerns that the Act would run afoul of *Chadha* because a single chamber of Congress, by withholding approval, could derail an otherwise properly-promulgated regulation:

The problem with the REINS Act is that, with regard to major rules, it would accomplish virtually the same result as the “traditional” one-house veto—namely, it would enable a single house of Congress to nullify an agency rule, regardless of the wishes of the other house, let alone the President. The question, then, is whether the Supreme Court would accept what amounts to a 180 degree change of direction if the one-house veto were repackaged in a different format, even though the risks of unchecked action by the legislative branch would be as great in the later version as in the earlier one. My suggestion is that it would not. The Court emphasized in the *Chadha* opinion that “the purposes underlying the Presentment Clauses and the bicameral requirement . . . guide our resolution of the important question presented in these cases,” and those purposes are implicated just as much by the REINS Act as by the legislative veto in its previous forms.

Ronald M. Levin, *The REINS Act: Unbridled Impediment to Regulation*, 83 GEO. WASH. L. REV. 1446, 1468 (2015).

## 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>24</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).

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

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

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<sup>24</sup> Whether the decision was in fact supported by substantial evidence was not before the Court.

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[ping] 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.

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

**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."

**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.**

*Epic Systems* arguably reduced *Chevron* to a shadow of itself, rendering it relevant only where the “traditional tools of statutory construction” leave an “unresolved ambiguity.” The even more maligned *Auer* deference seemed destined for a dramatic fate. *See generally* Christopher J. Walker, *Attacking Auer and Chevron Deference*, 16 GEO J.L. & PUB. POL’Y 103 (2018) (providing comprehensive overview of *Auer* critiques). Instead, a thin majority of the Supreme Court permitted it to persist, but in a substantially circumscribed form. When may courts defer to an

agency interpretation of its regulation? What does that deference look like?

**KISOR v. WILKIE**  
139 S. Ct. 2400 (2019)

Justice KAGAN announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–B, III–B, and IV, and an opinion with respect to Parts II–A and III–A, in which Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR join.

This Court has often deferred to agencies’ reasonable readings of genuinely ambiguous regulations. We call that practice *Auer* deference, or sometimes *Seminole Rock* deference, after two cases in which we employed it. See *Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). The only question presented here is whether we should overrule those decisions, discarding the deference they give to agencies. We answer that question no. *Auer* deference retains an important role in construing agency regulations. But even as we uphold it, we reinforce its limits. *Auer* deference is sometimes appropriate and sometimes not. Whether to apply it depends on a range of considerations that we have noted now and again, but compile and further develop today. The deference doctrine we describe is potent in its place, but cabined in its scope. On remand, the Court of Appeals should decide whether it applies to the agency interpretation at issue.

**I**

We begin by summarizing how petitioner James Kisor’s case made its way to this Court. Truth be told, nothing recounted in this Part has much bearing on the rest of our decision. The question whether to overrule *Auer* does not turn on any single application, whether right or wrong, of that decision’s deference doctrine. But a recitation of the facts and proceedings below at least shows how the question presented arose.

[Kisor sought in 1982 VA disability benefits based upon his PTSD. The VA denied Kisor’s request. In 2006, Kisor sought to reopen his claim. The VA granted Kisor’s request and granted him benefits, but only from the date of the motion to reopen and not from the date of first application. The Board of Veterans’ Appeals decision rested on its interpretation of a VA regulation which permitted retroactive benefits only if there were “relevant official service department records” that had not been considered. The Board held that the new records submitted were not “relevant” because they did not address the basis for his original denial. Eventually, the Federal Circuit affirmed based on deference to the Board’s interpretation of the rule, finding that “relevance” was vague. It could pertain either to the case in general or to the specific grounds for the denial, and the Board’s decision to choose the latter definition was not unreasonable.]

**II**

Before addressing that question directly, we spend some time describing what *Auer* deference is, and is not, for. You might view this Part as “just background” because we have made many of its points in prior decisions. But even if so, it is background that matters. For our account of why the doctrine emerged—and also how we have limited it—goes a long way toward explaining our view that it is worth preserving.

## A

Begin with a familiar problem in administrative law: For various reasons, regulations may be genuinely ambiguous. They may not directly or clearly address every issue; when applied to some fact patterns, they may prove susceptible to more than one reasonable reading. Sometimes, this sort of ambiguity arises from careless drafting—the use of a dangling modifier, an awkward word, an opaque construction. But often, ambiguity reflects the well-known limits of expression or knowledge. The subject matter of a rule “may be so specialized and varying in nature as to be impossible”—or at any rate, impracticable—to capture in its every detail. *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). Or a “problem[] may arise” that the agency, when drafting the rule, “could not [have] reasonably foresee[n].” *Id.* Whichever the case, the result is to create real uncertainties about a regulation’s meaning.

Consider these examples:

- In a rule issued to implement the Americans with Disabilities Act (ADA), the Department of Justice requires theaters and stadiums to provide people with disabilities “lines of sight comparable to those for members of the general public.” Must the Washington Wizards construct wheelchair seating to offer lines of sight over spectators when they rise to their feet? Or is it enough that the facility offers comparable views so long as everyone remains seated? See *Paralyzed Veterans of Am. V. D. C. Arena L. P.*, 117 F.3d 579 (CA DC 1997).
- The Transportation Security Administration (TSA) requires that liquids, gels, and aerosols in carry-on baggage be packed in containers smaller than 3.4 ounces and carried in a clear plastic bag. Does a traveler have to pack his jar of truffle pâté in that way?
- The Mine Safety and Health Administration issues a rule requiring employers to report occupational diseases within two weeks after they are “diagnosed.” Do chest X-ray results that “scor[e]” above some level of opacity count as a “diagnosis”? What level, exactly?
- An FDA regulation gives pharmaceutical companies exclusive rights to drug products if they contain “no active moiety that has been approved by FDA in any other” new drug application. Has a company created a new “active moiety” by joining a previously approved moiety to lysine through a non-ester covalent bond? See *Actavis Elizabeth LLC v. FDA*, 625 F.3d 760 (CA DC 2010).
- Or take the facts of *Auer* itself. An agency must decide whether police captains are eligible for overtime under the Fair Labor Standards Act. According to the agency’s regulations, employees cannot receive overtime if they are paid on a “salary basis.” And in deciding whether an employee is salaried, one question is whether his pay is “subject to reduction” based on performance. A police department’s manual informs its officers that their pay might be docked if they commit a disciplinary infraction. Does that fact alone make them “subject to” pay deductions? Or must the department have a practice of docking officer pay, so that the possibility of that happening is more than theoretical?

In each case, interpreting the regulation involves a choice between (or among) more than one reasonable reading. To apply the rule to some unanticipated or unresolved situation, the court must make a judgment call. How should it do so?

In answering that question, we have often thought that a court should defer to the agency’s construction of its own regulation. . . . [In *Seminole Rock*,] we declared that when “the meaning of [a regulation] is in doubt,” the agency’s interpretation “becomes of controlling weight unless it is

plainly erroneous or inconsistent with the regulation.” And *Seminole Rock* itself was not built on sand. Deference to administrative agencies traces back to the late nineteenth century, and perhaps beyond.

We have explained *Auer* deference (as we now call it) as rooted in a presumption about congressional intent—a presumption that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities. Congress, we have pointed out, routinely delegates to agencies the power to implement statutes by issuing rules. In doing so, Congress knows (how could it not?) that regulations will sometimes contain ambiguities. But Congress almost never explicitly assigns responsibility to deal with that problem, either to agencies or to courts. Hence the need to presume, one way or the other, what Congress would want. And as between those two choices, agencies have gotten the nod. We have adopted the presumption—though it is always rebuttable—that “the power authoritatively to interpret its own regulations is a component of the agency’s delegated lawmaking powers.” Or otherwise said, we have thought that when granting rulemaking power to agencies, Congress usually intends to give them, too, considerable latitude to interpret the ambiguous rules they issue.

In part, that is because the agency that promulgated a rule is in the “better position [to] reconstruct” its original meaning. Consider that if you don’t know what some text (say, a memo or an e-mail) means, you would probably want to ask the person who wrote it. And for the same reasons, we have thought, Congress would too (though the person is here a collective actor). The agency that “wrote the regulation” will often have direct insight into what that rule was intended to mean. The drafters will know what it was supposed to include or exclude or how it was supposed to apply to some problem. To be sure, this justification has its limits. It does not work so well, for example, when the agency failed to anticipate an issue in crafting a rule (*e.g.*, if the agency never thought about whether and when chest X-rays would count as a “diagnosis”). Then, the agency will not be uncovering a specific intention; at most (though this is not nothing), it will be offering insight into the analogous issues the drafters considered and the purposes they designed the regulation to serve. And the defense works yet less well when lots of time has passed between the rule’s issuance and its interpretation—especially if the interpretation differs from one that has come before. All that said, the point holds good for a significant category of “contemporaneous” readings. Want to know what a rule means? Ask its author.

In still greater measure, the presumption that Congress intended *Auer* deference stems from the awareness that resolving genuine regulatory ambiguities often “entail[s] the exercise of judgment grounded in policy concerns.” Return to our TSA example. In most of their applications, terms like “liquids” and “gels” are clear enough. (Traveler checklist: Pretzels OK; water not.) But resolving the uncertain issues—the truffle pâtés or olive tapenades of the world—requires getting in the weeds of the rule’s policy: Why does TSA ban liquids and gels in the first instance? What makes them dangerous? Can a potential hijacker use pâté jars in the same way as soda cans? Or take the less specialized-seeming ADA example. It is easy enough to know what “comparable lines of sight” means in a movie theater—but more complicated when, as in sports arenas, spectators sometimes stand up. How costly is it to insist that the stadium owner take that sporadic behavior into account, and is the viewing value received worth the added expense? That cost-benefit calculation, too, sounds more in policy than in law. Or finally, take the more technical “moiety” example. Or maybe, don’t. If you are a judge, you probably have no idea of what the FDA’s rule means, or whether its policy is implicated when a previously approved moiety is connected to lysine through a non-ester covalent bond.

And Congress, we have thought, knows just that: It is attuned to the comparative advantages of agencies over courts in making such policy judgments. Agencies (unlike courts) have “unique expertise,” often of a scientific or technical nature, relevant to applying a regulation “to complex or changing circumstances.” Agencies (unlike courts) can conduct factual investigations, can consult with affected parties, can consider how their experts have handled similar issues over the long course of administering a regulatory program. And agencies (again unlike courts) have political accountability, because they are subject to the supervision of the President, who in turn answers to the public. See *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). It is because of those features that Congress, when first enacting a statute, assigns rulemaking power to an agency and thus authorizes it to fill out the statutory scheme. And so too, when new issues demanding new policy calls come up within that scheme, Congress presumably wants the same agency, rather than any court, to take the laboring oar.

Finally, the presumption we use reflects the well-known benefits of uniformity in interpreting genuinely ambiguous rules. We have noted Congress’s frequent “preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal by litigation.” That preference may be strongest when the interpretive issue arises in the context of a “complex and highly technical regulatory program.” After all, judges are most likely to come to divergent conclusions when they are least likely to know what they are doing. (Is there anything to be said for courts all over the country trying to figure out what makes for a new active moiety?) But the uniformity justification retains some weight even for more accessible rules, because their language too may give rise to more than one eminently reasonable reading. Consider *Auer* itself. There, four Circuits held that police captains were “subject to” pay deductions for disciplinary infractions if a police manual said they were, even if the department had never docked anyone. Two other Circuits held that captains were “subject to” pay deductions only if the department’s actual practice made that punishment a realistic possibility. Had the agency issued an interpretation before all those rulings (rather than, as actually happened, in a brief in this Court), a deference rule would have averted most of that conflict and uncertainty. *Auer* deference thus serves to ensure consistency in federal regulatory law, for everyone who needs to know what it requires.

## B

But all that said, *Auer* deference is not the answer to every question of interpreting an agency’s rules. Far from it. As we explain in this section, the possibility of deference can arise only if a regulation is genuinely ambiguous. And when we use that term, we mean it—genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation. Still more, not all reasonable agency constructions of those truly ambiguous rules are entitled to deference. As just explained, we presume that Congress intended for courts to defer to agencies when they interpret their own ambiguous rules. But when the reasons for that presumption do not apply, or countervailing reasons outweigh them, courts should not give deference to an agency’s reading, except to the extent it has the “power to persuade.” We have thus cautioned that *Auer* deference is just a “general rule”; it “does not apply in all cases.” And although the limits of *Auer* deference are not susceptible to any rigid test, we have noted various circumstances in which such deference is “unwarranted.” In particular, that will be so when a court concludes that an interpretation does not reflect an agency’s authoritative, expertise-based, “fair[, or] considered judgment.”

We take the opportunity to restate, and somewhat expand on, those principles here to clear up some mixed messages we have sent. At times, this Court has applied *Auer* deference without significant analysis of the underlying regulation. At other times, the Court has given *Auer* deference

without careful attention to the nature and context of the interpretation. See, e.g., *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969) (deferring to an agency’s view as expressed in letters to third parties). And in a vacuum, our most classic formulation of the test—whether an agency’s construction is “plainly erroneous or inconsistent with the regulation,” *Seminole Rock*, 325 U.S. at 414—may suggest a caricature of the doctrine, in which deference is “reflexive.” So we cannot deny that Kisor has a bit of grist for his claim that *Auer* “bestows on agencies expansive, unreviewable” authority. But in fact *Auer* does no such thing: It gives agencies their due, while also allowing—indeed, obligating—courts to perform their reviewing and restraining functions. So before we turn to Kisor’s specific grievances, we think it worth reinforcing some of the limits inherent in the *Auer* doctrine.<sup>25</sup>

First and foremost, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous. If uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means—and the court must give it effect, as the court would any law. Otherwise said, the core theory of *Auer* deference is that sometimes the law runs out, and policy-laden choice is what is left over. But if the law gives an answer—if there is only one reasonable construction of a regulation—then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense. Deference in that circumstance would “permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.” *Auer* does not, and indeed could not, go that far.

And before concluding that a rule is genuinely ambiguous, a court must exhaust all the “traditional tools” of construction. . . .

If genuine ambiguity remains, moreover, the agency’s reading must still be “reasonable.” In other words, it must come within the zone of ambiguity the court has identified after employing all its interpretive tools. (Note that serious application of those tools therefore has use even when a regulation turns out to be truly ambiguous. The text, structure, history, and so forth at least establish the outer bounds of permissible interpretation.) . . . And let there be no mistake: That is a requirement an agency can fail.

Still, we are not done—for not every reasonable agency reading of a genuinely ambiguous rule should receive *Auer* deference. We have recognized in applying *Auer* that a court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight. As explained above, we give *Auer* deference because we presume, for a set of reasons relating to the comparative attributes of courts and agencies, that Congress would have wanted us to. But the administrative realm is vast and varied, and we have understood that such a presumption cannot always hold. The inquiry on this dimension does not reduce to any exhaustive test. But we have laid out some especially important markers for identifying when *Auer* deference is and is not appropriate.

To begin with, the regulatory interpretation must be one actually made by the agency. In other words, it must be the agency’s “authoritative” or “official position,” rather than any more ad hoc statement not reflecting the agency’s views. . . . Of course, the requirement of “authoritative” action must recognize a reality of bureaucratic life: Not everything the agency does comes from, or is even in the name of, the Secretary or his chief advisers. So, for example, we have deferred to “official staff memoranda” that were “published in the Federal Register,” even though never

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<sup>25</sup> The proper understanding of the scope and limits of the *Auer* doctrine is, of course, not set out in any of the opinions that concur only in the judgment.

approved by the agency head. But there are limits. The interpretation must at the least emanate from those actors, using those vehicles, understood to make authoritative policy in the relevant context. See, e.g., *Paralyzed Veterans*, 117 F.3d at 587 (refusing to consider a “speech of a mid-level official” as an “authoritative departmental position”); *Exelon Generation Co. v. Local 15, Int’l Brotherhood of Elec. Workers, AFL–CIO*, 676 F.3d 566 (CA7 2012) (declining deference when the agency had itself “disclaimed the use of regulatory guides as authoritative”). . . .

Next, the agency’s interpretation must in some way implicate its substantive expertise. . . . That point is most obvious when a rule is technical; think back to our “moiety” or “diagnosis” examples. But more prosaic-seeming questions also commonly implicate policy expertise; consider the TSA assessing the security risks of pâté or a disabilities office weighing the costs and benefits of an accommodation. Once again, though, there are limits. Some interpretive issues may fall more naturally into a judge’s bailiwick. Take one requiring the elucidation of a simple common-law property term, or one concerning the award of an attorney’s fee. When the agency has no comparative expertise in resolving a regulatory ambiguity, Congress presumably would not grant it that authority.<sup>26</sup>

Finally, an agency’s reading of a rule must reflect “fair and considered judgment” to receive *Auer* deference. That means, we have stated, that a court should decline to defer to a merely “convenient litigating position” or “*post hoc* rationalization[n] advanced” to “defend past agency action against attack.” And a court may not defer to a new interpretation, whether or not introduced in litigation, that creates “unfair surprise” to regulated parties. . . .

\* \* \*

The upshot of all this goes something as follows. When it applies, *Auer* deference gives an agency significant leeway to say what its own rules mean. In so doing, the doctrine enables the agency to fill out the regulatory scheme Congress has placed under its supervision. But that phrase “when it applies” is important—because it often doesn’t. As described above, this Court has cabined *Auer*’s scope in varied and critical ways—and in exactly that measure, has maintained a strong judicial role in interpreting rules. What emerges is a deference doctrine not quite so tame as some might hope, but not nearly so menacing as they might fear.

### III

That brings us to the lone question presented here—whether we should abandon the longstanding doctrine just described. In contending that we should, Kisor raises statutory, policy, and constitutional claims (in that order). But he faces an uphill climb. He must first convince us that *Auer* deference is wrong. And even then, he must overcome *stare decisis*—the special care we take to preserve our precedents. In the event, Kisor fails at the first step: None of his arguments provide good reason to doubt *Auer* deference. And even if that were not so, Kisor does not offer the kind of special justification needed to overrule *Auer*, and *Seminole Rock*, and all our many other decisions deferring to reasonable agency constructions of ambiguous rules.

#### A

Kisor first attacks *Auer* as inconsistent with the judicial review provision [§ 706] of the Administrative Procedure Act (APA). . . . According to Kisor, *Auer* violates that edict by thwarting “meaningful judicial review” of agency rules. . . .

<sup>26</sup> For a similar reason, this Court has denied *Auer* deference when an agency interprets a rule that parrots the statutory text. . . .

To begin with, that argument ignores the many ways, discussed above, that courts exercise independent review over the meaning of agency rules. As we have explained, a court must apply all traditional methods of interpretation to any rule, and must enforce the plain meaning those methods uncover. . . . [Even where an ambiguity exists], a court must consider whether the interpretation is authoritative, expertise-based, considered, and fair to regulated parties. . . .

And even when a court defers to a regulatory reading, it acts consistently with Section 706. That provision does not specify the standard of review a court should use in “determin[ing] the meaning” of an ambiguous rule. One possibility, as Kisor says, is to review the issue *de novo*. But another is to review the agency’s reading for reasonableness. [As discussed above, this perspective is supported by the rebuttable presumption that Congress intends to give an agency “considerable latitude to construe its ambiguous rules.”] [C]ourts do not violate Section 706 by applying *Auer*. To the contrary, they fulfill their duty to “determine the meaning” of a rule precisely by deferring to the agency’s reasonable reading. Section 706 and *Auer* thus go hand in hand.

That is especially so given the practice of judicial review at the time of the APA’s enactment. Section 706 was understood when enacted to “restate[ ] the present law as to the scope of judicial review.” Attorney General’s Manual on the Administrative Procedure Act 108 (1947). . . . At a minimum, nothing in the law of that era required all judicial review of agency interpretations to be *de novo*. . . .

Kisor next claims that *Auer* circumvents the APA’s rulemaking requirements. . . . But [section 553] allows agencies to issue “interpret[ive]” rules without notice and comment. A key feature of those rules is that (unlike legislative rules) they are not supposed to “have the force and effect of law” . . . . [Kisor argues that the result of *Auer* deference] is to make a rule that has never gone through notice and comment binding on the public. . . .

But this Court rejected the identical argument just a few years ago, and for good reason. In *Mortgage Bankers*, we held that interpretive rules, even when given *Auer* deference, do *not* have the force of law. An interpretive rule itself never forms “the basis for an enforcement action” . . . . An enforcement action must instead rely on a legislative rule, which (to be valid) must go through notice and comment. And in all the ways discussed above, the meaning of a legislative rule remains in the hands of courts, even if they sometimes divine that meaning by looking to the agency’s interpretation. . . . No binding of anyone occurs merely by the agency’s say-so.

And indeed, a court deciding whether to give *Auer* deference must heed the same procedural values as Section 553 reflects. Remember that a court may defer to only an agency’s authoritative and considered judgments. No *ad hoc* statements or *post hoc* rationalizations need apply. And recall too that deference turns on whether an agency’s interpretation creates unfair surprise or upsets reliance interests. So an agency has a strong incentive to circulate its interpretations early and widely. In such ways, the doctrine of *Auer* deference reinforces, rather than undermines, the ideas of fairness and informed decisionmaking at the core of the APA.

To supplement his two APA arguments, Kisor turns to policy, leaning on a familiar claim about the incentives *Auer* creates. According to Kisor, *Auer* encourages agencies to issue vague and open-ended regulations, confident that they can later impose whatever interpretation of those rules they prefer. [The Court noted that Justice Scalia advanced this argument in many opinions.]

But the claim has notable weaknesses, empirical and theoretical alike. First, it does not survive an encounter with experience. No real evidence—indeed, scarcely an anecdote—backs up the assertion. As two noted scholars (one of whom reviewed thousands of rules during four years of



government service) have written: “[W]e are unaware of, and no one has pointed to, any regulation in American history that, because of *Auer*, was designed vaguely.” Sunstein & Vermeule, 84 U. Chi. L. Rev., at 308. And even the argument’s theoretical allure dissipates upon reflection. For strong (almost surely stronger) incentives and pressures cut in the opposite direction. “[R]egulators want their regulations to be effective, and clarity promotes compliance.” Too, regulated parties often push for precision from an agency, so that they know what they can and cannot do. And ambiguities in rules pose risks to the long-run survival of agency policy. Vagueness increases the chance of adverse judicial rulings. And it enables future administrations, with different views, to reinterpret the rules to their own liking. Add all of that up and Kisor’s ungrounded theory of incentives contributes nothing to the case against *Auer*.

Finally, Kisor goes big, asserting (though fleetingly) that *Auer* deference violates “separation-of-powers principles.” In his view, those principles prohibit “vest[ing] in a single branch the law-making and law-interpreting functions.” If that objection is to agencies’ usurping the interpretive role of courts, this opinion has already met it head-on. Properly understood and applied, *Auer* does no such thing. . . . If Kisor’s objection is instead to the supposed commingling of functions (that is, the legislative and judicial) within an agency, this Court has answered it often before. That sort of mixing is endemic in agencies, and has been “since the beginning of the Republic.” It does not violate the separation of powers, we have explained, because even when agency “activities take ‘legislative’ and ‘judicial’ forms,” they continue to be “exercises of[ ] the ‘executive Power’ ”—or otherwise said, ways of executing a statutory plan. . . .

## B

[The Court held that *stare decisis* likewise required reaffirming *Auer*.]

. . . Deference to reasonable agency interpretations of ambiguous rules pervades the whole corpus of administrative law. . . . [B]ecause that is so, abandoning *Auer* deference would cast doubt on many settled constructions of rules. As Kisor acknowledged at oral argument, a decision in his favor would allow relitigation of any decision based on *Auer*, forcing courts to “wrestle [with] whether or not *Auer*” had actually made a difference. . . .

And third, even if we are wrong about *Auer*, “Congress remains free to alter what we have done.” . . .

[Kisor argues that *Auer* was] “wrong on its own terms” and “badly reasoned.” Of course, it is good—and important—for our opinions to be right and well-reasoned. But that is not the test for overturning precedent. Kisor does not claim that *Auer* deference is “unworkable,” a traditional basis for overruling a case. Nor does he point to changes in legal rules that make *Auer* a “doctrinal dinosaur.” All he can muster is that “[t]he administrative state has evolved substantially since 1945.” We do not doubt the point (although we note that *Auer* and other key deference decisions came along after most of that evolution took place). Still more, we agree with Kisor that administrative law doctrines must take account of the far-reaching influence of agencies and the opportunities such power carries for abuse. That is one reason we have taken care today to reinforce the limits of *Auer* deference, and to emphasize the critical role courts retain in interpreting rules. . . .

## IV

With that, we can finally return to Kisor’s own case. You may remember that his retroactive benefits depend on the meaning of the term “relevant” records in a VA regulation.

Applying the principles outlined in this opinion, we hold that a redo is necessary for two reasons. First, the Federal Circuit jumped the gun in declaring the regulation ambiguous. We have insisted that a court bring all its interpretive tools to bear before finding that to be so. It is not enough to casually remark, as the court did here, that “[b]oth parties insist that the plain regulatory language supports their case, and neither party’s position strikes us as unreasonable.” Rather, the court must make a conscientious effort to determine, based on indicia like text, structure, history, and purpose, whether the regulation really has more than one reasonable meaning. . . .

And second, the Federal Circuit assumed too fast that *Auer* deference should apply in the event of genuine ambiguity. As we have explained, that is not always true. . . . [The Solicitor General] explained that all 100 or so members of the VA Board act individually (rather than in panels) and that their roughly 80,000 annual decisions have no “precedential value.” He thus questioned whether a Board member’s ruling “reflects the considered judgment of the agency as a whole.” . . . [T]he questions the Solicitor General raised are exactly the kind the court must consider in deciding whether to award *Auer* deference to the Board’s interpretation.

We accordingly vacate the judgment below and remand the case for further proceedings.

*It is so ordered.*

Chief Justice ROBERTS, concurring in part.

. . . For the reasons the Court discusses in Part III–B, I agree that overruling those precedents is not warranted. I also agree with the Court’s treatment in Part II–B of the bounds of *Auer* deference.

I write separately to suggest that the distance between the majority and Justice GORSUCH is not as great as it may initially appear. The majority catalogs the prerequisites for, and limitations on, *Auer* deference: The underlying regulation must be genuinely ambiguous; the agency’s interpretation must be reasonable and must reflect its authoritative, expertise-based, and fair and considered judgment; and the agency must take account of reliance interests and avoid unfair surprise. Justice GORSUCH, meanwhile, lists the reasons that a court might be persuaded to adopt an agency’s interpretation of its own regulation: The agency thoroughly considered the problem, offered a valid rationale, brought its expertise to bear, and interpreted the regulation in a manner consistent with earlier and later pronouncements. Accounting for variations in verbal formulation, those lists have much in common.

That is not to say that *Auer* deference is just the same as the power of persuasion discussed in *Skidmore v. Swift & Co*; there is a difference between holding that a court ought to be persuaded by an agency’s interpretation and holding that it should defer to that interpretation under certain conditions. But it is to say that the cases in which *Auer* deference is warranted largely overlap with the cases in which it would be unreasonable for a court not to be persuaded by an agency’s interpretation of its own regulation.

Justice GORSUCH, with whom Justice THOMAS joins, with whom Justice KAVANAUGH joins as to Parts I, II, III, IV, and V, and with whom Justice ALITO joins as to Parts I, II, and III, concurring in the judgment.

It should have been easy for the Court to say goodbye to *Auer v. Robbins*. In disputes involving the relationship between the government and the people, *Auer* requires judges to accept an executive agency's interpretation of its own regulations even when that interpretation doesn't represent the best and fairest reading. This rule creates a "systematic judicial bias in favor of the federal government, the most powerful of parties, and against everyone else." Nor is *Auer*'s biased rule the product of some congressional mandate we are powerless to correct: This Court invented it, almost by accident and without any meaningful effort to reconcile it with the Administrative Procedure Act or the Constitution. A legion of academics, lower court judges, and Members of this Court—even *Auer*'s author—has called on us to abandon *Auer*. Yet today a bare majority flinches, and *Auer* lives on.

Still, today's decision is more a stay of execution than a pardon. The Court cannot muster even five votes to say that *Auer* is lawful or wise. Instead, a majority retains *Auer* only because of *stare decisis*. And yet, far from standing by that precedent, the majority proceeds to impose so many new and nebulous qualifications and limitations on *Auer* that THE CHIEF JUSTICE claims to see little practical difference between keeping it on life support in this way and overruling it entirely. So the doctrine emerges maimed and enfeebled—in truth, zombified.

Respectfully, we owe our colleagues on the lower courts more candid and useful guidance than this. And judges owe the people who come before them nothing less than a fair contest, where every party has an equal chance to persuade the court of its interpretation of the law's demands. One can hope that THE CHIEF JUSTICE is right, and that whether we formally overrule *Auer* or merely neuter it, the results in most cases will prove the same. But means, not just ends, matter, and retaining even this debilitated version of *Auer* threatens to force litigants and lower courts to jump through needless and perplexing new hoops and in the process deny the people the independent judicial decisions they deserve. All to what end? So that we may *pretend* to abide *stare decisis*?

Consider this case. Mr. Kisor is a Marine who lost out on benefits for post-traumatic stress disorder when the court of appeals deferred to a regulatory interpretation \*2426 advanced by the Department of Veterans Affairs. The court of appeals was guilty of nothing more than faithfully following *Auer*. But the majority today invokes *stare decisis*, of all things, to vacate that judgment and tell the court of appeals to try again using its newly retooled, multi-factored, and far less determinate version of *Auer*. Respectfully, I would stop this business of making up excuses for judges to abdicate their job of interpreting the law, and simply allow the court of appeals to afford Mr. Kisor its best independent judgment of the law's meaning.

The Court's failure to be done with *Auer*, and its decision to adorn *Auer* with so many new and ambiguous limitations, all but guarantees we will have to pass this way again. When that day comes, I hope this Court will find the nerve it lacks today and inter *Auer* at last. Until then, I hope that our judicial colleagues on other courts will take courage from today's ruling and realize that it has transformed *Auer* into a paper tiger.

[The remainder of Justice Gorsuch's opinion and the opinion of Justice Kavanaugh, concurring in the judgment, are omitted.]

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 8-48(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 8-48(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 8-48(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?

**§ 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.”

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Revisit Part I (the factual background) of the census case, *Department of Commerce v. New York*, *supra*, and then consider the following.

**DEPARTMENT OF COMMERCE v. NEW YORK**  
139 S. Ct. 2551 (2019)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

**IV**

At the heart of this suit is respondents’ claim that the Secretary abused his discretion in deciding to reinstate a citizenship question. We review the Secretary’s exercise of discretion under the deferential “arbitrary and capricious” standard. See 5 U. S. C. § 706(2)(A). Our scope of review is “narrow”: we determine only whether the Secretary examined “the relevant data” and articulated “a satisfactory explanation” for his decision, “including a rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (We may not substitute our judgment for that of the Secretary, but instead must confine ourselves to ensuring that he remained “within the bounds of reasoned decisionmaking.”

The District Court set aside the Secretary’s decision for two independent reasons: His course of action was not supported by the evidence before him, and his stated rationale was pretextual. We focus on the first point here . . .

The Secretary examined the Bureau’s analysis of various ways to collect improved citizenship data and explained why he thought the best course was to both reinstate a citizenship question and use citizenship data from administrative records to fill in the gaps. He considered but rejected the Bureau’s recommendation to use administrative records alone. As he explained, records are lacking for about 10% of the population, so the Bureau would still need to estimate citizenship for millions of voting-age people. Asking a citizenship question of everyone, the Secretary reasoned, would eliminate the need to estimate citizenship for many of those people. And supplementing census responses with administrative record data would help complete the picture and allow the Bureau to better estimate citizenship for the smaller set of cases where it was still necessary to do so.

The evidence before the Secretary supported that decision. As the Bureau acknowledged, each approach—using administrative records alone, or asking about citizenship and using records to fill in the gaps—entailed tradeoffs between accuracy and completeness. Without a citizenship question, the Bureau would need to estimate the citizenship of about 35 million people; with a citizenship question, it would need to estimate the citizenship of only 13.8 million. Under either approach, there would be some errors in both the administrative records and the Bureau’s estimates. With a citizenship question, there would also be some erroneous self-responses (about 500,000) and some conflicts between responses and administrative record data (about 9.5 million).

The Bureau explained that the “relative quality” of the citizenship data generated by each



approach would depend on the “relative importance of the errors” in each, but it was not able to “quantify the relative magnitude of the errors across the alternatives.” The Bureau nonetheless recommended using administrative records alone because it had “high confidence” that it could develop an accurate model for estimating the citizenship of the 35 million people for whom administrative records were not available, and it thought the resulting citizenship data would be of superior quality. But when the time came for the Secretary to make a decision, the model did not yet exist, and even if it had, there was no way to gauge its relative accuracy. As the Bureau put it, “we will most likely never possess a fully adequate truth deck to benchmark” the model—which appears to be bureaucratese for “maybe, maybe not.” The Secretary opted instead for the approach that would yield a more complete set of data at an acceptable rate of accuracy, and would require estimating the citizenship of fewer people.

The District Court overruled that choice, agreeing with the Bureau’s assessment that its recommended approach would yield higher quality citizenship data on the whole. But the choice between reasonable policy alternatives in the face of uncertainty was the Secretary’s to make. He considered the relevant factors, weighed risks and benefits, and articulated a satisfactory explanation for his decision. In overriding that reasonable exercise of discretion, the court improperly substituted its judgment for that of the agency.

The Secretary then weighed the benefit of collecting more complete and accurate citizenship data against the risk that inquiring about citizenship would depress census response rates, particularly among noncitizen households. In the Secretary’s view, that risk was difficult to assess. The Bureau predicted a 5.1% decline in response rates among noncitizen households if the citizenship question were reinstated. It relied for that prediction primarily on studies showing that, while noncitizens had responded at lower rates than citizens to the 2000 short-form and 2010 censuses, which did not ask about citizenship, they responded at even lower rates than citizens to the 2000 long-form census and the 2010 American Community Survey, which did ask about citizenship. The Bureau thought it was reasonable to infer that the citizenship question accounted for the differential decline in noncitizen responses. But, the Secretary explained, the Bureau was unable to rule out other causes. For one thing, the evidence before the Secretary suggested that noncitizen households tend to be more distrustful of, and less likely to respond to, *any* government effort to collect information. For another, both the 2000 long-form census and 2010 ACS asked over 45 questions on a range of topics, including employment, income, and housing characteristics. Noncitizen households might disproportionately fail to respond to a lengthy and intrusive Government questionnaire for a number of reasons besides reluctance to answer a citizenship question—reasons relating to education level, socioeconomic status, and less exposure to Government outreach efforts.

The Secretary justifiably found the Bureau’s analysis inconclusive. Weighing that uncertainty against the value of obtaining more complete and accurate citizenship data, he determined that reinstating a citizenship question was worth the risk of a potentially lower response rate. That decision was reasonable and reasonably explained, particularly in light of the long history of the citizenship question on the census.

Justice BREYER would conclude otherwise, but only by subordinating the Secretary’s policymaking discretion to the Bureau’s technocratic expertise. Justice BREYER’s analysis treats the Bureau’s (pessimistic) prediction about response rates and (optimistic) assumptions about its data modeling abilities as touchstones of substantive reasonableness rather than simply evidence for the Secretary to consider. He suggests that the Secretary should have deferred to the Bureau or at

least offered some special justification for drawing his own inferences and adopting his own assumptions. But the Census Act authorizes the Secretary, not the Bureau, to make policy choices within the range of reasonable options. And the evidence before the Secretary hardly led ineluctably to just one reasonable course of action. It called for value-laden decisionmaking and the weighing of incommensurables under conditions of uncertainty. The Secretary was required to consider the evidence and give reasons for his chosen course of action. He did so. It is not for us to ask whether his decision was “the best one possible” or even whether it was “better than the alternatives.” *FERC v. Electric Power Supply Assn.*, 577 U. S. —, —, (2016). By second-guessing the Secretary’s weighing of risks and benefits and penalizing him for departing from the Bureau’s inferences and assumptions, Justice BREYER—like the District Court—substitutes his judgment for that of the agency.

[As excerpted supra, the Court ultimately affirmed on the issue of pretext. Justice Thomas’s opinion for himself, Gorsuch, and Kavanaugh concurring and dissenting in part is excerpted above and omitted here.]

JUSTICE BREYER, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, concurring in part and dissenting in part.

I join Parts I, II, IV–A, and V of the Court’s opinion (except as otherwise indicated in this opinion). I dissent, however, from the conclusion the Court reaches in Part IV–B. To be more specific, I agree with the Court that the Secretary of Commerce provided a pretextual reason for placing a question about citizenship on the short-form census questionnaire and that a remand to the agency is appropriate on that ground. But I write separately because I also believe that the Secretary’s decision to add the citizenship question was arbitrary and capricious and therefore violated the Administrative Procedure Act (APA).

There is no serious dispute that adding a citizenship question would diminish the accuracy of the enumeration of the population—the sole constitutional function of the census and a task of great practical importance. The record demonstrates that the question would likely cause a disproportionate number of noncitizens and Hispanics to go uncounted in the upcoming census. That, in turn, would create a risk that some States would wrongfully lose a congressional representative and funding for a host of federal programs. And, the Secretary was told, the adverse consequences would fall most heavily on minority communities. The Secretary decided to ask the question anyway, citing a need for more accurate citizenship data. But the evidence indicated that asking the question would produce citizenship data that is *less* accurate, not more. And the reason the Secretary gave for needing better citizenship data in the first place—to help enforce the Voting Rights Act of 1965—was not convincing.

In short, the Secretary’s decision to add a citizenship question created a severe risk of harmful consequences, yet he did not adequately consider whether the question was necessary or whether it was an appropriate means of achieving his stated goal. The Secretary thus failed to “articulate a satisfactory explanation” for his decision, “failed to consider . . . important aspect[s] of the problem,” and “offered an explanation for [his] decision that runs counter to the evidence,” all in violation of the APA. *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). These failures, in my view, risked undermining public confidence in the integrity of our democratic system itself. I would therefore hold that the Secretary’s decision—whether pretextual or not—was arbitrary, capricious, and an abuse of

discretion.

## II

[The Secretary's] decision "reinstate[s] [a] citizenship question on the 2020 decennial census." The agency's decision memorandum provided one and only one reason for making that decision—namely, that the question was "necessary to provide complete and accurate data in response to" a request from the Department of Justice (DOJ). . . .

The decision memorandum adds that the agency had not been able to "determine definitively how inclusion of a citizenship question on the decennial census will impact responsiveness. However, even if there is some impact on responses, the value of more complete and accurate data derived from surveying the entire population outweighs such concerns." The Secretary's decision thus rests upon a weighing of potentially adverse consequences (diminished responses and a less accurate census count) against potentially offsetting advantages (better citizenship data). In my view, however, the Secretary did not make reasonable decisions about these potential costs and benefits in light of the administrative record.

## A

Consider first the Secretary's conclusion that he was "not able to determine definitively how inclusion of a citizenship question on the decennial census will impact responsiveness." Insofar as this statement implies that adding the citizenship question is unlikely to affect "responsiveness" very much (or perhaps at all), the evidence in the record indicates the contrary.

## 1

The administrative record includes repeated Census Bureau statements that adding the question would produce a less accurate count because noncitizens and Hispanics would be less likely to respond to the questionnaire. The Census Bureau's chief scientist said specifically that adding the question would have "an adverse impact on self-response and, as a result, on the accuracy and quality of the 2020 Census." And the chief scientist backed this statement up by pointing to "[t]hree distinct analyses." [Justice Breyer then summarized the three studies.]

Putting numbers upon these study results, the Census Bureau estimated that adding the question to the short form would lead to 630,000 additional nonresponding households. That is to say, the question would cause households covering more than 1 million additional people to decline to respond to the census. When the Bureau does not receive a response, it follows up with in-person interviews in an effort to obtain the missing information. The Bureau often interviews what it calls "proxies," such as family members and neighbors. But this follow-up process is subject to error; and the error rate is much greater than the error rate for self-responses. The Bureau thus explained that lower self-response rates "degrade data quality" by increasing the risk of error and leading to hundreds of thousands of fewer correct enumerations. The Bureau added that its estimate was "conservative." It expected "differences between citizen and noncitizen response rates and data quality" to be "amplified" in the 2020 census "compared to historical levels." Thus, it explained, "the decrease in self-response for citizen households in 2020 could be much greater than the 5.1 percentage points [it] observed during the 2010 Census." Its conclusion in light of this evidence was clear. Adding the citizenship question to the short form was "very likely to reduce the self-response rate" and thereby "har[m] the quality of the census count."

The Census Bureau's analysis received support from other submissions. . . . On the other

hand, the Secretary received submissions by other groups that supported adding the question. But as far as I can tell (or as far as the arguments made here and in the District Court inform the matter), none of these latter submissions significantly added to, or detracted from, the Census Bureau's submissions in respect to the question's likely impact on response rates.

## 2

The Secretary's decision memorandum reached a quite different conclusion from the Census Bureau. The memorandum conceded that "a lower response rate would lead to . . . less accurate responses." But it concluded that neither the Census Bureau nor any stakeholders had provided "definitive, empirical support" for the proposition that the citizenship question would reduce response rates. The memorandum relied for that conclusion upon a number of considerations, but each is contradicted by the record.

The memorandum first pointed to perceived shortcomings in the Census Bureau's analysis of nonresponse rates. It noted that response rates are generally lower overall for the long form and ACS than they are for the short form. But the Bureau explained that its analysis accounted for this consideration, and no one has given us reason to think the contrary. The Secretary also noted that the Bureau "was not able to isolate what percentage of [the] decline was caused by the inclusion of a citizenship question rather than some other aspect of the long form survey." But the Bureau said attributing the decline to the citizenship question was a "reasonable inference," and again, nothing in the record contradicted the Bureau's judgment. And later analyses have borne out the Bureau's judgment that the citizenship question contributes to the decline in self-response.

The memorandum next cast doubt on the Census Bureau's analysis of the rate at which people responded to particular questions on the ACS. It noted that the "no answer" rate to the citizenship question was comparable to the "no answer" rate for other questions on the ACS, including educational attainment, income, and property insurance. But as discussed above, the Bureau found it significant that the "no answer" rate for the citizenship question was "much greater" than the "no answer" rate for the other questions that appear on the *short form*—that is, the form on which the citizenship question would appear. The Secretary offered no reason why the demographic variables to which he pointed provided a better point of comparison. . . .

The upshot is that the Secretary received evidence of a likely drop in census accuracy by a number somewhere in the hundreds of thousands, and he received nothing significant to the contrary. The Secretary pointed out that the Census Bureau's information was uncertain, *i.e.*, not "definitive." But that is not a satisfactory answer. Few public-policy-related statistical studies of risks (say, of many health or safety matters) are definitive. As the Court explained in *State Farm*, "[i]t is not infrequent that the available data do not settle a regulatory issue, and the agency must then exercise its judgment in moving from the facts and probabilities on the record to a policy conclusion." 463 U.S. at 52. But an agency confronted with this situation cannot "merely recite the terms 'substantial uncertainty' as a justification for its actions." Instead, it "must explain the evidence which is available" and typically must offer a reasoned explanation for taking action without "engaging in a search for further evidence."

The Secretary did not do so here. He did not explain why he made the decision to add the question without following the Bureau's ordinary practice of extensively testing proposed changes to the census questionnaire. Without that testing, the Secretary could not treat the Bureau's expert opinions and its experience with the relevant surveys as worthless merely because its conclusions were not precise. The Bureau's opinions were properly considered as evidence of likelihoods,

probabilities, or risks.

As noted above, the consequences of mistakes in the census count, of even a few hundred thousand, are grave. Differences of a few thousand people, as between one State and another, can mean a loss or gain of a congressional seat—a matter of great consequence to a State. See 351 F.Supp.3d at 594. And similar small differences can make a large difference to the allocation of federal funds among competing state programs. *Id.*, at 596–597; see also *Baldrige*, 455 U.S. at 353–354, n. 9, 102 S.Ct. 1103. If near-absolute certainty is what the Secretary meant by “definitive,” that insistence would itself be arbitrary in light of the constitutional and statutory consequences at stake. And if the Secretary instead meant that the evidence does not indicate a serious risk of a less accurate count, that conclusion does not find support in the record.

## B

Now consider the Secretary’s conclusion that, even if adding a citizenship question diminishes the accuracy of the enumeration, “the value of more complete and accurate data derived from surveying the entire population *outweighs* . . . concerns” about diminished accuracy. That conclusion was also arbitrary. The administrative record indicates that adding a citizenship question to the short form would produce less “complete and accurate data,” not more.

### 1

The Census Bureau informed the Secretary that, for about 90% of the population, accurate citizenship data is available from administrative records maintained by the Social Security Administration and Internal Revenue Service. The Bureau further informed the Secretary that it had “high confidence” that it could develop a statistical model that would accurately impute citizenship status for the remaining 10% of the population. The Bureau stated that these methods alone—using existing administrative records for 90% of the population and statistical modeling for the remaining 10%—would yield more accurate citizenship data than also asking a citizenship question. How could that be so? The answer is somewhat technical but readily understandable.

*First*, consider the 90% of the population (about 295 million people) as to whom administrative records are available. The Government agrees that using these administrative records would provide highly reliable information about citizenship, because the records “require proof of citizenship.” By contrast, if responses to a citizenship question were used for this group, the Census Bureau predicted without contradiction that about one-third of the noncitizens in this group who respond would answer the question untruthfully, claiming to be citizens when they are not. Those incorrect answers—about 9.5 million in total—would conflict with the administrative records on file for those noncitizens. And what would the Census Bureau do with the conflicting data? If it accepts the answer to the citizenship question as determinative, it will have less accurate data. If it accepts the citizenship data from administrative records as determinative, asking the question will have served no purpose. . . .

*Second*, consider the remaining 10% of the population (about 35 million people) for whom the Government lacks administrative records. The question here is which approach would yield the most “complete and accurate” citizenship data for this group—adding a citizenship question or using statistical modeling alone? To answer this question, we must further divide this group into two categories—those who would respond to the citizenship question if it were asked and those who would not.

Start with the category of about 22 million people who would answer a citizenship question

if it were asked. Would their answers regarding citizenship be more accurate than citizenship data produced by statistical modeling? The Census Bureau said no. That is because many of the noncitizens in this group would answer the question falsely, resulting in an estimated 500,000 inaccurate answers. And those who answer the question falsely would be commingled, perhaps randomly, with those who answer it correctly, thereby casting doubt on the answers of all 22 million, with no way of knowing which answers are correct and which are false. By contrast, the Bureau believed that it could develop a statistical model that would produce more accurate citizenship data than these census responses. The Bureau therefore informed the Secretary that it could do better. . . .

Next, turn to the more than 13 million remaining people who would not answer the citizenship question even if it were asked. As to this category, the Census Bureau would *still need to use statistical modeling* to obtain citizenship data, because there would be no census response to use instead. Hence, asking the citizenship question would add nothing at all as to this group. To the contrary, as the Government concedes, asking the question would *reduce* the accuracy of the citizenship data for this group, because the relatively inaccurate answers to the citizenship question would diminish the overall accuracy of the Census Bureau's statistical model.

. . . The Census Bureau therefore told the Secretary that asking the citizenship question, even in addition to using administrative records, “would result in poorer quality citizenship data” than using administrative records alone, and would “still have all the negative cost and quality implications” of asking the citizenship question. I could find no evidence contradicting that prediction.

## 2

If my description of the record is correct, it raises a serious legal problem. How can an agency support the decision to add a question to the short form, thereby risking a significant undercount of the population, on the ground that it will *improve* the accuracy of citizenship data, when in fact the evidence indicates that adding the question will *harm* the accuracy of citizenship data? Of course it cannot. But, as I have just said, I have not been able to find evidence to suggest that adding the question would result in more accurate citizenship data. Neither could the District Court. After reviewing the record in detail, the District Court found that “all of the relevant evidence before Secretary Ross—all of it—demonstrated that using administrative records . . . would actually produce more accurate [citizenship] data than adding a citizenship question to the census.”

What consideration did the Secretary give to this problem? He stated simply that “[a]sking the citizenship question of 100 percent of the population gives each respondent the opportunity to provide an answer,” which “may eliminate the need for the Census Bureau to have to impute an answer for millions of people.” He therefore must have assumed, *sub silentio*, exactly what the Census Bureau experts urged him not to assume—that answers to the citizenship question would be more accurate than statistical modeling. And he ignored the undisputed respects in which asking the question would make the existing data less accurate. Other than his assumption, the Secretary said nothing, absolutely nothing, to suggest a reasoned basis for disagreeing with the Bureau's expert statistical judgment.

The Government now maintains that the Secretary reasonably discounted the Census Bureau's recommendation because it was based on an untested prediction about the accuracy of its model. But this is not a case in which the Secretary was presented with a policy choice between

two reasonable but uncertain options. For one thing, the record is much less uncertain than the Government acknowledges. Although it is true that the Census Bureau at one point told the Secretary that it could not “quantify the relative magnitude of the errors across the alternatives at this time,” it unequivocally stated that asking the question “*would result in poorer quality citizenship data*” than omitting it. Thus, even if the Bureau could not “quantify” the relative accuracy of the options, it could and did conclude that one option was likely more accurate than the other. Even in the face of some uncertainty, where all available evidence indicates that one option is better than the other, it is unreasonable to choose the worse option without explanation.

For another thing, to the extent the record reflects some uncertainty regarding the accuracy of the Census Bureau’s statistical model, that is because the model needed to be “developed and tested” before it could be employed. But the Secretary made his decision before any such development or testing could be completed. . . .

In these respects, the Secretary failed to consider “important aspect[s] of the problem” and “offered an explanation for [his] decision that runs counter to the evidence before the agency.” *State Farm*, 463 U.S. at 43. . . .

\* \* \*

I agree with the Court that the APA gives agencies broad leeway to carry out their legislatively delegated duties. And I recognize that Congress has specifically delegated to the Secretary of Commerce the authority to conduct a census of the population “in such form and content as he may determine.” § 141(a). But although this delegation is broad, it is not without limits. The APA supplies one such limit. In an effort to ensure rational decisionmaking, the APA prohibits an agency from making decisions that are “arbitrary, capricious, [or] an abuse of discretion.” 5 U. S. C. § 706(2)(A).

This provision, of course, does not insist that decisionmakers think through every minor aspect of every problem that they face. But here, the Secretary’s decision was a major one, potentially affecting the proper workings of our democratic government and the proper allocation of hundreds of billions of dollars in federal funds. Yet the decision was ill considered in a number of critically important respects. The Secretary did not give adequate consideration to issues that should have been central to his judgment, such as the high likelihood of an undercount, the low likelihood that a question would yield more accurate citizenship data, and the apparent lack of any need for more accurate citizenship data to begin with. The Secretary’s failures in considering those critical issues make his decision unreasonable. They are the kinds of failures for which, in my view, the APA’s arbitrary and capricious provision was written. . . .

## NOTES AND QUESTIONS

**Note 8-72.** How do Chief Justice Roberts’ and Justice Breyer’s applications of *State Farm* differ? How about their characterizations of the evidence?

**Note 8-73.** If it seems to you as though the majority articulates a “softer” version of the hard-look doctrine, to what might you contribute that? The history of the citizenship question? The political sensitivity of the question? Might these be useful grounds for future parties seeking to distinguish the census case?

## Chapter 9

### § 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.” Second, the Court concluded that the “conciliation requirement” is “mandatory, not precatory,” and “serves as a necessary precondition to filing a lawsuit.” 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.” 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.” These requirements provide the court with a “manageable standard.” 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.

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.

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.” 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.” 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.

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.” 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.” In such cases, “a court must conduct the factfinding necessary to decide that limited dispute.” 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.”

**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**

Revisit Part I (the factual background) of the census case, *Department of Commerce v. New York*, and then consider the following.

## **DEPARTMENT OF COMMERCE v. NEW YORK**

139 S. Ct. 2551 (2019)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

### **IV**

. . . The Government . . . argues that the Secretary’s decision was not judicially reviewable under the Administrative Procedure Act in the first place. We begin with that contention.

### **A**

The Administrative Procedure Act embodies a “basic presumption of judicial review,” *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967), and instructs reviewing courts to set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” 5 U. S. C. § 706(2)(A). Review is not available, however, “to the extent that” a relevant statute precludes it, § 701(a)(1), or the agency action is “committed to agency discretion by law,” § 701(a)(2). The Government argues that the Census Act commits to the Secretary’s unreviewable discretion decisions about what questions to include on the decennial census questionnaire.

We disagree. To be sure, the Act confers broad authority on the Secretary. Section 141(a) instructs him to take “a decennial census of population” in “such form and content as he

may determine, including the use of sampling procedures and special surveys.” 13 U. S. C. § 141. The Act defines “census of population” to mean “a census of population, housing, and matters relating to population and housing,” and it authorizes the Secretary, in “connection with any such census,” to “obtain such other census information as necessary.” It also states that the “Secretary shall prepare questionnaires, and shall determine the inquiries, and the number, form, and subdivisions thereof, for the statistics, surveys, and censuses provided for in this title.” And it authorizes him to acquire materials, such as administrative records, from other federal, state, and local agencies in aid of conducting the census. Those provisions leave much to the Secretary’s discretion.

But they do not leave his discretion unbounded. In order to give effect to the command that courts set aside agency action that is an abuse of discretion, and to honor the presumption of judicial review, we have read the § 701(a)(2) exception for action committed to agency discretion “quite narrowly, restricting it to ‘those rare circumstances where the relevant statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.’” And we have generally limited the exception to “certain categories of administrative decisions that courts traditionally have regarded as ‘committed to agency discretion,’ such as a decision not to institute enforcement proceedings, *Heckler v. Chaney*, 470 U.S. 821, 831–832 (1985), or a decision by an intelligence agency to terminate an employee in the interest of national security, *Webster v. Doe*, 486 U.S. 592, 600–601 (1988).

The taking of the census is not one of those areas traditionally committed to agency discretion. We and other courts have entertained both constitutional and statutory challenges to census-related decisionmaking.

Nor is the statute here drawn so that it furnishes no meaningful standard by which to judge the Secretary’s action. In contrast to the National Security Act in *Webster*, which gave the Director of Central Intelligence discretion to terminate employees whenever he “deem[ed]” it “advisable,” the Census Act constrains the Secretary’s authority to determine the form and content of the census in a number of ways. Section 195, for example, governs the extent to which he can use statistical sampling. Section 6(c) . . . circumscribes his power in certain circumstances to collect information through direct inquiries when administrative records are available. More generally, by mandating a population count that will be used to apportion representatives, the Act imposes “a duty to conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment.”

The Secretary’s decision to reinstate a citizenship question is amenable to review for compliance with those and other provisions of the Census Act, according to the general requirements of reasoned agency decisionmaking. Because this is not a case in which there is “no law to apply,” *Overton Park*, 401 U.S. at 410, the Secretary’s decision is subject to judicial review.

[As excerpted *supra*, the Court ultimately affirmed on the basis of pretext.]

JUSTICE ALITO, concurring in part and dissenting in part.

...

To put the point bluntly, the Federal Judiciary has no authority to stick its nose into the question whether it is good policy to include a citizenship question on the census or whether the reasons given by Secretary Ross for that decision were his only reasons or his real reasons. Of

course, we may determine whether the decision is constitutional. But under the considerations that typically guide this Court in the exercise of its power of judicial review of agency action, we have no authority to decide whether the Secretary's decision was rendered in compliance with the Administrative Procedure Act (APA).

## I

The APA authorizes judicial review of “agency action” taken in violation of law, 5 U.S.C. §§ 706(2)(A)–(D), but § 701(a)(2) of the APA bars judicial review of agency actions that are “committed to agency discretion by law.” Although we have characterized the scope of § 701(a)(2) as “‘narrow,’ ” *Heckler v. Chaney*, 470 U.S. 821, 830 (1985), there are circumstances in which it applies. And while our cases recognize a strong presumption in favor of judicial review of agency action, this “is ‘just’ a presumption,” and like all real presumptions, it may be (and has been) rebutted.

In considering whether the general presumption in favor of judicial review has been rebutted in specific cases, we have identified factors that are relevant to the inquiry: whether the text and structure of the relevant statutes leave a court with any “‘meaningful standard against which to judge the agency’s exercise of discretion’”; whether the matter at hand has traditionally been viewed as committed to agency discretion; whether the challenged action manifests a “general unsuitability” for judicial review because it involves a “complicated balancing of a number of factors,” including judgments regarding the allocation of agency resources or matters otherwise committed to another branch; and whether judicial review would produce “disruptive practical consequences.”

Applying those factors, I conclude that the decision of the Secretary of Commerce to add core demographic questions to the decennial census questionnaire is committed to agency discretion by law and therefore may not be challenged under the APA.

## II

### A

I start with the question whether the relevant statutory provisions provide any standard that courts can apply in reviewing the Secretary's decision to restore a citizenship question to the census. The provision that directly addresses this question is 13 U.S.C. § 141(a), the statute that vests the Secretary with authority to administer the decennial census. This provision gives the Secretary unfettered discretion to include on the census questions about basic demographic characteristics like citizenship. It begins by providing that the Secretary

“shall, in the year 1980 and every 10 years thereafter, take a decennial *census of population ... in such form and content as he may determine*, including the use of sampling procedures and special surveys.”

The two phrases I have highlighted—“census of population” and “in such form and content as he may determine”—are of immediate importance. A “census of population” is broader than a mere head count. The term is defined as “a census of population ... *and matters relating to population*.” Because this definition refers to both “a census of population” and “matters relating to population,” the latter concept must include more than a “census of population” in the strict sense of a head count. And it seems obvious that what this additional information must include is the sort of basic demographic information that has long been sought in the census. So the statute clearly authorizes the Secretary to gather such information.

The second phrase, “in such form and content as he may determine,” specifies how this information is to be gathered, namely, by a method having the “form and content” that the Secretary “may determine.” In other words, this is left purely to the Secretary’s discretion. A clearer and less restricted conferral of discretion is hard to imagine.

...

The § 141(a) language discussed above is even more sweeping than that of the statute in *Webster*. Unlike the Census Act, the statute in *Webster* placed a condition on the Director’s action—in particular, the requirement that he terminate an employee only after concluding that doing so would further the “interests of the United States.” No such condition applies to the Secretary’s determination about the form and content of the decennial census . . . . [Justice Alito proceeds to address several other provisions and explains why he believes they do not provide for judicial review.]

### III

In addition to requiring an examination of the text and structure of the relevant statutes, our APA § 701(a)(2) cases look to whether the agency action in question is a type that has traditionally been viewed as committed to agency discretion or whether it is instead one that “federal courts regularly review.” In cases where the Court has found that agency action is committed to agency discretion by law, an important factor has been the absence of an established record of judicial review prior to the adoption of the APA.

Here, there is no relevant record of judicial review. We are confronted with a practice that reaches back two centuries. The very first census went beyond a mere head count and gathered additional demographic information, and during virtually the entire period prior to the enactment of the APA, a citizenship question was asked of everyone. Notably absent from that long record is any practice of judicial review of the content of the census. Indeed, this Court has never before encountered a direct challenge to a census question. And litigation in the lower courts about the census is sparse and generally of relatively recent vintage.

...

### IV

In sum, neither respondents nor my colleagues have been able to identify any relevant, judicially manageable limits on the Secretary’s decision to put a core demographic question back on the census. And without an “adequate standard of review for such agency action,” courts reviewing decisions about the “form and content” of the census would inevitably be drawn into second-guessing the Secretary’s assessment of complicated policy tradeoffs, another indicator of “general unsuitability” for judicial review.

Indeed, if this litigation is any indication, widespread judicial review of the Secretary’s conduct of the census will usher in an era of “disruptive practical consequences,” and this too weighs against review.

Respondents protest that the importance of the census provides a compelling reason to allow APA review. But this argument overlooks the fact that the Secretary is accountable in other ways for census-related decisionmaking. If the Secretary violates the Constitution or any applicable statutory provision related to the census, his action is reviewable. The Secretary is also accountable to Congress with respect to the administration of the census since he has that power only because

Congress has found it appropriate to entrust it to him. And the Secretary is always answerable to the President, who is, in turn, accountable to the people. . . .

**§ 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 establish standing: “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. 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[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(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.

In *Sebelius v. Auburn Reg’l Med. Ctr.*, the Supreme Court stated that 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.

## 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.

For a perspective on how to address FOIA's shortcomings as applied to hybrid government and privatization, see Alfred C. Aman, Jr. & Landyn Wm. Rookard, *Private Government and the Transparency Deficit*, 71 ADMIN. L. REV. (forthcoming 2019).